THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-00013

The Protestant Episcopal Church
in the Diocese of South Carolina et. al.. . . . . Respondents,

v.

The Episcopal Church (a/k/a The Protestant
Episcopal Church in the United States of
America) and The Episcopal Church in South Carolina. . . . . Appellants.

# RECORD ON APPEAL - Volume 5

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# Parish of St. Andrew
# OSA 3

A. D. 1785.

*AN ORDINANCE* FOR VESTING POWERS IN THE RESPECTIVE VESTRIES AND CHURCHWARDENS OF THE EPISCOPAL CHURCHES IN THE PARISHES OF ST. PAUL AND ST. ANDREW, AND THEIR SUCCESSORS FOR THE TIME BEING, FOR THE BENEFIT OF THE SAID RESPECTIVE CHURCHES AND CONGREGATIONS. *No.* 1269.

WHEREAS, several of the inhabitants of the said parishes of St. Paul and St. Andrew have respectively associated themselves together, and by voluntary contributions have raised and are now raising a fund for the maintenance of ministers for the respective churches, of the principles and tenets of the Church of England, and for repairing the said churches: Preamble:

I. *Be it therefore ordained*, by the honorable the Senate and House of Representatives, and by the authority of the same, That the said vestries and churchwardens, or a majority of them, respectively, are hereby vested with all the powers and authorities which are vested in any corporated and established church in this State, by the respective names of "The Vestries and Churchwardens of the Parish of St. Paul," and "The Vestries and Churchwardens of the Parish of St. Andrew;" and by their respective names shall, from time to time, and at all times hereafter, have perpetual succession, and a common seal for their respective churches, and be able and capable in law to purchase, have, hold, receive, take, retain and enjoy, all the real estates, lands, tenements and hereditaments, rents and income thereof, which are now in their respective hands or vested in the said vestries and churchwardens respectively, in trust for the established congregations of the church of England in the said parishes of St. Paul and St. Andrew, respectively, as aforesaid; and they and each of their respective successors shall be able and capable in law to have, hold, receive, enjoy, possess and retain all the monies or other personal estates, and all the securities for the same, and the interest and proceeds thereof, which are now in the hands of or vested in the said respective vestries and churchwardens; and also, at their discretion to call in and replace at interest the said monies respectively, or any part thereof. Powers of the vestries and wardens.

II. *And be it further ordained* by the authority aforesaid, That the said vestry and churchwardens, or their successors, for the parish of St. Andrew, are hereby required and empowered to have the said parish church completely repaired, and the pews erected in the said church as heretofore; and for the cost and expense thereof to assess the said pews when finished, rateably and proportionably, according to their respective value; which assessment the proprietors thereof are hereby enjoined and required to pay, when called upon by the vestry and churchwardens for that purpose: and in case the said proprietors, or any of them, shall neglect or refuse to pay such assessment, that, and in such case, the said vestry and churchwardens be, and they are hereby, empowered to sell and convey to the highest bidder, all such pew and pews in the said church, belonging to such proprietor or proprietors so refusing to pay for rebuilding the same as aforesaid, and after deducting the sum or sums assessed thereon respectively, to pay the overplus, if any there may be, to the several and respective proprietors thereof, when called upon for that purpose. Parish church of St. Andrew to be repaired.

III. *And be it also ordained* by the authority aforesaid, That the said vestry and churchwardens for the parish of St. Paul, are hereby empowered and directed to sell and dispose of, at public vendue, all that tract of land belonging to and claimed by the said church, situate on Stono river, Vestry of St. Paul empowered to sell a tract of land.

PLAINTIFF'S EXHIBIT DSA-3 1922

Old St. Andrews Parish
0100001
2007-880.001

A.D.1785.

in the said parish, (reserving such part thereof where the old church formerly stood, and the land around it, which was made use of for a cemetery or burial place, which shall forever be kept from being occupied in any other manner than for a place of worship and for burying the dead,) and the money arising from the sale of the said land to be appropriated for the maintenance and support of a proper Episcopal clergyman or minister for the said parish of St. Paul, to be paid in such manner as the vestry and churchwardens may see fit and proper.

Said vestries and churchwardens may sue and be sued.

IV. *And be it also ordained* by the authority aforesaid, That it shall and may be lawful for the said vestries and churchwardens of the said parishes of St. Paul and St. Andrew, or their respective successors, to sue or be sued, implead and be impleaded, answer and be answered unto, in any court or courts, or other places, before any judges or justices, in all manner of actions, suits, complaints, pleas, causes or things whatsoever, and of what nature or kind soever, which shall be to them in any wise belonging or appertaining in or about the respective premises.

May receive and hold gifts and devises of lands, &c.

V. *And be it also ordained* by the authority aforesaid, That it shall and may be lawful for the said vestries and churchwardens respectively, and their successors forever, to take and hold, to them and their successors respectively forever, any donations and devises of lands, slaves, monies and other chattels, real and personal, for the purposes aforesaid, which any charitable or other well disposed person or persons may give or devise to the said churches respectively.

And appoint clergymen, &c.

VI. *And be it also ordained* by the authority aforesaid, That it shall and may be lawful for the said vestries and churchwardens respectively, and their successors in office, or a majority of them, to appoint and choose a proper Episcopal clergyman and minister, and all other persons necessary to be employed for the benefit of the respective congregations, and at their will and pleasure displace, remove and supply others in the room and stead of them, or any of them, and to appoint such salaries, perquisites, or other rewards, for their service and labour therein, as they shall from time to time approve of and think fit.

This a public Act.

VII. *And be it also ordained* by the authority aforesaid, That this Ordinance shall and may be given in evidence on the trial of any issue or cause, in any court of law or equity in this State, without special pleading.

In the Senate House, the twenty-fourth day of March, in the year of our Lord one thousand seven hundred and eighty-five, and in the ninth year of the Independence of the United States of America.

JOHN LLOYD, *President of the Senate.*
JOHN FAUCHEREAUD GRIMKE,
*Speaker of the House of Representatives.*

---

*No.* 1290. *AN ORDINANCE* TO ASCERTAIN THE DUTIES OF THE OFFICERS OF THE CUSTOMS, AND TO VEST THEM WITH NECESSARY POWERS.

Preamble.

WHEREAS, it is expedient and necessary that the duties of the several officers of the customs should be fully and accurately ascertained, the more effectually to secure the faithful collection of the duties imposed by the Legislature of this State;

I. *Be it ordained*, by the honorable the Senate and House of Representatives, met in General Assembly, and by the authority of the same, That

Old St Andrews Parish
0100002
2007-880.001

# Church of the Holy Cross
# Stateburg
# HCS 1, 2

1924

1788-90-01

Claremont County December 17. 1787

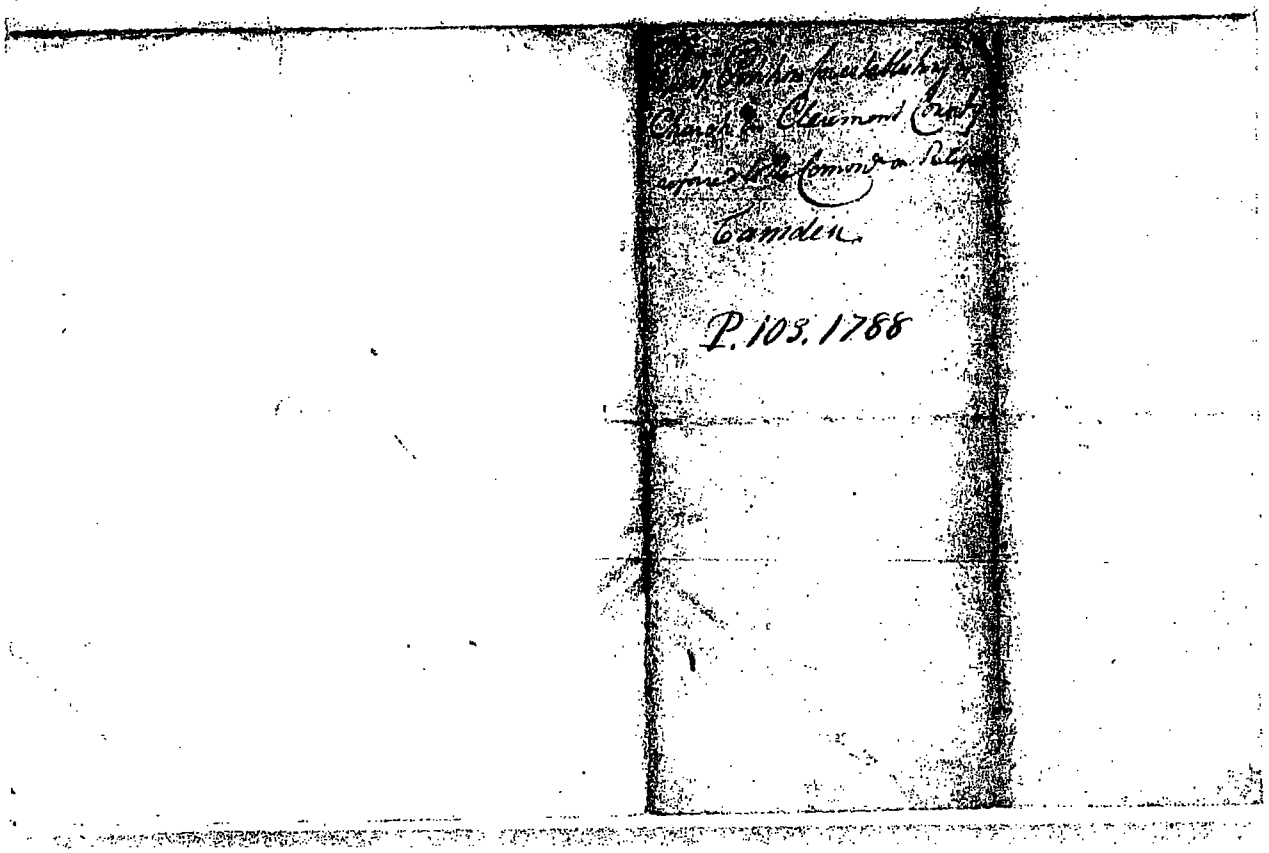
To the Hon.ble John Julius Pringle Esq.r Speaker & the rest of the Members of the Hon.ble House of Representatives. The Petition of sundry Inhabitants of Claremont County, sheweth, that your Petitioners are desirous of building a Church for the purpose of religious worship & providing for the maintenance of a Minister and as they have already subscribed the Sum Required by the Constitution of this State, they therefore pray that a Law may be passed to incorporate them under the name of the Vestry & Church Wardens of the Episcopal Church of Claremont & that they be vested with all the privileges & immunities of their Sister Churches, & your Petitioners as in duty bound will ever pray

Phil Waring
C Cantey
H C
Nathaniel
John Christ.r Smith
Geo. Scot
Jer Hunt
Henry Cayne
John Hunt
Jno. Hunt
Wm. Wayne
Christopher Lewis
John Thomas
Saml Bacot
Wm. Hunt
Thomas Sumter Junr

48-1



EXHIBIT
HCS-1


P. 103. 1788

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

THIS IS TO CERTIFY THAT This and/or the attached is a true and accurate copy of a petition, dated 17 December 1787, of sundry inhabitants of Claremont County to incorporate them under the name of the Vestry & Church Wardens of the Episcopal Church of Claremont recorded in records of the SC General Assembly, S165015, Petitions, 1788, No. 90

now on deposit with South Carolina Department of Archives and History

GIVEN UNDER MY HAND AND THE SEAL OF THE DEPARTMENT THIS June 30, 2014

Elaine S. Rohr, Archivist
Reference Services

THE

# STATUTES AT LARGE

OF

# SOUTH CAROLINA;

EDITED, UNDER AUTHORITY OF THE LEGISLATURE,

BY

DAVID J. McCORD.

VOLUME EIGHTH,

CONTAINING THE ACTS RELATING TO CORPORATIONS AND THE MILITIA.

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON.
1840.

REFERENCE LIBRARY
SOUTH CAROLINA
DEPARTMENT OF ARCHIVES & HISTORY

EXHIBIT
HCS-2

"The German Calvinistic church of St. John, on the Fourhole."
"The German Lutheran church of St. Matthew, in Amelia Township."
"The German Lutheran church of Salem, on Sandy Run."
"The German Lutheran church of Mount Zion, on Twelve Mile creek."
"The German Lutheran church of St. Peter, on Eighteen Mile creek."
"The German Lutheran church of Bethel, on High Hill creek."
"The German Lutheran church of St. Martin."
"The German Lutheran church of Bethlehem, on Forest's ford."
"The German Protestant church of Bethany, on Green creek."
"The German Protestant church of Appii Forum, Cedar creek."
"The German Protestant church dedicated to Queen Charlotte, on Slippery creek, Ninety-six District."
"The German Lutheran church of St. George, on Hardlabor creek."
"The German Lutheran church of St. Jacob, on Wateree creek."
"The German Protestant church of St. George's, on Indian Field Swamp."

And by their said respective names, shall, severally, have pepetual succession of officers and members, and a common seal, with power to change, alter, break and make new the same, as often as they, the said corporation, shall severally judge expedient; and each and every of the said corporations, respectively, are hereby, vested with all the powers, privileges and advantages, which are specified and expressed in "The Act for incorporating divers religious societies therein named," passed the twenty-sixth day of March, one thousand seven hundred and eighty-four.

II. *And be it further enacted* by the authority aforesaid, That this Act shall be deemed and taken as a public Act, and notice shall be taken thereof in all courts of justice and elsewhere in this State; and the same may be given in evidence on the trial of any issue or cause, without being specially pleaded.

In the Senate, Friday the twenty-ninth day of February, in the year of our Lord one thousand seven hundred and eighty-eight, and in the twelfth year of the Independence of the United States of America.

JOHN LLOYD, *President of the Senate.*
JOHN JULIUS PRINGLE, *Speaker of the House of Representatives.*

---

AN ACT TO INCORPORATE THE VESTRIES AND CHURCH WARDENS OF THE EPISCOPAL CHURCHES IN THE PARISHES OF ST. LUKE, ST. MATTHEW, PRINCE GEORGE WINYAW, ST. STEPHEN, AND ST. JAMES GOOSE CREEK; AND ALSO THE VESTRIES AND CHURCH WARDENS OF THE EPISCOPAL CHURCHES OF CLAREMONT, AND OF SAINT HELENA ISLAND. No. 1415.

WHEREAS, the vestries, church wardens and divers other persons, members of the several Episcopal churches of the parishes of St. Luke, St. Matthew, Prince George Winyaw, and St. Stephen, and St. James Goose Creek, have, by their petitions to the General Assembly, humbly prayed to be incorporated, and to be severally vested with all the privileges Preamble.

and immunities which any of the sister churches enjoy. And *whereas*, the vestry, church wardens, and sundry other inhabitants of Claremont county, have, by their petition to the General Assembly set forth, that they are desirous of building a church for the purposes of religious worship, and providing for the maintenance of a Minister, and humbly prayed that a law might be passed to incorporate them by the name of "The Vestry and Church Wardens of the Episcopal Church of Claremont," and that they might be vested with all the privileges and immunities which any of their sister churches enjoy. And *whereas*, the vestry and church wardens, together with sundry other persons, inhabitants of the Island of St. Helena, members of the Episcopal church of the said Island, have, by their petition to the General Assembly, humbly prayed to be incorporated by the name of "The Vestry and Church Wardens of the Episcopal Church of Saint Helena Island," and to be also vested with all the privileges and immunities which any of their sister churches enjoy. And it appears meet and fitting agreeable to the constitution of this State, passed the nineteenth day of March, in the year of our Lord one thousand seven hundred and seventy-eight, that the prayers of the said several petitioners should be granted.

Episcopal churches of various parishes.

I. *Be it therefore enacted*, by the Honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the vestries and church wardens of the several and respective churches hereinbefore mentioned, elected or to be elected, in manner accustomed, and their successors in office for ever hereafter, shall be, and they are hereby, declared to be severally incorporated by the following names, that is to say:—The Vestry and Church Wardens of St. Luke's Parish, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Luke;" the vestry and church wardens of St. Matthew's Parish, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Matthew;" the vestry and church wardens of the Parish of Prince George Winyaw, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of Prince George Winyaw;" the vestry and church wardens of the Parish of St. Stephen, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Stephen;" the vestry and church wardens of the Parish of St. James Goose Creek, by the name of "The Vestry and Church Wardens of the Episcopal Church of St. James Goose Creek;" the vestry and church wardens of Claremont county, by the name of "The Vestry and Church Wardens of the Episcopal Church of Claremont;" and the vestry and church wardens of St Helena Island, by the name of "The Vestry and Church Wardens of the Episcopal Church of St. Helena Island;" and by their said several names, shall, from time to time, and at all times hereafter, each, have perpetual succession, and a common seal, and be severally capable in law, to have, hold, receive, possess and enjoy, all the lands, tenements and hereditaments, and the rents and income thereof, which now are severally vested in the said vestries and church wardens, respectively, and to their several and respective successors in office; and severally, to sell, alien, demise, exchange or lease the same, as the majority of the said corporations shall severally and respectively think convenient; and they, and each of them, and their, and each of their successors, shall severally be capable in law, to have, receive, possess and retain, all the monies or other personal estates, and all the securities of the same, and the interests and proceeds thereof, which now are in possession of the said vestries and

church wardens, respectively; and also, at the discretion of a majority of each of the said corporations, to call in and replace at interest the said monies or any part thereof.

II. *And be it further enacted*, by the authority aforesaid, That the said vestries and church wardens, respectively, and their respective successors in office, shall be able and capable in law, to purchase or receive by devise, gift or donation, and to have, hold and enjoy, to them and their several and respective successors in perpetuity, or for any term of years, any estate in lands, tenements or hereditaments, goods or chattels, of what nature or kind soever, and to sell, alien, exchange, demise or lease the same, or any part thereof, as they, or a majority of them, or their several and respective successors in office shall think convenient, and for the benefit and advantage of the said vestries and church wardens, respectively, for the purposes aforesaid. What estates to hold.

III. *And be it further enacted* by the authority aforesaid, That the respective vestries and church wardens and their successors in office, are hereby required and empowered, to build, re-build, refit and repair their said churches, respectively, as often as need may be, on such plan as the said respective corporations, or a majority of them, respectively, shall think proper; and for the costs and expense thereof, to assess the pews in the same churches, rateably and proportionably, according to their respective rules, which assessment, the owners and proprietors of pews are hereby enjoined and required to pay when called upon by the respective vestries and church wardens for that purpose; and in case the said proprietors, or any of them, shall neglect or refusse to pay such assessment for the space of six months, that then, and in such case, the respective vestries and church wardens, shall be, and they are hereby, severally empowered to sell and convey in fee simple, to the highest bidder, all such pew and pews in the respective churches, belonging to such proprietor or proprietors, so refusing to pay for the building, re-building or repairing such church as aforesaid, and after deducting the sum or sums assessed thereon respectively, to pay the overplus, if any there may be, to the several and respective proprietors thereof, when called upon for that purpose. Churches to be rebuilt and repaired.

IV. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestries and church wardens, respectively, and their successors in office, or a majority of them, respectively, and they are hereby authorized and empowered, to sell and convey to any person or persons that they shall think proper, any of the pews in the said respective churches, (not being private property,) in such manner, and on such conditions, or for such term or terms as they, or a majority of them, respectively, shall think fit; and also, annually to assess and rate each and every of the pews in the said respective churches, at such sum or sums of money, as they, or a majority of them, shall respectively think right, regard being always had to the situation of the said pews; and if any person or persons, shall at any time neglect or refuse to pay the sum or sums of money, at which his, her or their pew or pews are rated, within three months after public notice given of such rate and assessment, that then, it shall and may be lawful for the respective vestries and church wardens, or a majority of them, respectively, to let and hire the said pew or pews, for any term not exceeding three years, to any person or persons who may be willing to hire the same. To sell pews.

V. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the respective vestries and church wardens, and their

To choose Clergymen.

successors in office, or a majority of them, respectively, to elect and choose proper clergymen and ministers for their respective churches, and all other necessary officers; and again, at their will and pleasure, to displace and remove such ministers and officers, and supply others in the room and stead of him or them so removed; and to appoint salaries, perquisites or other rewards, for the labor and service of such ministers and other officers in their respective churches, as they shall from time to time, approve and think fit.

Church Wardens of Prince George Winyaw to sell lot.

VI. *And be it further enacted*, That it shall and may be lawful, for the vestry and church wardens of the said Episcopal Church of Prince George Winyaw, to sell, alien, demise, release and convey, in fee simple, in such manner as they, or a majority of them, shall think fit, to such person or persons as may choose to become purchasers of the same, or any part thereof, all that lot of land, containing one acre, be the same more or less, originally reserved at the laying out the town of Georgetown, and allotted for building a church for the use of the inhabitants professing the religion of the Church of England, and to appropriate all such sum and sums of money as may be obtained for the same, one acre lot to the rebuilding and repair of the parish church in the said town, or to such other purpose and purposes for the benefit of the said corporation, as the said vestry and church wardens, or a majority of them, shall think fit.

Lots in Georgetown vested in the church wardens.

VII. *And be it further enacted* by the authority aforesaid, That the lots known by the numbers one hundred and thirty-threee, (133) and one hundred and thirty-four, (124) in the plan of the said town of Georgetown, formerly purchased by the inhabitants thereof for the purpose of building a church, and whereon the parish church now stands, shall be, and the same are hereby, vested in the said vestry and church wardens, and their successors in office forever, for the use of the said church by this Act incorporated. And that it shall not be lawful for any person or persons who were proprietors of pews in the said church, nor their assigns, heirs or executors, who do not contribute to the repairs of the said church, to claim any right, title, interest or property in the soil on which the same pews stood, nor to the pews that may be erected in the same church, but of and from the same shall be debarred and forever excluded by virtue of this Act; any law or usage to the contrary notwithsfanding.

To make by-laws.

VIII. *And be it further enacted* by the authority aforesaid, That the said vestries and church wardens, and their successors in office, or a majority of them, respectively, shall have full power and authority from time to time, to make and establish such and so many by-laws, rules and orders, as to them shall seem necessary and convenient, for the better regulating, governing, well ordering, and directing the said corporations, respectively; and the ministers, officers, servants and persons by them employed, or to be employed on or about the same; and for the better managing, limiting, appointing of all and every the trusts and authorities in them, and each of them, respectively, reposed and to be reposed; and for the doing, managing and transacting all things necessary for, and concerning the government of the said corporations, and the same by-laws, rules and orders, to put in use and execution accordingly; and the same, or any part of them, again at their will and pleasure, to alter, change, suspend or revoke, all which said by-laws, rules and orders, so to be made by the said corporations, respectively, shall be binding on every member of the said corporations, respectively, and the ——— churches by this Act incorporated, and be from

time to time, by them, and each of them, punctually and invíolably observed, according to the tenor and effect thereof, under the several pains, penalties and disabilities therein appointed and declared. *Provided*, that the same shall be reasonable and not contrary or repugnant to the laws of this State.

IX. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestries and church wardens, respectively, by the respective names hereinbefore mentioned, to sue and be sued, implead and be impleaded, answer and be answered unto, in all or any court or courts, or other places, before any judges or justices, in all manner of actions, suits, complaints, pleas, causes or things whatsoever, and of what nature or kind soever, which shall or may be commenced, sued or prosecuted, by or against them in any manner, touching or concerning the premises. Sue and be sued.

X. *And be it further enacted* by the authority aforesaid, That this Act shall be deemed a public Act, and may be given in evidence without special pleading, on any trial of any issue or cause in any court of law or equity in this State.

In the Senate, this the twenty-ninth day of February, in the year of our Lord one thousand seven hundred and eighty-eight, and in the twelfth year of the Independence of the United States of America.

JOHN LLOYD, *President of the Senate.*
JOHN JULIUS PRINGLE, *Speaker of the House of Representatives.*

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AN ACT TO INCORPORATE THE VESTRY AND CHURCH WARDENS OF THE EPISCOPAL CHURCH OF THE PARISH OF ST. GEORGE'S DORCHESTER, AND FOR VESVING IN THEM AND THEIR SUCCESSORS IN OFFICE, THE SEVERAL DONATIONS AND OTHER CHARITABLE FUNDS BELONGING TO THE PARISH; AND FOR OTHER PURPOSES THEREIN MENTIONED. No. 1439.

WHEREAS, sundry inhabitants and other members of the Episcopal church in the parish of Saint George Dorchester, did, by their petition to the General Assembly, now sitting, set forth that the church in the said parish had been wantonly destroyed by the British during the late war, whereby the petitioners and others were deprived from attending divine service, and from procuring a minister. And *whereas*, by the last will and testament of several pious and well disposed persons, divers sums of money were given for the maintenance of a minister and other proper officers for the same, and those pious and good intentions would be more effectually carried into execution if the vestry and church-wardens elected, and hereafter to be elected, by the said inhabitants and freeholders were incorporated and made one body politic in law, and vested with all the powers, privileges and immunities which any of their sister churches enjoy. Preamble.

I. *Be it therefore enacted*, by the honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the vestry and church-wardens of the said parish, elected and to be elected, in manner as heretofore used and accus- Episcopal church St. George Dorchester.

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

THIS IS TO CERTIFY THAT This and/or the attached is a true and accurate copy of Act No. 1415, "An Act to Incorporate the Vestries and Church Wardens of the Episcopal Churches...And Also the Vestries and Church Wardens of the Episcopal Churches of Claremont... recorded in records of the SC General Assembly, Statutes at Large of South Carolina, ed. by David J. McCord, Volume 8, title page and pages 145-149 now on deposit with South Carolina Department of Archives and History

GIVEN UNDER MY HAND AND THE SEAL OF THE DEPARTMENT
THIS August 15, 2013

Elaine Sherrill Rohr, Archivist
Reference Services

# Prince George Winyah
# PG 4, 5

EXHIBIT
PG #4



"The German Calvinistic church of St. John, on the Fourholo."
"The German Lutheran church of St. Matthew, in Amelia Township"
"The German Lutheran church of Salem, on Sandy Run."
"The German Lutheran church of Mount Zion, on Twelve Mile creek."
"The German Lutheran church of St. Peter, on Eighteen Mile creek."
"The German Lutheran church of Bethel, on High Hill creek."
"The German Lutheran church of St. Martin."
"The German Lutheran church of Bethlehem, on Forest's ford."
"The German Protestant church of Bethany, on Green creek."
"The German Protestant church of Appii Forum, Cedar creek."
"The German Protestant church dedicated to Queen Charlotte, on Slippory creek, Ninety-six District."
"The German Lutheran church of St. George, on Hardlabor creek."
"The German Lutheran church of St. Jacob, on Wateree creek."
"The German Protestant church of St. George's, on Indian Field Swamp."

And by their said respective names, shall, severally, have perpetual succession of officers and members, and a common seal, with power to change, alter, break and make new the same, as often as they, the said corporation, shall severally judge expedient; and each and every of the said corporations, respectively, are hereby, vested with all the powers, privileges and advantages, which are specified and expressed in "The Act for incorporating divers religious societies therein named," passed the twenty-sixth day of March, one thousand seven hundred and eighty-four.

II. *And be it further enacted* by the authority aforesaid, That this Act shall be deemed and taken as a public Act, and notice shall be taken thereof in all courts of justice and elsewhere in this State; and the same may be given in evidence on the trial of any issue or cause, without being specially pleaded.

In the Senate, Friday the twenty-ninth day of February, in the year of our Lord one thousand seven hundred and eighty-eight, and in the twelfth year of the Independence of the United States of America.

JOHN LLOYD, *President of the Senate.*
JOHN JULIUS PRINGLE, *Speaker of the House of Representatives.*

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No. 1415.

AN ACT TO INCORPORATE THE VESTRIES AND CHURCH WARDENS OF THE EPISCOPAL CHURCHES IN THE PARISHES OF ST. LUKE, ST. MATTHEW, PRINCE GEORGE WINYAW, ST. STEPHEN, AND ST. JAMES GOOSE CREEK; AND ALSO THE VESTRIES AND CHURCH WARDENS OF THE EPISCOPAL CHURCHES OF CLAREMONT, AND OF SAINT HELENA ISLAND.

Preamble.

WHEREAS, the vestries, church wardens and divers other persons, members of the several Episcopal churches of the parishes of St. Luke, St. Matthew, Prince George Winyaw, and St. Stephen, and St. James Goose Creek, have, by their petitions to the General Assembly, humbly prayed to be incorporated, and to be severally vested with all the privileges



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and immunities which any of the sister churches enjoy. And *whereas*, the vestry, church wardens, and sundry other inhabitants of Claremont county, have, by their petition to the General Assembly set forth, that they are desirous of building a church for the purposes of religious worship, and providing for the maintenance of a Minister, and humbly prayed that a law might be passed to incorporate them by the name of "The Vestry and Church Wardens of the Episcopal Church of Claremont," and that they might be vested with all the privileges and immunities which any of their sister churches enjoy. And *whereas*, the vestry and church wardens, together with sundry other persons, inhabitants of the Island of St. Helena, members of the Episcopal church of the said Island, have, by their petition to the General Assembly, humbly prayed to be incorporated by the name of "The Vestry and Church Wardens of the Episcopal Church of Saint Helena Island," and to be also vested with all the privileges and immunities which any of their sister churches enjoy. And it appears meet and fitting agreeable to the constitution of this State, passed the nineteenth day of March, in the year of our Lord one thousand seven hundred and seventy-eight, that the prayers of the said several petitioners should be granted,

Episcopal churches of various parishes.

I. *Be it therefore enacted*, by the Honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the vestries and church wardens of the several and respective churches hereinbefore mentioned, elected or to be elected, in manner accustomed, and their successors in office for ever hereafter, shall be, and they are hereby, declared to be severally incorporated by the following names, that is to say:—The Vestry and Church Wardens of St. Luke's Parish, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Luke;" the vestry and church wardens of St. Matthew's Parish, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Matthew;" the vestry and church wardens of the Parish of Prince George Winyaw, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of Prince George Winyaw;" the vestry and church wardens of the Parish of St. Stephen, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Stephen;" the vestry and church wardens of the Parish of St. James Goose Creek, by the name of "The Vestry and Church Wardens of the Episcopal Church of St. James Goose Creek;" the vestry and church wardens of Claremont county, by the name of "The Vestry and Church Wardens of the Episcopal Church of Claremont;" and the vestry and church wardens of St Helena Island, by the name of "The Vestry and Church Wardens of the Episcopal Church of St. Helena Island;" and by their said several names, shall, from time to time, and at all times hereafter, each, have perpetual succession, and a common seal, and be severally capable in law, to have, hold, receive, possess and enjoy, all the lands, tenements and hereditaments, and the rents and income thereof, which now are severally vested in the said vestries and church wardens, respectively, and to their several and respective successors in office; and severally, to sell, alien, demise, exchange or lease the same, as the majority of the said corporations shall severally and respectively think convenient; and they, and each of them, and their, and each of their successors, shall severally be capable in law, to have, receive, possess and retain, all the monies or other personal estates, and all the securities of the same, and the interests and proceeds thereof, which now are in possession of the said vestries and



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church wardens, respectively; and also, at the discretion of a majority of each of the said corporations, to call in and replace at interest the said monies or any part thereof.

What estates to hold.

II. *And be it further enacted*, by the authority aforesaid, That the said vestries and church wardens, respectively, and their respective successors in office, shall be able and capable in law, to purchase or receive by devise, gift or donation, and to have, hold and enjoy, to them and their several and respective successors in perpetuity, or for any term of years, any estate in lands, tenements or hereditaments, goods or chattels, of what nature or kind soever, and to sell, alien, exchange, demise or lease the same, or any part thereof, as they, or a majority of them, or their several and respective successors in office shall think convenient, and for the benefit and advantage of the said vestries and church wardens, respectively, for the purposes aforesaid.

Churches to be rebuilt and repaired.

III. *And be it further enacted* by the authority aforesaid, That the respective vestries and church wardens and their successors in office, are hereby required and empowered, to build, re-build, refit and repair their said churches, respectively, as often as need may be, on such plan as the said respective corporations, or a majority of them, respectively, shall think proper; and for the costs and expense thereof, to assess the pews in the same churches, rateably and proportionably, according to their respective rules, which assessment, the owners and proprietors of pews are hereby enjoined and required to pay when called upon by the respective vestries and church wardens for that purpose; and in case the said proprietors, or any of them, shall neglect or refusse to pay such assessment for the space of six months, that then, and in such case, the respective vestries and church wardens, shall be, and they are hereby, severally empowered to sell and convey in fee simple, to the highest bidder, all such pew and pews in the respective churches, belonging to such proprietor or proprietors, so refusing to pay for the building, re-building or repairing such church as aforesaid, and after deducting the sum or sums assessed thereon respectively, to pay the overplus, if any there may be, to the several and respective proprietors thereof, when called upon for that purpose.

To sell pews.

IV. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestries and church wardens, respectively, and their successors in office, or a majority of them, respectively, and they are hereby authorized and empowered, to sell and convey to any person or persons that they shall think proper, any of the pews in the said respective churches, (not being private property,) in such manner, and on such conditions, or for such term or terms as they, or a majority of them, respectively, shall think fit; and also, annually to assess and rate each and every of the pews in the said respective churches, at such sum or sums of money, as they, or a majority of them, shall respectively think right, regard being always had to the situation of the said pews; and if any person or persons, shall at any time neglect or refuse to pay the sum or sums of money, at which his, her or their pew or pews are rated, within three months after public notice given of such rate and assessment, that then, it shall and may be lawful for the respective vestries and church wardens, or a majority of them, respectively, to let and hire the said pew or pews, for any term not exceeding three years, to any person or persons who may be willing to hire the same.

V. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the respective vestries and church wardens, and their



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To choose Clergymen.

successors in office, or a majority of them, respectively, to elect and choose proper clergymen and ministers for their respective churches, and all other necessary officers; and again, at their will and pleasure, to displace and remove such ministers and officers, and supply others in the room and stead of him or them so removed; and to appoint salaries, perquisites or other rewards, for the labor and service of such ministers and other officers in their respective churches, as they shall from time to time, approve and think fit.

Church Wardens of Prince George Winyaw to sell lot.

VI. *And be it further enacted*, That it shall and may be lawful, for the vestry and church wardens of the said Episcopal Church of Prince George Winyaw, to sell, alien, demise, release and convey, in fee simple, in such manner as they, or a majority of them, shall think fit, to such person or persons as may choose to become purchasers of the same, or any part thereof, all that lot of land, containing one acre, be the same more or less, originally reserved at the laying out the town of Georgetown, and allotted for building a church for the use of the inhabitants professing the religion of the Church of England, and to appropriate all such sum and sums of money as may be obtained for the same, one acre lot to the rebuilding and repair of the parish church in the said town, or to such other purpose and purposes for the benefit of the said corporation, as the said vestry and church wardens, or a majority of them, shall think fit.

Lots in Georgetown vested in the church wardens.

VII. *And be it further enacted* by the authority aforesaid, That the lots known by the numbers one hundred and thirty-three, (133) and one hundred and thirty-four, (124) in the plan of the said town of Georgetown, formerly purchased by the inhabitants thereof for the purpose of building a church, and whereon the parish church now stands, shall be, and the same are hereby, vested in the said vestry and church wardens, and their successors in office forever, for the use of the said church by this Act incorporated. And that it shall not be lawful for any person or persons who were proprietors of pews in the said church, nor their assigns, heirs or executors, who do not contribute to the repairs of the said church, to claim any right, title, interest or property in the soil on which the same pews stood, nor to the pews that may be erected in the same church, but of and from the same shall be debarred and forever excluded by virtue of this Act; any law or usage to the contrary notwithstanding.

To make by-laws.

VIII. *And be it further enacted* by the authority aforesaid, That the said vestries and church wardens, and their successors in office, or a majority of them, respectively, shall have full power and authority from time to time, to make and establish such and so many by-laws, rules and orders, as to them shall seem necessary and convenient, for the better regulating, governing, well ordering, and directing the said corporations, respectively; and the ministers, officers, servants and persons by them employed, or to be employed on or about the same; and for the better managing, limiting, appointing of all and every the trusts and authorities in them, and each of them, respectively, reposed and to be reposed; and for the doing, managing and transacting all things necessary for, and concerning the government of the said corporations, and the same by-laws, rules and orders, to put in use and execution accordingly; and the same, or any part of them, again at their will and pleasure, to alter, change, suspend or revoke, all which said by-laws, rules and orders, so to be made by the said corporations, respectively, shall be binding on every member of the said corporations, respectively, and the ——— churches by this Act incorporated, and be from

time to time, by them, and each of them, punctually and inviolably observed, according to the tenor and effect thereof, under the several pains, penalties and disabilities therein appointed and declared. *Provided*, that the same shall be reasonable and not contrary or repugnant to the laws of this State.

Sue and be sued.

IX. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestries and church wardens, respectively, by the respective names hereinbefore mentioned, to sue and be sued, implead and be impleaded, answer and be answered unto, in all or any court or courts or other places, before any judges or justices, in all manner of actions, suits, complaints, pleas, causes or things whatsoever, and of what nature or kind soever, which shall or may be commenced, sued or prosecuted, by or against them in any manner, touching or concerning the premises.

X. *And be it further enacted* by the authority aforesaid, That this Act shall be deemed a public Act, and may be given in evidence without special pleading, on any trial of any issue or cause in any court of law or equity in this State.

In the Senate, this the twenty-ninth day of February, in the year of our Lord one thousand seven hundred and eighty-eight, and in the twelfth year of the Independence of the United States of America.

JOHN LLOYD, *President of the Senate.*
JOHN JULIUS PRINGLE, *Speaker of the House of Representatives.*

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## AN ACT TO INCORPORATE THE VESTRY AND CHURCH WARDENS OF THE EPISCOPAL CHURCH OF THE PARISH OF ST. GEORGE'S DORCHESTER, AND FOR VESTING IN THEM AND THEIR SUCCESSORS IN OFFICE, THE SEVERAL DONATIONS AND OTHER CHARITABLE FUNDS BELONGING TO THE PARISH; AND FOR OTHER PURPOSES THEREIN MENTIONED. No. 1430.

Preamble.

WHEREAS, sundry inhabitants and other members of the Episcopal church in the parish of Saint George Dorchester, did, by their petition to the General Assembly, now sitting, set forth that the church in the said parish had been wantonly destroyed by the British during the late war, whereby the petitioners and others were deprived from attending divine service, and from procuring a minister. And *whereas*, by the last will and testament of several pious and well disposed persons, divers sums of money were given for the maintenance of a minister and other proper officers for the same, and those pious and good intentions would be more effectually carried into execution if the vestry and church-wardens elected, and hereafter to be elected, by the said inhabitants and freeholders were incorporated and made one body politic in law, and vested with all the powers, privileges and immunities which any of their sister churches enjoy.

Episcopal church St. George Dorchester.

I. *Be it therefore enacted*, by the honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the vestry and church-wardens of the said parish, elected and to be elected, in manner as heretofore used and accus-

EXHIBIT
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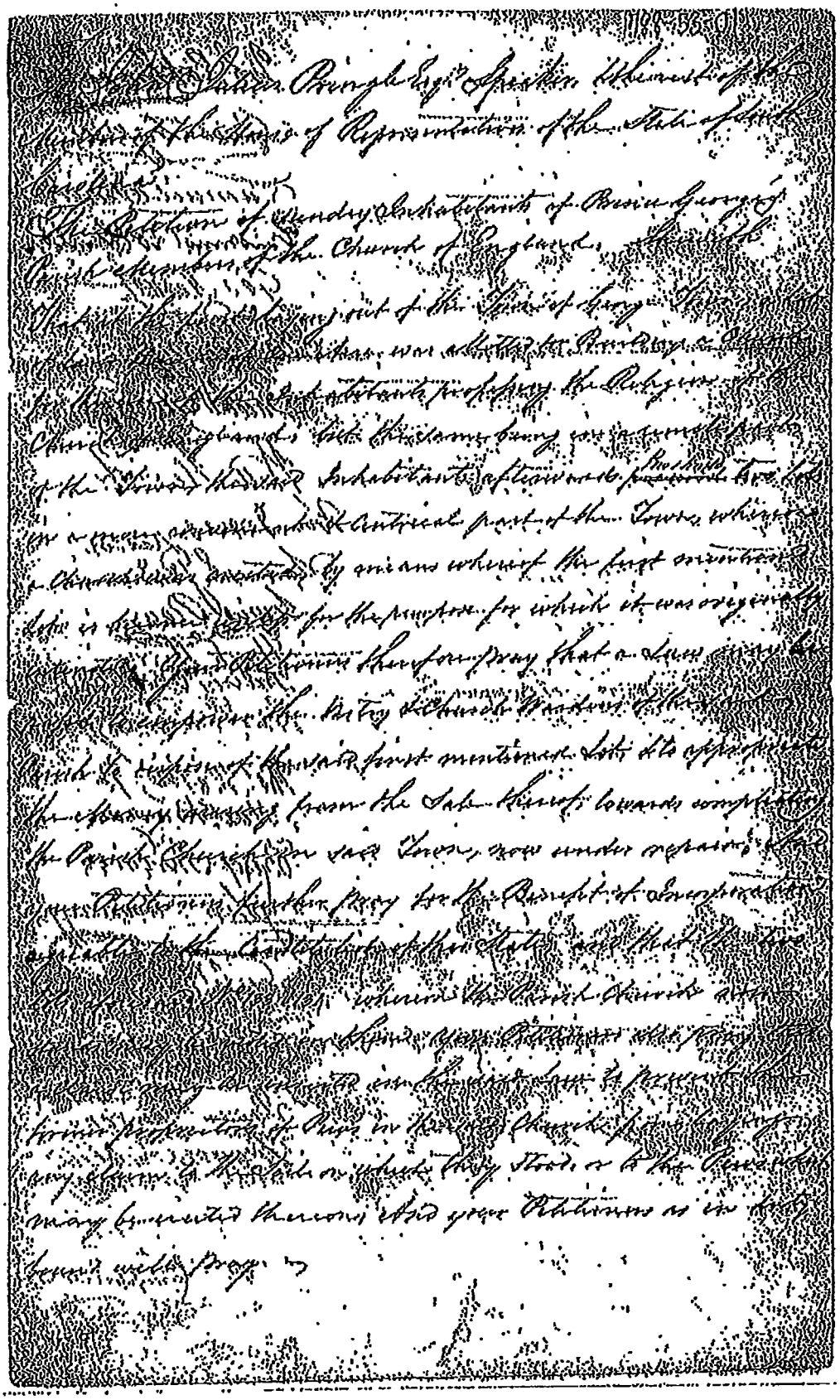
PG #5

(27)
REPRODUCED FROM DOCUMENTS IN
SOUTH CAROLINA DEPARTMENT OF ARCHIVES AND HISTORY
COLUMBIA, S. C.
General Assembly
Petition 1788 #52



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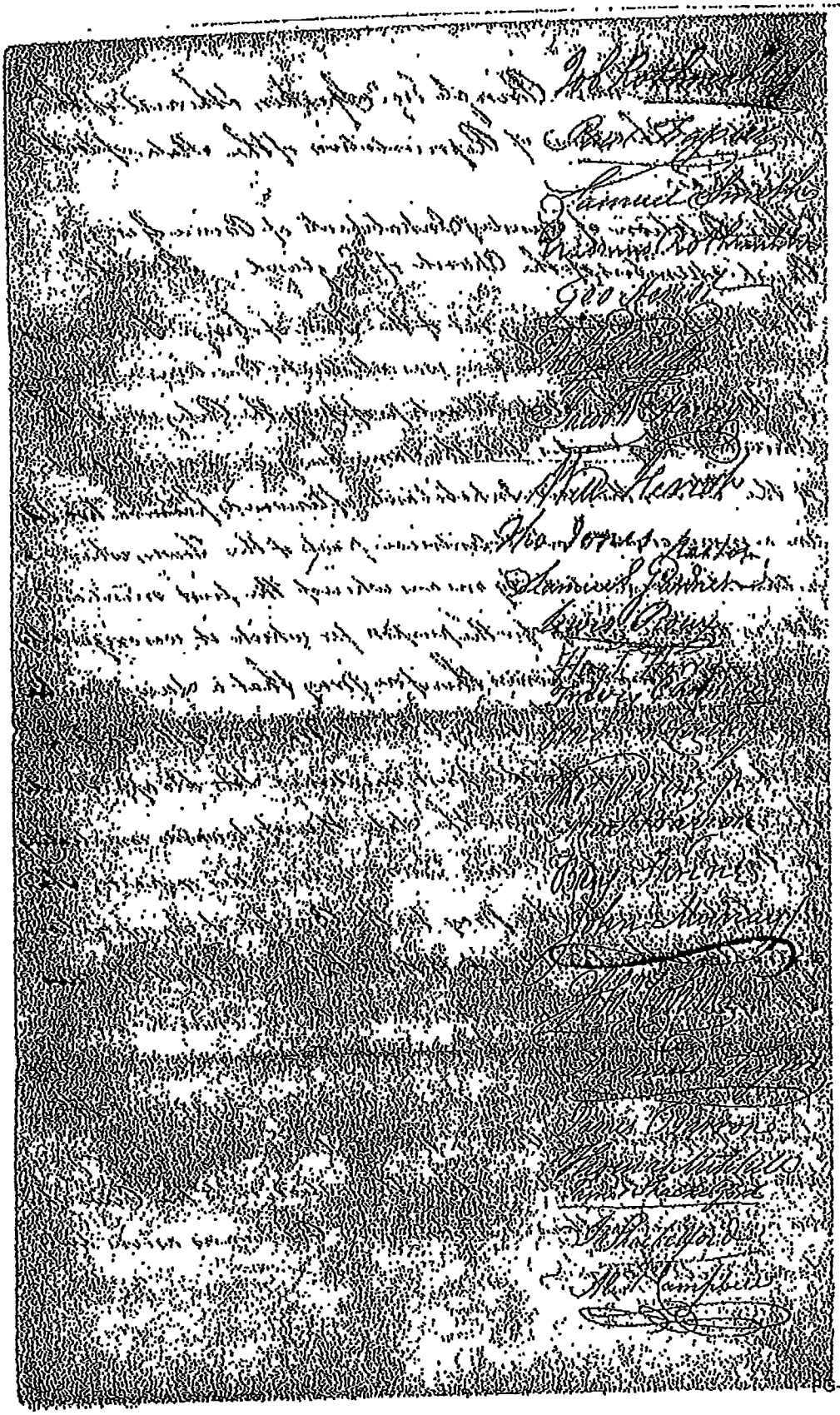

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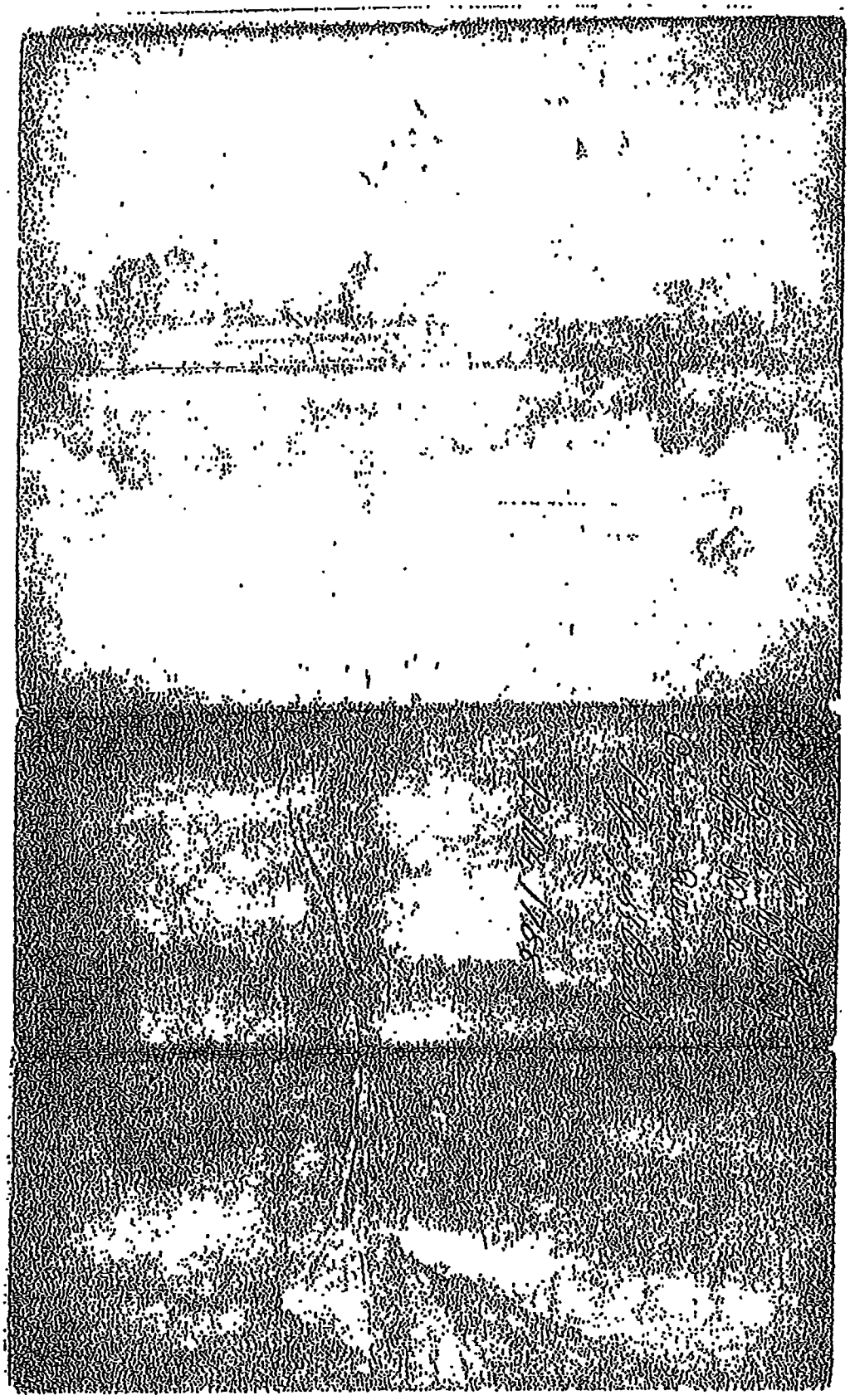

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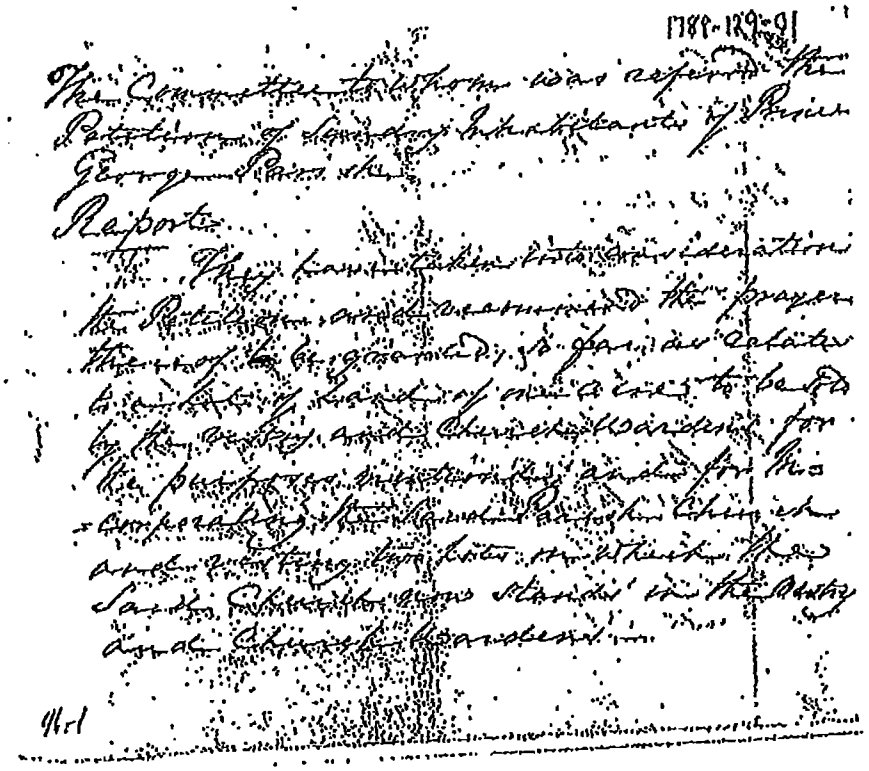
1944

To John Julius Pringle, Esq., Speaker, and the rest of the Members of the House of Representatives of the State of South Carolina.

This Petition of sundry Inhabitants of Prince George Parish Members of the Church of England showeth:

That at the first laying out of the Town of George Town, a lot of land herein of one acre was allotted for building a church for the use of the inhabitants professing the religion of the Church of England; but the same being in a remote part of the Town, the said inhabitants afterwards purchased two lots in a more convenient and centrical part of the Town, whereon a church was erected, by means whereof the first mentioned lot is become unfit for the purpose for which it was originally intended. Your Petitioners therefore pray that a law may be passed to empower the Vestry and Church Wardens of the said Parish to dispose of the said first mentioned lot and to appropriate the money arising from the sale thereof, towards completing the Parish church in said Town, now under repair. And your Petitioners further pray for th Benefit of Incorporation agreeable to the Constitution of this State, and that the two lots aforesaid No. 133 and 134, whereon the Parish Church now stands may be vested in them. Your Petitioners also pray that a clause may be inserted in the said Law to prevent the former proprietors of pews in the said Church from laying any claim to the land on which they stood, or to the pews which may be erected thereon, and your Petitioners as in duty bound will pray.

REPRODUCED FROM DOCUMENTS IN
SOUTH CAROLINA DEPARTMENT OF ARCHIVES AND HISTORY
COLUMBIA, S. C.
General Assembly
General Hist. Accession
1788 #129



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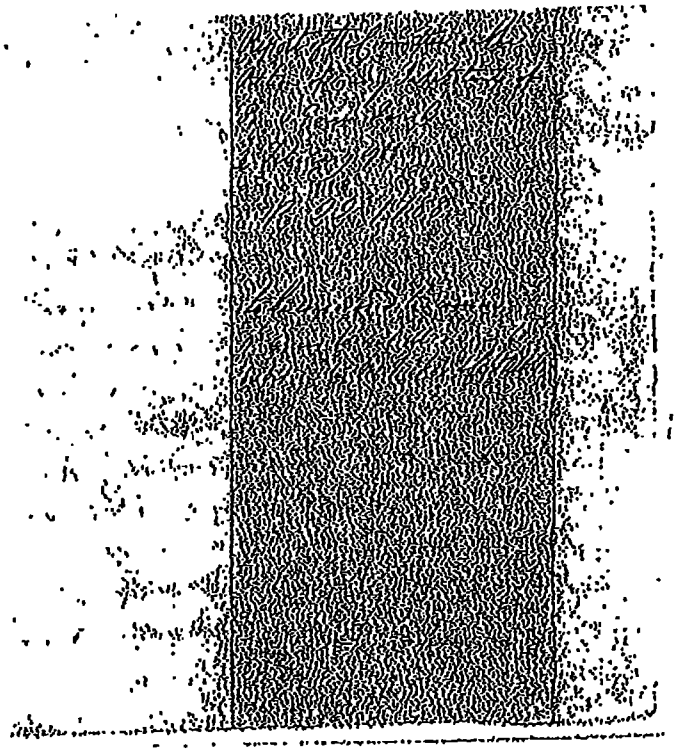

# St. Philip's
# SPH 3, 5, 36

1949

A. D. 1785.

*Acts relating to Corporations.*

No. 1278. AN ACT TO INCORPORATE THE VESTRIES AND CHURCH-WARDENS OF THE EPISCOPAL CHURCHES IN THE PARISHES OF SAINT PHILIP AND SAINT MICHAEL, IN CHARLESTON; AND FOR OTHER PURPOSES.

Preamble.

WHEREAS, the vestries and church-wardens of the Episcopal Churches in the parishes of Saint Philip and Saint Michael, called and known by the name of the "Church of England," have, by their joint petition to the General Assembly, set forth, that since the passing of the Constitution of this State, the support which was formerly provided by the Legislature for the clergy and other officers of that church is withdrawn; that many well disposed persons in the said parishes have contributed divers sums of money towards the establishing a fund for the maintenance of ministers, for the payment of their other officers, and the repairs of the said churches and parsonage houses, and that those good intentions may be more effectually carried into execution if the vestries and church-wardens of the said churches were made one body politic and corporate in law, and vested with such powers and authority as are hereinafter particularly mentioned.

Vestry and wardens of St. Philip's and St. Michael's.

I. *Be it therefore enacted*, by the honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the present vestries and church-wardens of the churches in the parishes of St. Philip and St. Michael, and their successors forever hereafter, shall be, and they are hereby declared to be, one body corporate, in deed and in name, by the name of the "Vestries and Church-wardens of the Episcopal Churches of the parishes of St. Philip and St. Michael, Charleston," and by that name shall, from time to time, and at all times hereafter, have perpetual succession and a common seal, and be capable in law, to have, hold, receive, possess and enjoy all the lands, tenements and hereditaments, and the rents and income thereof, which now are vested in the said vestries and church-wardens respectively, to them and their successors in office, and to sell, alien, exchange, demise or lease the same, or any part thereof, as they or a majority of them, shall think convenient; and they and their successors shall be able and capable in law, to have, receive, possess and retain all the monies or other personal estates, and all securities for the same, and the interest and proceeds thereof, which now are in the possession of the said joint vestries and church-wardens, and also at their discretion to call in and replace at interest the said monies, or any part thereof. *Provided nevertheless*, that in case any of the sums heretofore or hereafter to be subscribed by any person or persons whomsoever, or any gifts, devises or bequests hereafter to be made by any person or persons, for the purposes aforesaid, shall be appropriated to any other use or uses than the payment of ministers of the said churches performing divine service therein, or of any other churches or chapels, of the principles and tenets of the Church of England, that may hereafter be built within the city of Charleston, and for the payment of the salaries of the other officers of the said churches or chapels respectively, and the repairs of the said churches or chapels and parsonage houses, that then it shall and may be lawful for the persons so subscribing, giving, devising or bequeathing as aforesaid, their heirs, executors or administrators, to sue the said vestries and church-wardens, or their successors in office, and recover back the said subscriptions, gifts, devises or bequests, with the interest.

II. *And be it further enacted* by the authority aforesaid, That the said vestries and church-wardens, and their successors in office, shall be able

EXHIBIT SPH-3

and capable in law, to purchase, receive, have, hold and enjoy, to them and their successors in perpetuity, or for any term of years, any estate in lands, tenements or hereditaments, goods or chattels, of what nature or kind soever, and to sell, alien, exchange, demise or lease the same, or any part thereof, as they and their successors in office shall think convenient, for the benefit and advantage of the said vestries and church-wardens, for the purposes aforesaid. *Provided always*, that nothing herein contained, shall extend or be construed to extend, to invalidate or make void the leases heretofore made by the vestry and church-wardens of St. Philip's parish of the glebe lands of the said parish, or to deprive the lessees of the said lands, their executors, administrators or assigns, respectively, of their right to a renewal of their leases on the terms therein mentioned. May hold estate.

III. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestries and church-wardens, and their successors in office, or a majority of them, to appoint and choose proper clergymen or ministers for the said churches, and all other necessary officers, and at their will and pleasure to displace or remove, and supply others in the room or stead of him or them so removed, and to appoint such salaries, perquisites or other rewards for their labour and service therein, as they shall from time to time approve and think fit. Appoint Clergymen

IV. And *whereas*, the rents arising from the glebe lands above mentioned, and the interest of monies belonging to the said churches, are at present inadequate to the expense which must be necessarily incurred in providing for the support of the ministers and other officers of the said churches, and the repairs of the said churches and parsonage houses; *Be it therefore enacted* by the authority aforesaid, That until the rents of the said lands, and the interest of monies belonging to the said churches shall be sufficient to defray the expenses above mentioned, the said vestries and church-wardens, and their successors in office, shall be, and they are hereby authorized and impowered, annually to rate and assess each and every of the pews in the said churches, at such sum or sums of money as they, or a majority of them, shall think proper, and will be sufficient for the purposes aforesaid, regard being always had to the situation of the said pews; and if any person or persons, shall at any time neglect or refuse to pay the sum or sums of money at which his or her pew or pews are rated, within one month after such assessment as aforesaid, that then it shall and may be lawful for the said vestries and church-wardens, or a majority of them, to let to hire the said pew or pews, for any term not exceeding one year, to any person or persons who may be willing to hire the same. Pews to be rated.

V. *And be it further enacted* by the authority aforesaid; That it shall and may be lawful for the said vestries and church-wardens, by the name of the "Vestries and Church-wardens of the Episcopal Churches of the parishes of St. Philip and St. Michael, Charleston," to sue and be sued, implead and be impleaded, answer and be answered unto, in any court of judicature in this State, in all actions or suits of what nature or kind soever, which to them shall in any wise belong or appertain, in or about the premises.

VI. *And be it further enacted* by the authority aforesaid, That the last clause of an Act entitled "An Act for laying out and establishing several new streets in the North-west part of Charleston, and for building a new parsonage house for the parish of St. Philip, Charleston, and for empowering the vestry and church-wardens of the said parish for the time being, to lay out part of the glebe land of the said parish in lots, and to let the Act repealed.

same out on building leases; and for other purposes therein mentioned, passed the seventh day of April, in the year of our Lord one thousand seven hundred and twenty," be, and the same is hereby, repealed and made null and void to all intents and purposes.

In the Senate House, the twenty-fourth day of March, in the year of our Lord one thousand seven hundred and eighty-five, and in the ninth year of the Independence of the United States of America.

JOHN LLOYD, *President of the Senate.*
JOHN F. GRIMKE, *Speaker of the House of Representatives.*

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No. 1287. AN ORDINANCE TO INCORPORATE THE MASTER TAYLOR'S SOCIETY.

Preamble. WHEREAS, several persons, inhabitants of this State, have associated themselves together under the name of the "Master Taylor's Society," for the humane and charitable purpose of extending relief to such of the members and their families as may at any time through misfortune, be reduced to indigence; and have preferred a petition to the General Assembly, to be incorporated:

Master Tailor's Society. I. *Be it ordained*, by the honorable the Senate and House of Representatives, in General Assembly met, and by the authority of the same, That Theodore Trezvant, Samuel Stent and John McCall, together with the several persons who now are, or shall hereafter be, members of that society in this State, shall be, and they are hereby declared to be, one body corporate and politic, in deed and in name, by the name and style of the "Master Taylor's Society," and by that name shall have perpetual succession of officers and members, and a common seal, with power to change, alter, break and make new the same, as often as they shall judge expedient, and they and their successors shall be able and capable in law, to purchase, have, hold, receive, enjoy, possess and retain to them and their successors in perpetuity, or for any term of years, any estate or estates, real and personal, messuages, lands, tenements or hereditaments, of what kind or nature soever, not exceeding five hundred pounds sterling, per annum, and to sell, alien, exchange, demise or lease the same, or any part thereof, as they shall think proper; and they and their successors, shall be able and capable in law, to have, hold, receive, enjoy, possess and retain all the monies or other personal estate, and all the securities for the same, and the interest or proceeds thereof, which are now in the hands of, or vested in any of the said members in trust for the said society, and also at their discretion, to call in and replace at interest, the said monies, or any part thereof, and by the same name to sue and be sued, implead and be impleaded, answer and be answered unto, in any court of law or equity in this State, and to make, constitute and establish such by-laws, rules and orders, not repugnant to the laws of the land, as to a majority of the members shall appear necessary for the better regulating, ordering and governing the said society.

II. *And be it further ordained* by the authority aforesaid, That it shall and may be lawful for the corporation hereby erected, to take and hold, to

EXHIBIT SPH-5



May draw lottery.

VIII. *And be it further enacted* by the authority aforesaid, That the said corporation shall be, and they are hereby, fully authorized and empowered, from time to time, to erect and proceed to the drawing, and finally to conclude any lottery or lotteries, that they may think necessary to establish for the use and benefit of the said town.

IX. *And be it further enacted* by the authority aforesaid, That this Act shall be deemed a public Act, and if any person or persons shall be sued for any thing done by virtue of this Act, he may plead the general issue, and give this Act and the special matter in evidence.

In the Senate House, the nineteenth day of February, in the year of our Lord one thousand seven hundred and ninety-one, and in the fifteenth year of the Independence of the United States of America.

DAVID RAMSAY, *President of the Senate.*
JACOB READ, *Speaker of the House of Representatives.*

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No. 1533. AN ACT TO MAKE AND ESTABLISH THE VESTRIES AND CHURCH WARDENS OF THE EPISCOPAL CHURCHES OF THE PARISHES OF ST. PHILIP AND ST. MICHAEL, IN CHARLESTON, TWO SEPERATE AND DISTINCT BODIES POLITIC AND CORPORATE, AND TO ENLARGE THEIR POWERS.

Preamble.

WHEREAS, the vestries and church wardens of the Episcopal churches of the parishes of Saint Philip and Saint Michael, in Charleston, are desirous that they should be made, established, and incorporated, as two separate and distinct bodies politic and incorporate, and that each, should respectively, have and possess the same authority, powers and privileges, which are by an Act of the General Assembly of this State, passed on the twenty-fourth-day of March, in the year one thousand seven hundred and eighty-five, granted to and vested in the said two churches conjointly, and that they shall have, severally, certain powers in addition to those granted to them in the said Act; and it is expedient and proper, that such their desires shall be effected.

St. Philip and St. Michael separated.

I. *Be it therefore enacted*, by the honorable the Senate and House of Representatives of this State, now met and sitting in General Assembly, and by the authority of the same, That the said vestries and church wardens of the Episcopal churches of the Parishes of St. Philip and St. Michael, in Charleston, be, and they are hereby, made, established and incorporated, as two separate and distinct bodies, politic and corporate, in name and in law; and that each of them separately, shall thereafter, have, possess and enjoy, their respective properties severally, and shall also have, possess and enjoy, the same authority, powers and privileges, which by the Act of the General Assembly aforesaid, are granted to, and vested in them conjointly; and that the said vestry and church wardens of the Episcopal church of the parish of St. Philip, in Charleston, and their successors in office for ever hereafter, shall be and they are hereby, declared to be incorporated, as a body politic and corporate, in deed and in law, by the name of "The Protestant Episcopal Church, of the Parish of Saint Philip, in Charleston, in the State of South Carolina." And that the said vestry and

church wardens of the Episcopal Church of the parish of St. Michael, in Charleston, and their successors in office forever hereafter, shall be, and they are hereby declared to be, incorporated as a body politic and corporate, in deed and in law, by the name of "The Protestant Episcopal Church, of the Parish of St. Michael, in Charleston, in the State of South Carolina."

II. *And be it further enacted* by the authority aforesaid, That the said two churches, by their respective names before mentioned, shall severally, from time to time, and at all times hereafter, have perpetual succession, and a common seal, and be capable in law, to have, hold, take, receive, possess and enjoy, all the lands, tenements and hereditaments, and the rents and income thereof, which now are, or hereafter shall be, vested in them, respectively, by gift, devise or purchase, to them and their respective successors in office for ever, not exceeding the annual income of one thousand pounds each; and that the said two churches, by their said respective names, shall and may, severally, sue and be sued, implead and be impleaded, answer and be answered unto, in any court of judicature in this State, in all actions or suits of what nature or kind soever, which to them shall in any wise belong or appertain, in or about the premises. Rights and privileges.

III. *And be it further enacted* by the authority aforesaid, That the said corporations, and each of them, shall have full power and authority, by their respective names above mentioned, either at law or in equity, to sue for, recover and receive, all and every such sum and sums of money, goods, chattels, houses, lands, real estate, or other property, as now is, or are, or hereafter shall be due to, or kept and detained from them, or either of them, by any one or more of their, or either of their own body, sect, fraternity or society, or any other person or persons whomsoever; any law, usage or custom to the contrary thereof in any wise notwithstanding.

IV. *And be it further enacted* by the authority aforesaid, That if any person or persons shall neglect or refuse to pay the sum or sums of money, at which his, her or their pew or pews in either of the said two churches, is or are already rated or assessed, according to the directions of the Act of the General Assembly hereinbefore mentioned, within six months after the passing of this Act; or in case any person or persons shall refuse or neglect to pay the sum or sums of money, at which his, her or their pew or pews, in either of the said two churches, shall at any time hereafter be rated or assessed, according to the directions of the said Act of the General Assembly, within six months after such assessment as aforesaid, then, and in either of the said two cases, it shall and may be lawful for the vestries and church wardens, or a majority of them, of the said churches, respectively, to let out and hire the said pew or pews, to any person or persons who may be willing to rent or hire the same, for such term or length of time as may be necessary to make up such sum or sums of money as may be due or owing on account of assessments as aforesaid, or otherwise, by the owner or owners thereof to the church in which such pew or pews is or are situated.

V. *And be it further enacted* by the authority aforesaid, That the agreement made and entered into, by the vestries and church wardens of the said two churches, relative to the glebe lands, and all and every act, matter, transaction, thing and deed, done or executed by virtue or in consequence of any agreement made by or between them, relative to the said glebe land, or any joint property belonging to them, shall be, and the same is

and are hereby declared to be, valid, firm and effectual; any law, custom or usage to the contrary thereof in any wise notwithstanding.

VI. *And be it further enacted* by the authority aforesaid, That so much of the Law or Act for incorporating the said churches, passed on the twenty-fourth day of March, in the year of Lord one thousand seven hundred and eighty-five, as is repugnant to this Act, shall be, and the same is hereby, repealed.

In the Senate House, the twentieth day of December, in the year of our Lord one thousand seven hundred and ninety-one, and in the sixteenth year of the Independence of the United States of America.

DAVID RAMSAY, *President of the Senate.*
JACOB READ, *Speaker of the House of Representatives.*

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No 1535. AN ACT TO INCORPORATE THE GRAND LODGE, AND THE SEVERAL LODGES UNDER THE JURISDICTION THEREOF, OF SOUTH CAROLINA ANCIENT YORK MASONS.

Preamble. WHEREAS, Brigadier General Mordecai Gist, Grand Master, and others the officers and members of eighteen Lodges of Ancient York Masons, represented in Grand Lodge in the city of Charleston, have petitioned the Legislature to be incorporated a body politic, by the name and style of "The Grand Lodge of the State of South Carolina Ancient York Masons, and its Masonic Jurisdiction." And *whereas*, it is expedient to grant the prayer of the said petition.

Grand Lodge of Acient York Masons. I *Be it therefore enacted*, by the Honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the said society abovementioned, and the subordinate lodges aforesaid, composing the same, and the several persons who now are or shall hereafter be members, respectively, and their successors, members and officers thereof, respectively, shall be, and are hereby declared to be, a body politic and corporate, in name and in deed, by the name and style of "The Grand Lodge of the State of South Carolina Ancient York Masons, and its Masonic Jurisdiction," and by the same name shall have perpetual succession of officers and members, and a common seal, with power to change, alter and make new the same, as often as the said corporation shall judge expedient.

Rights and privileges. II. *Be it also enacted* by the authority aforesaid, That the said society and the Lodges constituting the same, shall be able and capable in law, to purchase, have, hold, receive, enjoy, possess and retain, to itself, or each or any of them, in perpetuity or for any term of years, any lands, tenements or hereditaments, of what kind or nature soever, not exceeding the value of five thousand pounds; and to sell, alien, exchange or demise or lease the same, or any part thereof, as the said corporation shall think proper; and by the same name, to sue and be sued, implead and be impleaded, answer and be answered unto, in any court of law or equity in this State; and to make such rules, orders and by-laws, (not repugnant to the laws of this State,) as may be necessary, for the order, rule, good government and management thereof; and it shall and may be lawful to and for the said society to constitute subordinate Lodges, and to do all other things concerning the government, estate, monies and revenues of said Grand Lodge and subordinate Lodges.

EXHIBIT SPH-36

STATE OF SOUTH CAROLINA

APPLICATION FOR REGISTRATION
OF A TRADEMARK OR SERVICE MARK

Original: $15 per mark, per class
Renewal: $5
Assignment: $3

Check one:
☐ Trademark or ☒ Service Mark

1. Name of Applicant: The Protestant Episcopal Church, of the Parish of Saint Philip, In Charleston, in the State of South Carolina

2. Applicant's principal place of business address: 142 Church Street, Charleston, SC 29401

3. Applicant's place of business address in South Carolina, if any:

142 Church Stgreet, Charleston, SC 29401

4. Applicant is:

☐ an individual or sole proprietor

☐ a corporation duly organized under the laws of the State of

☐ a partnership duly organized under the laws of the State of

Names of General Partners:

☐ a Limited Liability Company duly organized under the laws of the State of

☒ other legislatively chartered by Act 1533 of the General Assembly, December 20, 1791

5. Describe the mark, including any literal and/or design elements if claimed:

ST. PHILIP'S CHURCH

6. The actual goods or services in connection with which the mark is used (i.e., shoe laces, cat food, heating repair services, baby-sitting services, etc.):

Religious services, namely, ministerial, evangelical and missionary services.

7. The mode or manner in which the mark is used (i.e., labels, advertisements, brochures, etc.):

Advertisements for the Services

8. The class(es) in which the goods or services fall (see attached):

Section 39-15-1150(C)(8) Miscellaneous

9. The mark, with respect to the goods or services identified above, was first used by applicant or predecessor in interest as follows (include month, day, and year):

Date of first use anywhere: 7/1/1680 Date of first use in South Carolina: 7/1/1680

10. Has the applicant, or any predecessor in interest, ever filed an application to register the mark or portions of the mark or a composite of the mark with the United States Patent and Trademark office?

☐ YES ☒ NO

If you answered "YES", please provide the full particulars including the filing date, serial number and status of each application. If an application was finally refused registration or has otherwise not resulted in registration, please state the reason for this:

11. Please enclose three (3) original, identical specimens showing the mark as actually used.

**DECLARATION OF OWNERSHIP**

Applicant herewith declares that he/she has read the above and foregoing application and knows the contents thereof and that the facts set out herein are true and correct, that the three specimens of the mark submitted are true and correct, that the applicant is the owner of the mark, and that the mark is in use. Additionally, to knowledge of the person verifying this application, no other person has registered this mark either federally or in this State, or has the right to use this mark in its identical form or in near resemblance as to be likely, when applied to the goods or services of another person, to cause confusion or to cause mistake or to deceive.

Signature

Sworn to and subscribed before me

this 16th day of, November 2011

Julian Garland

Notary Public for South Carolina

My Commission Expires: Sept. 5, 2013

JULIANN GARLAND NOTARY PUBLIC SOUTH CAROLINA

W.B. Gibson Leonard

Name

Parish Administrator / Agent

Title

843-722-7734

Telephone Number

11-16-2011

Date

NOTE

THE ACCEPTANCE OF A TRADEMARK OR SERVICE MARK FOR REGISTRATION BY THE OFFICE OF THE SECRETARY OF STATE PROVIDES THE OWNER WITH A RIGHT TO USE SUCH MARK IN THE STATE OF SOUTH CAROLINA ON THE GOODS AND SERVICES IDENTIFIED IN THE REGISTRATION APPLICATION. HOWEVER, THE OFFICE OF THE SECRETARY OF STATE DOES NOT SEARCH OTHER STATE OR FEDERAL REGISTRATIONS, INTERNET DOMAIN NAMES OR OTHER COMMON LAW (UNREGISTERED) USERS, THEREFORE, RIGHTS GRANTED BY THIS REGISTRATION MAY BE AFFECTED OR PREEMPTED BY PRIOR USE OR OTHER REGISTRATION OF THE MARK.

St. Philip's Church
Charleston, South Carolina

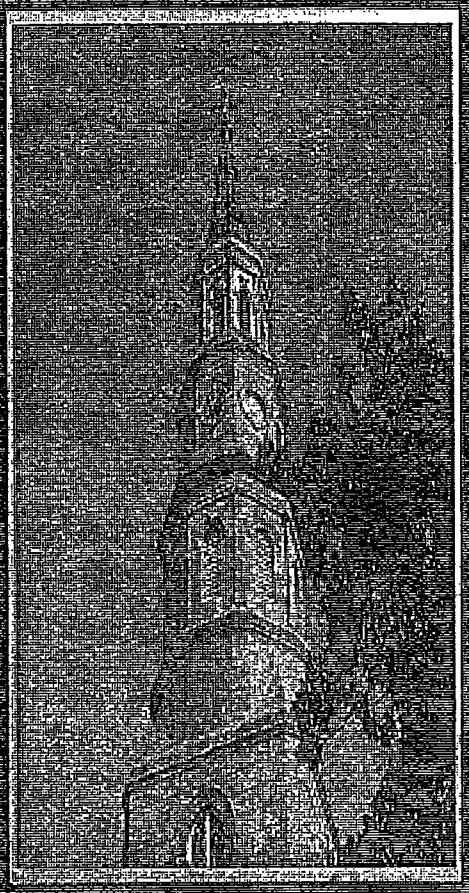
# WELCOME

Founded in 1680 and located in the heart of Charleston, South Carolina, St. Philip's Church is a vibrant community of faith that confesses and proclaims the crucified and risen Christ and God's unconditional grace, love, and forgiveness for sinners.

St. Philip's is a parish in the Diocese of South Carolina and a member of the worldwide Anglican Communion.

Listen to our historic bells - a signature icon of Charleston's "soundscape."

LISTEN TO OUR SERMONS



State of South Carolina

# Office of the Secretary of State

The Honorable Mark Hammond

**TRADEMARK REGISTRATION**

**SERVICE MARK REGISTRATION**

**I, Mark Hammond, Secretary of State, hereby certify that the following mark has been registered in this state according to the provisions of the South Carolina Code of Laws Section 39-15-1105 et seq. to:**

The Protestant Episcopal Church, of the Parish of Saint Philip, In Charleston, in the State of South Carolina
142 Church Street
Charleston, SC 29401-

## St. Philip's Church

**Date of First Use in South Carolina: 7/1/1680**
**Class of Goods or Services: Service mark class #8**

**Registration Date: 11/22/2011**
**If an Entity, Organized under the Laws of**

**Description: The mark consists of the words "St. Philip's Church"**

**Date of First Use: 7/1/1680**
**Description of Goods or Services: Religious services, namely, ministerial, evangelical and missionary services.**
**Expiration Date: 11/22/2016**

**Given under my hand and Great Seal of the State of South Carolina on November 22, 2011**

Mark Hammond

Mark Hammond, Secretary of State

# St. Matthew's - Fort Motte
# SMFM 1

1960

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

THIS IS TO CERTIFY THAT This and/or the attached is a true and accurate copy of Act No. 1415 (1788), AN ACT TO INCORPORATE THE VESTRIES AND CHURCH WARDENS OF THE EPISCOPAL CHURCHES, ETC.,

recorded in records of the South Carolina General Assembly, Statutes at Large, Vol. VIII, title page & pp. 145-149,

now on deposit with South Carolina Department of Archives and History

GIVEN UNDER MY HAND AND THE SEAL OF THE DEPARTMENT THIS

TWENTY-SECOND SEPTEMBER 2010.

Paul Begley

Paul Begley
Reference Services

SM-FM Exhibit No. 1

THE

# STATUTES AT LARGE

OF

# SOUTH CAROLINA;

EDITED, UNDER AUTHORITY OF THE LEGISLATURE,

BY

DAVID J. McCORD.

VOLUME EIGHTH,

CONTAINING THE ACTS RELATING TO CORPORATIONS AND THE MILITIA.

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON.
1840.

REFERENCE LIBRARY
SOUTH CAROLINA
DEPARTMENT OF ARCHIVES & HISTORY

SM - FM 000053

1962

"The German Calvinistic church of St. John, on the Fourhole."
"The German Lutheran church of St. Matthew, in Amelia Township"
"The German Lutheran church of Salem, on Sandy Run."
"The German Lutheran church of Mount Zion, on Twelve Mile creek."
"The German Lutheran church of St. Peter, on Eighteen Mile creek."
"The German Lutheran church of Bethel, on High Hill creek."
"The German Lutheran church of St. Martin."
"The German Lutheran church of Bethlehem, on Forest's ford."
"The German Protestant church of Bethany, on Green creek."
"The German Protestant church of Appii Forum, Cedar creek."
"The German Protestant church dedicated to Queen Charlotte, on Slippery creek, Ninety-six District."
"The German Lutheran church of St. George, on Hardlabor creek."
"The German Lutheran church of St. Jacob, on Wateree creek."
"The German Protestant church of St. George's, on Indian Field Swamp."

And by their said respective names, shall, severally, have pepetual succession of officers and members, and a common seal, with power to change, alter, break and make new the same, as often as they, the said corporation, shall severally judge expedient; and each and every of the said corporations, respectively, are hereby, vested with all the powers, privileges and advantages, which are specified and expressed in "The Act for incorporating divers religious societies therein named," passed the twenty-sixth day of March, one thousand seven hundred and eighty-four.

II. *And be it further enacted* by the authority aforesaid, That this Act shall be deemed and taken as a public Act, and notice shall be taken thereof in all courts of justice and elsewhere in this State; and the same may be given in evidence on the trial of any issue or cause, without being specially pleaded.

In the Senate, Friday the twenty-ninth day of February, in the year of our Lord one thousand seven hundred and eighty-eight, and in the twelfth year of the Independence of the United States of America.

JOHN LLOYD, *President of the Senate.*
JOHN JULIUS PRINGLE, *Speaker of the House of Representatives.*

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AN ACT TO INCORPORATE THE VESTRIES AND CHURCH WARDENS OF THE EPISCOPAL CHURCHES IN THE PARISHES OF ST. LUKE, ST. MATTHEW, PRINCE GEORGE WINYAW, ST. STEPHEN, AND ST. JAMES GOOSE CREEK; AND ALSO THE VESTRIES AND CHURCH WARDENS OF THE EPISCOPAL CHURCHES OF CLAREMONT, AND OF SAINT HELENA ISLAND. No. 1415.

WHEREAS, the vestries, church wardens and divers other persons, members of the several Episcopal churches of the parishes of St. Luke, St. Matthew, Prince George Winyaw, and St. Stephen, and St. James Goose Creek, have, by their petitions to the General Assembly, humbly prayed to be incorporated, and to be severally vested with all the privileges Preamble.



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and immunities which any of the sister churches enjoy. And *whereas*, the vestry, church wardens, and sundry other inhabitants of Claremont county, have, by their petition to the General Assembly set forth, that they are desirous of building a church for the purposes of religious worship, and providing for the maintenance of a Minister, and humbly prayed that a law might be passed to incorporate them by the name of "The Vestry and Church Wardens of the Episcopal Church of Claremont," and that they might be vested with all the privileges and immunities which any of their sister churches enjoy. And *whereas*, the vestry and church wardens, together with sundry other persons, inhabitants of the Island of St. Helena, members of the Episcopal church of the said Island, have, by their petition to the General Assembly, humbly prayed to be incorporated by the name of "The Vestry and Church Wardens of the Episcopal Church of Saint Helena Island," and to be also vested with all the privileges and immunities which any of their sister churches enjoy. And it appears meet and fitting agreeable to the constitution of this State, passed the nineteenth day of March, in the year of our Lord one thousand seven hundred and seventy-eight, that the prayers of the said several petitioners should be granted.

Episcopal churches of various parishes.

I. *Be it therefore enacted*, by the Honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the vestries and church wardens of the several and respective churches hereinbefore mentioned, elected or to be elected, in manner accustomed, and their successors in office for ever hereafter, shall be, and they are hereby, declared to be severally incorporated by the following names, that is to say:—The Vestry and Church Wardens of St. Luke's Parish, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Luke;" the vestry and church wardens of St. Matthew's Parish, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Matthew;" the vestry and church wardens of the Parish of Prince George Winyaw, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of Prince George Winyaw;" the vestry and church wardens of the Parish of St. Stephen, by the name of "The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Stephen;" the vestry and church wardens of the Parish of St. James Goose Creek, by the name of "The Vestry and Church Wardens of the Episcopal Church of St. James Goose Creek;" the vestry and church wardens of Claremont county, by the name of "The Vestry and Church Wardens of the Episcopal Church of Claremont;" and the vestry and church wardens of St Helena Island, by the name of "The Vestry and Church Wardens of the Episcopal Church of St. Helena Island;" and by their said several names, shall, from time to time, and at all times hereafter, each, have perpetual succession, and a common seal, and be severally capable in law, to have, hold, receive, possess and enjoy, all their lands, tenements and hereditaments, and the rents and income thereof, which now are severally vested in the said vestries and church wardens, respectively, and to their several and respective successors in office; and severally, to sell, alien, demise, exchange or lease the same, as the majority of the said corporations shall severally and respectively think convenient; and they, and each of them, and their, and each of their successors, shall severally be capable in law, to have, receive, possess and retain, all the monies or other personal estates, and all the securities of the same, and the interests and proceeds thereof, which now are in possession of the said vestries and

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church wardens, respectively; and also, at the discretion of a majority of each of the said corporations, to call in and replace at interest the said monies or any part thereof.

What estates to hold.

II. *And be it further enacted*, by the authority aforesaid, That the said vestries and church wardens, respectively, and their respective successors in office, shall be able and capable in law, to purchase or receive by devise, gift or donation, and to have, hold and enjoy, to them and their several and respective successors in perpetuity, or for any term of years, any estate in lands, tenements or hereditaments, goods or chattels, of what nature or kind soever, and to sell, alien, exchange, demise or lease the same, or any part thereof, as they, or a majority of them, or their several and respective successors in office shall think convenient, and for the benefit and advantage of the said vestries and church wardens, respectively, for the purposes aforesaid.

Churches to be rebuilt and repaired.

III. *And be it further enacted* by the authority aforesaid, That the respective vestries and church wardens and their successors in office, are hereby required and empowered, to build, re-build, refit and repair their said churches, respectively, as often as need may be, on such plan as the said respective corporations, or a majority of them, respectively, shall think proper; and for the costs and expense thereof, to assess the pews in the same churches, rateably and proportionably, according to their respective rules, which assessment, the owners and proprietors of pews are hereby enjoined and required to pay when called upon by the respective vestries and church wardens for that purpose; and in case the said proprietors, or any of them, shall neglect or refusse to pay such assessment for the space of six months, that then, and in such case, the respective vestries and church wardens, shall be, and they are hereby, severally empowered to sell and convey in fee simple, to the highest bidder, all such pew and pews in the respective churches, belonging to such proprietor or proprietors, so refusing to pay for the building, re-building or repairing such church as aforesaid, and after deducting the sum or sums assessed thereon respectively, to pay the overplus, if any there may be, to the several and respective proprietors thereof, when called upon for that purpose.

To sell pews.

IV. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestries and church wardens, respectively, and their successors in office, or a majority of them, respectively, and they are hereby authorized and empowered, to sell and convey to any person or persons that they shall think proper, any of the pews in the said respective churches, (not being private property,) in such manner, and on such conditions, or for such term or terms as they, or a majority of them, respectively, shall think fit; and also, annually to assess and rate each and every of the pews in the said respective churches, at such sum or sums of money, as they, or a majority of them, shall respectively think right, regard being always had to the situation of the said pews; and if any person or persons, shall at any time neglect or refuse to pay the sum or sums of money, at which his, her or their pew or pews are rated, within three months after public notice given of such rate and assessment, that then, it shall and may be lawful for the respective vestries and church wardens, or a majority of them, respectively, to let and hire the said pew or pews, for any term not exceeding three years, to any person or persons who may be willing to hire the same.

V. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the respective vestries and church wardens, and their

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To choose Clergymen. successors in office, or a majority of them, respectively, to elect and choose proper clergymen and ministers for their respective churches, and all other necessary officers; and again, at their will and pleasure, to displace and remove such ministers and officers, and supply others in the room and stead of him or them so removed; and to appoint salaries, perquisites or other rewards, for the labor and service of such ministers and other officers in their respective churches, as they shall from time to time, approve and think fit.

Church Wardens of Prince George Winyaw to sell lot. VI. *And be it further enacted*, That it shall and may be lawful, for the vestry and church wardens of the said Episcopal Church of Prince George Winyaw, to sell, alien, demise, release and convey, in fee simple, in such manner as they, or a majority of them, shall think fit, to such person or persons as may choose to become purchasers of the same, or any part thereof, all that lot of land, containing one acre, be the same more or less, originally reserved at the laying out the town of Georgetown, and allotted for building a church for the use of the inhabitants professing the religion of the Church of England, and to appropriate all such sum and sums of money as may be obtained for the same, one acre lot to the rebuilding and repair of the parish church in the said town, or to such other purpose and purposes for the benefit of the said corporation, as the said vestry and church wardens, or a majority of them, shall think fit.

Lots in Georgetown vested in the church wardens. VII. *And be it further enacted* by the authority aforesaid, That the lots known by the numbers one hundred and thirty-threee, (133) and one hundred and thirty-four, (124) in the plan of the said town of Georgetown, formerly purchased by the inhabitants thereof for the purpose of building a church, and whereon the parish church now stands, shall be, and the same are hereby, vested in the said vestry and church wardens, and their successors in office forever, for the use of the said church by this Act incorporated. And that it shall not be lawful for any person or persons who were proprietors of pews in the said church, nor their assigns, heirs or executors, who do not contribute to the repairs of the said church, to claim any right, title, interest or property in the soil on which the same pews stood, nor to the pews that may be erected in the same church, but of and from the same shall be debarred and forever excluded by virtue of this Act; any law or usage to the contrary notwithsfanding.

To make by-laws. VIII. *And be it further enacted* by the authority aforesaid, That the said vestries and church wardens, and their successors in office, or a majority of them, respectively, shall have full power and authority from time to time, to make and establish such and so many by-laws, rules and orders, as to them shall seem necessary and convenient, for the better regulating, governing, well ordering, and directing the said corporations, respectively; and the ministers, officers, servants and persons by them employed, or to be employed on or about the same; and for the better managing, limiting, appointing of all and every the trusts and authorities in them, and each of them, respectively, reposed and to be reposed; and for the doing, managing and transacting all things necessary for, and concerning the government of the said corporations, and the same by-laws, rules and orders, to put in use and execution accordingly; and the same, or any part of them, again at their will and pleasure, to alter, change, suspend or revoke, all which said by-laws, rules and orders, so to be made by the said corporations, respectively, shall be binding on every member of the said corporations, respectively, and the ——— churches by this Act incorporated, and be from

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time to time, by them, and each of them, punctually and inviolably observed, according to the tenor and effect thereof, under the several pains, penalties and disabilities therein appointed and declared. *Provided*, that the same shall be reasonable and not contrary or repugnant to the laws of this State.

IX. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestries and church wardens, respectively, by the respective names hereinbefore mentioned, to sue and be sued, implead and be impleaded, answer and be answered unto, in all or any court or courts, or other places, before any judges or justices, in all manner of actions, suits, complaints, pleas, causes or things whatsoever, and of what nature or kind soever, which shall or may be commenced, sued or prosecuted, by or against them in any manner, touching or concerning the premises. Sue and be sued.

X. *And be it further enacted* by the authority aforesaid, That this Act shall be deemed a public Act, and may be given in evidence without special pleading, on any trial of any issue or cause in any court of law or equity in this State.

In the Senate, this the twenty-ninth day of February, in the year of our Lord one thousand seven hundred and eighty-eight, and in the twelfth year of the Independence of the United States of America.

JOHN LLOYD, *President of the Senate.*
JOHN JULIUS PRINGLE, *Speaker of the House of Representatives.*

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AN ACT TO INCORPORATE THE VESTRY AND CHURCH WARDENS OF THE EPISCOPAL CHURCH OF THE PARISH OF ST. GEORGE'S DORCHESTER, AND FOR VESTING IN THEM AND THEIR SUCCESSORS IN OFFICE, THE SEVERAL DONATIONS AND OTHER CHARITABLE FUNDS BELONGING TO THE PARISH; AND FOR OTHER PURPOSES THEREIN MENTIONED. No. 1439.

WHEREAS, sundry inhabitants and other members of the Episcopal church in the parish of Saint George Dorchester, did, by their petition to the General Assembly, now sitting, set forth that the church in the said parish had been wantonly destroyed by the British during the late war, whereby the petitioners and others were deprived from attending divine service, and from procuring a minister. And *whereas*, by the last will and testament of several pious and well disposed persons, divers sums of money were given for the maintenance of a minister and other proper officers for the same, and those pious and good intentions would be more effectually carried into execution if the vestry and church-wardens elected, and hereafter to be elected, by the said inhabitants and freeholders were incorporated and made one body politic in law, and vested with all the powers, privileges and immunities which any of their sister churches enjoy. Preamble.

I. *Be it therefore enacted*, by the honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the vestry and church-wardens of the said parish, elected and to be elected, in manner as heretofore used and accus- Episcopal church St. George Dorchester.

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# Christ Church
# CC 24, 25

1968

# THE STATE OF SOUTH CAROLINA.

EXECUTIVE DEPARTMENT.

## By the Secretary of State.

*Whereas,* WM. J. EDMONDSON, JNO.M. MITCHELL, W. E. FREEMAN, ARTHUR L. RIVERS, R. H. PINCKNEY, I. G. MCCANTS, AND T. H. J. WILLIAMS

a majority of the Board of Directors of "THE VESTRY AND CHURCH WARDENS OF THE EPISCOPAL CHURCH OF THE PARISH OF CHRIST CHURCH"

a corporation created under and pursuant to ~~the laws~~ by an Act of the General Assembly of South Carolina, ~~by an Act of the General Assembly~~ duly approved 27th day of March A D. 1787

HAVE CERTIFIED, over their signatures, Resolutions authorizing in behalf of the aforesaid Corporation additional authority to borrow money for the purpose of carrying out the objects of its charter; to make notes, bonds or other evidences of debt, and to secure the payments of its obligations by mortgage or deed of trust on all of any of its property and franchises, both real and personal, and, generally confer upon said corporation the powers now conferred by the provisions of Article II, Chapter XLVIII of Volume I of the Code of Laws of South Carolina, 1902"

(authorized and set forth in the certificate aforesaid);

which Resolutions were adopted pursuant to law, at a meeting of the stockholders of the aforesaid Corporation, of which thirty days' published notice was given, which notice stated the purpose of the aforesaid meeting; and further, that said Resolutions were adopted by a majority vote, and that in all respect there has been complied with the provisions of Section 1889, Code of Laws of South Carolina, 1902, and all amendments thereto.

NOW, THEREFORE, I, R. M. McCown, Secretary of State, by virtue of the authority in me vested by chapter XLVII, of the Code of Laws of South Carolina, 1902, and amendments thereto, and all Acts or parts of Acts me thereto enabling, do hereby certify that the requirements of law for said amendment have been complied with, and for good and sufficient reasons to me appearing, do hereby certify that the charter of the aforesaid Company has been so amended.

GIVEN under my hand and the seal of the State, at Columbia, this 7th day of May in the year of our Lord one thousand nine hundred and eight, and in the one hundred and 32nd year of the Independence of the United States of America.

R. M. McCown
Secretary of State.

(SEAL)

CERTIFIED TO BE A TRUE AND CORRECT. May 26, 1953

D. Frank Thornton
Secretary of State.

PLAINTIFF'S EXHIBIT
CC-24

No. 1363. AN ACT TO INCORPORATE THE VESTRY AND CHURCH-WARDENS OF THE EPISCOPAL CHURCH OF THE PARISH OF CHRIST CHURCH

WHEREAS, sundry inhabitants and other freeholders, members of the Episcopal Church in the parish of Christ Church, did, by their petition to the General Assembly, set forth that the church in the said parish was, in the late war most wantonly burnt down by the British army, during their operations in this State, whereby the petitioners are prevented from attending divine service therein, and from procuring a minister to perform public worship in the said parish, according to the rites and ceremonies of their said church. and WHEREAS, several pious and well disposed persons, by their last will and testament, as also others by voluntary subscriptions, have given divers sums of money for re-building and fitting up the said church, and for providing for the maintenance of a minister and the payment of other proper officers of the same; and those pious and good intentions would be more effectually carried into execution, if the prayer of the said petitioners, "that the vestry and church-wardens, elected or to be elected by the said inhabitants and freeholders, were incorporated and made one body politic and corporate in law, and vested with all the powerrs, privileges and immunities which any of their sister churches enjoy."

I. BE IT THEREFORE ENACTED by the Honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, that the vestry and church-wardens of the said church, elected or to be elected, in manner as heretofore accustomed, and their successors in office forever hereafter, shall be, and they are hereby declared to be, incorporated by the name of "The Vestry and Church-Wardens of the Episcopal Church in the Parish of Christ Church;" and the said church-wardens or a majority of them, are hereby vested with all the powers and authorities which are vested in any corporated and established church in this State, and by the name aforesaid shall, from time to time, and at all times hereafter, have a perpetual succession, and a common seal for their said church; and they and their successors in office, shall be capable in law, to have, hold, receive, possess and enjoy, all the lands, tenements and hereditaments, and the rents and income thereof, which now are vested in the vestry and church-wardens of the said church, and also be capable to sell, alien, demise, exchange or lease the same, in such manner and for such term as they or a majority of them shall think expedient; and that they, the said vestry and church-wardens, and their successors, shall be able and are capable in law to have, hold, receive, possess and retain, all the monies or other personal estates, and all securities for the same, and the interest and proceeds thereof, which now are in the possession of the said vestry and church-wardens, or any of them; and also, at their discretion, to call in and re-place at interest the said monies or any part thereof.

II. AND BE IT FURTHER ENACTED by the authority aforesaid, That the said vestry and church-wardens and their successors in office, shall be able and capable in law to purchase or receive by devise, gift or donation, and to have, hold and enjoy, to them and their successors, in perpetuity or for any term of years, any estate, in lands, tenements or hereditaments, or slaves, goods, chattels, monies or other personal estate; of what nature or kind soever, and again to sell, alien, demise, lease or dispose of the same, or any part thereof, in such manner as they, or a majority of them, or their successors in office, shall think expedient, and most for the benefit and advantage of the said vestry and church-wardens, for the purposes aforesaid,

III. AND BE IT FURTHER ENACTED by the authority aforesaid, That they, the said vestry and church-wardens, and their successors in office, are hereby required and empowered to have the said parish church completely rebuilt or repaired, and pews erected in the said church, as heretofore, or on such other plan as they, or a majority of them, shall think proper, and for the costs and expense thereof to assess the said pews when finished, rateably and proportionably, according to their respective value, which assessment the owners and proprietors of pews are hereby enjoined and required to pay, when called upon by the vestry and church-wardens for that purpose. And in case the said proprietor or any of them shall neglect or refuse to pay such assessment, for"

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the space of two months, that then, and in such case, the said vestry and church-wardens shall be, and they are hereby, empowered to sell and convey to the highest bidder all such pew and pews in the said church, belonging to such proprietor or proprietors so refusing to pay for repairing or re-building the same, as aforesaid; and after deducting the sum or sums assessed thereon, respectively, to pay the overplus, if any there may be, to the several and respective proprietors thereof, when called upon for that purpose.

IV. AND BE IT FURTHER ENACTED by the authority aforesaid, That it shall and may be lawful for the said vestry and church-wardens, and their successors in office, or a majority of them, and they are hereby authorized and empowered to sell and convey to any person or persons that they shall think proper, any of the pews in the said church, (not being private property,) in such manner and on such conditions, or for such term or terms as they shall think fit; and also, annually, to assess and rate each and every of the pews in the said church, at such sum or sums of money as they, or a majority of them, shall, respectively, think right, regard being always had to the situation of the said pews; and if any person or persons shall at any time neglect or refuse to pay the sum or sums of money at which his, her or their pew or pews are rated, within two months after public notice given of such rate and assessment, that then it shall and may be lawful for the said vestry and church-wardens, or a majority of them, to let and hire the said pew or pews for any term not exceeding three years, to any person or persons who may be willing to hire the same.

V. AND BE IT FURTHER ENACTED by the authority aforesaid, That it shall and may be lawful for the said vestry and church-wardens, and their successors in office, or a majority of them, to appoint and choose proper clergymen and ministers for the said church, and all other necessary officers, and at their will and pleasure to displace or remove such persons and supply others in the room or stead of him or them so removed, and to appoint such salaries, perquisites or other rewards for the labor and service of such ministers and other officers in the said church, as they shall, from time to time, approve and think fit.

VI. AND BE IT FURTHER ENACTED by the authority aforesaid, That it shall and may be lawful for the said vestry and church-wardens, by the name aforesaid, to sue and be sued, plead and be impleaded, answer and be answered unto, in any court of judicature of this State, in all actions or suits of what nature or kind soever, which may be commenced, sued or prosecuted by or against them, in any manner touching or concerning the premises.

VII. AND BE IT FURTHER ENACTED by the authority aforesaid, That this Act shall be deemed a public Act, and may be given in evidence without special pleading, on any trial of any issue or cause in any court of law or equity in this State.

In the Senate House, the twenty-seventh day of March, in the year of our Lord one thousand seven hundred and eighty-seven, and in the eleventh year of the Independence of the United States of America.

JOHN LLOYD, President of the Senate.

JOHN J. PRINGLE, Speaker of the House of Representatives.

Certified to be a true and correct copy
May 26, 1953.

A. Frank Mouton
SECRETARY OF STATE

CC-313-00285

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

FEB 2 5 2014

SECRETARY OF STATE OF SOUTH CAROLINA

THE

# STATUTES AT LARGE

OF

## SOUTH CAROLINA;

EDITED, UNDER AUTHORITY OF THE LEGISLATURE,

BY

DAVID J. McCORD.

VOLUME EIGHTH,

CONTAINING THE ACTS RELATING TO CORPORATIONS AND THE MILITIA.

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON.
1840.

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SOUTH CAROLINA
DEPARTMENT OF ARCHIVES & HISTORY

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late members of the Presbyterian Congregation in Williamsburgh Town ship, relative to the right of property in and to the meeting house and the land on which the said meeting house of the late society stands, or in any way to better the claim of that part of the said society hereby incorporated. But the same questions shall be heard, tried and determined in any court of law or equity in this State, in the same manner as if this Act and the said recited Act had never been made.

II. *And be it further enacted* by the authority aforesaid, That this Act shall be deemed and taken as a public Act, to all intents and purposes whatsoever.

In the Senate House, the twenty-seventh day of March, in the year of our Lord one thousand seven hundred and eighty-seven, and in the eleventh year of the Independence of the United States of America.

JOHN LLOYD, *President of the Senate.*

JOHN J. PRINGLE, *Speaker of the House of Representatives.*

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No. 1363. AN ACT TO INCORPORATE THE VESTRY AND CHURCH-WARDENS OF THE EPISCOPAL CHURCH OF THE PARISH OF CHRIST CHURCH.

Preamble.

WHEREAS, sundry inhabitants and other freeholders, members of the Episcopal Church in the parish of Christ Church, did, by their petition to the General Assembly, set forth that the church in the said parish was, in the late war most wantonly burnt down by the British army, during their operations in this State, whereby the petitioners are prevented from attending divine service therein, and from procuring a minister to perform public worship in the said parish, according to the rites and ceremonies of their said church. And *whereas*, several pious and well disposed persons, by their last will and testament, as also others by voluntary subscriptions, have given divers sums of money for re-building and fitting up the said church, and for providing for the maintenance of a minister and the payment of other proper officers of the same; and those pious and good intentions would be more effectually carried into execution, if the prayer of the said petitioners, "that the vestry and church-wardens, elected or to be elected by the said inhabitants and freeholders, were incorporated and made one body politic and corporate in law, and vested with all the powers, privileges and immunities which any of their sister churches enjoy."

I. *Be it therefore enacted* by the Honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the vestry and church-wardens of the said church, elected or to be elected, in manner as heretofore accustomed, and their successors in office forever hereafter, shall be, and they are hereby declared to be, incorporated by the name of "The Vestry and Church-Wardens of the Episcopal Church in the Parish of Christ Church;" and the said church-wardens or a majority of them, are hereby vested with all the powers and authorities which are vested in any corporated and established church in this State, and by the name aforesaid shall, from time to time, and at all times hereafter, have a perpetual succession, and a common seal for their said church; and they and their successors in office, shall

Episcopal church of Christ Church.

be capable in law, to have, hold, receiv tenements and hereditaments, and the now are vested in the vestry and churc also be capable to sell, alien, demise, o manner and for such term as they or a dient; and that they, the said vestry a cessors, shall be able and are capable in and retain, all the monies or other per the same, and the interest and proceeds session of the said vestry and church-w at their discretion, to call in and re-plac part thereof.

II. *And be it further enacted* by the vestry and church-wardens and their su capable in law to purchase or receive have, hold and enjoy, to them and their term of years, any estate, in lands, ten goods, chattels, monies or other perso soever, and again to sell, alien, demis any part thereof, in such manner as th successors in office, shall think expedie vantage of the said vestry and church-

III. *And be it further enacted* by the said vestry and church-wardens, hereby required and empowered to hav rebuilt or repaired, and pews erected i on such other plan as they, or a majori for the costs and expense thereof to rateably and proportionably, according sessment the owners and proprietors required to pay, when called upon by that purpose. And in case the said pr or refuse to pay such assessment, for and in such case, the said vestry and are hereby, empowered to sell and co pew and pews in the said church, belo tors so refusing to pay for repairing o and after deducting the sum or sums a the overplus, if any there may be, to t thereof, when called upon for that pur

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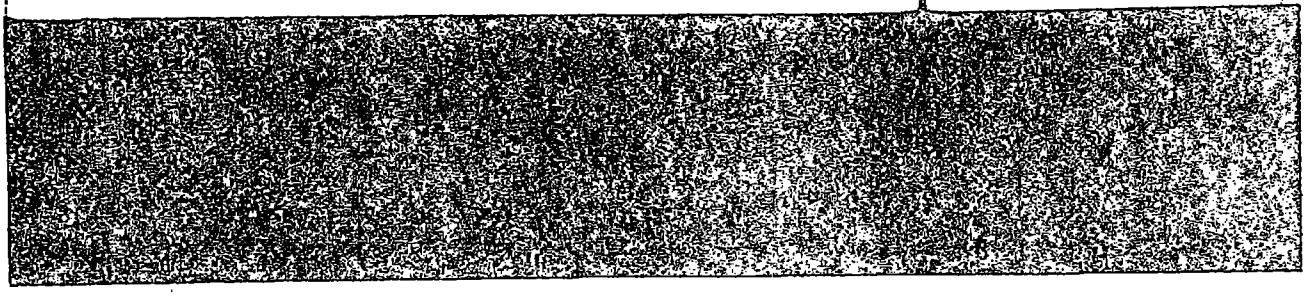

in Congregation in Williamsburgh Town-
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heard, tried and determined in any court
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made.

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public Act, to all intents and purposes

nth day of March, in the year of our Lord one thou-
seven, and in the eleventh year of the Independence
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*of the Senate.*

*aker of the House of Representatives.*

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THE VESTRY AND CHURCH-WARDENS OF
OF THE PARISH OF CHRIST CHURCH.

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by the name aforesaid shall, from time to
, have a perpetual succession, and a com-
nd they and their successors in office, shall



be capable in law, to have, hold, receive, possess and enjoy, all the lands, tenements and hereditaments, and the rents and income thereof, which now are vested in the vestry and church-wardens of the said church, and also be capable to sell, alien, demise, exchange or lease the same, in such manner and for such term as they or a majority of them shall think expedient; and that they, the said vestry and church-wardens, and their successors, shall be able and are capable in law to have, hold, receive, possess and retain, all the monies or other personal estates, and all securities for the same, and the interest and proceeds thereof, which now are in the possession of the said vestry and church-wardens, or any of them; and also, at their discretion, to call in and re-place at interest the said monies or any part thereof. Rights and powers.

II. *And be it further enacted* by the authority aforesaid, That the said vestry and church-wardens and their successors in office, shall be able and capable in law to purchase or receive by devise, gift or donation, and to have, hold and enjoy, to them and their successors, in perpetuity or for any term of years, any estate, in lands, tenements or hereditaments, or slaves, goods, chattels, monies or other personal estate; of what nature or kind soever, and again to sell, alien, demise, lease or dispose of the same, or any part thereof, in such manner as they, or a majority of them, or their successors in office, shall think expedient, and most for the benefit and advantage of the said vestry and church-wardens, for the purposes aforesaid.

III. *And be it further enacted* by the authority aforesaid, That they, the said vestry and church-wardens, and their successors in office, are hereby required and empowered to have the said parish church completely rebuilt or repaired, and pews erected in the said church, as heretofore, or on such other plan as they, or a majority of them, shall think proper, and for the costs and expenses thereof to assess the said pews when finished, ratably and proportionably, according to their respective value, which assessment the owners and proprietors of pews are hereby enjoined and required to pay, when called upon by the vestry and church-wardens for that purpose. And in case the said proprietor or any of them shall neglect or refuse to pay such assessment, for the space of two months, that then, and in such case, the said vestry and church-wardens shall be, and they are hereby, empowered to sell and convey to the highest bidder all such pew and pews in the said church, belonging to such proprietor or proprietors so refusing to pay for repairing or re-building the same, as aforesaid; and after deducting the sum or sums assessed thereon, respectively, to pay the overplus, if any there may be, to the several and respective proprietors thereof, when called upon for that purpose. To re-build church.

IV. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestry and church-wardens, and their successors in office, or a majority of them, and they are hereby authorized and empowered to sell and convey to any person or persons that they shall think proper, any of the pews in the said church, (not being private property,) on such manner and on such conditions, or for such term or terms as they shall think fit; and also, annually, to assess and rate each and every of the pews in the said church, at such sum or sums of money as they, or a majority of them, shall, respectively, think right, regard being always had to the situation of the said pews; and if any person or persons shall at any time neglect or refuse to pay the sum or sums of money at which his, her or their pew or pews are rated, within two months after public notice given of such rate and assessment, that then it shall and may be lawful for the May sell the pews.

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1974

said vestry and church-wardens, or a majority of them, to let and hire the said pew or pews for any term not exceeding three years, to any person or persons who may be willing to hire the same.

V. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestry and church-wardens, and their successors in office, or a majority of them, to appoint and choose proper clergymen and ministers for the said church, and all other necessary officers, and at their will and pleasure to displace or remove such persons and supply others in the room or stead of him or them so removed, and to appoint such salaries, perquisites or other rewards for the labor and service of such ministers and other officers in the said church, as they shall, from time to time, approve and think fit.

VI. *And be it further enacted* by the authority aforesaid, That it shall and may be lawful for the said vestry and church-wardens, by the name aforesaid, to sue and be sued, plead and be impleaded, answer and be answered unto, in any court of judicature of this State, in all actions or suits of what nature or kind soever, which may be commenced, sued or prosecuted by or against them, in any manner touching or concerning the premises.

VII. *And be it further enacted* by the authority aforesaid, That this Act shall be deemed a public Act, and may be given in evidence without special pleading, on any trial of any issue or cause in any court of law or equity in this State.

In the Senate House, the twenty-seventh day of March, in the year of our Lord one thousand seven hundred and eighty-seven, and in the eleventh year of the Independance of the United States of America.

JOHN LLOYD, *President of the Senate.*
JOHN J. PRINGLE, *Speaker of the House of Representatives.*

---

No. 1397. AN ACT TO INCORPORATE THE CAMDEN ORPHAN SOCIETY, AND THE FRIENDLY CAMBRIDGE SOCIETY IN NINETY-SIX DISTRICT.

Preamble. WHEREAS, several of the inhabitants of this State, have associated themselves together under the name and style of "The Camden Orphan Society," for the purpose of founding, endowing and supporting a public school in the town of Camden, for the education and instruction of youth, and for other beneficial purposes; and have made humble application to the Legislature of this State to be incorporated as a body politic, and to be invested with such powers and authorities as may be most conducive to answer and further the good intentions of the said association.

Camden Orphan Society. I. *Be it therefore enacted* by the Honorable the Senate and House of Representatives of the State of South Carolina, now met and sitting, in General Assembly, and by the authority of the same, That the president, wardens and the several persons who now are, or shall hereafter become members of that society, be, and they are hereby, incorporated under the name of the Camden Orphan Society," and by that name shall have perpetual succession of officers and members, and a common seal, with power

OF SOUTH

*Acts relating*

to change, alter, break and make n
judge expedient; and they, and their
in law, to purchase, have, hold, recei
and their successors in perpetuity, o
estates, real and personal, messuages
any kind or nature soever, and to sel
same, or any part thereof, as they
name to sue and be sued, implea
answered unto, in any court of law
such rules and by-laws, (not repugn
land,) for the benefit and advantage
order, rule, and good government an
for the masters, teachers and schola
time, agreed to by the majority of t

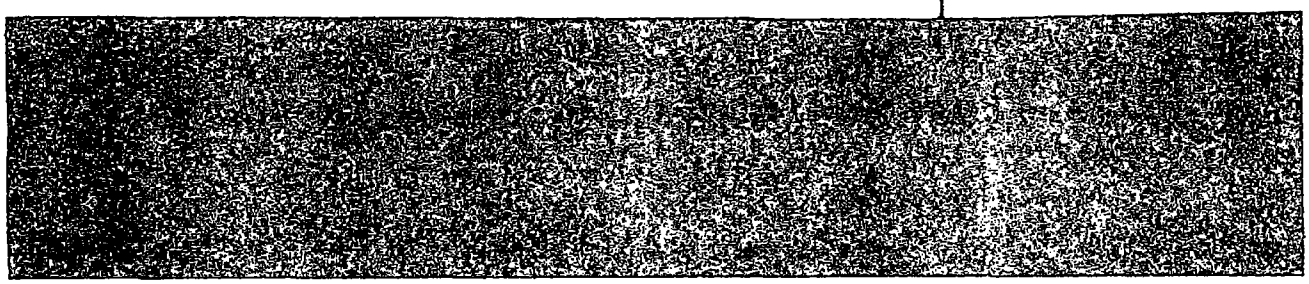
II. *And be it further enacted* by
and may be lawful for the corporatio
them and their successors, forever,
lands and personal estates, and to
and supporting the said school,
tion of such poor and helpless or
shall judge proper objects of the cha
and choose, and at their pleasure to
cers, school-masters, teachers and se
ed for the above purposes, or other
point such salaries, perquisites or
therein, as the said society shall,
think fit.

III. And *whereas*, a number of
selves into a society in the district
Cambridge Friendly Society," the
perity of the College of Cambridge
rity aforesaid, That the president an
said society, be incorporated by th
Society;" and shall have and enjoy
and authorities hereinbefore given a
ty, to all intents and purposes.

IV. *And be it further enacted* by
shall and may be given in evidence
any court of law or equity, without

In the Senate House, the twenty-seventh
and seven hundred and eighty-eigh
the United States of America.

JOHN LLOYD, *President of*
JOHN JULIUS PRINGLE,



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1975

## VESTRY AND CHURCH-WARDENS OF THE EPISCOPAL CHURCH OF THE PARISH OF CHRIST CHURCH

*Note: This online database was last updated on 9/8/2013 6:01:22 PM.*
*See our Disclaimer.*

| | |
|---|---|
| **DOMESTIC / FOREIGN:** | Domestic |
| **STATUS:** | Good Standing |
| **STATE OF INCORPORATION / ORGANIZATION:** | SC<br>Non Profit |

### REGISTERED AGENT INFORMATION

| | |
|---|---|
| **REGISTERED AGENT NAME:** | |
| **ADDRESS:** | |
| **CITY:** | |
| **STATE:** | |
| **ZIP:** | |
| **SECOND ADDRESS:** | |

| | |
|---|---|
| **FILE DATE:** | 03/27/1787 |
| **EFFECTIVE DATE:** | / / |
| **DISSOLVED DATE:** | / / |

### Corporation History Records

| CODE | FILE DATE | COMMENT | Document |
|---|---|---|---|
| Incorporation | 03/27/1787 | ELEE/AMD BK A PG 91 INCORP 3/27/1787 BY GA | Film |

**Disclaimer: The South Carolina Secretary of State's Business Filings database is provided as a convenience to our customers to research information on business entities filed with our office. Updates are uploaded every 48 hours. Users are advised that the Secretary of State, the State of South Carolina or any agency, officer or employee of the State of South Carolina does not guarantee the accuracy, reliability or timeliness of such information, as it is the responsibility of the business entity to inform the Secretary of State of any updated information. While every effort is made to insure the reliability of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from this database does so at his own risk.**

rtify t the following is a faithful c of th -laws of Christ Church
approv y a Congregational Meeting on M. , 198

Hubert R. Shearon, Secretary
July 14, 1980

BY-LAWS

CHRIST CHURCH

MOUNT PLEASANT, S. C.

ARTICLE I - GENERAL

Section 1: The Episcopal Church of the Parish of Christ Church, known as Christ Church, Mount Pleasant, does acknowledge and accede to the doctrine, discipline and worship, the Constitution and Canons of the Protestant Episcopal Church in the United States of America and the Constitutions and Canons of the same Church in the Diocese of South Carolina. These are our principles for promoting the welfare and work of this Parish as servants of our Lord, Jesus Christ: that we be missionary minded; that we shall endeavor to use tithing of time, talent and treasure to support our church; that we endeavor to provide for the development, training and utilization of lay ministries; and that all our differences be settled in the Spirit of the Lord.

Section 2: In the event Christ Church, Mount Pleasant, S. C. should ever dissolve pursuant to the Canons of the Protestant Episcopal Church in the Diocese of South Carolina, automatically the offices of the Vestry, Wardens and other officers of the Church shall become vacant, and the Standing Committee of the Protestant Episcopal Church in the Diocese of South Carolina shall become the managing body of the corporation, with full power and authority without restriction, to sell or mortgage its property or any part thereof, to convey any or all of its property to the trustees of the Protestant Episcopal Church in South Carolina.

Section 3: The terms of these By-laws which may be in conflict with the Canons of the Protestant Episcopal Church in the United States of America and/or the Diocese of South Carolina are hereby amended to conform to such canons.

ARTICLE II - MEMBERSHIP

Section 1: Membership in the Parish shall consist of every baptized person who is a member of the Episcopal Church in the United States who shall be associated with Christ Church who elects to be a member by signifying in writing, or by Confirmation in the Parish, or by letter of transfer from another congregation of the Church. A person from another religious group, who has been baptized, may become a member by reception into this Parish by the Priest of the same. The minor children of members, if they have been baptized, are also considered members.

ARTICLE III - MEETINGS AND ELECTIONS

Section 1: There shall be an annual meeting of the congregation in accordance with Canon VI of the Canons of the Diocese of South Carolina, on such day as the Vestry may decide.

Section 2: Every member of the congregation, aged 17 or more, who is a communicant in good standing as provided for by the Canons of the Protestant Episcopal Church in the United States of America and the Diocese of South Carolina, shall be eligible to vote. All elections shall be by ballot determined by a majority vote of those eligible voters present and voting. These communicants present at any congregational meeting duly called shall constitute a quorum. Thereshall be no voting by proxy.

Section 3: At each Annual Parish Meeting there shall be elected by ballot, three (3) Vestrypersons to serve a term of three (3) years or until their successors are elected, on the rotating Vestry.

No Vestryperson may serve two (2) consecutive terms on the Vestry, but shall be required to wait a period of one (1) year before becoming eligible for re-election to the Vestry.

In the event that a vacancy on the Vestry occurs, the Vestry shall be empowered to elect a successor who will serve until the next Annual Parish Meeting, at which time there shall be elected a Vestryperson to serve for the unexpired term. A Vestryperson so elected to fill a vacancy of one (1) years duration or less, shall be eligible for re-election at the next annual meeting of the congregation.

Section 4: At each annual meeting of the congregation, there shall be elected from among the members of the Vestry age 21 or over, a Senior Warden and a Junior Warden, to serve for a term of one (1) year, or until their successors be elected. The Junior and Senior Wardens shall have had one (1) year's experience as a Vestryperson at Christ Church. The Church Wardens shall assume office upon conclusion of the election. In the event of a vacancy in either position, the Vestry shall be empowered to elect a successor from among its members, to serve for the unexpired term.

Section 5: At each annual meeting, there shall be elected by ballot, four (4) Lay Delegates and four (4) alternates to the Diocesan Convention. Nominations shall be made from the floor at the annual meeting with the consent of the nominee.

There shall be a minimum of eight (8) nominees. The Four (4) nominees receiving the highest number of votes shall be declared elected as delegates and the four (4) nominees receiving the next highest number of votes shall be declared elected as alternates.



PLAINTIFF'S EXHIBIT
CC-25

In the event of a tie vote between the fourth and fifth nominees, a run-off vote between these two should be carried out to determine the fourth delegate.

Section 6: The Rector shall preside over all congregational and vestry meetings. The Senior Warden shall preside in the absence of the Rector. In the event that the Rector and Senior Warden are not in attendance, the Junior Warden shall preside and, in his absence, a presiding officer shall be appointed from the Vestry by majority vote of the Vestry.

Section 7: Notice of meetings of the congregation shall be given by the Rector or by the Senior Warden if there be no Rector, and published in the Church Bulletin on the two (2) consecutive Sundays immediately prior to the meeting and no meeting shall be held without such notice.

Section 8: Special meetings of the congregation may be called by the Vestry with the knowledge of the Rector, or the Bishop in the absence of the Rector, at any time, and shall be called whenever requested in writing by twenty (20) members of the congregation with the knowledge of the Rector or the Bishop in the absence of the Rector. If, for any reason, the Parish is not then being served by a Rector, the Vestry shall be empowered to call such meetings.

ARTICLE IV - VESTRY

Section 1: The duties of the Vestry and Wardens are those as set forth by the Canons of the Protestant Episcopal Church in the United States of America and of the Diocese of South Carolina.

Section 2: The Vestry shall consist of nine (9) members chosen from the eligible communicants of the congregation, age 18 or over, excepting the Wardens (as per Article III, Section 4), together with the Rector and Assistant Clergy if there be any.

Section 3: The Vestry shall meet during the week following the Annual Parish Meeting and thereafter monthly unless otherwise agreed upon by its members. Due notice of Vestry meetings shall be given the congregation, and any communicant in good standing shall be privileged to attend any meeting of the Vestry, except when in executive session. Special meetings of the Vestry may be called by the Rector or by three or more members of the Vestry with the knowledge of the Rector or by the Bishop in the absence of the Rector. If, for any reason, the Parish is not then being served by a Rector, the Senior Warden, or in his absence the Junior Warden, may call special meetings of the Vestry.

Section 4: The Vestry shall elect a Secretary of the Vestry, either from among its members or otherwise, as it may choose, who shall give due notice of all meetings of the Vestry; keep minutes of its proceedings and attend to all clerical requirements of the Vestry. The Secretary shall act as Secretary of meetings of the congregation and shall keep in a separate book a copy of the By-laws with any changes made thereof by proper action. The Vestry may elect an Assistant Secretary, who may or may not be a member of the Vestry, to assist the Secretary. The Secretary of the Vestry shall act as the Secretary of the Congregational Meetings.

Section 5: The Congregation shall elect a Treasurer who is a communicant in good standing, who may or may not be a member of the Vestry, who shall receive all sums due the Church and deposit them in the name of Christ Church, in banks and/or other depositories approved by the Vestry, draw checks on the account as directed by the Vestry, taking receipts; render statements to the Vestry as shall be requested by them; submit an annual report which, when approved by the Vestry, shall be submitted to the congregation at the annual meeting and keep a fair set of books on the finances of the Church which shall at all times be available for inspection by members of the Vestry. Investments of church funds in any item, items or areas other than in banks and/or other depositories previously approved by the Vestry shall be done only after recommendation by the Finance Committee and approval by the Vestry. The Treasurer may receive a salary to be fixed by the Vestry, and shall give a bond with approved security in an amount determined by the Vestry. Premium on said bond shall be paid by the Church. The Treasurer's books shall be audited at least once a year. The Vestry may elect an Assistant Treasurer, who may or may not be a member of the Vestry, to assist the Treasurer as directed by the Vestry.

Section 6: The Vestry shall set compensation for all officers and employees. No person receiving any compensation from the Church shall be eligible to be a member of the Vestry except the Rector, Assistant Clergy, Treasurer and Assistant Treasurer.

Section 7: A quorum for a Vestry meeting shall consist of a majority of the duly elected Vestrypersons then actively serving on the Vestry.

Section 8: A member of the Vestry who shall have failed to attend three (3) consecutive regular meetings and shall not have made the reason known for his absence to either the Rector or Wardens, shall be considered to have submitted a resignation and shall be so notified in writing as to its acceptance. The Vestry, if it wishes, may by majority vote suspend the application of this Section until the next congregational meet

Section 9: The Vestry shall be in charge of and responsible for the financial operation of the church and the maintenance of the physical plant, and in the absence of a Rector, for providing for divine services.



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1978

...ne Vest..., shall transact all the temporal business of the Church and shall hold, manage and administer all Church property, including real property which they shall have power to alienate, lease or otherwise deal with and dispose of by deed or other documents executed by the Wardens or one of them upon resolution of the Vestry; provided that the Vestry shall not alienate or otherwise encumber the Church property without the written consent of the Bishop and the Standing Committee of the Diocese as provided in Canon VI, Section 3 of the General Church Canons. They shall provide that all buildings and their contents be adequately insured as in their judgment may seem necessary.

Section 10: No appeals for funds for any purpose shall be made in the name of Christ Church without the express consent of the Vestry, other than offerings required by Canon or directed by the Bishop.

Section 11: The Vestry, through the Senior Warden or other Vestryperson duly appointed by the Vestry, shall submit to the annual meeting of the congregation a report of their official acts during the year and other information deemed important.

Section 12: The Rector, or a Memorial Committee appointed by the Rector with the consent of the Vestry, shall be responsible for presenting to the Vestry for its consent all memorials and gifts to be given to the church.

Section 13: It shall be the duty of the Vestry and/or Rector, from time to time, to create such committees as may be deemed necessary to carry on or assist with the work of the Parish.

These committees shall be responsible to the Vestry and shall assist it in the discharge of its responsibilities in the following areas: (1) Worship; (2) Finance; (3) Administration; (4) Christian Education; (5) Property and Physical Plant; (6) Evangelism and Church Growth; (7) Parish Life and Fellowship; (8) Compassion and Pastoral Care, and; (9) Parish Organizations. A member of the Vestry shall be designated as responsible to the Vestry for each of these committees so formed. The enumeration of the areas of Vestry responsibilities shall not be considered as limiting the creation of ad hoc committees for special purposes.

ARTICLE V - PARISH COUNCIL

Section 1: A parish council shall be established in order to facilitate the functioning of the Parish in its organizational, missionary, educational and social work on behalf of the Gospel. It shall be comprised of the Clergy, Vestry and heads of organized activities in the Parish along with three (3) members in good standing of the Parish who have been selected by the Vestry. The Rector, or in the absence of the Rector, the Senior Warden, shall convene the Parish Council at least three (3) times during theyear.

Section 2: The major purposes of the council shall be to propose, discuss and evaluate the programs undertaken by the Parish and to transform programs to be undertaken into financial requests which may be presented to the Parish by the Vestry prior to the annual fund raising canvasses.

Section 3: Due notice of Parish Council meetings shall be made to that members of the congregation may attend.

ARTICLE VI - MINISTERS

Section 1: There shall be a Priest and there may be one Priest or Deacon for the Congregation of Christ Church, styled the Rector and an Assistant to the Rector, who sha be entitled to receive from the Church such salary and other compensation as may from time to time be fixed by the Vestry. The Rector shall be chosen and elected by the Vestry, with the consent of the Bishop of the Diocese.

Section 2: The Rector, when provision is made by the Vestry, shall have the power to select a Deacon or Priest to work as an Assistant to the Rector, functioning as provided by the Canons of the Church.

Section 3: The Rector or Assistant shall register in books provided by the Vestry, all births, marriages, baptisms, confirmations and funerals of persons who may be born, baptized, presented for confirmation or reception by the Bishop or buried by them or by the Minister officiating in their absence.

Section 4: The priest who performs any service for which a compensation is allowed, shall in all cases be entitled to the fee or compensation resulting therefrom.

ARTICLE VII - ADMINISTRATIVE RULES AND PROCEDURES.

Section 1: The Vestry shall keep a list of operating rules and procedures.

Section 2: It shall be the duty of the Secretary of the Vestry to insure that this list of rules and procedures is kept current and available to the congregation at all times.

ARTICLE VIII - AMENDMENTS TO BY-LAWS

Section 1: No amendment of these By-laws shall be effective until it be presented in writing and approved by two successive meetings of the congregation.



CC-313-00282
1979

# Exhibits 6 thru 13 from "Plaintiffs Memorandum in Opposition to Defendants' Motion to Vacate" (October 11, 2013)

CERTIFIED COPY
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COUNTY

# Exhibit 6

CERTIFIED COPY

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

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

Personally appeared before me, The Right Reverend Mark J. Lawrence, who being duly sworn, deposes and says:

1. I reside in Charleston, South Carolina.

2. I am Chief Operating Officer of The Protestant Episcopal Church in the Diocese of South Carolina (the "Diocese") and have been employed in that capacity since January 26, 2008 at which time I was consecrated as the Bishop of the Diocese.

3. I regularly attend meetings of the Board of Directors of the Diocese and of the Trustees of The Protestant Episcopal Church in the Diocese of South Carolina (the "Trustees"). I have a seat and voice on those Boards but no vote. The Diocese Board typically meets monthly and the Trustees meet quarterly.

4. Between 2009 and 2012, the Diocese in convention took the following actions:

- October 2009, appended to the Declaration of Conformity which clergy agree to at their ordination to define the "doctrine, discipline and worship" of the Episcopal Church to mean what is expressed in the "Thirty-Nine Articles, the Creeds, the Chicago Lambeth Quadrilateral and the Theology of the Historic Prayer Books."

- October 2009, declaring its "interest sovereign authority" as a founder of The Episcopal Church, redirected resources for mission and ministry to support initiatives in other dioceses and parishes in the Anglican Communion from the Episcopal Church.

- March 2010, rejected the asserted authority of the Presiding Bishop to hire counsel "that present themselves as the legal counsel for the Episcopal Church in South Carolina" as being contrary to the express will of the Diocese as well as the Constitution of the Episcopal Church.

- October 2010, passed a Canon stating that the ecclesiastical authority of the Diocese is the sole and final authority with respect to any dispute over the interpretation of the Diocese's Constitution and Canons.

- October 2010, amended the Diocese's Constitution to remove its accession to the Canons of The Episcopal Church and providing that the Diocese's Constitution and Canons prevail over any inconsistent programs of the Constitution of the General Convention.

- Amended the Constitution allowing constitutional changes to be made at any meeting of the Diocese rather than just at its annual convention.

- Removed the section in the Canons which purported to create a trust over parish property.

- Changed the purposes statement of the Diocese's Articles of Incorporation.

5. On September 29, 2011, I learned that all of these actions of the Diocese were part of a complaint alleging that I had abandoned the doctrine, discipline and worship of The Episcopal Church" and that the Disciplinary Board of Bishops ("DBB") was considering the complaint.

6. On November 28, 2011, I was notified by Bishop Dorsey Henderson that the DBB had concluded that a majority of the DBB had concluded that the actions listed in ¶4 above constituted abandonment, stating that the question was whether these actions "by the **Diocese,** even though supported by the **Bishop,** constitute abandonment by the **Bishop.** A majority of the members of the Board was unable to conclude that they do." Attachment A. (Email of 11/28/11 from Henderson to Lawrence & others attaching his statement.)

7. On August 27, 2012, I was asked by the Bishop of the Upper Diocese of South Carolina, The Reverend W. Andrew Waldo, if I would consider meeting with the Presiding Bishop to determine if there was a way to amicably resolve our differences.

8. On September 6, 2012, a meeting between myself, Bishop Waldo and Katherine Jefferts-Schori was set for October 3, 2012.

9. Without my knowledge or involvement, the DBB met on September 18, 2012 and apparently certified that I had abandoned The Episcopal Church. I was never served with their certificate by The Episcopal Church and in the Motion for a Preliminary Injunction that was served on me with the Complaint on March 7, 2013, that document, referenced as "Exhibit to Bp. Henderson's affidavit" is not attached. I am informed and believe that Mr. Wade Logan, Chancellor of the Diocese, has seen a copy of a document that was emailed to him the evening of October 15, 2012 from David Beers, Chancellor to the Presiding Bishop, which was represented

as this document, but was not signed by Bishop Henderson.

10. I am informed and believe that two of the three charges of abandonment were those found a year before not to have been abandonment and that the third was the issuance of quit claim deeds to parishes in the Diocese by Chancellor Wade Logan stated to be at my direction.

11. On September 20, 2012, I was asked by the Standing Committee of the Diocese (also its Board of Directors) to interpret provisions of the Constitution and Canons as the ecclesiastical authority of the Diocese.

12. On October 2, 2012, I issued that interpretation, which is attached as Attachment B.

13. On October 2, 2012, I am informed and believe that the Board of Directors passed a resolution as set forth in the Minutes of the Board. Attachment C.

14. On October 3, 2012, I met with Bishop Jefferts Schori and Bishop Waldo. We agreed to discuss "creative solutions" to the differences between TEC and the Diocese. A further meeting was set for October 11, 2012, but was postponed until October 22, 2013 due to the funeral of Nick Ziegler, a former Chancellor of the Diocese, which took place on the 11th.

15. On October 11, 2012, I received a request from Bishop Jefferts Schori for a phone conference which was subsequently set for October 15, 2012.

16. On October 15, 2012, I received the call together with Wade Logan. Bishop Jefferts Schori told me, for the first time, about the renewed abandonment charges, about her receipt of the certificate on October 10 and of her intention to issue a "restriction of ministry" which would be forwarded that afternoon.

17. I am informed and believe that Wade Logan received by email later that afternoon an unsigned Word document with attachments and an unsigned document that stated it was a restriction of ministry. I have never been served with this restriction, unsigned or signed.

FURTHER, THE AFFIANT SAYETH NOT.

The Right Reverend Mark J. Lawrence

Sworn to before me this 11th day of April, 2013
Elizabeth B Snyder
Notary Public for the State of South Carolina
My Commission expires: 9/7/2021

ELIZABETH B. SNYDER
Notary Public, State of South Carolina
My Commission Expires 9/7/2021

# Attachment A

**From:** DUSC@aol.com [mailto:DUSC@aol.com]
**Sent:** Monday, November 28, 2011 4:30 PM
**To:** mlawrence@dioceseofsc.org; cwells@livingchurch.org; bsmith@ap.org; anglicansunited@sbcglobal.net; mfschlonberg@episcopalchurch.org
**Subject:** From Bp. Henderson: Decision by the Disciplinary Board re: Bishop Lawrence

Sisters and Brothers, the Disciplinary Board for Bishops has reached a decision regarding information submitted to it by persons who inquired whether that information, regarding actions by conventions of the Diocese of South Carolina and its Bishop, +Mark Lawrence, constituted abandonment of The Episcopal Church by Bishop Lawrence under the Canons of the Church.

A statement announcing that decision is attached.

Faithfully in our Lord, Dorsey F. Henderson, Jr., Bishop
President, Disciplinary Board for Bishops

A Statement by the President of the Disciplinary Board for Bishops
Regarding the Bishop of the Diocese of South Carolina

On November 22, the Disciplinary Board for Bishops met via conference call to consider whether, based on information previously submitted to the Board by lay communicants and a priest of the Diocese of South Carolina, the Bishop of that Diocese, the Right Rev'd Mark Lawrence, has abandoned the communion of The Episcopal Church.

Based on the information before it, the Board was unable to make the conclusions essential to a certification that Bishop Lawrence had abandoned the communion of the Church. I have today communicated the Board's action to Bishop Lawrence by telephone, to be followed by an e-mail copy of this statement.

The abandonment canon (Title IV, Canon16) is quite specific, designating only three courses of action by which a Bishop is to be found to have abandoned the church: first, "by an open renunciation of the Doctrine, Discipline or Worship of the Church"; second, "by formal admission into any religious body not in communion with" the Church; and, third, "by exercising Episcopal acts in and for a religious body other than the Church or another church in communion with the Church, so as to extend to such body Holy Orders as the Church holds them, or to administer on behalf of such religious body Confirmation without the express consent and commission of the proper authority in the Church...." Applied strictly to the information under study, none of these three provisions was deemed applicable by a majority of the Board.
A basic question the Board faced was whether actions by conventions of the Diocese of South Carolina, though they seem — I repeat, *seem* — to be pointing toward abandonment of the Church and its discipline by the **diocese**, and even though supported by the Bishop, constitute abandonment by the **Bishop**. A majority of the members of the Board was unable to conclude that they do.

It is also significant that Bishop Lawrence has repeatedly stated that he does not intend to lead the diocese out of The Episcopal Church — that he only seeks a safe place within the Church to live the Christian faith as that diocese perceives it. I speak for myself only at this point, that I presently take the Bishop at his word, and hope that the safety he seeks for the apparent majority in his diocese within the larger Church will become the model for safety — a "safe place" — for those under his episcopal care who do not agree with the actions of South Carolina's convention and/or his position on some of the issues of the Church.

The Right Rev'd Dorsey F. Henderson, Jr.
President, Disciplinary Board for Bishops

# Attachment B

Diocese of South Carolina • Post Office Box 20127 • Charleston, South Carolina 29413
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October 2, 2012

The Very Rev. Paul Fuener
President of the Standing Committee
Prince George Winyah
301 Screven Street
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Georgetown, SC 29442-0674

**INTERPRETATION OF THE CONSTITUTION AND CANONS BY THE ECCLESIASTICAL AUTHORITY OF THE DIOCESE**

Dear Paul:

By letter dated July 16, 2011, subsequently copied to the Diocese, the Secretary to the Executive Council of The Episcopal Church expressed certain opinions concerning provisions of the Diocese's Constitution and Canons.

By letter dated September 28, 2011, I rejected these opinions on behalf of the Diocese together with the President of the Standing Committee.

On September 20, 2012, the Standing Committee of the Diocese requested an Interpretation, pursuant to my constitutional and canonical authority as Ecclesiastical Authority of the Diocese, concerning this dispute. The request of the Standing Committee raised the following questions:

(i) *What are the meaning and function of Article I of the Diocese's Constitution, particularly the language that the Diocese "accedes to the Constitution" of The Episcopal Church?*

(ii) *Can the Diocese withdraw the accession referred to in Article I and/or its membership as a constituent member diocese of The Episcopal Church?*

(iii) *What are the procedures by which the accession and membership can be withdrawn, including whether such decisions can take effect without amending Article I and what diocesan bodies or offices are authorized to make such decisions?*

*(iv) Does the letter dated June 16, 2011 from the Secretary of the Executive Council of the Episcopal Church, subsequently copied to the Diocese, have any effect on the interpretation of the Diocese's Constitution and Canons?*

As Ecclesiastical Authority of the Diocese, I provide final and binding answers to these questions in this Interpretation pursuant to the following sources of authority: Article IX and Canon XXXVII of the Constitution and Canons of the Diocese and Articles II and IV of the Constitution of The Episcopal Church. This Interpretation will address these questions as follows: Section I will review the text of Article I of the Constitution; Section II will review the legislative history of this Article and relevant provisions in the Constitution of The Episcopal Church; Section III will consider historical precedents in which the Diocese has addressed the issues raised in these questions; and Section IV will then answer each of these questions based on this analysis.

## Section I:
## The Text of Article I

The starting point for answering these questions is the plain meaning of the text of the Constitution, particularly the first sentence of Article I:

> "The Church in the Diocese of South Carolina accedes to the Constitution of the Protestant Episcopal Church in the United States of America. In the event that any provision of the Constitution of the General Convention of the Protestant Episcopal Church in the United States of America is inconsistent with, or contradictory to, the Constitution and Canons of the Protestant Episcopal Diocese of South Carolina, the Constitution and Canons of this Diocese shall prevail."

The text of the first sentence of Article I is different in important respects from the other articles in the Constitution, including the remainder of Article I. The first sentence, commonly called "the accession clause," uses an indicative form of the verb "accede" rather than the mandatory or permissive verbs ("shall" or "may") characteristic of legislative language. In this respect the accession clause in Article I is different from all other articles in the Constitution that use standard legislative language consisting of either the mandatory "shall" or the permissive "may," including the second sentence of Article I itself.

This suggests that the purpose of the accession clause in Article I is different from that of the other constitutional provisions that either impose mandatory requirements on or limit the discretion of diocesan authorities. Indicative language is characteristic of contractual or constitutional recitals that do not impose requirements but merely record facts that serve as the basis for operative language imposing duties or establishing rights.

On its face, therefore, the plain meaning of the text of the accession clause in Article I does not impose any mandatory requirement that the Diocese "shall accede" to the Constitution of The Episcopal Church. It is descriptive, not prescriptive.

In contrast, the second sentence of Article I uses standard prescriptive language and imposes a mandatory standard for interpreting the Diocese's Constitution and Canons. By its plain meaning, diocesan Constitution and Canons "prevail" over any inconsistent provision in the general Constitution. This sentence functions as a supremacy clause making diocesan law legally supreme over provisions of the Constitution of the Episcopal Church.

Section II:
Legislative History

*1. Antecedents to Article I*

In 1789 authorized representatives of the Diocese subscribed to and adopted the first Constitution of The Episcopal Church on behalf of the Diocese. (JGC, 42, 69, 85, 101-102.) The Diocese subsequently ratified this action by its representatives at the Diocesan Convention in 1790. (DSC 1790 J (Dalcho) 478.)

The fact that the Diocese had adopted, or acceded to, the Episcopal Church Constitution was not referenced in the Diocese's Constitution, however, until 1841, over fifty years later. Article I of the 1841 Constitution, a comprehensive revision of the Diocese's earlier Constitution, referenced the Diocese's accession for the first time in language similar to the current language:

> "The Protestant Episcopal Church in South Carolina accedes to, recognizes and adopts the general Constitution and Canons of the Protestant Episcopal Church in the United States of America, and acknowledges their authority accordingly." (1841 J 49.)

As is true of the Diocese's current Constitution, the first article in the 1841 Constitution was unique in its use of indicative, descriptive language. Every other article in the 1841 Constitution used the prescriptive "shall." Moreover, like the current Constitution but unlike its predecessors, the 1841 Constitution had no preamble containing relevant recitals.

Prior to 1841 there was no explicit reference in the Diocese's Constitution to the action taken in 1789. The first revision to the Diocese's Constitution after1789 was in 1806. While it omitted any reference to accession, the 1806 Constitution did include the following recital in its preamble:

> "Whereas, by General Conventions of the Pro. Epis. Churches in the U. S. A. a constitution and canons have been formed for the government and discipline of the same..." (1806 J (Dalcho) 495.)

The 1806 Constitution also included a provision that:

> "No article, canon, rule or other regulation, of any general or state convention, shall be obligatory on any Epis. Church within this state, where the same shall be found to infringe on any of its chartered rights." (1806 J (Dalcho) 497.)

The Constitution in effect prior to 1806 had been adopted by "the Protestant Episcopal Church in South Carolina" in 1786 before it acceded to the first general Constitution in 1789 at the founding of "the Protestant Episcopal Church in the United States of America." Although the 1786 Constitution made no reference to any possible accession, at that point still three years in the future, it did contemplate the formation of "a General Ecclesiastical Government." Indeed, the South Carolina Conventions that adopted the 1786 Constitution also reviewed the first draft of a proposed general constitution, finding some provisions acceptable but objecting to others. The South Carolina Church was fully familiar with the proposed plan for a national church, having had two representatives serve on the committee that prepared the first draft of a general constitution. (JGC 18.) It is significant, therefore, that Article IV of the 1786 Constitution included a specific reservation of power to the South Carolina Church:

> "That no power be delegated to a General Ecclesiastical Government, except such, as cannot be exercised by the Clergy and Vestries, in their respective Congregations." (1786 J (Dalcho) 467-74.)

This constitutional reservation was in effect when the original accession to the general Constitution was made in 1789.

From 1841 until 2011 Article I was not materially changed (with the exception of the hiatus during the Civil War discussed below). In 2011 Article I was changed to its current language by deleting both the reference to the general canons and the second clause of the prior provision ("acknowledges their authority accordingly") and by adding the second sentence giving legal priority to the Diocese's Constitution and Canons in case of conflict.

As this review of the constitutional antecedents indicates, the degree to which the Diocese has accepted the general canons of The Episcopal Church has varied over the years. The Diocese had explicit constitutional reservations of power in the early nineteenth century. The reservation of diocesan authority was most apparent in the 1786 and 1806 Constitutions and again in 1807 when the Diocese gave careful attention to whether it had adopted the general Constitution and Canons. The conclusion reached concerning the Constitution will be reviewed below, but the Diocesan Convention in 1807 refused to adopt general canons passed after 1789 because they were in part "obnoxious to several of the Churches in this state." (1807 J (Dalcho) 501.)

In 2010 the Diocese again declined to accept canons enacted by the General Convention, in large part due to the conclusion that the new disciplinary canon violated the church's Constitution. At

the General Convention held earlier this year the Diocese's concerns were reinforced when the General Convention passed resolutions calling for a review of the "Constitutionality of Certain Provisions of Title IV," due to "their possible conflict with the Constitution of the Episcopal Church." (2012 Resolutions C049 and C116.)

This review of the Diocese's constitutional history discloses the following facts: (i) the Diocese existed prior to the formation of The Episcopal Church; (ii) its authorized representatives participated in the establishment of the general church; (iii) pursuant to the general Constitution the Diocese delegated only such authority as it saw fit to delegate to the general church, not *vice versa*, and continued to reserve authority to itself; (iv) its adoption of the general Constitution occurred over fifty years before that fact was subsequently reflected in the Diocese's Constitution; and (v) the degree to which the Diocese has accepted general canons has varied during the years of its membership in The Episcopal Church.

*2. Derivation of "Accede"*

The direct source of the term "accede" in Article I of the Diocese's Constitution is the general Constitution of The Episcopal Church, in which that term or one of its cognates has been used since the initial draft of that Constitution in 1785 for Dioceses not then admitted to the convention. The indirect sources of the term "accede" were the first constitution of the United States, the Articles of Confederation, on which the Episcopal Church Constitution was modeled, and ultimately international law, in which "accede" has a technical meaning that was borrowed for use in these other constitutions.

In international law the term "accede" is a specialized term used to describe the act of a sovereign state becoming a party to a treaty already signed by others. *Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 79, n. 7 (2nd Cir. 2005). A treaty is a compact among sovereign and independent states whose relationships are characterized by comity. "Acceding" was the term used in the Articles of Confederation, which established a "league of friendship" of states retaining their "sovereignty, freedom and independence." That term is not used in the United States Constitution, which later established a hierarchical central government given legal supremacy over the states. The use in the Episcopal Church Constitution of treaty language borrowed from the Articles of Confederation was not accidental. One of those serving on the committee that prepared the first draft of the Episcopal Church Constitution was a signatory to the Articles of Confederation.

In the early years of the Diocese's membership in The Episcopal Church it used a variety of terms to describe its original acceptance of the general Constitution, including "subscribed," "adopted" and "agreed to." Consistent with this practice, the 1841 Constitution of the Diocese used the expression "accedes to, recognizes and adopts" to describe this action by the Diocese. Regardless of the terminology used, however, one feature of accession is invariable in the context of The Episcopal Church: accession is to a document, initially limited to the Constitution

but later extended to include the general canons as well. In no case, however, was there accession to an organization or entity. This distinction will be discussed further below.

One final historical precedent illuminating the meaning of "accedes" in our context is the resolution of The Episcopal Church in 1969 by which it "acceded and subscribed to the Proposed Constitution of the said Anglican Consultative Council." (1969 JGC 159-60.) Two years earlier The Episcopal Church had added to the Preamble of its Constitution the recital that it "is a constituent member of the Anglican Communion." All agree that the Anglican Communion is a fellowship of autonomous member churches, that it lacks a central hierarchical authority with legal supremacy over its constituent members, and that accession to the constitution of the Anglican Consultative Council is not irrevocable.

*3. Important Distinctions: the Accession Clause in the Diocese's Constitution; the Accession to which This Clause Refers; Membership in the Legal Entity Comprising The Episcopal Church;*

The immediate subject of this Interpretation is an article in the Diocese's Constitution and in particular one clause in that article, the accession clause. In order to interpret this clause correctly and answer the questions posed by the Standing Committee it is necessary to distinguish three related but separate concepts: the constitutional clause itself; the accession to which it refers; and membership in the legal entity comprising The Episcopal Church for which accession is a prerequisite.

When properly understood, the process by which a new diocese becomes a member of the association, the legal entity comprising The Episcopal Church, is a two-step process. There is also an optional third step. The first step is for the new diocese, already a duly constituted legal entity, to accede to or adopt the general Constitution (later extended to include the Constitution and Canons). The second step is for the diocese to request and be accepted for membership in the legal entity. Under the general Constitution the first step is a prerequisite for the second, a necessary but not sufficient condition for membership. Under the current Constitution the process "originates" in "unorganized territory" by "duly" constituting a new legal entity, a "new diocese." This new entity then makes an accession and subsequently applies for membership in The Episcopal Church by filing its Constitution and accession with agents of the church. "After consent" of the General Convention the new diocese "thereupon" becomes a member of the unincorporated association comprising The Episcopal Church. The current provision spells out in greater detail the same process described more succinctly in the first Constitution: "A Protestant Episcopal Church in any of the United States not now represented, may, at any time hereafter, be admitted, on acceding to this Constitution." (JGC 84, 100.) Albeit succinctly, two steps were defined: accession and then admission.

For the founding dioceses, including South Carolina, these two steps occurred almost simultaneously by virtue of the fact that there was no association to join until they had created it by adopting the Constitution. But the logical distinction was still noted in the journal of the

General Convention by the language that "after subscribing" the representatives "took their seats as members of the Convention." (JGC 97.) For dioceses joining later, however, substantial time could elapse between these two steps. For example, in 1835 the "Church of Illinois," already duly constituted under its own bishop, was admitted to membership in August after having acceded to the general Constitution in March. (2 JGC 572; 1835 Ill. J 13.)

The optional third step is including a reference to the accession in the diocesan constitution. For South Carolina and other founding dioceses this step occurred long after the original accession was made. Even today, some dioceses have never added a reference to accession to their diocesan constitutions. There is no uniformity either in wording or practice on this point, which reflects the different legal personalities of the various dioceses.

These distinctions will be important in answering the questions that are the subject of this Interpretation. It is clear from these facts that: (i) a constitutional accession clause may not constitute an accession, but merely refer to one previously made (South Carolina, 1841); (ii) the underlying accession to which a constitutional clause refers does not itself constitute membership in the legal entity (Illinois, 1835); and therefore (iii) a constitutional accession clause does not constitute or even refer *directly* to membership in the legal entity, but only to a prerequisite to that membership.

*4. Relevant Provisions of the Constitution of The Episcopal Church*

As already noted, the accession clause in Article I of the Diocese's Constitution refers to an accession to a document, the Episcopal Church Constitution. Although not constitutive of membership in the legal entity comprising The Episcopal Church, accepting the provisions in the Constitution is a prerequisite for such membership. These provisions together with general principles of association law, the law applicable to the legal entity comprising The Episcopal Church, inform the Interpretation of Article I of the Diocese's Constitution.

The key features of the general Constitution relevant to accession are the following. First, the general Constitution establishes no central hierarchical body given legal supremacy over the constituent member dioceses. Although adopted after the United States Constitution had been ratified, the Episcopal Church Constitution omitted a supremacy clause or any other provision expressing in clear legal language that any central body had hierarchical priority over the dioceses.

Second, there is no provision prohibiting a member diocese from either withdrawing from the legal entity or rescinding its accession to the Constitution, which as we have seen are distinct steps.

Third, there is no provision requiring member dioceses to submit diocesan constitutional and canonical changes to a central body or office for prior review and approval nor is there any

procedure for review and disapproval after enactment. Proposed amendments to the general Constitution, in contrast, must be formally transmitted to the dioceses for consideration prior to their adoption by a majority of dioceses at the next General Convention. Dioceses thus have unfettered and unreviewable freedom to make changes to their Constitutions and Canons.

I will return to these principles when answering the specific question presented, but there are significant diocesan precedents concerning accession directly on point that must be reviewed before addressing these questions.

## Section III:
## Precedents

Throughout its history the Diocese has associated itself with other dioceses on three occasions by adopting or acceding to the constitutions or canons of other associations. On another three occasions it has withdrawn its accession in whole or in part. These precedents show a consistent interpretation over two centuries of the meaning of the accession clause in Article I and the process by which the Diocese accedes or withdraws accession and membership in other associations.

*1. 1789: Original Accession to the Constitution of The Episcopal Church*

As noted above, authorized representatives of the Diocese subscribed to and adopted the first constitution of The Episcopal Church on behalf of the Diocese in 1789. The Diocese subsequently ratified the action of its representatives at the Diocesan Convention in 1790.

The Diocese has always understood itself to be one of the founding dioceses of the association comprising The Episcopal Church. Indeed, one of the Diocese's authorized delegates to the 1789 General Convention, later to become the first Bishop of the Diocese, chaired the committee of the whole at the 1789 General Convention that arranged the final negotiations among the various state churches that resulted in the formation of The Episcopal Church. (JGC 94.)

At the Diocesan Convention in 1807 the question was raised whether the constitution of The Episcopal Church in fact had been "adopted by the Protestant Episcopal Church in the state of South Carolina." After consulting the journals of prior conventions, the 1807 Diocesan Convention concluded that the delegates to the 1789 General Convention had been "duly elected," that they had "subscribed" the general constitution "on the behalf of" the Diocese, and that the Diocesan Convention in 1790 had unanimously commended the delegates and "agreed to" the general constitution. The 1807 Diocesan Convention then unanimously determined that the general constitution had been adopted by the Diocese. (1807 J (Dalcho) 499-501.)

As noted above, in 1807 and at all times prior to that date the Diocese's Constitution contained no provision reflecting an accession to the general Constitution. It was not until 1841 that a reference to the accession was added to the diocesan Constitution as part of a comprehensive

revision of the Constitution. It is clear from the facts already recited that this initial constitutional reference to accession was intended not to establish the Diocese's accession to the general Constitution but instead to reflect an accession that had been made over fifty years earlier.

*2. 1861-62: Withdrawal of Accession to The Episcopal Church and Accession to the Constitution of the Church in the Confederate States*

In 1861 Bishop Thomas Davis addressed the effect that the secession of the state of South Carolina from the United States had on the Diocese. In particular he considered the question "have we parted or are we not still in constitutional union with" The Episcopal Church. At the outset of the Diocesan Convention in 1861 Bishop Davis advised the Convention of his conclusion that "We are, therefore, a free and independent diocese." ( 1861 J 19-20.) In response to this determination by the Bishop, the Diocesan Convention passed several implementing resolutions, including the following:

> Resolved, That this Convention concur entirely and earnestly with the Bishop in the views expressed in his address to this Convention,
>
> Resolved, That a Committee of three be appointed to prepare after the adjournment of this Convention such alterations in our Constitutions and Canons, as are, or may be, required by our changes of civil and ecclesiastical relations, and to report to our next Convention.
>
> Resolved, That forthwith and meanwhile all such parts of our present Constitution and Canons, as are inconsistent with the present position of our Church, are hereby declared to be null and void.

The basis for these resolutions as noted in their preamble was the fact already determined by the Bishop that the Diocese "resumes now its delegated rights and its separate existence, and is competent to enter into new ecclesiastical connections." (1861 J 24-26.) This fact previously announced by the Bishop was the basis for, not the product of, the Convention's resolutions.

In 1862 the Diocesan Convention passed another resolution by which it agreed to the constitution of the Church in the Confederate States and elected delegates who attended the council of the Confederate Church later that year on behalf of the Diocese. (1862 J 37.) In September 1862 the Presiding Bishop of the Confederate Church issued a "declaration" that "satisfactory evidence" had been provided that the Diocesan Conventions of South Carolina and other dioceses had adopted the constitution of the Confederate Church. (1862 JCSA 8-9.)

At the time of the withdrawal from The Episcopal Church in 1861 and the accession to the constitution of the Confederate Church in 1862 Article I of the Constitution of the Diocese was unchanged from that first adopted in 1841: "The Protestant Episcopal Church in South-Carolina accedes to, recognizes and adopts the general Constitution and Canons of [The Episcopal

Church] ...." (1861 J 59; 1862 J 66.) Pursuant to the resolution passed in 1861 requiring conforming changes to the provisions of the Constitution that already had been declared "null and void" new constitutional language was adopted in 1863 after two readings to reflect the withdrawal from The Episcopal Church in 1861 and the accession to the constitution of the Confederate Church in 1862. (See 1864 J 68.)

It is clear from these facts that the accession clause in Article I was understood at that time to restrict neither the authority of the Bishop to declare the accession to the Episcopal Church Constitution terminated nor the authority of the Diocesan Convention to accede to the constitution of the Confederate Church. Article I was understood as reflecting determinations already made by the diocesan authorities and therefore requiring subsequent conforming changes to record those decisions.

*3. 1866: Re-accession to the Constitution of the Episcopal Church and Withdrawal of Accession to the Confederate Church*

In 1866 at the conclusion of the Civil War a resolution was passed by the Diocesan Convention to withdraw from the Confederate Church and rejoin The Episcopal Church. Significantly, a proposal was made to the Convention that "this reunion shall be considered complete so soon as the requisite alterations of the Constitution shall have been adopted and ratified constitutionally." This proposal was rejected, however, by the Diocesan Convention, which by resolution "hereby declared" inconsistent provisions of the Constitution and Canons "to be henceforth of no force." The Convention then directed that the Constitution "be changed" immediately "to conform to the legislation adopted at this Council." (1866 J 40-45.)

It is clear from these facts that determinations of accession to the constitutions of other associations and withdrawals of such accession were understood at that time to be within the competence of diocesan authorities and changes to the Constitution to conform to these determinations were regarded as ministerial changes, not as amendments to the Constitution.

*4. 2010: Withdrawal of Accession to the Canons of the Episcopal Church*

As noted above, in 2010 the Diocesan Convention passed a resolution nullifying with immediate effect certain canons of the General Convention of The Episcopal Church. At the same time, the Convention passed a first reading of an amendment to Article I removing the reference to accession to the canons of General Convention. This language in Article I was subsequently removed after a second reading at the 2011 Convention, but the nullification of general canons passed at the 2010 Convention had effect immediately upon the passage of the resolution in 2010. (2010 J pp.) Again, this precedent demonstrates that the Diocesan Convention understood that accessions were matters to be determined by the diocesan authorities and that subsequent changes to the Constitution were conforming, not authorizing, changes.

Section IV:

Answers to Questions Concerning the Interpretation of Article I

Based on the text of the Constitution, the legislative history and the historical precedents, I answer the questions of interpretation posed by the Standing Committee as follows:

(i) *What are the meaning and function of Article I of the Diocese's Constitution, particularly the language that the Diocese "accedes to the Constitution" of The Episcopal Church?*

Based on the plain meaning of the text of Article I, the legislative history and the precedents, I conclude that the first sentence of Article I, the accession clause, functions as a recital. It uses indicative language, in contrast to the prescriptive or permissive legislative language found elsewhere throughout the Constitution. As a recital, the accession clause imposes no mandatory duty on the Diocese to maintain the accession. There is no prescriptive language in the accession clause mandating that the Diocese "shall accede" to the general Constitution.

The accession clause is directly derived from the first article in the 1841 Constitution, which also was the only article in that Constitution to use indicative, descriptive language. The 1841 constitutional revision removed completely the preamble found in prior constitutions, including a recital referring to the general Constitution—although not to the Diocese's accession. It is apparent from these facts that in the absence of a preamble, the recital concerning the general Constitution was placed in the first article.

In this respect Article I of the Diocese's Constitution has the same function as the recital in the preamble to the general Constitution, which recites in indicative language that The Episcopal Church "is a member of the Anglican Communion."

Second, based on the uniform interpretations by the Diocese from 1789 to the present, I conclude that the accession clause does not constitute the Diocese's accession but merely records and reflects an accession made independently of this provision. This is most obvious from the fact that an accession reference was first added to the Constitution in 1841, over fifty years after the original accession was made, but it is also consistent with all other precedents and the plain meaning of the constitutional text.

Third, the reference in the accession clause is to the accession to the general Constitution, not to membership in the legal entity comprising The Episcopal Church. Because these are distinct concepts, the accession clause makes no reference to association membership itself, in either prescriptive or descriptive language. It is not uncommon for nonprofit entities to adopt standards or rules, such as transparency or accountability standards, promulgated by organizations of which they are not a member. Although accession to the Episcopal Church Constitution and membership in the legal entity are associated concepts, they are distinct acts. Article I refers to the former; it does not address the latter. In this respect, the recital in Article I differs from that in

the preamble to the general Constitution, which explicitly references membership, not the accession to the constitution.

Fourth, the adaption of the concept of accession from international law and the Articles of Confederation confirms the basic structure of The Episcopal Church as an association of dioceses retaining their distinct legal personalities, rights and sovereignty.

Finally, the second sentence of Article I functions as a supremacy clause establishing the legal priority of the Diocese's Constitution and Canons over the general ones. Because the general Constitution contains no such supremacy clause and there is no other provision prohibiting dioceses from enacting their own, this is consistent with the general Constitution.

*(ii) Can the Diocese withdraw the accession referred to in Article I and/or its membership as a constituent member diocese of The Episcopal Church?*

From the legislative history reviewed above it is apparent that the Protestant Episcopal Church in South Carolina was a duly constituted legal entity and was independent of all other Episcopal churches prior to the adoption of any general Constitution forming the association comprising the Episcopal Church in the United States. The South Carolina Church has retained its distinct legal personality ever since. When it first acceded to the general Constitution and joined the Episcopal Church, the Diocese's Constitution explicitly limited the powers that were "delegated" to "the General Ecclesiastical Government" and reserved legal authority to the Diocese. Throughout its history the Diocese has from time to time exercised its independent and reserved authority by rejecting general canons and withdrawing its accession and membership.

The Episcopal Church was formed in 1789 pursuant to its Constitution as a "voluntary association," a form of entity now generally referred to as an unincorporated nonprofit association. The constituent members of this association are dioceses that have distinct legal personalities prior to joining. These legal entities first accede to the general Constitution and then join the association as members upon the consent of the other members through their agents.

It has long been the rule of association law that a member is free to withdraw at any time absent an agreement to the contrary. *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). There are no restrictions on withdrawal in the general Constitution.

In addition, freedom of association, like the free exercise of religion, is a constitutional right protected by the First Amendment. As a religious society that pre-existed The Episcopal Church, the Diocese enjoys distinct free exercise and associational rights that were not extinguished by its associating with other member dioceses to form The Episcopal Church. The leading experts on association law acting under the auspices of the American Bar Association have expressed the opinion that restrictions on member withdrawal from an association would be unenforceable on public policy and constitutional grounds. Although there are no such restrictions in the Episcopal

Church Constitution, this remains an important principle of association and constitutional law that would render moot any attempt to discern an implicit restriction on withdrawal in the provisions of the general Constitution.

The Executive Council has asserted that the requirement in the general Constitution that "new dioceses" give an "unqualified accession" means that this accession and subsequent association membership are irrevocable and that this provision is applicable to all dioceses notwithstanding its explicit limitation to new dioceses. This argument would be irrelevant even if true due to the constitutional principles just noted. But it also fails on other grounds. It is an elementary principle of contract law (and the constitution of a voluntary association is a legal contract) that all acceptances must be unqualified or unconditional in order to form a contract. The requirement of an "unqualified accession" thus adds nothing to the common principles of contract law that would be applicable in any event. It simply requires that the joining diocese attach no conditions or qualifications to its accession. But this is a question of contract formation, not duration. Under contract law, the standard rule is that unless expressly agreed otherwise, a contract without a stated duration is terminable at will or upon reasonable notice. If an unqualified acceptance made a contract irrevocable, a contract without a term of duration could never be terminated, which is contrary to the settled law. To make a contract irrevocable, parties would not specify that acceptance (accession) must be "unqualified." They would specify that the contract is "irrevocable." Formation and duration are distinct matters. "Unqualified" applies to the former; "irrevocable" to the latter.

In any event, this requirement is not applicable to the Diocese under any theory since it applies by its own terms only to new dioceses joining in recent years. The Diocese made its accession and joined the association long before this provision was adopted.

The understanding that an unqualified accession is not irrevocable is also consistent with the practice of The Episcopal Church itself when it made an unqualified accession to the constitution of the Anglican Consultative Council in terms strikingly similar to those used by the Diocese in making its accession to the general Constitution. The Episcopal Church has always asserted its complete legal autonomy from the Anglican Communion and its official bodies.

Therefore, I conclude based on the terms of the general constitution, the meaning of the term "accede" and settled principles of association, constitutional and contract law that both withdrawal of the accession to the Constitution and withdrawal from membership in the association are permitted.

*(iii) What are the procedures by which the accession and membership can be withdrawn, including whether such decisions can take effect without amending Article I and what diocesan bodies or offices are authorized to make such decisions?*

Because accession to the general Constitution and membership in the association are distinct matters, I will address this question in three parts: withdrawal of the accession; withdrawal of association membership; and which diocesan authorities are competent to make such decisions.

First, it follows from the plain meaning of Article I and the fact that the accession clause is a recital that imposes no mandatory obligation on the Diocese that both accessions or withdrawals of accession by an authorized diocesan authority take legal effect either immediately or at such time and upon such conditions as the diocesan authority specifies. This interpretation is consistent with all of the historical precedents cited above. In none of the six precedents in the history of the Diocese has the accession or withdrawal of accession taken legal effect upon the completion of conforming changes to the Constitution, and an interpretation that this was required by the Constitution was explicitly rejected by the Diocesan Convention in 1866.

Second, the answer to the question concerning withdrawal from membership in the association is straightforward. Because Article I makes no mention of association membership and the general Constitution does not prohibit withdrawal from the association, it would be legally possible for the Diocese to withdraw from the association and maintain its accession to the general Constitution even if the accession clause had required the diocese to maintain its accession, which it does not. In any event, as a recital, the accession clause in Article I imposes no mandatory duties on the Diocese regarding either accession or association membership. For both of these reasons, withdrawal from association membership can take legal effect without amending Article I.

Third, it follows from the answers given above, the text of the Constitution and Canons and the historical precedents already cited that the Constitution and Canons do not specify the diocesan bodies or officers authorized to make or withdraw accessions or membership decisions in other associations.

The Constitution and Canons identify several authorities of the Diocese, including the Diocesan Convention, the Bishop as Ecclesiastical Authority of the Diocese and the Standing Committee. The Constitution and Canons explicitly reserve certain decisions to the Diocesan Convention, including the election of a Bishop, admission of new parishes or missions, election of deputies to General Convention, enactment of canons and amendments to the Constitution. However, accessions, withdrawals of accession and decisions concerning association membership are not among the matters reserved by Constitution or Canon to the Diocesan Convention.

Of the six precedents in the history of the Diocese, four accessions or withdrawals have been determined by the Diocesan Convention, one (the original accession in 1789) by delegates specifically authorized to make such a determination "on behalf of" the Diocese and the other by the Bishop who concluded in 1861 that the original accession to The Episcopal Church had been terminated. It is significant that the Diocesan Convention in 1861 did not purport to enact the

termination of the accession by resolution, but instead recognized it as the pre-existing basis for its subsequent resolutions implementing this termination.

I therefore conclude based on the texts of the Constitution and Canons and historical precedents that decisions concerning accessions, withdrawals of accession and decisions concerning association membership can be effected by any competent diocesan authority, including the Diocesan Convention, the Bishop acting as Ecclesiastical Authority of the Diocese, the Standing Committee and other delegates specifically authorized by the Diocese to act in such a matter on its behalf.

*(iv) Does the letter dated June 16, 2011 from the Secretary of the Executive Council of the Episcopal Church, subsequently copied to the Diocese, have any effect on the interpretation of the Diocese's Constitution and Canons?*

The intended effect of this letter is far from clear. It was not addressed to the Ecclesiastical Authority of the Diocese and was only provided to the diocese weeks after it was mailed to its recipient. It stated that a subcommittee of the Executive Council "agreed" that an earlier Council resolution that did not mention the Diocese "covers the situation there" notwithstanding the fact that the earlier resolution discussed a constitutional provision that applies on its face only to the "admission of new dioceses."

In any event, the Executive Council is not a body established or authorized by the Constitution of The Episcopal Church. It does not have constitutional authority to review and approve changes to the Constitution and Canons of member dioceses. Indeed, no general body or office is given this authority by the Constitution. The Executive Council does not have constitutional authority to make final and binding interpretations of the general Constitution. Again, no general body or office is given this authority by the Constitution. The Executive Council does not have legal supremacy over member dioceses. Yet again, no general body or office is given this authority by the Constitution.

In contrast, as provided in Article IX of the Diocese's Constitution and Canon XXXVII and Articles II and IV of the general Constitution the Bishop is "the Ecclesiastical Authority" of the Diocese. The Diocese's Constitution states explicitly that the diocesan Constitution and Canons "shall prevail" in case of conflict with the Constitution of The Episcopal Church. Canon XXXVII gives the Ecclesiastical Authority of the Diocese explicit authority to make final and binding interpretation of the Diocese's Constitution and Canons. Based on these facts I conclude that neither the letter from the Secretary of the Executive Council nor any resolution by that Council has any effect on the interpretation of the Diocese's Constitution and Canons.

The Protestant Episcopal Diocese of South Carolina pre-existed the formation of the association comprising The Episcopal Church and was a founding member of that association. As noted, the Diocese has from time to time throughout its history joined other associations as a member, including The Episcopal Church, the church in the Confederate States, and the Anglican

Communion Network. As of the date of this Interpretation, the Diocese remains a member of the association comprising The Episcopal Church, but its legal existence as a separate religious society incorporated in the state of South Carolina would continue uninterrupted if it elected to terminate its membership in that association as it has when other association memberships have been terminated in the past.

As a pre-existing and separately incorporated religious society, the Diocese has First Amendment rights distinct from those of other associations of which it may be a member. Pursuant to those rights, the members of the Diocese have sole authority to determine the rules for the governance of their society. They have done so in their Constitution. They have made that Constitution prevail over any conflicting provision in the Constitution of The Episcopal Church. They have constituted the Bishop (or the Standing Committee in the absence of a bishop) as the Ecclesiastical Authority of the Diocese and given the Ecclesiastical Authority exclusive authority to interpret the Constitution and Canons of the Diocese, including the authority to determine who can meet and vote and what is or is not in order for voting at such meetings.

I make this Interpretation of the Constitution and Canons as the Ecclesiastical Authority of the Diocese pursuant to my authority under the Constitutions of the Diocese and The Episcopal Church and Canon XXXVII. I do so with the advice and counsel of the Chancellor of the Diocese. This Interpretation shall be final and binding in all respects.

Faithfully Yours,

+Mark D Lawrence

The Rt. Rev. Mark J. Lawrence
XIV Bishop of South Carolina

Telephone (843) 722-4075 • Email: office@dioceseofsc.org • Fax (843) 723-7628

# Attachment C

"The SC received from Bishop Lawrence the answers to the questions that the SC resolved to submit to the Bishop at its September 18 meeting and thereby did submit to the Bishop to be answered. A copy of the Bishop's answers to those questions is attached to these minutes.

The following motion was made by Mrs. Willis and seconded by the Rev. Greg Snyder:

"The Protestant Episcopal Church in the Diocese of South Carolina, through its Board of Directors and its Standing Committee, hereby withdraws its accession to the Constitution of the Episcopal Church and disaffiliates with the Episcopal Church by withdrawing its membership from the Episcopal Church. This decision shall be effective immediately upon the taking of any action of any kind by any representative of the Episcopal Church against The Bishop, The Standing Committee or any of its members or the Convention of this Diocese or any of its members including purporting to discipline, impair, restrict, direct, place on administrative leave, charge, derecognize or any other action asserting or claiming any supervisory, disciplinary or other alleged hierarchical authority over this Diocese, its leaders or members.

The Chancellor shall certify to the Ecclesiastical Authority and to the Board of Directors that such condition has occurred which certification shall be conclusive."

After thorough discussion, the motion passed unanimously."

STANDING COMMITTEE AND BOARD OF DIRECTOR'S MINUTES, OCTOBER 2, 2012

CERTIFIED COPY
2013 OCT 11 AM 8:[illegible]

**Exhibit 7**

CLERK OF COURT
[illegible] COUNTY

CERTIFIED COPY

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

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

PERSONALLY appeared before me, Wade H. Logan, III, who, being duly sworn, deposes and says that:

1. I am of legal age, of sound mind, capable of making this Affidavit and make it on the basis of my own personal knowledge and of records and information made known to me in the ordinary course of business.

2. I am a graduate of the University of North Carolina at Chapel Hill (1966) and the University of South Carolina School of Law (1969), where I received a J.D. degree. Since 1969, I have been licensed to practice law by the Supreme Court of South Carolina, admitted to the bar of that Court and of this honorable Court and have been practicing law in the Charleston, South Carolina area.

3. I am now, and have been since approximately 2007, the Chancellor of a South Carolina nonprofit religious corporation, the Protestant Episcopal Church in the

Diocese of South Carolina (hereinafter the "Diocese"). In that capacity, I act as the corporate legal advisor to and the attorney for Bishop, the Right Reverend Mark J. Lawrence (hereinafter "the Bishop") as well as the other corporate offices and organizations, in matters affecting the interests of the Diocese.

4. As Chancellor of the Diocese, and pursuant to its Constitution and Canons, I am an *ex officio* member of its Convention, the Standing Committee (its Board of Directors) and its Trustees, all with seat and voice but no vote. I am the parliamentarian at Diocesan Convention.

5. Prior to 1973, the Diocese was a South Carolina unincorporated association. In 1973, it was incorporated as a non-profit religious corporation under the law of the State of South Carolina.

6. To my knowledge, information and belief, the Diocese has never been incorporated in any other state. The Episcopal Church (hereinafter "TEC") is not a member of this South Carolina non-profit corporation, nor was there any legal requirement under the laws of the State of South Carolina that the Diocese had to obtain the permission of TEC to incorporate or to exist as a non-profit religious corporation. TEC does not now have nor has it ever had the right to approve the Diocese's Articles of Incorporation, Bylaws or Constitution and canons.

7. As a South Carolina non-profit religious corporation, the Diocese has a Constitution and By-Laws, which are the governing documents of the Diocese. Under South Carolina law, the members of this corporation are the members of the Board of Directors, which elects its own members. To my knowledge, information and belief,

TEC is not now, nor has it ever been, a member of either the corporation or of its Board of Directors. All corporate affairs are handled by this governing body.

8. On October 2, 2012, the Diocese's Board of Directors passed a resolution which stated that the Diocese withdrew its accession to the Constitution of TEC and disaffiliated from TEC by withdrawing its membership in that organization. This Resolution was effective immediately upon the taking any action of any kind by any representative of TEC against the Diocese's Bishop.

9. Prior to that time, on August 27, 2012, the Diocese's Bishop and I met with Bishop Andrew Waldo, Bishop of the Upper Diocese of South Carolina, and his Chancellor, Belton Zeigler, to explore the idea of a possible amicable solution to the differences between TEC and the Diocese. Upon information and belief, as a result of that meeting, Bishop Waldo contacted the Right Reverend Katherine Jefferts Schori, Presiding Bishop of TEC (hereinafter "Presiding Bishop"), to attempt to set up a meeting.

10. On or about September 8, 2012, the meeting was eventually scheduled for October 3, 2012 in New York. The Presiding Bishop, Bishop Waldo and Bishop Lawrence attended that meeting. The Presiding Bishop stated that she wanted to continue to explore the possibility of an amicable solution. At the October 3rd meeting, a follow-up meeting was set for October 11, 2012 in Atlanta, Georgia.

11. Sometime after November, 2011, without any notice to Bishop Lawrence, a number of complainants filed charges against him with TEC. Without any knowledge on my part or on the part of Bishop Lawrence, the Disciplinary Board of Bishops (hereinafter "DBB") had met in Salt Lake City, Utah, to consider, among other things,

charges against Bishop Lawrence. Upon information and belief, on September 18, 2012, the DBB certified to the Presiding Bishop that Bishop Lawrence had "abandoned" TEC. No notice of this action was given to the Diocese nor Bishop Lawrence and at the meeting with the Presiding Bishop on October 3, she did not advise him that this action had been taken.

12. On October 9, 2012, the Presiding Bishop asked to have a private conversation with Bishop Lawrence. Due to the death of a previous Chancellor of the Diocese on October 8, the meeting previously scheduled for October 11 was postponed until October 22. Via email, the Presiding Bishop advised Bishop Lawrence that she needed to have a telephone conference with him and the Diocese's Chancellor. That conversation was scheduled for Monday, October 15 at 1:00 p.m.

13. On October 15, 2012, the telephone conference having been moved up to noon, the Presiding Bishop spoke with Bishop Lawrence and myself, along with TEC Chancellor, David Booth Beers. She advised that she had received a written certification of abandonment from the DBB on October 10, that she was required under the applicable TEC Canons (the validity of which the Diocese does not recognize) to restrict his ministry, that Mr. Beers would be sending restriction and other paperwork, that she would still be willing to meet on October 22, and that she would not publicize these developments.

14. Later that day, and pursuant to the October 2, 2012 Resolution of the Diocese's Standing Committee, as its Chancellor, I certified that the condition of the Resolution had been met, and that the Diocese was disaffiliated from TEC.

15. Later that day, October 15, 2012, I received from Mr. Beers an unsigned copy of the so-called certificate of abandonment. On some later date, I did receive a signed signature page from Mr. Beers, (a copy of which is attached) but I have never received a complete signed document. To my knowledge, information and belief, Bishop Lawrence has never been served with a copy of the certificate of abandonment, as required by the applicable Canons of TEC.

16. The Diocese is a South Carolina religious nonprofit corporation governed by its Board of Directors, not TEC. There is only one entity known as the Diocese and the Plaintiff does not represent the Diocese nor has he any authorization to act on its behalf.

FURTHER, THE AFFIANT SAYETH NOT.

Wade H. Logan, III

Sworn to/subscribed before me this 11th day of April, 2013

Notary Public for the State of South Carolina
My Commission expires: _____

BRITTANY JOHNSON
Notary Public, South Carolina
My Commission Expires
April 12, 2022

Canons of The Episcopal Church.

Dated: September 18, 2012

(The Rt. Rev.) Dorsey F. Henderson, Jr., M.Div., J.D., D.D.
President

# Exhibit 8

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

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

Pursuant to 28 U.S.C. § 1766, I, Michael Nazir-Ali, declare the following:

1. I have personal knowledge of the facts herein.

2. I am a Bishop in the Church of England and a former member of the House of Lords. I served fifteen years as the 106th Bishop of Rochester, resigning from that post in September 2009 to take up my present ministry amongst persecuted Christians and in the Anglican Communion at large.

3. I have a degree in Economics, Sociology and Islamic History from the University of Karachi, Pakistan and degrees in Theology, Philosophy and Comparative Literature from the

Universities of Cambridge and Oxford. I am a Senior Fellow at Wycliffe Hall, Oxford. I am also an Honorary Fellow of St. Edmund Hall, Oxford and of Fitzwilliam College, Cambridge.

4. I have taught at colleges and universities in the United Kingdom and in Pakistan.

5. I served as the General Secretary of the Church Missionary Society from 1989-1994 and was the Bishop of Raiwind, Pakistan.

6. I have served on the staff of the Archbishop of Canterbury and as a director of the Oxford Centre for Mission Studies.

7. I am, or have been, on the following groups:

- Theological consultant to the Crown Appointments Group (1998-2001);
- Founding member of the Dialogue of Scholars;
- President of the Network For Interfaith Concerns in the Anglican Communion (NIFCON)
- Secretary to the Archbishop's Commission on Communion and Women in the Episcopate (The Eames Commission);
- Chairman of the Mission Theology Advisory Group of the Board of Mission (1992-2001);
- Member of the Anglican and Roman Catholic International Commission;
- Member of the Archbishop's Council;
- Member of the House of Bishops, Church of England and its Standing Committee;
- Chairman of the Working Party on Women in the Episcopate;
- Chairman of the House of Bishops, Church of England, Theological

Group;

- Chairman of Council, Trinity College, Bristol, United Kingdom.

8. I am Visiting Bishop for Anglican Communion Relationships with the Diocese of South Carolina.

9. I have been asked the question whether the polity (ecclesiology) of the Church of England "mirrors" that of the Episcopal Church. It does not. There are many differences between the Church of England and the Episcopal Church. Among them are the following:

a. The polity of the Episcopal Church has been derived from the Scottish Episcopal Church rather than the Church of England. This is seen not only in the name but also in its version of the Book of Common Prayer.

b. The principle and practice of lay involvement is also different: in the Church of England the Convocations were wholly clerical with the lay dimension being provided by Parliament until the emergence of Synodical government in 1970.

c. Church of England Dioceses are grouped under a Metropolitan See and diocesan bishops owe due obedience to their Metropolitan. However, legal personality belongs to the Bishop and the Diocese with property being held at the diocese level and not centrally. The Episcopal Church's Presiding Bishop is not an Archbishop and has no metropoitical See.

d. Diocesan bishops have to pay homage to the Sovereign and to receive their temporalities (civil authorities) directly from her and not from the Metropolitan.

e. The Church of England has only central Canons. Dioceses do not have canons of their own.

f. The polity of the Episcopal Church is different from that of the Church of

England and where similar, favors the authority of the diocese in the Episcopal Church.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 9, 2013.

Bishop Michael Nazir-Ali

The Right Reverend Dr. Michael Nazir-Ali

CERTIFIED COPY
2013 OCT 11 AM 9:50
CLERK OF COURT
COUNTY

# Exhibit 9

CERTIFIED COPY

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

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

Personally appeared before me, The Right Reverend Alden Moinet Hathaway, who being duly sworn, deposes and says:

1. I reside at 107 Laurens Street, Beaufort, South Carolina.

2. I am a retired Bishop in the Episcopal Church. I have been an ordained member of the clergy in the Episcopal Church for over fifty years. From 1981-1997, I served as the Bishop of The Episcopal Diocese of Pittsburgh.

3. I attended Western Reserve Academy and Cornell University. I was an Ensign, Lieutenant and a Gunny Officer in the United States Navy serving on the USS McGinty. I was honorably discharged in 1959.

4. I received my Divinity Degree from Episcopal Divinity School in 1961.

5. I am presently on the staff of The Parish Church of St. Helena, Beaufort, South

Carolina as its Bishop in Residence. I also serve on the board of the Holy Trinity Classical Christian School.

6. In April 2009, I endorsed the "Bishops' Statement on the Polity of The Episcopal Church," a true and accurate copy of which is attached. I agree today, as I did four years ago, with the positions expressed in that statement about the polity of the Episcopal Church. My agreement is based on my study of Episcopal polity and my practice of it for over fifty years. Among these are the following:

a. The fundamental structure of the Episcopal Church is a voluntary association of equal dioceses with the bishop of each diocese as its ecclesiastical authority;

b. The diocese is the fundamental unit of the Episcopal Church. Dioceses in the Episcopal Church are not now, nor have they ever been, subordinate to a metropolitan or central hierarchy of any sort.

FURTHER, THE AFFIANT SAYETH NOT.

The Right Reverend Alden Moinet Hathaway

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

Notary Public for the State of South Carolina
My Commission expires: 12/28/16

ELAINE L. SHEPHERD NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 12-28-2016

# BISHOPS' STATEMENT ON THE POLITY OF THE EPISCOPAL CHURCH

The Right Reverend James M. Adams, Jr.
Bishop of Western Kansas

The Right Reverend Peter H. Beckwith
Bishop of Springfield

The Right Reverend William C. Frey
Assisting Bishop of Rio Grande; Retired Bishop of Colorado

The Right Reverend Alden M. Hathaway
Retired Bishop of Pittsburgh

The Right Reverend John W. Howe
Bishop of Central Florida

The Right Reverend Russell E. Jacobus
Bishop of Fond du Lac

The Right Reverend Paul E. Lambert
Bishop Suffragan of Dallas

The Right Reverend Mark J. Lawrence
Bishop of South Carolina

The Right Reverend Edward S. Little II
Bishop of Northern Indiana

The Right Reverend William H. Love
Bishop of Albany

The Right Reverend D. Bruce MacPherson
Bishop of Western Louisiana

The Right Reverend Edward L. Salmon, Jr.
Retired Bishop of South Carolina

The Right Reverend Michael G. Smith
Bishop of North Dakota

The Right Reverend James M. Stanton
Bishop of Dallas

The Right Reverend Don A. Wimberly
Bishop of Texas

Also Endorsed By:

The Reverend Canon Professor
Christopher Seitz
The Reverend Dr. Philip Turner
The Reverend Dr. Ephraim Radner
(The Anglican Communion Institute, Inc.)

## BISHOPS' STATEMENT ON THE POLITY OF THE EPISCOPAL CHURCH

We write as Bishops of The Episcopal Church, the Anglican Communion and the One, Holy, Catholic, and Apostolic Church. We are joined by distinguished theologians known for their long service throughout the Anglican Communion.

The Historic Episcopate has always been recognized as an essential non-negotiable element of our Anglican identity, including by the Bishops of The Episcopal Church "in Council assembled as Bishops in the Church of God" and recorded in the Chicago-Lambeth Quadrilateral.[1] Bishops are successors to the apostles and upon their consecration receive the authority and responsibility inherent in the sacred and unbroken apostolic office. The people of God are united in one local church by their communion with their Bishop, and through the communion of all the Bishops in a college of Bishops the people of God around the world are joined in one communion. Resolution 49 of the 1930 Lambeth Conference, quoted in part in the preamble to our Constitution, notes that the Anglican Communion consists of "those duly constituted Dioceses, Provinces and regional Churches in communion with the See of Canterbury" that are "bound together not by a central legislative and executive authority, but by mutual loyalty sustained through the common counsel of the bishops in conference."[2]

This understanding of the Historic Episcopate derives first from the authority Jesus bestowed on his disciples and second on the Apostles' subsequent provision for the continuation of their ministry without interruption by those consecrated to the office of Bishop. The joint Anglican Roman Catholic International Commission described the understanding of episcopal authority shared by the two communions:

> The Spirit of Christ endows each bishop with the pastoral authority needed for the effective exercise of *episcope* within a local church. This authority necessarily includes responsibility for making and implementing the decisions that are required to fulfill the office of a bishop for the sake of *koinonia*. Its binding nature is implicit in the bishop's task of teaching the faith through the proclamation and explanation of the Word of God, of providing for the celebration of the sacraments, and of maintaining the Church in holiness and truth. Decisions taken by the bishop in performing this task have an authority which the faithful have a duty to receive and accept.[3]

### I

### The Bishop Is the Ecclesiastical Authority in the Diocese

The Constitution and Canons of General Convention make the Bishop the Ecclesiastical Authority in the diocese. That authority is always properly exercised in accordance with the constitution and canons of the diocese, but from the perspective of the Constitution it is the Bishop (or the Standing Committee in the absence of a Bishop) that is the Ecclesiastical Authority, not any central body or officer.

Our Constitution does not purport to define the authority inherent in the office of Bishop, but

recognizes in Article II that our jurisdiction is that of an "Ordinary" and affirms through the use of this significant term that the Bishops of The Episcopal Church possess the full authority of the apostolic office. "Ordinary" is a term of art in Anglican and Roman Catholic ecclesiology and canon law that refers to the power inherent in the office given by the Lord to Peter and the Apostles. In the Roman Catholic Church, "ordinary power" is the power exercised by the Bishop of Rome as successor to Peter in a supreme and universal manner and by the diocesan bishops within their sees.[4] It is the power that derives from divine office, not canon law.

The Church of England, which itself received the Historic Episcopate from the Roman Catholic Church, continues to recognize in its canon law that its diocesan bishops exercise "jurisdiction as Ordinary."[5] The Anglican co-chairman of the Anglican Roman Catholic International Commission explained the inherent authority of bishops as follows: "The essential powers and responsibilities of apostolic ministry are inherent in the gift of this ministry. They may be ordered and given shape by human law, but they are not the creation of human law."[6] The inherent nature of this authority was noted by the seminal thinker on Anglican polity, Richard Hooker, who followed St. Augustine in emphasizing that this authority was "not by force of any council (for councils do all presuppose bishops, nor can there any council be named so ancient, either general, or as much as provincial, [since] the Apostles' own time, but we can shew that bishops had their authority before it, and not from it)."[7]

Following the American Revolution, the several Episcopal Churches in this country received this same apostolic office from the Church of England prior to the formation of The Episcopal Church itself. This point must be emphasized: the Historic Episcopate existed among Anglicans in this country prior to the adoption of our Constitution. By subsequently using the term "Ordinary" to describe its diocesan Bishops, our Constitution affirms this historic office as understood in both Anglican and Roman Catholic tradition and recognizes the inherent authority of its Bishops, an authority they possess by means of their apostolic office and not through administrative powers enumerated in our Constitution and canons.

This inherent authority of a Bishop is also given constitutional recognition by two other provisions in our Constitution. The first, already noted, describes the Bishop and Standing Committee in the absence of a Bishop as "the Ecclesiastical Authority" in the diocese.[8] The second prohibits any Bishop from acting in another diocese without consent of the diocesan authority. Not even the whole House of Bishops or, indeed, the entire General Convention acting unanimously could override this constitutional reservation of ecclesiastical authority to the diocesan Bishop and Standing Committee. Lest there be any doubt about this issue, the Constitution specifies that Bishops can act outside their own dioceses even when authorized by the House of Bishops only in "territory not yet organized into Dioceses of this Church."[9]

It is significant in this regard that the office of Presiding Bishop, unlike that of diocesan Bishop, is a constitutionally-defined office.[10] The Presiding Bishop does not have a see and does not exercise ordinary power, but only the limited authority delegated by the Constitution and duly enacted canons. Included in this defined authority is jurisdiction over the small number of churches known as the "Convocation of American Churches in Europe," but even this limited jurisdiction is exercised with the consent of other Anglican Bishops having authority in Europe. The Presiding Bishop at the "direction" of the House of Bishops may also act or authorize others to act in unorganized territory, but the primary responsibility of the Presiding Bishop is,

as the name implies, to preside at the meetings of the House of Bishops and to act as its agent in canonical matters. But neither the House of Bishops as a whole nor the Presiding Bishop on its behalf has ecclesiastical authority to act within or speak on behalf of a diocese.

We emphasize this significant feature of our governance at the outset because in the recent controversies surrounding the withdrawal of several dioceses from The Episcopal Church the Presiding Bishop and others acting on her behalf, including the Presiding Bishop's chancellor, have purported to act within dioceses, to "recognize" or "de-recognize" diocesan officers and to speak on behalf of The Episcopal Church in civil litigation involving dioceses. We respect the desire of the Presiding Bishop to provide pastoral assistance in these areas, and indeed we too want to do all that we can to reach out to persons in those dioceses who wish to remain in The Episcopal Church. But neither she nor anyone acting on her behalf has constitutional authority to act without consent from the Ecclesiastical Authority except in unorganized territory. Nor are they authorized to speak for The Episcopal Church in civil litigation within a diocese. That is not among the constitutional powers conferred on the Presiding Bishop or the House of Bishops or the General Convention as a whole. That is the constitutional prerogative of the Ecclesiastical Authorities of the dioceses, their Bishops and Standing Committees. However we respond to the pastoral needs of continuing Episcopalians in the seceding dioceses, it must be done in accord with our Constitution and Canons.

## II

## The Fundamental Structure of The Episcopal Church Is That of a Voluntary Association of Equal Dioceses

Given the constitutional reservation of authority within the diocese to the Bishop and Standing Committee, it is not surprising that the fundamental structure of our Church is that of a voluntary association of equal dioceses.

It is significant that the same term, "voluntary association," has been used by both the founding father of The Episcopal Church to describe the organization he was so instrumental in forming and by the civil law to describe religious societies and other unincorporated voluntary organizations in general. Our Church's primary architect was, of course, William White, and his blueprint was *The Case of the Episcopal Churches in the United States Considered*, published in 1782 as the Revolutionary War was nearing an end. As a result of American independence, many of the former Church of England parishes had become independent churches while others were still organized as state churches under the control of state legislatures. White's concept, later accepted by others in the former colonies, was that the Anglican churches would first be organized into state churches and then the state churches would organize themselves nationally as a voluntary association of state churches (now called "dioceses").[11] Pursuant to this plan, White was one of the first two Americans consecrated by the Archbishop of Canterbury in 1787 to serve in the Episcopal Churches. When The Episcopal Church eventually was duly organized in 1789, Bishop White and Bishop Samuel Seabury, consecrated by the Scottish Episcopal Church, sat as the first House of Bishops at the first General Convention.[12]

Just as the thirteen states were the "independent and sovereign" constituents of the American

confederation that existed when the church now known as The Episcopal Church was being formed, the state churches were the bodies that combined to constitute what was initially called the Protestant Episcopal Church. It was the dioceses, then co-extensive with the newly-independent states, that created our Church's Constitution and General Convention. The constitutional mechanisms of governance they created preserved their status as equal members of a voluntary association of dioceses. As noted by the official commentary on our Constitution and canons, "Before their adherence to the Constitution united the Churches in the several states into a national body, each was completely independent." It then describes that national body they created as "a federation of equal and independent Churches in the several states."[13]

As this brief summary of our founding history shows, the fundamental structure of The Episcopal Church from the outset has been that of a voluntary association of dioceses meeting together in a General Convention as equals. This structure is clearly reflected in our Constitution. There is no provision in the Constitution that defines a diocese. The dioceses are the undefined constituent elements out of which The Episcopal Church is formed. In contrast, General Convention is created and defined in Article I, which still provides in language virtually unchanged from the original that "The Church in each diocese which has been admitted to union with the General Convention...shall be entitled to representation...." As this current language makes clear, "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 any other body or group, that is "entitled to representation" at General Convention.

This fundamental concept of dioceses as equal constituent members of The Episcopal Church is manifest in the mechanisms of governance created by the Constitution, including the provisions for representation and voting at General Convention, the means by which the Book of Common Prayer and Constitution are amended, and the procedures by which new dioceses are admitted to membership in The Episcopal Church after they are constituted.

*Representation and Voting*

All dioceses have equal representation. 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 voting mechanism constitutionally required in the House of Deputies, gives the dioceses collective control over the General Convention.

The House of Deputies does not decide important matters by majority vote, but by a vote "by orders."[14] This is a vote in which the diocesan deputations vote by diocese separately by their clergy and lay deputies. Each diocese gets one vote in each order. This procedure of voting by diocese has been the hallmark of our Conventions from the outset and reflects the fact that the dioceses meet in such Conventions as equal members. The first Convention in 1785 that began the organizing process and produced the first draft Constitution made explicit in its very first resolution that the states were its constituent members: the resolution was that "each State have one vote."[15] The next year the Convention of 1786 passed a resolution asking "the several States" to "ratify" the constitution at the next convention.[16] When eventually adopted, the first Constitution called for "suffrages by states" in the General Convention.[17] In the Convention in

1789, at which the organization of The Episcopal Church was completed, the issue before the Convention was "proposed union with the Churches in the States of New Hampshire, Massachusetts, and Connecticut."[18]

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, that is represented in General Convention. Explaining General Convention's voting procedures, the Church's official commentary notes the provision in the first Constitution ("suffrages by states") and concludes "still today a vote by orders is also a vote by dioceses."[19]

*Constitutional Amendments*

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

Diocesan constitutional changes, in contrast, receive no prior review or approval from General Convention or other central bodies. As already noted, our first 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 The Episcopal Church ratifies our Constitution when it joins, typically by an accession clause in its own constitution. Apart from an initial review when a new diocese applies for membership in The Episcopal Church, there is no provision for prior review or approval of diocesan constitutional changes, canons or other actions. A diocese within The Episcopal Church, 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.")

*Admission of New 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 misunderstanding about this process, so the procedure must be examined carefully. It should be noted at the outset that the relevant constitutional provision, Article V, is captioned "Admission of New Dioceses" not "Creation of New Dioceses." This reflects the language, already noted, in Article I that dioceses are "admitted" to union with General Convention. Those who continue to claim that dioceses are "created" by General Convention ignore the legal precision of Article V.

The first sentence of that Article specifies General Convention's role in this process. It is to give "consent." This wording indicates at the outset that the role of General Convention is secondary, not primary. It consents to actions initiated elsewhere. The subsequent sentences in Article V specify the process by which dioceses are admitted to The Episcopal Church. The proceedings "originate" with a convention of "the unorganized area," not with General Convention. It is the unorganized area that "duly adopts" its own constitution. Article V then describes the legal entity created by the duly adopted constitution not, as before, as an "unorganized area," but as a "diocese." Then the "new diocese" submits its constitution to the General Convention for consent; and upon receipt of this consent, it enters into "union with the General Convention."

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

The logic of this process can be grasped by a hypothetical case. Suppose an unorganized area holds its convention and duly adopts a constitution. Suppose further that before applying to The Episcopal Church for admission to General Convention it votes at its convention to apply not to The Episcopal Church but to another province of the Anglican Communion. By definition, the General Convention has yet to give consent and admit the new diocese. Nevertheless, the diocese is fully constituted by adopting its own constitution and so legally capable of acting on its own behalf. This can be seen by reading carefully the provisions of Article V and recognizing that this article reflects the operation of the civil law on the creation of religious societies and voluntary associations.

To summarize the conclusions of this section, the following are fundamental features of the governance and structure of The Episcopal Church:

- The state churches were independent legal entities prior to their organization of The Episcopal Church.
- New dioceses organized now are duly constituted entities with distinct legal personalities prior to admission to The Episcopal Church.
- Dioceses retain their distinct legal personalities as defined by their constitutions when they join The Episcopal Church.
- The constituent members of General Convention are its dioceses; it is the dioceses that are "represented" and vote as equals.
- The most important matters decided at General Convention, amendments to the Constitution and Book of Common Prayer are referred to the diocesan conventions for consideration prior to action by General Convention and the final vote is taken at General Convention by diocese.

## III

## Dioceses Are Not Subordinate to a Metropolitan or Central Hierarchy

We are now in a position to address the nature of authority in The Episcopal Church. Because this material is complex and some of the conclusions may seem surprising, we will proceed by looking first at the actual language used in the Constitution. We will then place that language in three contexts that help illuminate it: the historical circumstances in which the governance of The Episcopal Church was created; the principle of subsidiarity, which was invoked by our founders and has long been recognized as a key feature of Anglican polity; and the governing instruments of other churches that have the central hierarchical language and structures that our Church lacks. We will then conclude with a review of the factors demonstrating the lack of such structures and the autonomy of dioceses in The Episcopal Church.

*The Language Used in the Constitution*

As what we have said above indicates, The Episcopal Church is comprised of member dioceses that join together to create various central bodies and offices, including a General Convention, Executive Council and Presiding Bishop. What is not defined in our Constitution is any legal or hierarchical relationship among these various bodies. Indeed, a recent legal analysis of our Constitution and history has shown that the Constitution is devoid of the legal terminology used to express hierarchies in legal documents.[20] On the one hand, a General Convention is created and given legislative authority to enact general canons, but the preexistent diocesan conventions are also recognized as having legislative authority and there is no provision making the General Convention "supreme" or "highest" or providing that general canons supersede diocesan ones. Indeed, none of the following terms routinely used in legal documents to indicate hierarchical priority is found at all in our Constitution: "supreme"; "supremacy"; "highest"; "hierarchical"; "subordinate"; "sole"; "preempt"; "final"; and "contrary". Other terms used to indicate hierarchical relationships, including "exclusive", "subject to", "consent", "notwithstanding", and "inconsistent" are found in the Constitution, but they are not used to indicate a central hierarchy.[21] This is often assumed and is even alleged in civil cases instituted in the name of The Episcopal Church by the Presiding Bishop and her chancellor, but there are no provisions to this effect in our Constitution as a simple search with any search engine will demonstrate. The only instance that is even debatable is the use of the term "consent" in Article V governing the admission of new dioceses, but as we have already discussed that consent is to a process initiated and controlled by the diocese, whose own consent is thereby presumed.

This lack of hierarchical concepts in the Constitution confirms the traditional understanding of our structure that already has been quoted from the official commentary: The Episcopal Church is a federation (or confederation) of independent, or better, autonomous, dioceses. We will not revisit the work that has already been done on this topic, but we will now review three factors that reinforce this understanding of our polity.

*The Historical Context in which The Episcopal Church Was Organized*

Understanding our structures of governance requires familiarity with the historical context in which The Episcopal Church was organized. Two features of this context are paramount: first, The Episcopal Church was organized and its Constitution adopted just as the American states were changing their form of government from that of a "league of friendship" of sovereign and independent states under the Articles of Confederation to the hierarchically-structured federal form of government specified in the United States Constitution; and second, the fact that by virtue of the American Revolution the churches in the United States were necessarily forced to change the fundamental governance they had previously experienced as part of the Church of England, the Supreme Governor of which was the British monarch.

On the first point it is necessary to recognize that two of the most active participants in the General Conventions that organized The Episcopal Church and drafted its first Constitution were two men, James Duane and John Jay, noted to this day among legal scholars for their roles in developing the jurisprudence of hierarchy used in the United States Constitution. Duane was a signatory to the Articles of Confederation on behalf of New York and was the mayor and first federal judge in New York. Sitting as judge in 1784, Duane ruled in a well-known case still studied by legal scholars that the lack of a routine technical term indicating hierarchical priority substantially eviscerated a New York statute purporting to nullify part of the peace treaty ending the Revolutionary War.[22] Six weeks later Duane was a delegate to the first interstate convention that established the fundamental principles of what was to become the Constitution of The Episcopal Church.[23] The first of these principles was the very language, that "there be a general convention," that remains to this day the only specification of the authority of General 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.[24] That Constitution, the key language of which remains virtually unchanged in the current Constitution, contained no language giving hierarchical priority to the General Convention. Duane was also made a member of the executive committee selected to correspond with the churches in the United States and the Archbishop of Canterbury to obtain consecrations for American bishops.[25] He was once again a delegate to the 1786 Convention.[26]

John Jay was the United States Secretary for Foreign Affairs during the Confederation and was later the first Chief Justice of the United States Supreme Court. He is also known among legal scholars for his work in drafting the hierarchical legal language that resolved the treaty nullification controversy with Great Britain and that became the prototype for the Supremacy Clause in the United States Constitution, the primary provision establishing the hierarchy of the federal government in our federal system.[27] Right in the middle of his work on the treaty controversy, Jay was a delegate to the General Convention in June 1786.[28] It was this Convention that amended and then approved the Constitution drafted the year before containing no language giving hierarchical priority to the General Convention or any central body. Although Jay arrived late, after the Constitution had been approved, 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 key letter to the Archbishop of Canterbury from the Convention.[29] 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 be incorporated into the Supremacy Clause of the United States Constitution. It is inconceivable that these two knowledgeable lawyers, known to this day for their role in developing our jurisprudence concerning legal hierarchies, would have inadvertently drafted a Constitution devoid of hierarchical language.

One distinctive feature of our Constitution is its use of an unusual technical term from international law, "acceding," to describe the act of dioceses' accepting the Constitution. It is the term used in international law to describe a sovereign state's becoming a party to a treaty already signed by others, a treaty being a compact among sovereign and independent states. "Acceding" was the term used in the Articles of Confederation, which established a "league of friendship" of states retaining their "sovereignty, freedom and independence." The term "acceding" is not used in the United States Constitution, which established a hierarchical central government. This use of treaty language could not have been accidental. James Duane was a signatory to the Articles of Confederation; John Jay, besides being the nation's Foreign Secretary and Chief Justice, negotiated the second treaty with Great Britain, known to this day as the "Jay Treaty." These men clearly knew what the term "acceding" signified.[30]

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.[31] 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.[32] 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.[33] Between October 1785 and October 1786, no fewer than six letters were exchanged between the General Convention and the English bishops on this topic.[34] Both Duane and Jay played major roles in drafting this correspondence.[35] The agreement reached was that the Oaths of Supremacy and Allegiance to the monarch and the Oath of Due Obedience to the Archbishop 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...."[36] Submission to a *hierarchy*, the monarch and the archbishop, 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 these oaths. 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.[37]

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Thus, the two primary legal influences on the structure of The Episcopal Church, the English Act of Supremacy and the United States constitutional framework, were of preeminent interest

at precisely the time our Church was organized. None of the participants organizing our 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 significant jurisprudential inspiration from the very people guiding the formation of The Episcopal Church, the young church elected not to include an explicit central hierarchy in its governance. And although our 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.

*The Principle of Subsidiarity*

The principle of subsidiarity is crucial to understanding the relationship between dioceses and central bodies in The Episcopal Church and the effect of silence in our Constitution. It can be succinctly defined as follows: "Subsidiarity expresses a preference for governance at the most local level consistent with achieving government's stated purposes."[38] It is the principle behind the Tenth Amendment to the United States Constitution and is fundamental to European law and Roman Catholic social teaching. And it is described by both the Windsor and Virginia Reports as a key strand of Anglican governance. Subsidiarity may be a principle applicable to hierarchical structures, in which case it is usually the subordinate body in favor of which the presumption for local governance operates. But it is also applicable to non-hierarchical organizations as well as is shown by its importance in the Anglican Communion. The distinction drawn by subsidiarity, however, is between local and central, not between subordinate and supreme. The Windsor Report defines the principle as follows: "the principle that matters should be decided as close to the local level as possible."[39]

Of particular relevance to the formation of The Episcopal Church is the fact that subsidiarity was also emphasized by Bishop White in *The Case,* was later adopted as a "fundamental principle" by the nascent Pennsylvania church in 1784, and through the influence of Bishop White and the Pennsylvania church guided The Episcopal Church as a whole. This fundamental principle was expressed as follows: "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."[40] Especially important is the term "delegated." Powers are delegated by the local body to the central body, not vice-versa. This is an explicit statement that the reservoir of authority was to be in the local bodies, not the central one. Thus, such powers must be explicitly, not implicitly, delegated by the local body to the general body. In other words, this principle creates the presumption that silence indicates that the local body retains the power. To limit the authority of a local body, whether a parish or a diocese, an explicit prohibition must be stated.

*Other Churches*

We have seen that our Constitution does not create hierarchical central bodies or offices and that this was an intentional decision by our founders pursuant to the principle of subsidiarity they articulated at the very outset of our Church's organization. The difference between The Episcopal Church and the Church of England in this regard has already been noted, but equally instructive is a review of the governing instruments of other churches that do have such central hierarchies. Here one sees readily the language, structures and mechanisms of hierarchy that are

not found in our Constitution.

For example, the concepts of hierarchy, i.e., the operative legal terms indicating supremacy, subordination, preemption and finality, are clearly articulated in the code of canon law of the Roman Catholic Church. 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.**[41]

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."[42] Unlike the dioceses of The Episcopal Church, which are duly organized before admission to our Church, 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."[43] 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."[44]

To take another example, the polity of the Serbian Orthodox Church is of paramount legal significance 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.[45]
>
> 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.**[46]
>
> [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.[47]

These provisions in the Serbian Orthodox constitution led the Supreme Court to conclude that the Holy Assembly of Bishops was the central hierarchy in that church. It is clearly designated as "the highest hierarchical body," its decisions are "final," its dioceses are "administrative division[s]," and they and their bishops exist and serve at the pleasure of the Holy Assembly. In addition, as we discuss below, the bishops swear an "Episcopal-Hierarchical Oath" of "perpetual obedience" to the hierarchical body, the Holy Assembly.

Similarly, the constitution of the Evangelical Lutheran Church in America specifies a clearly identified hierarchy:

> 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.[48]

The Evangelical Lutheran Church's constitution also contains explicit provisions giving its constituent synods only such powers as are conferred by the general canons and bodies and requiring that synod enactments be consistent with decisions of the general body and that prior ratification by the general body of synod constitutional amendments be given before the amendments take effect.[49]

Likewise, the constitution of the Presbyterian Church USA indicates unequivocally the hierarchical relationship of its 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.).[50]

The General Assembly is also given the explicit power "to provide authoritative interpretation of the *Book of Order* which shall be binding on the governing bodies of the church...."[51]

Finally, the governing instrument of the United Methodist Church gives its highest legislative body, its General Conference, the express authority to define the powers and duties both of its regional and local conferences and of its bishops. 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."[52]

*The Episcopal Church Lacks the Structures and Mechanisms of Central Hierarchical Control*

What this survey of other church's governing instruments shows quite plainly is not only that our Constitution lacks the relevant hierarchical terminology seen at a glance in these other constitutions, but also that the general bodies in The Episcopal Church lack the mechanisms by which hierarchical authority is exercised.

- The Constitution lacks any language making General Convention the "supreme" or "highest" authority, making its decisions "final" or making dioceses "subordinate" to any other office or body.
- The Episcopal Church lacks any metropolitan or archbishop with authority over its diocesan bishops. To the contrary, the episcopal authority of the diocesan bishop and diocese is given explicit constitutional protection.
- Our episcopal vows contain no reference to a hierarchy, but only a pledge of conformity to the doctrine, discipline and worship of The Episcopal Church. This stands in marked contrast to churches with central hierarchies, including the Church of England, the Roman Catholic Church and the Serbian Orthodox Church, which have explicit "hierarchical oaths" by which allegiance is sworn to the hierarchical body.
- General bodies play no substantive role in the selection of bishops or in giving consents. Consents are given by dioceses. Even when occurring close to General Convention, consents are given by the diocesan bishop and delegations, not the House of Bishops or the House of Deputies collectively.
- Church discipline is handled almost exclusively at the diocesan level. Even in the case of bishops it is handled by ad hoc courts, not by the general bodies.
- Dioceses are not created, extinguished or combined by General Convention as administrative districts of a hierarchically-controlled general church. The creation of a diocese "originates" in the diocese, which after being duly constituted is "admitted" to union with General Convention.
- The general bodies of The Episcopal Church have no right of prior review or authority to approve the actions of diocesan conventions, including in particular changes to the dioceses' governing instruments. The lack of a right of prior review and approval clearly establishes General Convention'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. This is a key mechanism of hierarchical control.

The autonomy of our dioceses has long been recognized as an essential feature of the polity of our Church. For example, in the volume on the polity of The Episcopal Church included in the widely-distributed series in the 1950s and 1960s entitled "The Church's Teaching," written by the long-time professor of church history at the General Theological Seminary with the assistance of an "Authors' Committee" composed of professors, leading rectors and a bishop of the Church, the author, Dr. Powel Dawley summarized the role of the diocese as follows:

> Diocesan participation in any national program or effort, for example, must be voluntarily given; it cannot be forced. Again, while the bishop's exercise of independent power within the diocese is restricted by the share in church government possessed by the Diocesan Convention or the Standing Committee, his independence in respect to the rest of the Church is almost complete.[53]

This autonomy was again confirmed as recently as February 2009 by the ecclesiastical court deposing Charles Bennison as Bishop of Pennsylvania. In the Bennison case, the Diocese of Los Angeles refused to cooperate with the court and to produce documents that had been requested not only by the parties, but also by a representative of the Presiding Bishop and even the court itself. The court concluded that it had no authority to compel the diocese to comply: "Unfortunately, the diocese refused all of those requests and the Court had no ability to obtain those documents.... Rather, the Diocese of Los Angeles, a wholly autonomous entity which is not a party to these proceedings, chose not to produce the documents notwithstanding entreaties from the Court."[54]

We agree with the conclusion of the court in the Bennison decision that dioceses are autonomous under our Constitution and are not subject to hierarchical control by central bodies, whether they be the Presiding Bishop, the General Convention, the Executive Council or the courts of The Episcopal Church. Our dioceses work together as a matter of comity in fellowship and communion, but legally we remain autonomous bodies with distinct legal personalities.

## IV

## The Nature of Our Vows

The charge is frequently made that those who reject the understanding of our polity now being asserted by the Presiding Bishop, most recently in a civil lawsuit in Pittsburgh, have violated their ordination vows to uphold the doctrine and discipline of The Episcopal Church. We regard these sacred vows as inviolable and therefore take this allegation with the utmost seriousness. We begin by emphasizing the full extent of the vows, not often noted, that we made at our episcopal consecrations:

> In the Name of the Father, and of the Son, and of the Holy Spirit, I, N.N., chosen Bishop of the Church in N., solemnly declare that I do believe the Holy Scriptures of the Old and New Testaments to be the Word of God, and to contain all things necessary to salvation; and I do solemnly engage to conform to the doctrine, discipline, and worship of The Episcopal Church.[55]

We reaffirm these vows without reservation.

The engagement we made and reaffirm is to conform to the "doctrine, discipline and worship" of The Episcopal Church. The objection that those who do not accept the interpretation of that "discipline" (polity) proposed by the Presiding Bishop are in violation of their episcopal vows is mere question begging. The objectors assume without argument that the discipline of our Church is such that anyone with a different understanding is in violation of that discipline. But

this is to assert what must be proved. What the discipline of The Episcopal Church requires is precisely the question at issue. It is the Presiding Bishop's interpretation that is novel and it is not less so for being advocated in civil court.

In this context, we must again emphasize that our vows contain no pledge of obedience to a metropolitan or central hierarchy as is explicit in the episcopal oaths taken in churches that have such hierarchies. For example, Serbian Orthodox bishops swear an "Episcopal-Hierarchical Oath" that they will "always be obedient to the Most Holy Assembly," the very body identified in that church's constitution as "the highest hierarchical body."[56] Similarly, Roman Catholic bishops are required to answer in the affirmative the following questions:

> Are you resolved to build up the Church as the body of Christ and to remain united to it within the order of bishops under the authority of the successor of the apostle Peter?
> Are you resolved to be faithful in your obedience to the successor of the apostle Peter?[57]

A Bishop in the Church of England is required by canon law not only to swear an oath of allegiance to the monarch as already noted, but also to take "the oath of due obedience to the archbishop and to the metropolitical Church of the province wherein he is to exercise the episcopal office."[58] This oath is as follows:

> In the Name of God, Amen. I, *N.*, chosen Bishop of the Church and See of *N.* do profess and promise all due reverence and obedience to the Archbishop and to the Metropolitical Church of *N.* and to their Successors : So help me God, through Jesus Christ.[59]

Indeed, our consecration vows in The Episcopal Church, often called the "Declaration of Conformity," resemble only the third part of the Church of England consecration vows, the Declaration of Assent:

> Archbishop: In the declaration you are about to make, will you affirm your loyalty to this inheritance of faith as your inspiration and guidance under God in bringing the grace and truth of Christ to this generation and making Him known to those in your care?
>
> Ordinand: I, AB, do so affirm, and accordingly declare my belief in the faith which is revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness; and in public prayer and administration of the sacraments, I will use only the forms of service which are authorized or allowed by Canon.[60]

This Declaration by itself, absent the hierarchical oaths to the sovereign and metropolitical authorities, resembles that of the profession traditionally made by a bishop upon his election to the See of Rome:

> I will firmly believe and hold the catholic faith, according to the tradition of the apostles, of general councils and of other holy fathers, especially of the eight holy universal councils ... as well as of the general councils..., and to preserve intact this faith unchanged to the last dot, and to defend and preach it to the point of death and the shedding of my blood, and likewise to follow and observe in every way the rite handed down of the ecclesiastical sacraments of the church.[61]

No longer subject to another hierarchical authority the newly-elected pope declares only his doctrinal assent and conformity.

We also have been given our apostolic office in trust. When the American churches requested that the Church of England bestow the Historic Episcopate on our developing church, nineteen Bishops of the Church of England stated in reply that

> we cannot but be extremely cautious, lest we should be the instruments of establishing an Ecclesiastical system which will be called a branch of the Church of England, but afterwards may possibly appear to have departed from it essentially, either in doctrine or in discipline.[62]

Indeed, we received the Episcopate only after a special enactment of the British Parliament exempted our Bishops from "the oaths of allegiance and supremacy, and the oath of due obedience to the Archbishop for the time being," accepting our vows of conformity in substitution, and after our state churches passed an "Act of General Convention" "declaring their steadfast resolution to maintain the same essential Articles of Faith and discipline with the Church of England."[63]

Our episcopal vows contain no pledge of obedience to a higher office or body, as do churches with metropolitical hierarchies, but we do hold our apostolic office in trust. We understand our vow to require conformity to the doctrine and worship we hold in trust and to the discipline of The Episcopal Church as set forth in this statement. We intend to remain faithful to that sacred undertaking.

## V

## Maintaining Constituent Membership in the Anglican Communion Is Our Constitutional Right

Not only is the diocese the fundamental unit of The Episcopal Church, it is also the fundamental unit in catholic ecclesiology by which the people of God in the particular or local churches relate to the wider communion. In a 2007 communication sent by the Archbishop of Canterbury to Bishop Howe, the Archbishop emphasized this point:

> The organ of union with the wider Church is the Bishop and the Diocese rather than the Provincial structure as such.... I should feel a great deal happier, I must say, if those who are most eloquent for a traditionalist view in the United States showed a fuller understanding of the need to regard the Bishop and the Diocese as the primary locus of ecclesial identity rather than the abstract reality of the 'national church'.[64]

We are committed to remaining faithful members of The Episcopal Church and the Anglican Communion. We have noted with increasing concern statements by leaders and bodies of The Episcopal Church questioning our participation in the proposed Anglican covenant and opining that dioceses may not sign the covenant if The Episcopal Church as a whole were to refrain from doing so on behalf of all its dioceses.

The preamble to our Constitution identifies continuing constituent membership in the Anglican

Communion as one of the fundamental conditions on which our governing agreement is based. The failure to maintain that membership would plunge The Episcopal Church into a constitutional crisis. It is an elementary principle of law that agreements can be terminated in the event of material breach or repudiation by another party or by fundamental changes of circumstances. 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.[65] In this regard, it is significant that the preamble to our Constitution makes only two points: (1) that The Episcopal Church 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 no longer recognize The Episcopal Church, the circumstances specified in the preamble already have fundamentally changed in that our Church no longer remains in fellowship with a significant number of the "dioceses, provinces and regional churches" identified in our own Constitution.[66] Failure to sign the proposed covenant would be decisive in this respect. And were The Episcopal Church to attempt to change its constitutional governance to restrict diocesan autonomy, particularly in the case of an Anglican covenant, it would constitute a material breach or repudiation of its "basic" governing agreement.

We must speak plainly here. Any attempt to prevent willing dioceses from signing the covenant would be unconstitutional and thereby void.

## VI

## Conclusion

We have found it necessary to address these issues as a matter of faithfulness to our apostolic vocation and our Constitution. The traditional doctrine and worship and the historic polity of the Church are in grave peril. For this reason, we emphasize that The Episcopal Church consists of autonomous, but interdependent, dioceses not subject to any metropolitical power or hierarchical control. The Ecclesiastical Authorities in our dioceses are the Bishops and Standing Committees; no one else may act in or speak on behalf of the dioceses or of The Episcopal Church within the dioceses. We intend to exercise our episcopal authority to remain constituent members of the Anglican Communion and will continue to speak out on these issues as necessary.

April 18, 2009

[1] The Book of Common Prayer (1979), pp. 876-77, Oxford Univ. Press, 1979.
[2] 1930 Lambeth Resolution 49, http://www.lambethconference.org/resolutions/1930/1930-49.cfm (accessed on Mar. 16, 2009).
[3] The Gift of Authority (Authority in the Church III), para. 36, Anglican Roman Catholic International Commission, Sept 3, 1998, http://www.prounione.urbe.it/dia-int/arcic/doc/e_arcicII_05.html (accessed on Mar. 16, 2009).
[4] Roman Catholic Church, *Codex Iuris Canonici* (1983), can. 331; can. 369, unofficial English translation, IntraText Digital Library, www.intratext.com/X/ENG0017.HTM ,1990s (accessed on Mar.16, 2009).
[5] The Canons of the Church of England (2008), C 18, http://www.cofe.anglican.org/about/churchlawlegis/canons (accessed on Mar. 16, 2009).
[6] M. Santer, "Communion, Unity and Primacy: An Anglican Response to *Ut Unum Sint*", *Ecclesiology*, 3 (2007), p. 286, quoted in C. Podmore, "The Governance of the Church of England and the Anglican Communion," Jan. 7, 2009, http://www.cofe.anglican.org/about/churchlawlegis/canons (accessed on Mar. 16, 2009). Dr. Podmore notes "The diocesan bishop's powers are inherent in his office; they are not delegated by or exercised on behalf of the diocesan synod." (Para. 2.10.)
[7] Richard Hooker, *Laws of Ecclesiastical Polity*, Bk. VII, chap. v.3.
[8] Article IV.
[9] Article II.3.
[10] Article I.3.
[11] W. White, *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).
[12] *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835*, William Stevens Perry, ed., vol. I, p. 100, Claremont Mfg. Co., 1874.
[13] Edwin A. White and Jackson Dykman, *Annotated Constitution and Canons*, vol. I, pp. 12, 29, Church Publishing, 1981.
[14] Article I.5.
[15] *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835*, William Stevens Perry, ed., vol. I, p. 17, Claremont Mfg. Co., 1874.
[16] Id., p. 42.
[17] Id. p. 83.
[18] Id., p. 94.
[19] Edwin A. White and Jackson Dykman, *Annotated Constitution and Canons*, vol. I, p. 12, Church Publishing, 1981.
[20] M. McCall, "Is The Episcopal Church Hierarchical?", The Anglican Communion Institute, Inc., September 2008, http://anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf .
[21] Id., pp. 10-11.
[22] Id., pp. 8-13.
[23] *Journal of the Meetings 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*, p. 8, *reprinted in* Charles Evans, et al., eds., *Early American Imprints, Series I* (1639-1800).
[24] *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835*, William Stevens Perry, ed., vol. I, pp. 15, 18 Claremont Mfg. Co., 1874.
[25] Id., pp. 25, 57.
[26] Id., p. 49.
[27] M. McCall, "Is The Episcopal Church Hierarchical?", pp. 9-12, The Anglican Communion Institute, Inc., September 2008.
[28] *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835*, William Stevens Perry, ed., vol. I, p. 33, Claremont Mfg. Co., 1874.
[29] Id., p. 43.
[30] M. McCall, "Is The Episcopal Church Hierarchical?", pp. 20-21, The Anglican Communion Institute, Inc., September 2008.
[31] W. White, *The Case of the Episcopal Churches in the United States Considered* (1782), pp.6-7, *reprinted in* Charles Evans, et al., eds., *Early American Imprints, Series I* (1639-1800).

[32] 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*, pp. 442-58, Macmillan, 1896.
[33] *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835*, William Stevens Perry, ed,. vol. I, pp. 23-25, Claremont Mfg. Co., 1874.
[34] Id., pp. 14-62.
[35] For the role of Jay, see P. Marshall, *One Catholic and Apostolic: Samuel Seabury and the Early Episcopal Church*, pp. 237-38, Church Publishing, 2004.
[36] *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835*, William Stevens Perry, ed., vol. I, pp. 23,53, Claremont Mfg. Co., 1874.
[37] Id., pp. 55-56.
[38] George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," 94 Colum. L. Rev. 331, 339 (1994).
[39] Anglican Communion Office, "The Windsor Report," para. 38, 2004, http://www.anglicancommunion.org/windsor2004/index.cfm, (accessed on Mar. 16, 2009). See also Anglican Consultative Council, "The Virginia Report," 1997.
[40] *Journal of the Meetings 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*, pp. 6,12, *reprinted in* Charles Evans, et al., eds., *Early American Imprints, Series I* (1639-1800).
[41] *Roman Catholic Church, Codex Iuris Canonici* (1983), can. 331; can. 333, unofficial English translation, IntraText Digital Library, www.intratext.com/X/ENG0017.HTM (1990s) (accessed on Mar.16, 2009).
[42] Id., can. 373.
[43] Id., can. 377.
[44] Id., can. 369; can. 336.
[45] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 716 (1976).
[46] Id., p. 716-17.
[47] Id., p. 699.
[48] *Constitutions, Bylaws and Continuing Resolutions of the Evangelical Lutheran Church in America*, chap. 12.11, p. 88, 2008.
[49] Id., pp. 184, 212, 76.
[50] *The Constitution of the Presbyterian Church (USA): Part II Book of Order*, G-13.0101.
[51] Id., G-13.0103.
[52] United Methodist Church, *The Book of Discipline of the United Methodist Church (2004)*, paras. 8-12, 16, 27, 33, 42-43, 47, 55, 57, United Methodist Publishing House, 2004.
[53] Powel Mills Dawley, *The Episcopal Church and Its Work*, p. 116, Seabury Press, revised ed. 1961; see also Robert W. Prichard, "Courts, Covenants, and Canon Law: A Review of Legal and Canonical Issues Facing the General Convention," *Anglican and Episcopal History*, vol. 78:1, March 2009 .
[54] http://www.episcopalchurch.org/documents/2-2-09_decision_on_motion.pdf., (accessed on Mar. 16, 2009).
[55] The Book of Common Prayer (1979), p. 513, Oxford Univ. Press, 1979.
[56] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 716-18 (1976).
[57] Catholic Church, *Rites of Ordination of a Bishop, of Priests, and of Deacons*, United States Conference of Catholic Bishops, 2003.
[58] The Canons of the Church of England (2008), C 14, http://www.cofe.anglican.org/about/churchlawlegis/canons (accessed on Mar. 16, 2009).
[59] Book of Common Prayer (1662), Cambridge Univ. Press, 1987.
[60] Common Worship, http://www.cofe.anglican.org/worship/liturgy/commonworship/texts/ordinal/bishops.html, (accessed on Mar. 16, 2009).
[61] Council of Basel, (Mar. 26, 1436), http://www.ewtn.com/library/COUNCILS/FLORENCE.HTM#15 (accessed on Mar. 16, 2009).
[62] *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835*, William Stevens Perry, ed., vol. I, p. 36, Claremont Mfg. Co., 1874.
[63] Id., pp. 55-58.
[64] Private email dated October 14, 2007, from Archbishop Rowan Williams to Bishop John Howe. This email has been widely-reproduced on the internet.

[65] M. McCall, "Is The Episcopal Church Hierarchical?", pp. 21-22, The Anglican Communion Institute, Inc, (September 2008).

[66] "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).

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# Exhibit 10

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

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

Pursuant to 28 U.S.C. § 1746, I, Colin John Podmore, declare as follows:

1. I am of sound mind, capable of making this Declaration, and have personal knowledge of the facts herein stated. I am a church historian and church/charity executive. I received my degrees of B.A., M.A. and D.Phil. in Modern History from the University of Oxford. My doctorate was in church history. I am a Fellow of the Royal Historical Society.

2. From 1988 to 2013 I served on the staff of the General Synod of the Church of England at Church House, Westminster, latterly as Clerk to the General Synod. I have expertise in the ecclesiology (i.e. the theological understanding and practical ordering or structuring of the Church) of the Church of England and the Anglican Communion. I have published a book – *Aspects of Anglican Identity*[1] and numerous articles in this area.

In July 2008 the General Synod passed a resolution requesting the House of Bishops to prepare a report that would increase understanding of the governance of the Church of England within the Anglican Communion. The House's Standing Committee commissioned me to write

[1] C. J. Podmore, *Aspects of Anglican Identity* (London: Church House Publishing, 2005).

the report 'The Governance of the Church of England and the Anglican Communion',[2] which was circulated to members of the General Synod as the official response to its resolution. It was subsequently published on the Church of England website as a guide to the structures of the Church of England and the Anglican Communion.

3. I have recently resigned as Clerk to the General Synod in order to take up my present appointment as Director of the UK charity Forward in Faith. (Forward in Faith – North America is a separate body.)

I am making this statement in my personal capacity as a church historian and Anglican ecclesiologist and not on behalf of Forward in Faith. I received an unsolicited invitation to do so from Counsel for the Diocese of South Carolina and Bishop Mark Lawrence. I am not acquainted with, and have had no correspondence with, Bishop Lawrence or any other current office-holder in the Diocese of South Carolina.

4. In 2007 I commenced a study of the history and governance of the Protestant Episcopal Church in the USA (hereinafter sometimes abbreviated to 'the Episcopal Church'). As a result of that study I wrote an article entitled 'A Tale of Two Churches: The Ecclesiologies of The Episcopal Church and the Church of England Compared' (2008).[3] This was followed by a second article in 2010.[4] A third article, 'Two Streams Mingling: The American Episcopal Church in the Anglican Communion',[5] published in 2011, showed how the Anglican Communion, which achieved structural expression only in 1867 with the first Lambeth Conference of bishops, brought together churches (the Church of England, the Scottish Episcopal Church and the Protestant Episcopal Church in the USA) whose understandings of church governance differed markedly. Also in 2011 I published an article in the English periodical *Theology*.[6]

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[2] C. J. Podmore, *The Governance of the Church of England and the Anglican Communion* (GS Misc 910) (London: General Synod, 2009).
[3] C. J. Podmore, 'A Tale of Two Churches: The Ecclesiologies of The Episcopal Church and the Church of England Compared', *Ecclesiastical Law Journal* 10 (2008), pp. 34-70, reprinted with slight updating in *International Journal for the Study of the Christian Church* 8 (2008), pp. 124-154.
[4] C. J. Podmore, 'The Baptismal Revolution in the American Episcopal Church: Baptismal Ecclesiology and the Baptismal Covenant', *Ecclesiology*, 6 (2010), pp. 8-38.
[5] C. J. Podmore, 'Two Streams Mingling: The American Episcopal Church in the Anglican Communion', *Journal of Anglican Studies*, 9 (2011), 12-37.
[6] C. J. Podmore, 'Re-telling the Tale', *Theology*, 114 (2011), 13-22.

I. DIFFERENCES IN STRUCTURE BETWEEN THE CHURCH OF ENGLAND AND THE PROTESTANT EPISCOPAL CHURCH IN THE USA

5. The ecclesiology of the Protestant Episcopal Church in the USA differs markedly from that of the Church of England. The former does not "mirror" the latter.

a. The Church of England inherited (but has developed) the traditional catholic ecclesiology of the (pre-Reformation) Western Church in communion with Rome (as the leading English church historian Eamon Duffy has observed, the Church of England 'retained totally unchanged the full medieval framework of episcopal church government'[7]).

b. By contrast, the 'polity' of the Protestant Episcopal Church in the USA, born out of the American Revolution, reflected a democratic and egalitarian ecclesiology. In the words of the Bishop of Bethelehem (Pennsylvania), Paul Marshall, it was 'an American ecclesiology',[8] while another American church historian, David L. Holmes, has commented, 'A very American system of church government was created... that combined the ministry and liturgy of the English established church with the constitutional forms of American republicanism.'[9]

c. The leading American Episcopalian historian Robert Pritchard has said of this difference: 'It is easy for contemporary Americans to overlook the degree to which... [the founders of the Episcopal Church] departed from the English model of church organization.' 'They continued to use much of the same terminology', he writes, but 'created a church quite unlike that of England'.[10] Peter Doll, a leading historian of eighteenth-century Anglicanism in North America, has recently written (of the proposed American Prayer Book of 1786, but making a more general statement) in similar vein:

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[7] E Duffy, 'The Shock of Change: Continuity and Discontinuity in the Elizabethan Church of England', *Ecclesiastical Law Journal*, 7 (2004), 429–446 at p. 430.
[8] P. V. Marshall, *One, Catholic, and Apostolic: Samuel Seabury and the Early Episcopal Church* (New York: Church Publishing, 2004), p. 53 (chapter title: 'The search for an American ecclesiology').
[9] D. L. Holmes, *A Brief History of the Episcopal Church* (Harrisburg, PA: Trinity Press International, 1993), p. 57.
[10] R. W. Prichard, 'The Making and Re-Making of Episcopal Canon Law' [2010], p. 2: http://www.anglicancommunioninstitute.com/wp-content/uploads/2010/02/conferencetalk2010.pdf, accessed 10 April 2010.

> "It is highly important to note this declared intention to be faithful to the inheritance from the Church of England. It is a regular refrain throughout the history of the Episcopal Church that has in fact often signalled significant alterations to that inheritance."[11]

6. Claims that the Episcopal Church was organized in a way that imitated or reflected the structure of the Church of England cannot be sustained. Accordingly, it is inappropriate to adduce aspects of the ecclesiology of the Church of England in support of arguments about the structure of the Protestant Episcopal Church in the USA.

A. The Church in the Colonial Era

7. One of the key differences between the Protestant Episcopal Church in the USA and the Church of England is that the former has a written constitution (it was surely the first episcopal church ever to have, and indeed derive its existence from, a document so named) whereas the latter has not. In order to understand the origins of that constitution it is necessary to look at the organization of the Church of England in the American colonies before the War of Independence.

8. It is often stated that the Anglican churches in the American colonies were under the jurisdiction of the Bishop of London before the Revolution, but such statements are misleading. At times Bishops of London had appointed commissaries to exercise jurisdiction on their behalf in some colonies, but the American jurisdiction of Edmund Gibson (Bishop of London from 1723 to 1748) derived from a commission to him personally; his successor Thomas Sherlock did not obtain such a commission and accordingly appointed no commissaries – after 1762 only Virginia had one.[12] Before the Revolution there were no formal structures linking the churches in one colony to those in other colonies, and indeed in most of the colonies there were no formal structures at all above the level of the parish or congregation. In the five southern colonies (Maryland, Virginia, North Carolina, South Carolina and Georgia), where the church was established, the authority of colonial governors and assemblies gave some coherence, but

[11] P. M. Doll, 'Autonomy or Communion? The Passion of the Episcopal Church', *Theology*, 2012, 427-435 at p. 428.

[12] P. M. Doll, *Revolution, Religion and National Identity: Imperial Anglicanism in British North America, 1745–1795* (London, 2000), pp 169–170, 176; Prichard, *History*, pp 30–31.

even here, local congregations enjoyed a large measure of autonomy.[13] What occurred after the Revolution was not the separation of an American structure from the Church of England or even the recreation of a previously existing structure, but the creation of a completely new church, of which the only continuing units were the parishes or congregations. That church was constructed on very different lines from the Church of England.

B. A Church Constructed from Below

9. One of the many differences between the Church of England and the Protestant Episcopal Church in the USA is that the former was constructed from above, with powers being delegated from the highest level to lower levels, whereas the latter was constructed from below, powers being delegated upwards.

10. While the Church of England has always had dioceses, in most of England (the area whose evangelization stemmed from the mission of St Augustine to Canterbury in 597) those dioceses have from St Augustine's time been under the authority of the metropolitan (later styled 'archbishop') of an ecclesiastical province. Parishes were formed only much later, in the tenth, eleventh and twelfth centuries (300-600 years after St Augustine's arrival) – a point made by the architect of the Episcopal Church, William White, in contrasting it with the Church of England.[14] In the Church of England dioceses were, historically, created by or under the authority of the province, the national church or the Crown. Parishes were historically, and continue to be, subdivisions of dioceses.

11. In the Protestant Episcopal Church in the USA the position was the reverse. After the Revolution the parishes or congregations created bodies known as 'the Protestant Episcopal Church in the State of X'. They may have been encouraged to do so by those who aspired to have a national church, but the original state churches[15] were created by the parishes and congregations, not by a national body. It has been pointed out that in some cases a state church with a convention had not been formally constituted, but where state churches had been

[13] Cf C. O. Loveland, *The Critical Years: the reconstitution of the Anglican Church in the United States of America 1780-1789* (Greenwich, CT, 1956), pp 7–8; P. M. Doll, *Revolution, Religion and National* Identity, pp. 169–170, 176; R. W. Prichard, *A History of the Episcopal Church* (revised edition: Harrisburg, PA, 1999), pp 30–31.
[14] W. White, *The Case of the Episcopal Churches in the United States Considered*, ed. R G Salomon, *Historical Magazine of the Protestant Episcopal Church*, 22 (1953), 433-506 at pp. 452-3.
[15] This term is a convenient modern usage. The contemporary usage was "The Protestant Episcopal Church in the State of X" (see below), as in "The Protestant Episcopal Church in the State of So. Carolina."

constituted it was representatives elected by their conventions and acting on their behalf that created the General Convention and thereby created the Protestant Episcopal Church in the USA. The General Convention was, historically speaking, the creature of the state churches and not vice versa.

12. To this day, dioceses are not formed by the General Convention. Article V of the Constitution of the General Convention states that 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' (emphasis added). This formulation 'with the consent of' makes it clear that dioceses are not formed by the General Convention. Furthermore, Article V is entitled 'Of Admission of New Dioceses' – a formulation that makes it clear that the dioceses exist before they are admitted into union with the General Convention. Dioceses are not creatures of the General Convention. By contrast, in England the right to create dioceses (and not merely consent to their creation) has always resided at the provincial or national level.

13. The historical priority of the dioceses over the General Convention makes it inappropriate, in discussing the structure of the Episcopal Church, to begin with the general or national church and work down, discussing second the dioceses and thirdly the parishes or congregations. To do so would tend to create a misleading impression that the dioceses were subordinate units created by the national church, which is not the case.

14. Two further differences from the Church of England are signified by the original names of the state churches and the national church. In both cases the preposition was 'in' rather than 'of' – 'The Protestant Episcopal Church in the State of New York' (for example) and 'The Protestant Episcopal Church in the United States of America'. (N.B. the use of the preposition 'in' for the state churches did not constitute or betoken any difference between them and the national church in this regard). Presumably it was the non-established nature of the national church and most of the state churches that gave rise to this usage; the churches concerned were in the political unit concerned but were not a manifestation of it or in any sense the property of it. Secondly, the term 'church in the State of' (rather than 'diocese', which betokens an area under the jurisdiction of a bishop) reflected the fact that, while clergy were required to have been ordained by a bishop, bishops were an optional element of church government and in the early

decades many state churches did not have them. Only from the 1838 was the term 'diocese' used in the Constitution and Canons of The Episcopal Church.

II. THE EPISCOPAL CHURCH'S 'POLITY'

15. Another difference between the Episcopal Church and the Church of England is that, because it has a written constitution that stands comparison with the Constitution of the United States (while differing from it in significant respects), there has been much discussion of whether it is essentially a federal, confederal or unitary body. There is no comparable discussion of the structure of the Church of England.

16. In my 2008 article, written close to the beginning of my research, I followed David L. Holmes, quoting the 1959 Ph.D. dissertation by the political scientist James Dator[16] (which at that point I had not read), in stating that the Episcopal Church is ultimately a unitary body, 'albeit with a highly decentralized structure and strongly confederal characteristics'. Since writing that article I have read Mark McCall's 2008 essay 'Is the Episcopal Church Hierarchical', the lightly edited version of Dator's dissertation which the national leadership of the Episcopal Church published in 2010,[17] and a great deal of other material. In consequence I now conclude that it is incorrect to characterize the Episcopal Church as a unitary body or the power of the General Convention as 'supreme and unlimited'. As will be seen from what follows, the dioceses which form or formed the Episcopal Church have an existence which, historically and legally, is independent of it and not derived from it. They are therefore not subordinate parts of a unitary body.

17. Dator and more recent commentators have reviewed earlier literature on the related questions of whether the constitution of the Episcopal Church is 'federal', 'confederal' or 'unitary' and whether a diocese, having become part of the Episcopal Church by acceding to the Constitution and Canons of the General Convention and being admitted into union with it, may later secede from it. How far the use of terms drawn from political science to characterize the structure of a church is appropriate is itself debatable. When weighing the views of earlier commentators, it is important to ask what motivations they may have had for writing as they did. Many of the nineteenth- and twentieth-century writers whose works are discussed in this context

[16] J. A. Dator, 'The Government of the Protestant Episcopal Church in the United States of America: Confederal, Federal, or Unitary?' (Ph.D. dissertation, American University, 1959).
[17] J. Dator with J. Nunley, *Many Parts, One Body: How the Episcopal Church Works* (New York, NY: Church Publishing, 2010).

were not neutral academic commentators but had a personal or ecclesiastical interest in the matters they were discussing. Where writers may have lacked impartiality, the correct answer cannot be arrived at by simply identifying a balance of opinion or predominant view among them. More generally, it is demonstrable that on any given question the majority opinion may not be the correct opinion.

18. That said, it is interesting to note that in the introduction to his dissertation Dator quoted eight nineteenth- and twentieth-century authors (and cited ten others) who characterized the Episcopal Church's 'polity' as 'federal', three who described it as 'confederal' and four (plus one citation) for whom it was 'unitary'.[18] One of the most significant changes to the dissertation when it was published in 2010 was that five of the eight 'federal' quotations were removed from the text (though the relevant authorities are still cited in a footnote), whereas this was accompanied by the removal of only one of the three 'confederal' quotations (albeit the one which concludes with the underlined statement 'That General Convention was and still is the freely constituted creature of the several independent dioceses, and not the dioceses of the General Convention') and one of the four 'unitary' quotations.[19] The effect on the casual reader who does not examine footnotes is to make the balance of opinion among the older authorities quoted seem equal.

19. Perhaps the most significant conclusion that one can draw from study of earlier writings of the subject of the 'polity' of the Episcopal Church is that the nature of that 'polity' has been the subject of scholarly dispute for the best part of two centuries. Dator recognized that one reason for the contrary opinions is that 'some of the crucial points concerning the church's constitutional structure are genuinely open to varying interpretations because the facts about them are inconclusive.'[20] Presentations which fail to recognize this lack credibility.

## III. HIERARCHY AND ECCLESIAL DENSITY

### A. Hierarchy

20. One of the issues under discussion is that of whether the Episcopal Church can be categorized as 'hierarchical'. One difficulty which besets this discussion is that 'hierarchical' is

[18] Dator, Dissertation, pp. 4-9.
[19] Dator with Nunley, *Many Parts, One Body*, pp. 2-4.
[20] Dator with Nunley, *Many Parts, One Body*, p. 4.

in origin an ecclesiastical word (the Greek word means 'government by priests'), referring to an organized priesthood in successive grades, but it has come to have different meanings in general discourse and a specific meaning in American legal discourse.

21. The Church of England is governed by its bishops, with a form of governance that could be loosely be described as 'constitutional monarchy'. Bishops in their dioceses and the House of Bishops in the General Synod enjoy powers that are not equal to or shared with bodies of clergy and laity. By contrast, the governance of the Episcopal Church is more appropriately characterized as democratic and egalitarian. In the diocesan conventions the bishop tends to have a single vote among the clergy, and in the General Convention the House of Bishops and the House of Deputies (clergy and laity) are broadly equal.

22. In both churches there is at least a degree of hierarchy in the second ecclesiastical sense of 'an organized priesthood in successive grades', but this is much more true of the Church of England than it is of the Episcopal Church. Both churches have a threefold ministry of bishops, priests and deacons and in both the deacons and priests are subject to the bishops.

However, there is an important difference, Canon C 14 of the Canons of the Church of England provides that

> 'Every person whose election to any bishopric is to be confirmed, or who is to be consecrated bishop or translated to any bishopric or suffragan bishopric, or who is to be licensed as an assistant bishop, shall first take the oath of due obedience to the archbishop and the metropolitical church of the province wherein he is to exercise the episcopal office in the form and manner prescribed in and by the Ordinal.'[21]

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[21] The Canons of the Church of England (7th edn: London: Church House Publishing, 2012), Canon C 14 ('Of the Oaths of Obedience'), para. 1. Under Canon C 13 bishops must also (like other clergy and office holders) take the standard Oath of Allegiance to the Sovereign. Furthermore, diocesan bishops must, after the confirmation of their election (which makes them the bishop of the diocese and confers on them the spiritual jurisdiction over it) and before their enthronement, do homage to the Sovereign. They appear before Her Majesty in person and the "Oath of Homage" which they are required to take by the Appointment of Bishops Act 1533 is administered to them by the Secretary of State for Justice in his capacity as Lord Chancellor, the Clerk of the Closet holding the Bible open at a passage chosen by the bishop. The current form of this "Oath of Homage", as supplied to me by the Clerk of the Closet, is as follows:

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

The oath contained in the 'Form of Ordaining or Consecrating of an Archbishop or Bishop' in Ordinal of 1662 (published with the 1662 Book of Common Prayer) reads as follows:

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

Thus in the Church of England all bishops have to swear and oath of obedience not only to the Archbishop of the Province but also to the 'Metropolitical Church' (i.e., Canterbury Cathedral or York Minister). This is because the Archbishop has metropolitical jurisdiction over the province and when the archiepiscopal see is vacant that jurisdiction is exercised by the Chapter of the Metropolitical Church as 'guardian of the spiritualities'.[22] By contrast, though bishops of the Episcopal Church are obliged to make the Declaration of Conformity set out in Article VIII of the Constitution of the General Convention (which includes the words 'I do solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church'), they are not obliged to swear an oath of obedience to any person or body and do not in fact owe obedience to any person or body. The Presiding Bishop is not a metropolitan and the 'National Cathedral', in which the Presiding Bishop has a seat, is not a 'metropolitical church'. Neither the Presiding Bishop nor the National Cathedral has any jurisdiction over the dioceses of the Episcopal Church. The bishops and dioceses of the Episcopal Church are not hierarchically subordinate to them as the bishops and dioceses of the Church of England are to the Archbishop of the Province and the Metropolitical Church.

[22] The repeal of Canon C 19, which made explicit provision for guardianship of the spiritualities, in 2000 did not abolish the role of guardian of the spiritualities because the Canon only declared what the law already was in that regard. Draft Amending Canon No. 21 will reinstate Canon C 19 in modified form. See Draft Church of England (Miscellaneous Provisions) Measure and Draft Amending Canon No. 31: Explanatory Memorandum (GS 1866X/1877X (London: General Synod, 2012), p. 9.

The metropolitical jurisdiction of the Archbishops of Canterbury and York over their respective provinces is described in Canon C 17 of the Canons of the Church of England as follows:

> 'The archbishop has throughout his province at all times metropolitical jurisdiction, as superintendent of all ecclesiastical matters therein, to correct and supply the defects of other bishops, and during the time of his metropolitical visitation, jurisdiction as Ordinary, except in places and over persons exempt by law or custom.
>
> 'Such jurisdiction is exercised by the archbishop himself, or by a Vicar-General, official, or other commissary to whom authority in that behalf shall have been formally committed by the archbishop concerned.'[23]

The most recent example of an archiepiscopal visitation is that of the Diocese of Chichester, which commenced on 21 December 2011, when the then Archbishop of Canterbury appointed two commissaries to conduct an enquiry into the operation of diocesan child protection policies in the Diocese of Chichester. The legal instrument signed by the Archbishop directed that 'during the period of the Visitation, all issues relating to Safeguarding within the Diocese shall be dealt with solely by those persons to whom the Archbishop may from time to time make delegation in writing, and by no other'. It further provided that the suspension of the jurisdiction of the diocesan bishop and all others with ordinary jurisdiction within the Diocese for which Canon G 5 provides should have effect only in relation to the Safeguarding matters referred to in the instrument.[24]

In the Episcopal Church, by contrast, the Presiding Bishop (though recently empowered to suspend diocesan bishops for disciplinary reasons[25]), is not a metropolitan; she does not have

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[23] Canon C 17, paras 2-3. Further provision for visitations is made in Canon G 5.
[24] 'Visitation of the Diocese of Chichester': http://rowanwilliams.archbishopofcanterbury.org/canterbury//data/files/resources/2300/20111222091741619.pdf, accessed 1 April 2013.
[25] Under Canon IV.7.3 'If at any time the Bishop Diocesan determines that a Member of the Clergy may have committed any Offense, or that the good order, welfare or safety of the Church or any person or Community may be threatened by that member of the Clergy, the Bishop Diocesan may, without prior notice or hearing, (a) place

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any jurisdiction over the dioceses of the Episcopal Church and has no power to assume or exercise such jurisdiction in any circumstances. The General Convention (which meets only every three years) is a legislative, not an executive body. It has the power to legislate by canon but does not otherwise have any power to direct individual diocesan bishops to do or desist from doing specific acts. Nor does the Executive Council of the Episcopal Church have any such power. Thus there is no national body that has the metropolitical jurisdiction that the Presiding Bishop lacks. No person or body in the Episcopal Church which is outside or beyond a diocese can intervene in the life of the diocese and exercise jurisdiction within it in the way that the Archbishop of the Province can and does in the Church of England. In that respect, the dioceses of the Episcopal Church are sovereign, whereas the dioceses of the Church of England are hierarchically subordinate to the Archbishop of the Province.

23. In ecclesiastical terms, though the Episcopal Church has retained elements of hierarchy, it is not hierarchically structured in the way that the Church of England is.

B. Ecclesial Density

24. The concept of 'ecclesial density', introduced by Harding Meyer in 1980,[25] which has become a commonplace of ecclesiological discussion, is relevant to the discussion of whether the Episcopal Church is a 'hierarchical' church in the American legal sense. In ecclesiological terms, the question of whether the Episcopal Church is a 'hierarchical' church may be rephrased as a question as to which level of church life possesses the greatest 'thickness' or has the greatest weight. In my judgement, in the Episcopal Church it is the diocese which possesses the greatest ecclesial density. A number of factors suggest this.

25. The dioceses of the Episcopal Church have their own constitutions and canons. The power to adopt and amend a diocesan constitution and the power of diocesan conventions to

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restrictions upon the exercise of the ministry of such Member of the Clergy or (b) place such Member of the Clergy on Administrative Leave.' Canon IV.17.2 provides that if the member of the clergy is a bishop 'Bishop Diocesan shall mean the Presiding Bishop'.

[25] M. Root, 'Christian World Communions and the CUV Process', *Ecumenical Review*, 50 (1998), pp. 330-7, at p. 16.

legislate by canon are not conferred by the General Convention. Rather, as Robert Prichard has written, 'the national General Convention assumed the existence of diocesan constitutions... and canons'.[27] The Constitution and Canons of the General Convention include no articles or canons entitled 'Of diocesan conventions' and indeed no canon 'Of dioceses'. Article XI of the Constitution ('Of Dioceses and Missionary Dioceses') addresses only the interpretation of the term 'diocese'. There is no requirement for amendments to diocesan constitutions to be notified to, still less ratified by, the General Convention. By contrast, English dioceses do not have constitutions. The English diocesan synods were created, and their powers specified and limited, by the Synodical Government Measure 1969, a statute passed by the General Synod's predecessor the Church Assembly.

26. One of the most significant indications of 'ecclesial density' residing at the diocesan level (with a corresponding lack of 'ecclesial density' at the level of the General Convention) is the provision for voting in the General Convention.

27. It should first be noted that the dioceses do not have a number of representatives that reflects their size. Rather, each diocese – however larger or small – has four clergy and four lay representatives. The dioceses are units and not merely electoral constituencies. By contrast, in the General Synod of the Church of England, the dioceses generally have a minimum of three (in two cases, two) representatives in the House of Clergy and the House of Laity, but the precise number reflects the numbers of clergy and laity in the dioceses concerned, the Diocese of London having ten members in each House. Thus, in the Episcopal Church it is the dioceses that are represented in the General Convention, whereas in the Church of England it would be truer to say that it is the membership of a national church, arranged in dioceses, that is represented.

28. Article I.5 of the Constitution of the General Convention provides that the clerical or lay representatives of any three dioceses may require that the House of Deputies vote by orders (i.e. that clergy and laity vote separately). For some questions, a vote by orders is mandatory. In a vote by orders, each diocese has a single vote in each order, and for the question to be carried, a majority of dioceses must vote in favour in each order. So on important issues the House of Deputies is a body in which, effectively, it is the diocesan deputations that vote, not the members as individuals. Thus, the House of Deputies is ultimately an assembly of deputations of

[27] Prichard, 'The Making and Re-Making of Episcopal Canon Law', p. 5 (emphasis added).

diocesan churches, each casting a single block vote in each 'order' on behalf of its diocese. In that sense, the General Convention is not the synod of a single church in which the members vote as individuals but the convention of an association of diocesan churches in which, in each 'order', each diocese has one vote.

29. It has been stated that the General Convention ratified its own constitution. While in one sense this is true, the statement is misleading. The 1786 draft Constitution provided that it would be ratified 'by the Church in a majority of the States assembled in General Convention'. Thus, the Constitution was not ratified 'by the General Convention' but by 'the Church in a majority of the States', though the General Convention was the forum in which this occurred. That is an important difference which signified that the weight lay not with the General Convention as the sovereign body or synod of a single church, but with the state churches (later dioceses).

30. In 1901 the provisions for amending the Constitution of the General Convention were themselves amended. From 1789 the relevant article had specified that amendments would be made 'in General Convention by the Church in a majority of the States', but since 1901 it has instead specified that amendments are to be made 'by the General Convention'. This removed a previous ambiguity, whereby it was not clear whether the majority of the clergy and a majority of the lay deputies of a diocese had to concur in order for that diocese to be taken as having voted in favour of the amendment.[28] However, Article XII still requires that amendments are proposed at one regular meeting of the General Convention, notified to each diocesan convention, and then adopted at the next regular meeting of the General Convention, and that concurrence by the orders shall 'require the affirmative vote in each order by a majority of the Dioceses'. Diocesan voting has thus not been removed but continues. It is important to bear in mind that the House of Deputies is elected afresh for each regular meeting of the General Convention. Thus each diocesan convention elects its deputies in the knowledge of any amendments to the Constitution of the General Convention that are to be considered at the next regular meeting of the General Convention. In each 'order' the deputies of each diocese cast a

[28] R. A. White and J. A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church, adopted in General Conventions 1789–1979* (New York, 1981), pp. 140-145.

single vote, and in each order a majority of the dioceses must vote in favour for the amendment to be passed.[29]

31. The Episcopal Church is a church in which dioceses have an inherent right, not conferred by the national church, to adopt their own constitutions, and to amend them without reference to the national church. It is a church in which the national body is the creature of the dioceses (some of them, such as South Carolina, pre-existing the national body) and enjoys those powers which they, through their deputies, have delegated to it. It is a church in which the dioceses have equal rather than proportionate representation in the national body, and in which, on important questions, voting in the national body is by diocese not by individual members. In such a church, the diocese may be said to possess much greater 'ecclesial density' than the national church. The location of 'ecclesial density' at the diocesan, rather than the national level, militates against characterization of the Episcopal Church as an hierarchical church in the American legal sense of a church in which the 'lower' units are subordinate to a national legislative body. As has already been stated, the dioceses are in no sense subordinate to a national executive body or individual (other than in the specific matter of ecclesiastical discipline, for which a national system has been created).

## IV. DISASSOCIATION OR WITHDRAWAL

32. It will be understood from what has already been said about the nature of the Church of England that it has never been suggested that a diocese could unilaterally withdraw from the Church of England (though dioceses have been separated from it by action of the Crown or Parliament). By contrast, the question of whether dioceses, having acceded to the Constitution and Canons of the General Convention, may revoke their accession and withdraw has been discussed since the formation, during the American Civil War, of the Protestant Episcopal Church in the Confederate States of America. James Dator devoted eight pages to this question in the published version of his dissertation and admitted that 'the answer is more involved' than the answer to the question of whether dioceses could 'nullify' legislation of the

[29] When the Constitution is viewed in this way, the absence (which I noted in my 2008 article) of a provision comparable with that in the Constitution of the Church of England's General Synod, which permits it finally to approve certain measures, canons or schemes only if the proposals have previously been approved by the houses of clergy and laity of a majority of the diocesan synods, becomes understandable.

General Convention while remaining part of the Episcopal Church.[30] That the question concerning withdrawal has been recognized as a serious question is itself an indication of a significant difference between the Episcopal Church and the Church of England and of a certain lack of 'ecclesial density' on the part of the former.

33. The extent to which the dioceses in the Confederate States wished to separate from the Episcopal Church has been debated. What seems to be generally accepted is that, in the opinion of the Southern dioceses, the Episcopal Church was not such a unitary church that agreement of the General Convention was necessary in order for the relationship between it and some of the dioceses formerly represented in it to be severed. They also took the view that they were empowered to create a new body, the General Council of the Protestant Episcopal Church in the Confederate States of America, just as the original dioceses had created the General Convention.

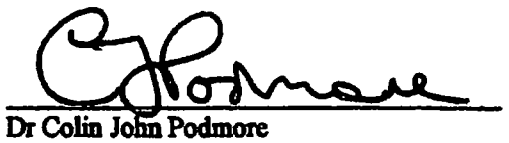
34. In my 2011 *Theology* article I observed that Dator's conclusion that dioceses cannot secede from the Episcopal Church is arguably his weakest, being essentially a conclusion from the silence of the Constitution of the General Convention on that point.[31] I failed to mention that his conclusion is also a qualified one. He states that 'the right of dioceses to secede from the American Episcopal Church was asserted by most Southern dioceses during the American Civil War', though denied by the rest of the Church. He then qualifies his conclusion that 'a diocese cannot secede without the permission of the General Convention' with the observation that 'the "National Church Theory" and socio-political factors that are not part of the church's constitutional structure, similar to those of the Civil War, may alter the constitutional situation independently of General Convention's wishes'.[32] Thus Dator conceded both that at the time of the Civil War a number of dioceses took the view that secession was possible and also that the individual dioceses are not inseparably part of the structure of the Episcopal Church and can in fact, in certain circumstances, be separated from it without the agreement of the General Convention – a concession which must qualify his characterization of the Episcopal Church as a 'unitary' body.

[30] Dator with Nunley, *Many Parts, One Body*, pp. 118-125.
[31] Dator with Nunley, *Many Parts, One Body*, p. 117.
[32] Dator with Nunley, *Many Parts, One Body*, p. 125.

35. There is no provision in the Constitution of the General Convention that would preclude it from providing (after notifying diocesan conventions of the proposal) that dioceses, having acceded to the Constitution and Canons of the General Convention, may not revoke such accession and thereby secede from the Episcopal Church. The important point is that the General Convention has in fact never made any such provision.

## V. DECLARATION

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 6 April, 2013.



Dr Colin John Podmore

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COUNTY

# Exhibit 11

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

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

Pursuant to 28 U.S.C. § 1766, I, Gillis J. Harp, declare the following:

1. I am Gillis J. Harp. I am a Professor of History at Grove City College, Pennsylvania.

2. I earned my M.A. and Ph.D. in American history from the University of Virginia (in 1980 and 1986, respectively). I have spent more than twenty-five years teaching American history at the college/university level.

3. I have conducted research in American religious history and published in scholarly, referenced academic journals, including *Church History* (twice) and *Anglican & Episcopal History* (twice). I am also the author of the intellectual biography *Brahmin Prophet: Phillips Brooks and the Path of Liberal Protestantism* (Rowman & Littlefield, 2003).

4. I have been asked to offer my opinion with respect to the polity of The Episcopal

Church particularly as it relates to Dioceses and Bishops in that religious denomination. The following are opinions that I hold based on my experience and training as a professional historian and teacher.

5. The dioceses in TEC could be described as hierarchical, but the body defined by the Preamble to the Constitution as a constituent member of the so-called Anglican Communion is not within any hierarchy, either of TEC or of the "Anglican Communion." The Dioceses of TEC are not subordinate units of a hierarchical religious denomination. Any decision of a Diocese in TEC to disaffiliate from the national denomination is fully in accord with the Constitution and Canons of TEC.

6. TEC (originally designated the Protestant Episcopal Church in the USA, or PECUSA) was organized as a confederation of pre-existing state churches (or Dioceses) which were self-governing entities that publicly affirmed their autonomy. The agreement by which the national church was constituted implicitly acknowledged the reliance of the national church on the voluntary cooperation of its component Dioceses.

7. The national church historically has exercised no control over sovereign Dioceses, but has relied and continues to rely on the cooperation of Dioceses and diocesan bishops for enforcement of its Canons. Neither the Presiding Bishop, the Executive Council of TEC enjoys any authority over the Dioceses. The General Convention is not TEC's supreme authority and lacks any mechanism of enforcement. There is no supreme judicatory body, but there are Ecclesiastical Courts for the discipline of members of the clergy, namely, a denominational system for the trial of bishops for canonical offenses and any appeals from such trials. At the same time, each diocese has a trial court established to try cases for deacons and priests charged with such offenses with a Court of Review at the Provincial level for appeals from the judgments

of diocesan trial courts.

8. No provision of the TEC Constitution gives General Convention the authority to overrule the actions of a diocese or the provisions of its constitution and canons.

9. The TEC Constitution is distinct from the U.S. Constitution, but this is because it *lacks* a Supremacy Clause, the very feature that was considered essential to the new constitutional arrangements of the post-1789 Republic. TEC, by contrast, retained a model of ecclesiastical government that was far more reminiscent of the Confederation era (under the Articles of Confederation) and that fundamental difference has endured down to the present day.

10. The process of forming a Diocese always begins at the local level and Dioceses are considered subsequently to be "received into union" with the General Convention. There is no provision for requiring that any change to a diocesan constitution be approved by the General Convention after its reception and such constitutions vary considerably in form. The TEC Constitution makes no provision for diocesan disaffiliation because the Dioceses are the creators of the General Convention not its creatures. From the very beginning in 1789 until now, TEC was an unincorporated association, originally organized by nine dioceses that adopted its original Constitution. That Constitution provided for the admission of other "Protestant Episcopal Churches" upon accession to the Constitution. The dioceses that adopted the Constitution did not "accede" to it. One should note that the reference was not to dioceses, but to other Protestant Episcopal Churches, presumably in the new United States of America, since the Constitution was for Protestant Episcopal Churches in the U. S. A.

11. The polity of TEC does not mirror The Church of England. Any suggestion that it does would be fanciful. The monarch of England has the title of "Supreme Governor of the Church of England," admittedly a kind of fiction today. In each of the Provinces of Canterbury

and York, there is an Archbishop under the authority exercised by the Supreme Government which is in fact the Supreme Governor and each of those two has ordinary authority over all of the diocesan bishops in his Province and those bishops in their dioceses have similarities with and differences from a diocesan bishop of TEC. Although the phrase "Anglican Communion" is widely used, no single "Anglican Church" with universal juridical authority has been created, because every national or regional church is fully autonomous. Being in communion means, *ideally*, that there is agreement on essential doctrines and that participation in the sacramental life of each constituent church is available to all communicant Anglicans.

12. Informed commentary on the government of TEC has varied widely in its view of diocesan autonomy. Those arguing for the supremacy of the General Convention, however, tended to ground their arguments in the language of church tradition rather than that of the TEC Constitution. Between 1895 and 1901, TEC considered a proposal to introduce language of supremacy and exclusivity with respect to the General Convention, but ultimately rejected it. In the first half of the twentieth century, various commentators – including a committee of the General Convention, a bishop and two seminary professors – all attested to the enduring autonomy of the Diocese as an ecclesiastical unit.

*-signature page to follow-*

**I declare under penalty of perjury that the foregoing is true and correct.**

**Executed on April_11_, 2013.**

Gillis J. Harp

**Dr. Gillis Harp**

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# Exhibit 12

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

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

I, Jeremy Bonner, being over the age of eighteen (18) years and fully competent to make this expert affidavit, hereby represent that the facts and opinions in this affidavit are based on my personal knowledge, and, if sworn as a witness I can testify competently to the facts and opinions as stated. Accordingly, being duly sworn according to law, I state the following:

a. I am a professional historian currently residing in Sheffield, England.

b. I received my Bachelor's degree in history from the University of Durham, England, and my Ph.D. in American history from the Catholic University of America in 2001. I also received a Master's degree in political science from the Catholic University of America in 1994.

c. Since 2001, I have served as an adjunct professor, as local circumstances permitted. I taught courses in history and political science at Robert Morris University in western Pennsylvania in 2008, a course on the American religious experience at Duquesne University in Pittsburgh in 2009, and led two seminar groups for the US Survey at the University of Sheffield in 2012.

d. My principal occupation over the past ten years has been that of a historian and researcher, with particular interests in nineteenth and twentieth century American religious history, most notably that of The Episcopal Church (TEC). From 2001 to 2002, I was the J. Franklin Jameson Fellow at the Library of Congress, in which capacity I produced an article on the career of an early twentieth century priest-activist. This subsequently appeared in the September 2003 issue of the journal *Anglican and Episcopal History*. From 2005 to 2007, I was retained by the then Episcopal Diocese of Pittsburgh to write an account of Anglican and Episcopal endeavors in southwestern Pennsylvania, which was published by Wipf and Stock in 2009 under the title *Called Out of Darkness Into Marvelous Light: A History of the Episcopal Diocese of Pittsburgh, 1750-2006*. This

study was favorably – though not uncritically – reviewed by Anglican historian and sociologist Miranda Hassett in the December 2009 issue of *Anglican and Episcopal History*. In 2007, I delivered a paper at the annual meeting of the Organization of American Historians on the subject of ecclesiastical authority, as manifested both within TEC and between TEC and the wider Anglican Communion. I am the editor for a collection of essays on the Kikuyu Conference of 1913 and its long-term implications both for the Church of England and the Anglican Communion.

e. I have published articles on twentieth century Mormonism, religious culture, American politics and the Catholic Church in the United States. My first book, *The Road to Renewal: Victor Joseph Reed and Oklahoma Catholicism, 1905-1971*, published by the Catholic University of America Press in 2008, explored the impact and the limits of institutional change in a distinctly hierarchical church body in an era of wide-ranging social transformation. A collection of essays entitled *Empowering the People of God: Catholic Action before and after Vatican II*, for which I am the principal editor, will be published by Fordham University Press in 2013.

f. I have been requested to render expert opinions in the following general area within my professional expertise: the current and historical organization and structure of the Episcopal Church, with particular reference to the nature of the compact of 1789. In my opinion, sovereign Dioceses constituted themselves as a national church that lacked both the institutional structures and supremacist language that are generally understood as constitutive of legal "hierarchy," thus leaving any Diocese free subsequently to nullify that compact.

g. My conclusions are based on a decade of study and publication in the fields of American history, American religious history, and the history of Anglicanism. I have extensively reviewed the Journals of the General Convention of the Episcopal Church; the diocesan journals of the Diocese of South Carolina; the Constitution and Canons of the Episcopal Church; the constitution and canons of the Diocese of South Carolina; Episcopal journals that address the questions of authority and property as they pertain to the Church; contemporary accounts of the Episcopal Church; standard Episcopal Church histories; and modern monographs dealing with the history of the Episcopal Church. All opinions expressed herein are made within a reasonable degree of certainty within my above-described areas of expertise. The authorities I have relied and based my opinions upon and the publications and sources footnoted herein are the type reasonably relied upon by experts in my above-described areas of expertise in forming opinions or inferences upon the subjects identified.

g. This affidavit constitutes a response to the affidavits of Robert Bruce Mullin and Walter Edgar filed on March 7, 2013.

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- Before 1776, the Anglican Churches in the Colonies were unconnected entities and, in the case of those Colonies with established Anglican Churches looked to the State Assembly (and the Governor) for their primary authority.

- The apparatus of the national church that has developed over time, including the Office of the Presiding Bishop and the Executive Council, has not and does not exercise supreme authority over the Dioceses.

- Dioceses are autonomous state entities that elect to "come into union" with the General Convention. They elect their own bishops, who may be deposed by the House of Bishops but cannot be replaced.

- Parishes are, for the most part, subordinate units of a Diocese, but their subordination has no implications for the parent organization.

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- The process by which the State Churches in Virginia and Maryland organized themselves in the early 1780s demonstrates that the constitutive unit of TEC was the Diocese (State).

- The General Conventions of 1785 and 1786 were vested with no authority and were simply deliberations by persons appointed by the State Conventions for the purpose of discussing a basis for common union.

- In both Maryland (1783) and Pennsylvania (1784) the State Conventions adopted declarations attesting to the fundamental principles on which they believed a

national church should be organized. Both stressed the importance of leaving the Dioceses (States) free to regulate their internal affairs.

- In Connecticut, the State Church unilaterally elected a bishop without reference to the views of Anglicans outside New England and vested their candidate with the authority to seek consecration from a body then out of communion with the Church of England. Such actions were reflective of a body that considered itself at liberty to make autonomous decisions.

- The State Churches in New England and those outside New England held such markedly different views on a variety of issues that the only possible compact was one that rested upon the agreement of the sovereign Dioceses to cooperate rather than upon their mutual submission to a common authority. The Constitution and Canons of 1789 reflected that reality.

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- The constitutions or acts of association of the Dioceses (States) who ratified the TEC Constitution and Canons in 1789 were not terminated at the time of ratification but remained in force throughout. In the absence of language of supremacy, subordination, exclusivity, preemption or finality, these constitutions were never subordinated to the TEC Constitution.

- TEC did not ratify its Canons before its Constitution and it is the Constitution that has served as the governing instrument of TEC since 1789.

- There is no language of supremacy in the TEC Constitution of 1789. In the absence of a national judicial system, all enforcement power rests with the Dioceses who are free to uphold or ignore the Constitution's provisions as they see fit.

- The TEC Constitution of 1789 was not ratified by the General Convention but by the Dioceses (States) assembled in the General Convention, thereby signifying the sovereign status of the Dioceses.

- The language of diocesan accession to the TEC Constitution varies dramatically from Diocese to Diocese and thirteen Dioceses have no Accession Clause. Accession can be qualified.

- The TEC Canons are only as effective as the Dioceses choose to make them. The General Convention has no power to penalize noncompliance.

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- An established Diocese is an autonomous corporate entity with which the General Convention cannot interfere. During both the nineteenth and twentieth century, national Canons were frequently ignored by Dioceses.

- The General Convention prescribes ordination requirements and clerical practices for priests and deacons, but it is the bishops and Standing Committees of Dioceses who interpret and enforce these requirements and practices.

- Despite enacting Canons relating to church property, the General Convention has no responsibility for parish and diocesan property under the Constitution.

- The process of clerical discipline is administered by diocesan courts and there is no national judicatory.

- The Church Pension Fund was and is a voluntary contribution scheme for all clergy, which has attained almost universal acceptance not because it was mandatory but because it was and is successful.

- The lack of supremacy of the General Convention is explicitly demonstrated in its deference to diocesan agencies, the absence of a judicial apparatus above the diocesan level and the manner in which the national church raises money from its Dioceses.

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- Those who argued for the supremacy of the General Convention grounded their conclusion less in the language of the TEC Constitution than in references to historic traditions and practices of the Church which this Court may be constitutionally precluded from examining.

• There is no evidence of a specific prohibition of diocesan withdrawal in the TEC Constitution and Canons.

• Other nineteenth century authorities, most notably Thomas Vail, accepted the principle that ultimately a Diocese had "*a right to withdraw from the connexion [with the General Convention] whensoever it may please*."

• Between 1895 and 1901, TEC considered including language of supremacy and exclusivity in respect of General Convention legislation but ultimately *rejected* it.

• The principle of diocesan autonomy was affirmed by Bishops William Perry (1891), Alexander Garrett (1895) and William Manning (1944) and by Episcopal seminary professors Powell Dawley (1955) and Daniel Stevick (1965).

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• The Episcopal Church was organized as a federation of sovereign Dioceses, a distinctly different arrangement from the hierarchical Church of England and other hierarchical churches.

• The General Convention enacts national Canons pertaining to the general life of the Church, yet remains dependent for their enforcement on bishops, Diocesan Conventions and diocesan courts.

• The General Convention may not alter the existing boundaries of a Diocese without its consent or appoint leaders of its own choosing.

• The model of government for TEC is neither that of the Church of England nor one derived from the U.S. Constitution, but that practiced under the Articles of Confederation. The Diocese remains the unit represented at the national level and the General Convention has frequently conceded its dependence upon the Dioceses to achieve national goals.

• There is no language of supremacy in the TEC Constitution that would give General Convention enactments priority over diocesan legislation, nor does it contain language that upholds the principle of indissoluble diocesan accession.

## I. INTRODUCTION

**Dr. Mullin represents the present dispute as one between "the Church itself" and certain "separatists," yet disputes concerning the relationship of the Dioceses to the national church have been present within The Episcopal Church since its establishment in 1789, and many church leaders have written in support of the notion of inherent diocesan autonomy over the years.**

1.-2. Dr. Mullin's biographical data is uncontested.

3. While not contesting Dr. Mullin's delineation of his brief, his assertion that "former members" of The Episcopal Church have asserted a right "to control and use Episcopal diocesan and parish property for the mission of other churches," anticipates the final judgment of the court on a matter still in dispute.

4. Dr. Mullin's account of his research is uncontested.

5. Dr. Mullin purports to represent the present division as one between "the Church itself" and a group of dissidents now outside the Church, yet several of the signatories to the Bishops' Statement, who are diocesan bishops within TEC, disagree with Dr. Mullin's interpretation of Episcopal polity.[1]

6. Dr. Mullin's representation of the position of the "separatists," who include a majority of members of the Diocese of South Carolina, is basically accurate.

7. Dr. Mullin wrongly states that the "separatist" position assumes the Constitution of the Church to be analogous to the US Constitution. This is not the position held by the proponents of diocesan autonomy since the US Constitution contains the Supremacy Clause which accords the federal government some authority over the States. A better analogy, as will be shown below, is with the Articles of Confederation. That the Constitution "preceded, defines and limits the authority of the General Convention" has been a feature of many discussions in the General Convention, while the view that diocesan accession to the TEC Constitution and Canons is "merely a temporary and mutual agreement between independent sovereigns" has certainly been articulated by church leaders in the past. For Dr. Mullin to state that these claims have "no basis" in the historical record is disingenuous to a fault.

8. Dr. Mullin's assertion that TEC "has throughout its existence been, and has understood itself to be, a hierarchical church," is highly debatable. Evidence from at least as late as the 1950s suggests that many observers believe that diocesan participation in the work of the national church organization was entirely voluntary. An enduring pattern of diocesan disregard of national canons without corresponding sanctions by the General Convention suggests that the national canons served as an adjunct to diocesan authority and did not impose an *enforceable* "federal" mandate.
In drawing attention to the body of case law relating to ecclesiastical hierarchy, Dr. Mullin relies on

[1] See "Bishops' Statement on the Polity of the Episcopal Church," Anglican Communion Institute, April 22, 2009. http://www.anglicancommunioninstitute.com/wp-content/uploads/2009/04/bishopsstatement_pdf.pdf

the public perception of TEC as an institution whose organizational structure is analogous to that of the Roman Catholic Church. However, as will discussed below, the language of "accession" and "recognition" is not synonymous with that of submission, particularly given that the national church has consistently failed to adopt the constitutional language of supremacy that is generally assumed to denote "hierarchy" in an ecclesiastical context.

As Bishop William Howe of South Carolina put it in 1874:

> Our General and Diocesan Conventions are *only reflections of our civil forms of government; and, like reflection, without the substance of the reality and original*. The civil government has power to make laws and enforce them upon all its subjects, while our Convention, sometimes professing to make Canons for priests and people, can enforce none of them upon the laity. Our Canons, indeed, are *little more than the expression of what we think should be regarded as wholesome rules for regulating the outward demeanor of individual Christians and the affairs of the Diocese*. The chief benefit of our Conventions is the intercourse of cultivated minds, the interchange of mature thought, and the social mingling of churchmen with each other, annually, which create impressions of Christian sympathy and churchly feeling upon all who attend those meetings."[2] (Emphases added.)

9. Dr. Mullin's summary of the structure of his argument is not contested.

10. The Episcopal Church has had great difficulty "consistently understanding itself" to be *anything* over the course of more than two centuries and the authority and powers of the General Convention have been the subject of vigorous debate both within that body and outside it. This is convincingly demonstrated in a 1959 doctoral dissertation by James Dator, entitled "The Government of the Protestant Episcopal Church," a study that has been extensively cited by many supporters of TEC's position that the national church is supreme. Dator devoted much of his introduction to a recitation of conflicting views on the subject within the Church, at one point even observing that "some of the points concerning the Church's constitutional structure are genuinely open to varying interpretation because the facts about them are so inconclusive," a strangely ambivalent observation for one who subsequently concluded emphatically that the Church exemplified unitary government.[3]

Equally tendentious is Dr. Mullin's assertion that a Diocese once admitted into union with the General Convention may not subsequently withdraw or disaffiliate from the General Convention without the consent of that body. Since TEC's Constitution and Canons are silent on the issue of diocesan withdrawal and disaffiliation, it follows that the national church must first demonstrate formal supremacy over a Diocese before precluding it from exercising its sovereign rights.

## II. IN BOTH ITS COLONIAL ANTECEDENTS AND IN ITS PRESENT CHARACTER, THE EPISCOPAL CHURCH HAS ACTED AS A FEDERATION OF STATE UNITS WITH NO SUPREME NATIONAL AUTHORITY

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[2] *South Carolina Convention Journal*, 1876, 30.

[3] James A. Dator, *The Government of the Protestant Episcopal Church* (PhD dissertation, The American University, 1959), 1-12 (quotation on 9).

- **Before 1776, the Anglican Churches in the Colonies were unconnected entities and, in the case of those Colonies with established Anglican Churches looked to the State Assembly (and the Governor) for their primary authority.**

- **The apparatus of the national church that has developed over time, including the Office of the Presiding Bishop and the Executive Council, has not and does not exercise supreme authority over the Dioceses.**

- **Dioceses are autonomous state entities that elect to "come into union" with the General Convention. They elect their own bishops, who may be deposed by the House of Bishops but cannot be replaced.**

- **Parishes are, for the most part, subordinate units of a Diocese, but their subordination has no implications for the parent organization.**

- **The Episcopal Church is a constituent member of the Anglican Communion, a federation of autonomous national churches. The language of affiliation used to describe that relationship is very similar to that which describes the relation of the Dioceses to the General Convention.**

*A. The Colonial Church*

11.-12. The Colonial Anglican Church originated in the missionary activities of the Church of England, but the nature of that missionary experience and of the colonial churches that resulted from it varied considerably. Almost every colonial church was a law unto itself, running the gamut from the established churches of the Chesapeake Bay colonies to the missionary clergy of the Society for the Propagation of the Gospel and their congregations, who were barely tolerated by New England's Congregationalist establishment. Far from promoting uniformity, colonial Anglicans revealed considerable diversity in matters of liturgy, doctrine and governance. While it is true, as Dr. Mullin states, that New World congregations were technically under the oversight of the Bishop of London and of his special representatives (known as Commissaries), in practice they were subject—at least in colonies where the Church of England was established—to the direct oversight of colonial governors and elected local assemblies.

In 1632, the Virginia Assembly enacted laws on ministerial responsibilities, behavior and compensation with virtually no input from the Bishop of London or any convocation of the Church of England,[4] a fact attested to by one of TEC's earliest historians, Francis Hawks:

> On his arrival in the colony, [a new clergyman] applied to the governor (*who was in effect the chief ruler of the Church*), or to the parishioners of some vacant living, and sometimes to both; and if his ministrations were agreeable to the congregation, he was "*received*" (such was the term in use) as their minister. It must not, however, be

[4] John F. Woolverton, *Colonial Anglicanism in North America* (Detroit, MI: Wayne State University Press, 1984), 74-80.

> supposed that by being thus *received*, the clergyman acquired a permanent settlement. By the act of 1642, the induction of a clergyman "into any parish that shall make presentation of him," *was directed to be performed by the governor*; it was entirely at the option of the parish to make or withhold such presentation. Without induction, the clergyman was held to possess no freehold in his living, but was at any time liable to removal, at the pleasure of the vestry, without trial or even crime alleged against him. Under these circumstances, there were but few of the clergy who could consider their situations as permanent, for there were but few who could prevail upon their vestries to present them for induction. The general custom, therefore, was to hire the minister from year to year.[5] (Emphasis in original; underlined emphasis added.)

A similar state of affairs prevailed in Maryland, where the Church of England was made the established church by an act of 1700.[6] William White – the clergyman generally credited with the birth of TEC – was in little doubt as to how things stood during the early eighteenth century:

> For although the Bishop of London was considered as the diocesan of the Episcopal churches in America, it is evident, that his authority could not be effectually exerted, at such distance, for the removing of unwanted clergymen; *besides which, there were civil institutions supposed to be in opposition to it, in the provinces where establishments had been proclaimed*. In Maryland, in particular, all interference of the Bishop of London, except in the single matter of ordinations, was held by the proprietary government to be an encroachment on its authorities.[7] (Emphasis added.)

Establishment first came to South Carolina in 1704 and South Carolina proved as committed as the Chesapeake colonies to the local supervision of Anglican congregations, as embodied in the Church Act of 1706.[8] In the words of the first historiographer of the Diocese of South Carolina in 1820:

> The Church of England, then, may clearly be divided into the Spiritual and Civil Church . . . [which], in this two-fold capacity, never had existence in America . . . The right of advowson was given by Charter to the Lords Proprietor, but it was never exercised. Nor did the Founders or Benefactors of any Church or Chapel, posses this right in any part of the American Provinces. The Clergy were not placed over the Churches contrary to

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[5] Francis L. Hawks, *Contributions to the Ecclesiastical History of the United States, Vol. I: A Narrative of Events Connected with the Rise and Progress of the Protestant Episcopal Church in Virginia* (New York: Harper and Brothers, 1836), 88.

[6] On Maryland, see Francis Hawks, *Contributions to the Ecclesiastical History of the United States, Vol. II: A Narrative of Events Connected with the Rise and Progress of the Protestant Episcopal Church in Maryland* (New York: John S. Taylor, 1839), 97-98.

[7] William White, *Memoirs of the Protestant Episcopal Church of the United States of America* (New York: E. P. Dutton and Company, 1880; orig. pub. 1820), 15.

[8] On South Carolina, see Woolverton, *Colonial Anglicanism in North America*, 165; Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (New York: Macmillan: 1902), 125-128. The details of the Church Act of 1706 and subsequent articles passed between 1710 and 1713 can be found in Frederick Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina from the First Settlement of the Province to the War of the Revolution* (Charleston, SC: 1820), 437-464.

> the wishes of the Parishioners. The Bishop of London licensed the Clergy to officiate in this part of his Diocess (sic) and the Venerable Society sent them out as Missionaries to particular Parishes, but the people were called together by the law of the province, to elect their Ministers.[9]

From 1704 until the Revolution, the South Carolina Assembly asserted the sovereignty of the Colony over the established church in a number of ways, including the removal of Anglican clergyman Edward Marsden from office for maintaining that the General Assembly had no authority over ecclesiastical affairs.[10] So opposed were the local authorities to autonomous Anglican clergy that the leading English missionary agency, the Society for the Propagation of the Gospel (SPG), ultimately agreed only to send clergy who had been formally requested by local congregations.[11] Moreover, when the Society for the Relief of Widows and Children of the Clergy of the Church of England in the Province of South Carolina was organized in 1762, it was the first such society in North America whose funds came entirely from colonial contributors (most northern societies received financial assistance from the SPG).[12]

13.-17. Dr. Mullin's description of synodical government in the Church of England reflects a reality unknown to North America. Ironically, it was also unknown to most eighteenth century Anglicans for the Canterbury and York Convocations – the clergy synods which in the seventeenth century had been the principle authors of ecclesiastical legislation – had been prorogued indefinitely by King George I in 1717 and did not reassemble until the mid-nineteenth century.[13] Ecclesiastical legislation could still be enacted by the English Parliament, but colonial Americans were obviously barred from participation in that body.

The facts reported by Dr. Mullin are therefore true but irrelevant. While trans-provincial "convocations" of American clergy occurred during the mid-eighteenth century, they were not sanctioned by any ultimate authority, be it the Archbishops of Canterbury and York, the Bishop of London, or even the directors of the SPG. For example, at the 1766 Elizabeth Town convention of clergymen from the northern colonies, which sought to promote a "spiritual" episcopate for America, the participants admitted that their recommendations were purely advisory and could bind neither churches nor clergy.[14] When Dr. Mullin quotes John Fulton on synodical authority, moreover, he appears oblivious to the fact that after 1789 the Bishops of The Episcopal Church were explicitly barred from exercising jurisdiction outside their own Diocese. However much English synodical legislation might in theory be binding on the Church of England everywhere, the reality was that in much of North America—as noted above—it was the colonial assembly that

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[9] Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 420.

[10] Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 54-58.

[11] Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 42.

[12] Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 190-191.

[13] Norman Sykes, *Church and State in England in the XVIIIth Century* (Hamden, CT: Archon Books, 1962), 310.

[14] Frederick V. Mills, *Bishops by Ballot: An Eighteenth Century Ecclesiastical Revolution* (New York: Oxford University Press, 1978), 42-44.

dictated many, if not most, congregational practices.

18. Dr. Mullin is correct in stating that the concept of diocesan autonomy had "no standing in the world of Anglican Christianity in the Seventeenth and Eighteenth centuries," *but only outside North America.* The singular status of the North American Colonies within the British Empire also had implications for ecclesiastical entities within their boundaries. Bishop William Howe of South Carolina addressed this principle in an 1890 address to his diocesan convention on the consequences for the Church of England of the American Revolution giving rise to thirteen sovereign States:

> The Catholic Church in a nation is coterminous with the nation and goes by its name. Hence we have the Church of England; the Church of France; the Church of Spain, or in smaller civil divisions the Church of Ephesus; the Church of Pergamos. So here, South Carolina, having become a distinct and independent sovereignty, the "Church of England in South Carolina" became the Church of South Carolina, the Church of Georgia, the Church of Pennsylvania, the Church of New York; thus following the old rule of a close correspondence between civil and ecclesiastical division of territory.[15]

While schism was certainly deplored, separation from those deemed to be in error was accepted as necessary and even praiseworthy. Since Article XIX of the Articles of Religion declared the Churches of Jerusalem, Alexandria, Antioch and Rome to be in error in "matters of faith," separation from the Church of Rome could hardly be considered schismatic.

19. It is true that the American Revolution was a time of crisis for American Anglicans and this paragraph demonstrates the intended function of the future General Convention, namely to preserve "Anglican identity, traditions, and modes of worship." However, this did not entail the replication of the top-down hierarchical structure of the Church of England, but rather the adoption of a moral compact sustained by the willingness of a diverse body of American Anglicans to uphold doctrinal integrity.

Dr. Mullin argues that one goal of forming a new general church was to secure church property, but in most States the Revolution effected no change in property rights since the Church of England was no longer established and property was already vested in the various parish corporations.[16] In two states with established churches—Virginia and Maryland—the *first* instinct of local Anglicans was not to organize a national church but to seek to persuade the State legislatures to recognize Anglican claims to local property formerly reserved to the Church of England.

20.-21. While the issues raised by this paragraph will be addressed more fully below, it should suffice here to note that the formal object of "revival" addressed in the New Brunswick meeting of

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[15] *South Carolina Convention Journal*, 1890, 121-122.

[16] In South Carolina, the Anglican establishment survived until 1778, when it was converted into a general 'Protestant establishment.' Under the new state constitution, existing Anglican parishes were confirmed in the property that they already held, while other religious congregations were permitted to incorporate. The constitution of 1790 abandoned even a nominal establishment, opening South Carolina to a simple religious pluralism. Cobb, *The Rise of Religious Liberty in America*, 505-507, 517.

May 11, 1784, was not—as Dr. Mullin implies—the *Church* which had existed before the Revolution, but a "society that had existed under charters of incorporation from the governors of the said three states [New York, New Jersey and Pennsylvania], for the support of Widows and Children of deceased Clergymen."[17] It should be also be noted that the documentary record indicates that the Constitution was actually adopted in August 1789 along with the Canons, and subsequently readopted in revised form in October.

22. The governmental structure of the newly formed Episcopal Church departed significantly from that of the Church of England. The complete divorce of American Anglicanism from English erastianism (the idea that a particular church body be accorded preferential status by the state, something reflected—until 1829—in the requirement that Members of Parliament belong to the Church of England), the absence from The Episcopal Church of any ecclesiastical court system above the diocesan level, and the limited authority accorded to the bishops, all attested to an ecclesiology that was, at least by English standards, profoundly anti-hierarchical. It is also significant that, from the beginning, the constitutive unit of the General Convention was the Diocese. All subsequent attempts to substitute representation on the basis of population for the present equal representation for all Dioceses in the General Convention have been rebuffed. In the General Synod of the Church of England (and its predecessor, the Church Assembly), the Dioceses are unequally represented and no votes are conducted on the basis of a majority vote *by Dioceses*, only by a majority vote of all elected members.

Dr. Mullin's allusion to the distinctiveness of the TEC Constitution is part of an argument to which his critics do not subscribe, namely that if TEC be not hierarchical it must be federal. Internal evidence suggests, however, that the authors of the TEC Church Constitution drew not upon the US Constitution but the Articles of Confederation, which permitted constitutional language of applicability but not of priority, in crafting the structures of governance. Thus the General Convention can be described as the "highest authority," only in the same way that the Confederation Congress was the highest political authority, with all the limitations that this implies, and with the knowledge that a Church is a voluntary association and not a sovereign state.

*B. The General Church*

23. The existence of multiple tiers does not—in itself—establish a relationship of authority and subordination; only appropriate constitutional language can do that. The national church (through the House of Bishops) does exercise control over Missionary Dioceses, which are subordinate, but not over sovereign Dioceses. There is no language in the Constitution to sustain Dr. Mullin's position that Dioceses are "subordinate to" and "under the jurisdiction of" The Episcopal Church. Dr. Mullin's assertion of a basic equivalence between the Parish-Diocese and Diocese-National Church relationship runs counter to the historical record. This is only reinforced by the equivalence he subsequently ascribes to parishes and missions under the designation "local worshipping congregations," despite the fact that a parish is an incorporated entity with some of whose rights even a bishop cannot interfere, while a mission is subordinate to the bishop, who may appoint and dismiss its clergy and lay leaders at his pleasure.

24.-25. While the description of the General Convention's activities is basically accurate, the use of

[17] White, *Memoirs of the Protestant Episcopal Church*, 19.

the phrase "governed by" reinforces a notion of the General Convention's constitutional supremacy that cannot be sustained. The implementation of national Canons at the diocesan level has always depended on the readiness of diocesan conventions and/or bishops to enforce them, and the historical record suggests a sustained pattern of selective enforcement and non-enforcement that has persisted up to the present day. The General Convention has always depended largely upon the *moral authority* of its "authoritative statements" to achieve its ends, and it lacks any practical means of enforcement and—at least until the 1990s—never even *attempted* to claim otherwise.

26. The General Convention may "articulate" the Doctrine, Discipline and Worship of the Church, but that does not make it the *supreme* authority. There is not today—and has never been—a mechanism for sanctioning a *Diocese* that fails to enforce national Canons on any subject, nor has the General Convention even denied membership in the General Convention to a Diocese that has so acted or has failed to pay the whole of its apportionment. The national church has failed to establish a national court of ultimate jurisdiction (or even to designate the General Convention as such a court, a situation not unknown in other hierarchical churches), despite pressure to do so. To say that the General Convention "cannot be limited" in its actions is both to set aside the authority of the constitutional compact by which the original Dioceses constituted the Church and to ignore the reality of selective enforcement of national Canons by the various Dioceses over a period of more than 200 years.

27. The office of Presiding Bishop was originally the title accorded the senior bishop in order of consecration and the duties of the Presiding Bishop were designated by the rules of the House of Bishops and not specifically by Canon. Unlike the Archbishops of Canterbury and York, however, the Presiding Bishop lacked the status of a metropolitan and the basis of his authority was moral and collegial, not structural. "A grand principle of the Protestant Episcopal Church," wrote future Bishop Thomas Vail in 1841, "is – the primitive and absolute co-equality of Bishops; and hence this Church can never have any sympathy with the Church of Rome, which seeks to elevate one Bishop to a vast height above all other."[18] The nineteenth century Presiding Bishops even continued to have jurisdictional responsibility for a Diocese, while exercising the office.

The General Convention of 1919 made provision for the election of the Presiding Bishop and also designated him the president of the new National Council. In 1943, the General Convention approved an amendment requiring the newly elected Presiding Bishop to resign his Diocese and serve solely in an executive capacity. All Presiding Bishops since Henry Knox Sherrill (1947-1958) have conformed to that model.[19]

Although the contemporary *perception* is that the Presiding Bishop is the metropolitan of an Anglican province, it is important to realize that this was not always the case. Indeed, The Episcopal Church frequently revealed a strong aversion to the idea of a 'superior' class of bishop, a fact that led the Committee to Consider the Question of the Election of a Presiding Bishop to assure

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[18] Thomas H. Vail, *The Comprehensive Church or Christian Unity and Ecclesiastical Union* (Hartford, CT: H. Huntington Jr., 1841), 68.

[19] Standing Commission on Constitution and Canons of the Episcopal Church, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as the Episcopal Church* (New York: Office of the General Convention, 1981-82), 3rd Edition, 199-201.

the General Convention of 1925 that "there is no hint of there being given to the Presiding Bishop, such as seems to be feared by some, any archiepiscopal powers, authorizing any interference in the internal affairs of a diocese."[20]

Over thirty years later, when offered the opportunity to amend the Canons to allow the Presiding Bishop to be styled "Archbishop of the Church," the General Convention of 1958 declined to agree.[21] That position also prevailed in 1982, when the General Convention, while agreeing to add the designation "Primate," declined to comply with the recommendation of the Standing Commission on the Structure of the Church to substitute "Archbishop" for "Presiding Bishop," even though the Commission insisted that this would "place the Presiding Bishop on a titular par with other Anglican metropolitans, while implying no change in authority or any archiepiscopal jurisdiction."[22] Even John Hines (1964-1973), so often credited with the accretion of power in the office of Presiding Bishop, refused to allow use of the title "Most Reverend," precisely *because* it denoted an archbishop.[23]

Recent attempts to portray the Presiding Bishop as enjoying supreme authority over her fellow bishops have little basis in the institutional history of the office, at least as attested to by qualified experts. Consider the view of Powell Mills Dawley, professor of ecclesiastical history at the General Theological Seminary in New York, whose contribution to the *Church's Teaching Series* was one of the primary instruments of seminary instruction during the 1950s. The Presiding Bishop, he insisted in 1955, "exercises no direct pastoral oversight of a diocese of his own, nor does he possess visitational or juridical powers within the independent dioceses of the Episcopal Church."[24] For a more personal (and anecdotal) perspective, we may consult the memoirs of the first of the modern Presiding Bishops, Henry Sherrill:

> All kinds of questions came to the Presiding Bishop, for people have no idea that his power is rightly limited. Let a lay person be discontented with the affairs of the diocese: the simple solution is to write to the Presiding Bishop and then be unhappy when informed that the matter rests with the diocese.[25]

28. The Executive Council replaced the National Council (first organized in 1919) in 1964. Prior to 1919, the only incorporated national body was the Domestic and Foreign Missionary Society (DFMS), a body which no one believed exercised authority over the Dioceses. It is important to recognize that while a significant number of Episcopalians desired an authoritative national

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[20] *Journal of the General Convention*, 1919, 297.

[21] *Journal of the General Convention*, 1958, 180-181.

[22] Standing Commission on Constitution and Canons of the Episcopal Church, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as the Episcopal Church* (New York: Office of the General Convention, 1981-1982), 3rd Edition, 1991 Supplement, 21-22.

[23] Kenneth Kesselus, *John E. Hines, Granite on Fire* (Austin, TX: The Episcopal Theological Seminary of the Southwest, 1995), 218, 309-310.

[24] Powel M. Dawley, *The Episcopal Church and Its Work* (Greenwich, CT: Seabury Press, 1955), 106.

[25] Henry K. Sherrill, *Among Friends* (Boston: Little, Brown and Company, 1962), 223.

organization, they tended to be in a minority. Indeed, Alexander Lloyd, General Secretary of the Domestic and Foreign Missionary Society from 1899 to 1919, failed to be elected the first president of the National Council—a post he coveted—because, in the words of his biographer, he "was known to favor a highly centralized church government which might threaten diocesan autonomy, and to many bishops the Episcopal Church was properly conceived as a federation of autonomous units rather than a single body with administrative sub-divisions."[26]

Many of the new national structures continued to depend on the readiness of the Dioceses to cooperate with them. By 1925, much of the General Convention's time was devoted to emphasizing the limits of centralization. That year, the Committee on Amendments to the Constitution bluntly stated that the National Council was a canonical not a constitutional body and that any General Convention could exercise its right to repeal the Canon that had created it.[27] Bishop Thomas Gailor of Tennessee, the first president of the National Council, described his role as that of "explaining the new organization to the clergy and people of the church, and trying to win their approval of it and cooperation."[28] Addressing the Church Congress of 1928, soon-to-be Presiding Bishop James DeWolf Perry adopted much the same attitude:

> [The] National Council could no more expect to produce results, to bear fruit, without the co-operation and without the stimulation of parish and vestry and rector and individual layman than the tree could expect to bear fruit without the bough . . . If there is any semblance of distributing power in the National Council it is only because with great effort it has built up what is intended to be—simply the decentralizing power by which spiritual force may be felt in every part of our Land, and every parish and every priest and every vestry may be stronger for its exercise.[29]

Such weaknesses became all the more apparent during the 1960s, when opposition to some of the programs proposed by Presiding Bishop John Hines of Texas, led Bishop Charles Kinsolving of Rio Grande to announce that his Diocese would cease to pay its national assessment.[30] As Hines' biographer makes clear, while these programs did not directly involve questions of diocesan autonomy (the grant recipients were—intentionally—not Episcopalian), even its implicit challenge ended in failure:

> Hines wanted the Episcopal Church to be not just an aggregation of dioceses but a national entity with an ability to make powerful and effective witness in the American community. Bishops accepted this override because they felt compelled to respond to widespread violence that they feared might end in a terrible national catastrophe. This experiment in bypassing their authority was an aberration. It lasted only three years,

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[26] Alexander K. Zabriskie, *Arthur Selden Lloyd: Missionary, Statesman and Pastor* (New York: Morehouse-Gorham Co., 1942), 219.

[27] *Journal of the General Convention*, 1925, 280.

[28] Thomas F. Gailor, *Some Memories* (Kingsport, TN: Southern Publishers, Inc., 1937), 221.

[29] *Forthright Opinions Within the Church: A Record of the Church Congress in the United States on Its Forty-Fifth Anniversary* (New York: Charles Scribners Sons, 1928), 212.

[30] Kesselus, *John E. Hines*, 331.

proving that such a policy could not survive in the Episcopal Church and suggesting the validity of Stephen Bayne's conclusion that it could not "act together, with power, in anything except safe programs of minor impact."[31]

*C. The Dioceses*

29. Until 1985, Article V of the TEC Constitution stated that the process of diocesan formation was always initiated at the local level. Only *after* the local body had acceded to the TEC Constitution and Canons (suggesting that it already had corporate existence) would the General Convention deliberate on whether or not to receive it "into union." In 1982, the General Convention amended Section 1 of Article V to introduce language of "unqualified accession," and specified the need for the approval of the Executive Council as well as the consent of the General Convention,[32] language finally ratified by the General Convention of 1985. Even today, Article V provides no indication of subordination of a recognized Diocese to the General Convention. The closest it comes to doing so is in the delineation of procedures for the cession and retrocession of territory between Dioceses (Article V.6).

Whatever may or may not be the implications of Article V for Dioceses received into union since 1985, the Diocese of South Carolina was a founding Diocese of The Episcopal Church. Not only did it make no change in the manner of its accession to the TEC Constitution and Canons after 1985 (an accession that was not formally recorded in the journals of the diocesan convention until 1841), but in 2010 it removed its accession to the TEC Canons and asserted the priority of the Diocesan Constitution over the TEC Constitution should the two ever be in conflict, arguing that, as a founding Diocese, it had always "freely exercised its sovereignty in acceding to the Constitution and Canons of the Episcopal Church."[33]

30. The examples cited in this paragraph relate to "new" Dioceses, not existing ones, and a significant number of older Dioceses have no accession clause. There is no statement of perpetual union to be found anywhere in the TEC Constitution, calling very much into question whether any form of subscription is perpetually enforceable in respect of *Dioceses*.

For any voluntary association, unqualified subscription to its governing articles tends to be a requirement for continuing membership. Unusually for a supposedly hierarchical church, however, TEC's Declaration of Conformity is not to an entity (such as the General Convention) but to the "Doctrine, Discipline and Worship" of the Church and clergy violations can only be sanctioned by diocesan courts. The absence of a judicial system above the diocesan level (as is found in the Church of England) has been much lamented but never remedied by the General Convention.

31. Bishops are tried not by the General Convention, but only by their peers in the House of Bishops, who have the authority to remove such a bishop from office. Any such deposition in no way alters the standing of that bishop's Diocese, however, since it immediately comes under the

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[31] Kesselus, *John E. Hines*, 398.

[32] *Annotated Constitution and Canons* (1981-1982), 1991 Supplement, 8.

[33] *South Carolina Convention Journal*, 2010, 20, 64.

authority of the diocesan Standing Committee until a new bishop is elected. As far as laypeople are concerned, Canon I.17.8 is the expression of a pious hope, since no mechanism exists for the trial of lay offenders; the judicial system is solely for clergy.

32. As a statement of the nature of diocesan government, this is generally accurate.

33. It is certainly true that the diocesan constitution and canons are authoritative at the local level. Article V.1 and Canon I.10.4 both relate explicitly to the *admission* of "new" dioceses and make no requirement as to their continuing "consistency" with the TEC Constitution and Canons *after* admission. There is no provision for review of later amendments to the constitution and canons of a Diocese by the General Convention. No evidence is offered for the assertion made in the final sentence of this paragraph and even if it were found to be true, it is irrelevant to the question of diocesan accession. A Diocese may require many things of those parishes subordinate to it without thereby infringing its own sovereign status.

34. While it has been generally accepted that every Diocese will have a bishop, there is in fact no constitutional requirement that this be so. Episcopal selection—like the creation of a new Diocese—is initially a local affair, conducted under rules prescribed by the electing Diocese (Article II.1). The confirmation process reflects not the General Convention's supremacy but a sense that bishops are also consecrated for the Church at large (a theological rather than a legal concept).

The fact that the General Convention subsequently instituted a system to confirm episcopal elections at times when the General Convention was not scheduled to meet and that substituted a majority vote of diocesan Standing Committees (a unit rule) for the votes of lay and clerical deputations in the House of Deputies (Canon III.11.4) clearly illustrates that it is *diocesan* approval that is being sought.

*D. The Parishes*

35.-37. This review of parish characteristics is generally correct, although prior to the Revolution the parish was the only unit of the Church to exist in North America and for much the nineteenth century it was often the only ecclesiastical body of the Church that was incorporated. Thus a parish has a legal identity that distinguishes it from a mission (which exists solely at the bishop's pleasure).

While there are arguments as to whether a parish is even subordinate to a Diocese, the assertion of hierarchical authority of a Diocesan Convention over a parish is far more explicit than the analogous claim made here for the General Convention over the Diocese. Diocesan Conventions are understood to enjoy the right to "tax" parishes (and impose sanctions for failure to comply) and clergy at ordination undertake to be obedient to their Bishop.[34] The General Convention has no authority to tax the Dioceses and bishops take no oath of obedience either to the Presiding Bishop or to the General Convention.

*E. Anglican Communion Membership*

[34] For the injunction to a prospective priest to "obey" his bishop, see *Book of Common Prayer and Administration of the Sacraments and Other Rites and Ceremonies of the Church* (1979), 526.

38.-39. There is no legal bond that unites the constituent churches of the Anglican Communion, many of which are far more "hierarchical" than The Episcopal Church. It is nevertheless interesting that Dr. Mullin makes a distinction between the hierarchy of The Episcopal Church and the non-hierarchy of the Anglican Communion, since, in 1969, TEC "acceded and subscribed" to the proposed constitution of the new Anglican Consultative Council,[35] a representative body of the Anglican Communion. Thus, TEC employed language in describing its relationship to the Anglican Communion that was essentially identical to that used to delineate the relationship between American Dioceses and the national church. Since it has become patently obvious in recent years that such central instruments as the Anglican Communion has been able to erect cannot exercise direct authority over the individual member churches, one can only conclude that a similar situation prevails within The Episcopal Church.[36] It should also be noted, in any contrast of the Anglican Communion with TEC, that while the former lacks both a uniform code of canon law and the international judicial apparatus to administer it, TEC, though boasting a national code of canon law, is equally deficient in providing for a national court system. This point will be developed below.

40. While Dr. Mullin is correct in denying a formal legislative role to the Lambeth Conference, it is noteworthy that he chooses not to document the discussions and institutional developments that have taken place since 1948. Interestingly, the first Lambeth Conference of 1867 was actually summoned in response to the concerns of bishops in Canada (then still part of the Church of England) *and the United States* over the perceived heretical teachings of Bishop Colenso of Natal (South Africa). That conference passed a resolution applauding the efforts of Bishop Gray of Cape Town to remove Colenso, an action that, on its face, would seem to constitute outside interference in the internal affairs of a province.[37] While the next hundred years witnessed few resolutions quite so explicit, the implication was that a body of bishops—whose apostolic office was mutually acknowledged throughout the Communion—enjoyed at least the moral authority of a synod. The then notorious endorsement of birth control for married couples by the Lambeth Conference of 1930 was unquestionably viewed by many non-Anglicans as an authoritative (though not necessarily positive) statement.[38] Since 1945, there has been a growing effort to harmonize the expression of Anglicanism within and between otherwise autonomous provinces. The Anglican Communion has added to its "Instruments of Unity," the Anglican Consultative Council and the Primates Meeting, respectively a forum for lay and clergy representatives from the various member churches and a gathering of the leaders of the various provinces.[39]

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[35] Robert Prichard, "The Making and re-making of Episcopal Canon Law," Anglican Communion Institute, February 15, 2010, 15.

[36] In one of the most recent surveys of the codes of canon law of the various churches of the Anglican Communion, TEC ranks as one of the least hierarchical church bodies. See Norman Doe, *Canon Law in the Anglican Communion: A Worldwide Perspective* (New York: Oxford University Press, 1998).

[37] Jonathan A. Draper, ed., *The Eye of the Storm: Bishop John William Colenso and the Crisis of Biblical Inspiration* (New York: T & T Clark International, 2003).

[38] See http://www.lambethconference.org/resolutions/1930/1930-15.cfm

[39] See http://www.anglicancommunion.org/resources/acis/docs/unity.cfm

41. Dr. Mullin wrongly references a proclamation of the Ecumenical Council of Nicaea, which pertains to the problem of receiving back into the Church those who had abandoned their previously held heretical beliefs. Such groups might well include those who had been consecrated bishops, creating the prospect of two bishops in the same jurisdiction and Canon 8 of the Council of Nicaea provided for such bishops to become assistant bishops (*chorepiscopi*) to prevent such a possibility. What Nicaea did not prohibit was the consecration of bishops to serve jurisdictions where it was considered that the existing bishop had succumbed to heresy, as St. Athanasius did at the height of the Arian Controversy. Of course, the definition of heresy is always a controversial matter, but no absolute prohibition can be deduced from an appeal to the Canons of Nicaea.

Proof that Episcopalians have recognized the need for exceptions prior to the twenty-first century is found in the remarks of the Joint Committee on the Increased Responsibilities of the Church of the General Convention of 1898, addressing the question of providing oversight in newly-American (and heavily Catholic) Cuba and Puerto Rico:

> A Nicene prohibition forbade a Bishop to exercise his authoritative episcopal functions within the limits of the Diocese of another Bishop . . . [but intervention may be justified] by the Historic Episcopate, wherever existing, unscriptural terms of communion are exacted, departures from primitive catholic doctrine which are unauthorized and unsound are inculcated, unhistoric domination of an alien episcopal authority is imposed, and unwholesome and immoral practices in the discipline of daily life are permitted and encouraged. If believing souls call aloud for relief from such encompassing error and wrong, then *the entering-in for help would seem to be rather a rightful catholic protection of oppressed orthodoxy*, than an uncatholic intrusion into a prohibited cure.[40] (Emphasis added.)

## *III. THE EPISCOPAL CHURCH WAS ORGANIZED BY PRE-EXISTING STATE CHURCHES WHO COMPOSED AND SIGNED A CONSTITUTIONAL COMPACT THAT ACKNOWLEDGED THE INHERENT AUTONOMY OF THE SOVEREIGN DIOCESES AND ELECTED NOT TO VEST THE GENERAL CONVENTION OR THE NATIONAL CHURCH WITH SUPREME AUTHORITY*

- **The process by which the State Churches in Virginia and Maryland organized themselves in the early 1780s demonstrates that the constitutive unit of TEC was the Diocese (State).**

- **The General Conventions of 1785 and 1786 were vested with no authority and were simply deliberations by persons appointed by the State Conventions for the purpose of discussing a basis for common union.**

- **In both Maryland (1783) and Pennsylvania (1784) the State Conventions adopted declarations attesting to the fundamental principles on which they believed a national church should be organized. Both stressed the importance of leaving the Dioceses (States) free to regulate their internal affairs.**

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[40] *Journal of the General Convention*, 1898, 136.

- **In Connecticut, the State Church unilaterally elected a bishop without reference to the views of Anglicans outside New England and vested their candidate with the authority to seek consecration from a body then out of communion with the Church of England. Such actions were reflective of a body that considered itself at liberty to make autonomous decisions.**

- **The State Churches in New England and those outside New England held such markedly different views on a variety of issues that the only possible compact was one that rested upon the agreement of the sovereign Dioceses to cooperate rather than upon their mutual submission to a common authority. The Constitution and Canons of 1789 reflected that reality.**

42. As was demonstrated above,[41] Dr. Mullin's contention that there was "no tradition of ecclesiastical legislation at the level of the individual colonies" is simply wrong. While there were no colonial convocations, the colonial assemblies enacted ecclesiastical legislation for the Church in their Colony in the same way that Parliament enacted ecclesiastical legislation for the Church of England.

Nothing in this paragraph demonstrates the supremacy of the national church. What Episcopalians meant by "national" must be understood in early nineteenth century terms, while the term "authoritative" is susceptible of a wide variety of meanings. The principle authority reserved to the General Convention was revision of the liturgy of the Book of Common Prayer; almost every other aspect of church life remained the responsibility of the Dioceses, who sent delegates to the General Convention but once every three years.

43. The notion of a uniform Anglican polity to which North Americans were committed to replicating in all particulars is thus extremely dubious. At the time The Episcopal Church was being formed, followers of the Anglican tradition in Scotland were divided between the Nonjurors[42]—who were considered out-of-communion with the Church of England—and English congregations served by English priests, while in Ireland, the established Church (outside Ulster) was an alien ecclesiastical structure imposed on an overwhelmingly Roman Catholic population.

Assuming Dr. Mullin to be correct in identifying William White's *The Case of the Episcopal Churches in the United States Considered*, as the point of departure for a new ecclesiastical organization, it is interesting to discover that White himself repudiated any suggestion of continuity between the colonial Church of England and the Episcopal churches in the States:

> They have been heretofore subject to the ecclesiastical authority of the Bishop of London. This authority was derived under a commission from the crown; which, *though destitute of legal operation, found a general acquiescence on the part of the churches*; being exercised no farther than to the necessary purposes of ordaining and licensing ministers. Hereby a connection was formed between the spiritual authority in England

[41] See above, paras. 11-12.

[42] The Nonjurors were to play a crucial role in the establishment of The Episcopal Church.

> and the episcopal (sic) churches in America, the latter constituting a part of the Bishop of London's diocese. But this connection was dissolved by the revolution . . . All former jurisdiction over the churches being thus withdrawn, and the chain which held them together broken, it would seem, that *their future continuance can be provided for only by voluntary associations for union and good government*. It is therefore of the utmost consequence, to discover and ascertain principles, on which such associations should be framed.[43] (Emphasis added.)

White here enunciated key principles of vital significance: that the authority of the Church of England over the colonial churches had by the eighteenth century become "destitute of legal operation"; that the Revolution "dissolved" the residual spiritual connection; and that any subsequent association of Episcopal churches could be conducted only on the basis of "voluntary association." Moreover, the model of authority assumed in *The Case of The Episcopal Churches Considered* was one in which power was *delegated* from below not granted from above, a distinct retreat from the principles which governed the Church of England. Quoting Jonathan Shipley (Bishop of St. Asaph from 1769 to 1788), White noted that "the great art of governing consists in not governing too much."[44] In modern parlance, this should be understood as the principle of *subsidiarity*, or the notion that power should always be vested in the smallest unit of government capable of administering it. If White's views on the manner of obtaining bishops underwent a metamorphosis between 1782 and 1789, his appreciation for subsidiarity did not.

White's conclusions reflected facts on the ground in Virginia and Maryland, which would have implications for the sort of national church that North American Anglicans would later establish. In Maryland, the local Anglican congregations—disestablished in 1776—were acutely conscious of their lack of corporate identity, despite securing a claim to property formerly reserved to the Church of England under the Maryland Vestry Act of 1779. In November 1780 (four years prior to the first meetings discussing the possibility of establishing some form of national church), Dr. William Smith brought together clergy and lay representatives in an official body, which adopted the name of "Protestant Episcopal Church." Three years later, that same Protestant Episcopal Church petitioned the governor for the right to incorporate on a statewide basis, forming, in the words of Dr. Smith, a "preparatory Convention or Conference, to consider and frame a DECLARATION of their own Rights as *one of the Churches of a separate and independent State* [and] to agree upon some articles of Government and Unity among themselves."[45] (Emphasis added.)

This "Declaration of certain fundamental Rights and Liberties of the Protestant Episcopal Church *of* Maryland" (emphasis added), adopted on August 18, 1783, ranks as one of the more significant texts of the founding era, not least because it maintained the "Right of the said Protestant Episcopal Church, in common with other Christian Churches under the American Revolution, to compleat and

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[43] William White, *The Case of The Episcopal Churches Considered*, edited by Richard G. Salomon (Church Historical Society, 1954), 20, 22.

[44] White, *The Case of The Episcopal Churches Considered*, 27.

[45] William Smith to William White, August 4, 1783, in William S. Perry, *Journals of the General Convention of the Protestant Episcopal Church in the United States, 1785-1835: Vol. 3; Historical Notes and Documents* (Claremont, NH: 1874), 22-23, fn. 2.

preserve herself as an *entire* Church, agreeably to her ancient Usages and Profession," (emphasis in original), even as it asserted continuity with the Church of England in respect of orders of ministry.[46] Writing over a half century later, Episcopal historian Francis Hawks called it "especially deserving of notice from the conclusive proof it furnishes that the Church of Maryland, like that of Virginia, claimed to have a *distinct, independent existence*, without reference to any connexion (sic) with the Church in any other colony."[47] (Emphasis added.)

A similar concern inspired the Episcopal Church in Virginia, which was disestablished in 1779. The Revolutionary War had rendered twenty-three of her ninety-five parishes extinct and left another thirty-four without clergy,[48] and it was only in 1784 that her leaders finally presented a petition to the Virginia Assembly seeking "to incorporate the Protestant Episcopal Church in Virginia, to enable them to regulate all the spiritual concerns of that church, *alter its forms of worship* and constitute such canons, by-laws and rules for government and good order thereof, as are suited to their religious principles."[49] (Emphasis added.) These legislative maneuverings kept the Virginians isolated from the early discussions concerning the formation of a national church. Indeed the account of the meeting of October 1784 (discussed below), which brought together representatives of the Church in New York, New Jersey, Pennsylvania and Delaware noted that "the Revd. Mr. Griffith from the State of Virginia was present by permission. The Clergy of that State being restricted by Laws yet in force there, were not at liberty to send Delegates, or consent to any Alterations in the Order, Government, Doctrine, or Worship of the Church."[50]

In Virginia and Maryland, therefore, the Church was legally constituted and recognized by the secular authorities at the state level well before its representatives ever consented to participation in the national church, thus demonstrating the falsity of any claim that the General Convention *preceded* the Dioceses. While Dr. Mullin alludes to these actions in Footnote 16 to Paragraph 46, he appears oblivious to the fact that the organization of "a successor entity to the Church of England" in Virginia and Maryland calls seriously into question his later arguments.

44. While the New Brunswick meeting of May 11, 1784, did discuss the principles by which church union might be effected, it was, as Dr. Mullin ultimately concedes, entirely informal. Two weeks after that meeting, a gathering of clergy and laity from Pennsylvania met in Philadelphia. At that meeting, a "standing committee of the Episcopal Church in this State," was appointed not merely to "correspond and confer with representatives from the Episcopal church in the other states," but also "to assist in framing an ecclesiastical government," and it was agreed "that a constitution of ecclesiastical government, when framed, be reported to the several congregations, through their respective ministers, church-wardens and vestrymen, to be binding on all the congregations consenting to it, as soon as a majority of the congregations shall have consented."

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[46] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 3*, 22-25.

[47] Hawks, *Protestant Episcopal Church in Maryland*, 294.

[48] Hawks, *Protestant Episcopal Church in Virginia*, 154.

[49] Hawks, *Protestant Episcopal Church in Virginia*, 156-157.

[50] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 3*, 3.

This meeting also recommended that the Standing Committee be bound by six Fundamental Principles, including the Church's independence of all foreign authority, its "full and exclusive" power to regulate its internal affairs and a requirement that a "representative body of clergy and laity" be the only body authorized to formulate Canons. It was in the matter of the sixth article, however, that William White's earlier commitment to subsidiarity was reiterated:

> 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.[51]

Setting aside the fact that the Church in Maryland and Virginia already enjoyed a legally constituted form of ecclesiastical government, it seems clear that the Church in Pennsylvania intended more by its preliminary work of organization—of which William White admitted himself to be the inspiration[52]—than the selection of delegates for the forthcoming General Convention. Furthermore, the New York meeting of October 1784 was explicit in stating that such organization was to be "in the States to which they respectively belong, agreeably to such Rules as they shall think proper."[53]

45.-48. When Dr. Mullin turns to the State meetings of 1785, he appears oblivious to the stirrings of local sovereignty to which several contemporary accounts give witness. In Pennsylvania, for example, the February invitation for representatives of congregations to meet in Philadelphia declared the intention to "*organize* the Episcopal Church in this State."[54] (Emphasis added.) In May, the founding State Convention asserted its willingness to admit clergy and lay deputies from neighboring States who desired to unite with it and "to have the same privileges and to be subject to the same regulations, as the clergy and congregations in this State."[55] Thus, even as members of the State churches were discussing the establishment of a national confederation, the Church in Pennsylvania—speaking through its State Convention—reserved the right to admit those outside its territorial boundaries to membership in its councils.

In Virginia, the State Convention—also meeting in May 1785—was equally explicit about the locus of its center of authority, issuing instructions to its delegates to the General Convention, which left the State Convention free to disapprove its proceedings, establishing a Standing Committee with broad powers, and adopting no less than forty-three "Rules of Order, Government and Discipline," subordinating any future Bishop to the will of the Convention and prescribing regulations governing clergy appointment and behavior.[56] In its instructions to the General Convention delegates,

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[51] *Journal of the Meetings which led to the Convention of the Protestant Episcopal Church in the State of Pennsylvania* (Philadelphia: Hall & Sellers, 1790), 1784, 6.

[52] See White, *Memoirs of the Protestant Episcopal Church*, 92.

[53] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 3*, 4.

[54] *Pennsylvania Convention Journal*, 1785, 9.

[55] *Pennsylvania Convention Journal*, 1785, 13.

[56] *Virginia Convention Journal*, 1785, 5, 8-11, reprinted in appendix to Hawks, *Protestant Episcopal Church in Virginia*.

moreover, the State Convention cautioned against an overly legalistic approach at the national level:

> Uniformity in doctrine and worship will unquestionably contribute to the prosperity of the Protestant Episcopal Church. But we earnestly wish that this may be pursued with liberality and moderation. The obstacles which stand in the way of union among Christian societies are too often founded on matters of mere form.[57]

The first official Convention of the Protestant Episcopal Church in the State of South Carolina did not take place until May 1785, followed by a second meeting in July owing to the lack of representation from many parishes. The only business recorded was the selection of four laymen and one clergyman to represent South Carolina at the General Convention the following September.[58] However, Bishop Albert Thomas, author of a history of the Diocese published in 1957, states that it met the same year that six *other* Dioceses "were founded."[59] Of the six representatives chosen to represent South Carolina, only the Revd. Henry Purcell, Jacob Read and Charles Pickney were present in Philadelphia in September 1785, where Purcell and Read served on the committee appointed to prepare and report a draft of an "Ecclesiastical Constitution for the Protestant Episcopal Church in the United States of America."[60] In April 1786, a third Convention was held in South Carolina, which resolved to appoint a committee to "form a constitution for the Associated Prot. Epis. Churches in this State."[61] Although the phrase "State" was frequently employed in preference to "Diocese" between 1776 and 1789, there was no fundamental distinction. The Diocesan Convention of South Carolina met again in May 1786, at which time it endorsed verbatim the six Fundamental Principles adopted by Pennsylvania in 1784 as a constitution.[62]

Dr. Mullin's argument that only the need to appoint state delegates to discuss the establishment of the General Convention prompted the formation of State Conventions, is explicitly repudiated by the cases of Virginia and Maryland and is at least debatable in the case of Pennsylvania. His argument relating to the non-existence of Dioceses in the early years of TEC (Paragraph 46, Footnote 17) introduces a distinction without a difference according to TEC's own commentary on the Constitution and Canons:

> [In the early years of the Church], the state was unusually accepted to be the unit of diocesan organization. Until 1838, the word 'State' was commonly and officially used to designate a 'Diocese' . . . Influenced by the formation of a national Church through

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[57] *Virginia Convention Journal*, 1785, 6.

[58] *South Carolina Convention Journal*, May 1785, July 1785, reprinted in Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 465-466.

[59] Albert S. Thomas, *A Historical Account of the Protestant Episcopal Church in South Carolina, 1820-1957* (Columbia, SC: 1957), 11-12.

[60] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1785, 18.

[61] *South Carolina Convention Journal*, April 1786, reprinted in Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 467.

[62] *South Carolina Convention Journal*, May 1786, reprinted in Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 473-474.

the federation of the separate Churches in the several states, the early leaders of the Church never conceived the existence of two dioceses within one state."[63]

49. Dr. Mullin's attempt to attribute significance to the prepositional distinctions by which the State Churches identified themselves in 1785 falls short. It might be argued that "Episcopal" at this point in time served less as a noun than as an adjective, a flag of convenience for congregations sharing a common heritage but desirous of avoiding the political stigma associated with Anglicanism, but even setting this argument aside, there are documented exceptions. As Dr. Mullin notes in Footnote 23· the 1783 "Declaration of certain fundamental Rights and Liberties" was issued by the "Protestant Episcopal Church *of* Maryland," while a letter to William White, from a clergyman charged with apprising members of the Church in New England of the deliberations of the May 1784 meeting, reported that the Episcopal Church *of* Connecticut was planning to send representatives to the October gathering.[64] (Emphasis added.)

Even more revealingly, Canon X of the Diocese of Virginia, adopted on May 21, 1787, referred to the "Protestant Episcopal Church *of* Virginia," even as Canon XIII—adopted the same day—spoke of the "Convention of the Protestant Episcopal Church *in* the state."[65] (Emphases added.)The fact that "in" and "of" were employed interchangeably in the same body of canonical regulations would seem to call into question the very premise on which Dr, Mullin bases his argument.

50.-54. The cursory fashion in which Dr. Mullin summarizes the "first meeting" of the General Convention in 1785 denies the casual reader an appreciation of the fact that this body lacked any corporate authority beyond that delegated by the States in their appointment of delegates. Dr. Mullin's assertion that the members of the General Convention believed that a request for bestowal of the episcopate "could not be made by any body lesser than the General Convention itself" is highly debatable. While Dr. Mullin supports his argument by reference to the expressed desire of the English archbishops and bishops that they could not consider candidates who did not come with the endorsement of the General Convention, he does not state that this requirement was accompanied by a similar one for local testimonials from the State Convention. A bishop, ordained as he was for the whole Church, might require provincial endorsement, but he was also—necessarily—the choice of his Diocese. In any case, the General Convention actually recommended "to the different Conventions, at their next respective sessions, to appoint committees, with powers to correspond with the English bishops, for the carrying of these resolutions into effect,"[66] hardly the action of a body that considered itself the *only* effective agent for securing the episcopate.

In affirming the "proposed Constitution" of 1785 as evidence of the new authority of the General Convention, Dr. Mullin invokes the authority of "the leading Nineteenth-Century expert on Episcopal Church law." While Murray Hoffman's overall approach will be addressed later in this

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[63] *Annotated Constitution and Canons* (1981-1982), 90.

[64] Unknown to William White, June 19, 1784, in Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 3*, 12.

[65] *Virginia Convention Journal*, 1787, 23.

[66] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1785, 25.

affidavit, it should be sufficient here to note that he was speaking of the Constitution ratified in 1789 and not of the "proposed" Constitution of 1785, which was precisely that. The State Conventions had yet to express an opinion on the language of this instrument and when they did so it was to prove, in some instances, far from favorable, while the General Convention still did not *exist* as an authoritative body in 1785. The General Convention was to serve as a focal point of unity and as a means of prescribing how best the Dioceses might relate one to another, but it was not to exercise overarching sovereignty at the latter's expense. Hoffman's assertion that "the mere act of establishing this Council involved and attached to it every power inherent in such a body, and not expressly refused to it," is the opinion of one man, not a judgment sustained either by the language of TEC's Constitution or the legislative record of the General Convention.

55. Dr. Mullin's discussion of the manner in which the proposed Constitution of 1785 was amended between 1786 and 1789 does less than justice to the complexity of the situation. His claim that the authority of the General Convention over the State Conventions was "reasserted" in 1786 ignores the fact that the General Convention *had no such authority at that time*. If, as Mullin quotes him, William White came to believe in the "necessity of a duly constituted body," it follows that the General Convention of 1786 was *not* such a body. To further write of granting *permission* to the State Conventions to determine whether or not to use the Proposed Book only until further provision was made, ignores the fact that many of the Conventions had already rejected it, as evidenced in a memorial from the Church in the State of New Jersey to the General Convention of 1786, which questioned "the right of any order or orders of men, in an episcopal church without a bishop, to make any alterations not warranted by immediate necessity, especially such as not only go to the mode of its worship, but also to its doctrines."[67]

56. Dr. Mullin is quite correct to note that William Smith—the elected candidate of his State—was denied a testimonial by the General Convention. From the outset, it was recognized that the national church had a role in the selection of bishops and could override a diocesan selection. However, that role was (and is) exercised by the Dioceses in the aggregate (whether through their delegates to the General Convention or through their Standing Committees) and it has always been a negative one. An episcopal nominee can be rejected, but a bishop cannot be appointed to a sovereign Diocese against its wishes and a Diocese remains sovereign with or without a bishop.

57.-58. Dr. Mullin's assertion that the General Convention of 1786 corporately asserted an inherent authority to ratify its own Constitution that was formally exercised in 1789 will be discussed in more detail below, but it should be sufficient here to note that the TEC Constitution was approved by delegates acting in their individual capacities and *ratified by the delegates on behalf of the States the following day*. The fact that the Constitution and Canons were not sent to the various State Conventions for ratification does not alter the fact that ratification was *by the States*.

It is wrong to suggest that there was less fear of centralization among Episcopalians as a whole than among other religious groups. The reason that there was comparatively little discussion of such matters in 1789 was that the principles embodied in Maryland's "Declaration of certain fundamental Rights and Liberties" and Pennsylvania's "Fundamental Principles" were assumed to be incorporated into any future constitutional settlement, as the absence of supremacist language in

[67] *Journals of the Conventions of the Protestant Episcopal Church of the State of New Jersey, 1785-1816* (New York: John Polhemus, 1890), 1786, 14.

respect of the General Convention and the limited discussion of the Dioceses in the Constitution and Canons of 1789 both attest.

59. Given Dr. Mullin's contention that the General Convention formed the Dioceses, it is interesting that Bishop William Perry (who edited an edition of the journals of the early General Conventions published in 1874) noted in his *History of the American Episcopal Church* that "New England, with its *organized dioceses* and bishop, though invited, and even urged to attend [the 1785 General Convention], stayed at home."[68] (Emphasis added.) Dr. Mullin's assertion that the New England churches held the "same view as their southern counterparts of the preeminence of a national church over its dioceses" is true only insofar as both accorded greater prominence to an intermediate institution: the southerners to the State Convention; the northerners to the office of bishop. In the words of one recent historian:

> In the majority view, it was the clergy and people, while in the early Connecticut view (which had sympathizers elsewhere), it was the bishop, and, to some extent, Convocation when acting as electors, who replaced the English sovereign as head of the church. Both sides claimed the support of the New Testament and of patristic writers, and each in its way was struggling to find a paradigm that would stand in place of the English system.[69]

60. Samuel Seabury was actually the second choice of the Connecticut clergy for elevation to the office of bishop, following Jeremiah Leaming's refusal to accept the nomination. Though born and educated in Connecticut, Seabury had exercised his pre-Revolutionary ministry in New Jersey and New York, so the fact that he was endorsed by clergy from outside Connecticut was thoroughly understandable. In a letter to the Archbishop of Canterbury dated April 21, 1783, however, Abraham Jarvis—on behalf of the clergy of Connecticut—specifically requested the consecration of a "Bishop for Connecticut."[70] Furthermore, a subsequent letter to the Archbishop (unsigned, but bearing evidence of authorship by Seabury's clerical supporters) observed: "If a bishop is once established in Connecticut, we are confident that bishops will soon be admitted into the other colonies, so that the fate of all the churches in the united colonies is virtually involved in the success of this application.[71]

61. Seabury's rejection by the English bishops and subsequent consecration by the Scottish Non-jurors was actually more controversial than Dr. Mullin implies here, not least because it introduced descent from the "Scottish line" into the American episcopate. The Episcopal Church of Scotland was not only disestablished but subject to penal laws and existed alongside "qualified" congregations overseen by English clergy and using the English Book of Common Prayer:

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[68] William S. Perry, *The History of the American Episcopal Church, 1587-1883* (Boston: James R. Osgood and Company, 1885), Vol. 2, 35.

[69] Paul V. Marshall, *One, Catholic, and Apostolic: Samuel Seabury and the Early Episcopal Church* (New York: Church Publishing, 2004), 71.

[70] E. Edwards Beardsley, *Life and Correspondence of Bishop Samuel Seabury, D.D.* (Boston: Houghton, Mifflin and Company, 1881), 81.

[71] Beardsley, *Life and Correspondence of Bishop Samuel Seabury*, 91.

> The Episcopal clergy of Scotland, except for those who ministered in the "qualified" chapels, were not in full communion with the Church of England . . . [if] the English Non-jurors and the Scottish Episcopalians were one, and if the former justified their existence only be denouncing the church as by law established, the Church of England could have no regular communion with the latter.[72]

Thus the Scottish line of the Episcopal Church was formally out of communion with the Church of England until 1789 (when the Non-jurors agreed to take oaths of allegiance to the Crown) and not until 1840 were Scottish *and American* clergy allowed to officiate in English parishes.[73] If continuity with the Church of England was an essential ingredient of the new American Church, then Seabury's consecration worked against that object.

62. Dr. Mullin's representation of Seabury as, in some manner, a part of TEC even before he and his supporters had acceded to the Constitution hardly does justice to the facts. For two years, until the consecration of White and Provoost in 1787, Seabury was the only bishop in the United States. Although assuming, under these circumstances, a general responsibility for the ordination of American clergy, there is no evidence that he sought to interfere with clergy oversight beyond his own jurisdiction, despite the charges that he extracted oaths of personal loyalty from outside candidates.
Regarding his purported use of the title "Bishop for America," Seabury historian Paul Marshall recently concluded that this designation was used only in jest and never as an official signature. In fact, Seabury signed himself "Samuel Bishop Episcopal Church of Connecticut," a formula similar to that used by his episcopal rival Samuel Provoost of New York after his consecration.[74] To declare Seabury to be anything other than the diocesan bishop that he undoubtedly was flies in the face of the historical record.

63.-64. New England churches outside Connecticut, though welcoming Seabury's episcopal ministrations, were far from being of one mind. Thus, Samuel Parker of Massachusetts wrote William White in January 1789 as follows:

> True it is that the Churches in Massachusetts have at present more the resemblance of Independent congregations than of Episcopal Churches, having one centre of union and communion. There are but six Episcopal Clergymen in the State: two of these have received Orders since the Revolution; one from yourself, the other from Bishop Seabury; two of the other four are so lax in their principles of Episcopal government that I think them averse to uniting under a common head . . . *It appears to me that a union might take place, even if the constitutions of government and liturgy varied a little in the different 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*

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[72] Fred G. Schneider, "Scottish Episcopalians and English Politicians: The Limits of Toleration," *Historical Magazine of the Protestant Episcopal Church* 45 (September 1976): 285.

[73] Schneider, "Scottish Episcopalians and English Politicians," 289.

[74] Marshall, *One, Catholic, and Apostolic*, 96-97.

> *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.[75] (Emphasis added.)

It seems clear that the "New England" Churches whose delegates ratified the Constitution of 1789 were as representative of their Dioceses as their southern counterparts. The accommodation of the peculiar ecclesiology of Connecticut by means of an agreement to constitute a House of Bishops and to dispense with the *requirement* for any State to send lay deputies was a considerable concession to local autonomy, as many Southerners opposed giving peculiar power to a bishop. Virginia hedged its future bishop around with canonical restrictions, while South Carolina initially refused even to consider electing one.[76] They were also critical of denying laypeople a voice in the government of the Church, a point that Dr. Mullin earlier noted to be one of the principle innovations of the American Anglican experiment.[77]

Such arrangements were necessary, however, to preclude the emergence of two separate Anglican entities in North America. Having obtained such concessions, Seabury (who was for a short time to be the first Presiding Bishop) was willing to take necessary steps in his own Diocese to achieve compliance. The 1790 adoption of the Constitution and Prayer Book by the clergy of Connecticut and the 1792 warning that congregations refusing to approve the TEC Constitution faced expulsion are evidence of this. These were, however, actions taken by the Convocation *of the Diocese* in respect of subordinate bodies (the parishes) and cannot be invoked in support of the proposition that, by doing so, the Diocese of Connecticut implicitly subordinated itself to the General Convention of The Episcopal Church in perpetuity.

65. It should be evident from the preceding analysis that the pursuit of unity by North American Anglicans was a far more complicated process than Dr. Mullin would have the reader believe. There is a distinct difference between a body having authority and having *supreme* authority, which Dr. Mullin fails to take into account. That there was a desire for a national church with the ability to promote doctrinal integrity and liturgical uniformity is beyond dispute. What is at issue is whether the body established for that purpose was capable of exerting authority over the State Churches should they fail to comply. As will be demonstrated below, the constitutional machinery of The Episcopal Church made no provision for such an eventuality.

## *IV. THE ABSENCE OF LANGUAGE IN THE 1789 CONSTITUTION AND CANONS OF THE EPISCOPAL CHURCH OF SUPREMACY UNDERSCORES THE ABSENCE OF A NATIONAL HIERARCHY FOR TEC*

- **The TEC Constitution of 1789 took as its model the Articles of Confederation,**

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[75] Samuel Parker to William White, January 20, 1789, in Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 3*, 378.

[76] From 1789 to 1812, South Carolina would have a bishop for just six years. On Virginia's attitude to bishops, see *Virginia Convention Journal*, 1785, 9-11, specifically Canons 11-12, 26-27, 35-37. On the opposition to electing a bishop in South Carolina, see *South Carolina Convention Journal*, April 1786, reprinted in Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 469.

[77] See above, Paragraph 22.

**rather than the U.S. Constitution. Given the involvement of such legal experts as John Jay and James Duane, it cannot be coincidental that nothing analogous to the Supremacy Clause of the U.S. Constitution was inserted into the TEC Constitution.**

- **The constitutions or acts of association of the Dioceses (States) who ratified the TEC Constitution and Canons in 1789 were not terminated at the time of ratification but remained in force throughout. In the absence of language of supremacy, subordination, exclusivity, preemption or finality, these constitutions were never subordinated to the TEC Constitution.**

- **TEC did not ratify its Canons before its Constitution and it is the Constitution that has served as the governing instrument of TEC since 1789.**

- **There is no language of supremacy in the TEC Constitution of 1789. In the absence of a national judicial system, all enforcement power rests with the Dioceses who are free to uphold or ignore the Constitution's provisions as they see fit.**

- **The TEC Constitution of 1789 was not ratified by the General Convention but by the Dioceses (States) assembled in the General Convention, thereby signifying the sovereign status of the Dioceses.**

- **The language of diocesan accession to the TEC Constitution varies dramatically from Diocese to Diocese and thirteen Dioceses have no Accession Clause. Accession can be qualified.**

- **The TEC Canons are only as effective as the Dioceses choose to make them. The General Convention has no power to penalize noncompliance.**

***A. The constitutional framework approved by TEC in 1789 was noteworthy for its failure to locate supreme authority in the General Convention and it necessarily affirmed the enduring sovereignty of the member Dioceses (States).***

66.-70.The Constitution of the Protestant Church was indeed a unique document, but not quite in the sense that Dr. Mullin seems to imply. In Paragraph 66, he once again misrepresents the sequence of events by which the TEC Constitution and Canons were adopted in 1789. In Paragraph 67, he fails to note that the Constitution was *ratified* "in General Convention by the Church in a majority of the States." In Paragraph 69, where he observes that none of the actions of the first General Convention of 1785 were "explicitly authorized by any language found in the Constitution," he appears oblivious to the fact that if the Constitution was as yet in the process of formation then there was no authority in it either to affirm or to prohibit.

More seriously, Dr. Mullin once again fails to acknowledge the preferred analogy with the Articles of Confederation, in his assertion that those who challenge the idea of TEC as a hierarchical church misread the provisions of its Constitution as analogous to those of the U. S. Constitution,. The Articles acknowledged the continued existence of local sovereignty at the State level, something that the actions of the Dioceses of Maryland and Virginia in the 1780s had reinforced at the ecclesiastical level. As will be subsequently demonstrated, this is the model that TEC's Constitution and Canons were assumed to uphold.

Dr. Mullin's assertion in Paragraph 68 that the TEC Constitution was drafted mainly to ensure continued meetings of the General Convention was not one that was shared by many of the canon lawyers whom he subsequently invokes in his defense of the principle of the supremacy of the national church, which at the very least raises questions about the consistency of his use of the sources that he employs.

71.-72. The Church's Constitution is "strikingly bare of the language of federation," declares Dr. Mullin, in paragraph 71, as is, of course, the U.S. Constitution, which also contains no specific reference either to "federal" or "federation."

Dr. Mullin rightly draws attention to the presence of such constitutional experts as John Jay and James Duane on the drafting committee for the TEC Constitution, but fails to entertain the possibility that their familiarity with both the Articles of Confederation and the U.S. Constitution might have had implications for the document that they helped prepare for TEC. Duane delivered the decision in *Rutgers v. Waddington* (1784) that because a New York statute nullifying the Treaty of Peace that concluded the Revolutionary War lacked a *non obstante* (notwithstanding) clause, it could not supersede it, but in so doing acknowledged that such a statute was *potentially* superior to the treaty. Jay, as Secretary of State for Foreign Affairs, had in 1786 proposed the resolutions that formed the ultimate basis for the language of the Supremacy Clause of the U.S. Constitution.[78] Both men were keenly aware of what was needed in the U.S. Constitution to overcome the problems of Confederation, yet neither apparently intervened to achieve a comparable result for the ecclesiastical body to which they both belonged.

The TEC Constitution of 1789 contained only four direct references to Dioceses (or rather to States), which spoke, respectively, to the entitlement of Dioceses to representation in the General Convention (Art. II); episcopal selection according to rules laid down by the Diocese (Art. IV); reservation of clergy trials to the jurisdiction of the various Dioceses (Art. VI); and the requirement that amendments to the Constitution be adopted by a "majority of the States" in two successive General Conventions (Art. IX). Article V, often described today as the assertion of the General Convention's authority over the "subordinate" dioceses, merely embodied the conditions under which future Dioceses would be admitted into union (the concept of accession is discussed below). Conspicuous by its absence was any analogue to the U.S. Constitution's Supremacy Clause, making the General Convention the "supreme authority" in the Church. Instead, Article I merely stated that "there shall be a General Convention of the Protestant Episcopal Church in the United States of America."[79]

Writing in 1891, Bishop William Perry offered the following verdict on the essential meaning of Article II of the TEC Constitution:

> [Not] only was recognition made of Diocesan or State independence, but the principle was laid down that the General Convention was to be composed of delegates of such order as the Church in each respective State should determine . . . The representation,

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[78] Mark McCall, "Is the Episcopal Church Hierarchical?" Anglican Communion Institute, September 2008, 8-10.

[79] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 83-84.

> and of course the manner of choosing that representation, were matters not within the purview of the general body, but were solely as the State Convention should determine.[80]

There is nothing in the record of debate to suggest that Bishop Perry's inference of subsidiarity from Article II is not applicable to the rest of the Constitution. Consequently, there was no need for an analogue to the Tenth Amendment; such authority was inherent in the State Churches.

73. Dr. Mullin's reference to Article IV as a *grant* of a new power by the General Convention to the State Conventions to elect their bishops that "had not been so exercised in Anglicanism for over 700 years," reveals his obliviousness to the fact that the State Conventions of Connecticut, Pennsylvania and New York had *already* exercised that right as much as four years before it was enshrined in the Constitution. The TEC Constitution attested to powers that were inherent in the pre-existing diocesan entities, and with which the national church could not interfere (while it might choose to negate an election, it could not impose a preferred candidate upon a recalcitrant Diocese).

74. In this paragraph Dr. Mullin returns to the argument made earlier in his affidavit concerning both the continuity of TEC with the Church of England and the previously subordinate status of the colonial Church of England. As was noted above, the Revolution marked a permanent break with the Church of England, and nowhere (either in Paragraph 74 or Footnote 38) does Dr. Mullin discuss the role played by governors and colonial legislatures in defining how the established churches conducted themselves. Nor is there anything in Dr. Mullin's account to suggest that the principles espoused in Maryland in 1783 and Pennsylvania in 1784 were simply set aside. As Bishop Perry later put it:

> [The] action contemplated in the Fundamental Principles of 1784 . . . proves conclusively that each Church in each independent State of the federal union, where organized agreeably to its own pleasure, deemed itself, and was regarded by each independent Church in the other States respectively, as an independent branch of the Catholic Church of Christ, lacking, indeed, a perfect organization while the Episcopate was wanting, but fully competent to seek that perfecting order and to organize for this purpose and for such other purposes as the present need seemed to require.[81]

75.-76. In these paragraphs, Dr. Mullin contends that intentional language of supremacy was not employed in the TEC Constitution because there were no "competing traditions of legislative autonomy" and no "long traditions of legislative independence." It is perhaps worth noting that the Church of England in North America endured for a longer period of time than elapsed between Methodist separation and Methodist reunion. Furthermore, as has already been demonstrated, there were indeed competing Anglican traditions of legislative autonomy, which were determined both by the politics of the colony involved and the character of the missionary society planting a congregation. The notion of Anglican uniformity in the 1780s is a political and theological illusion as Dr. Parker's above cited letter makes clear.

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[80] William S. Perry, *The General Ecclesiastical Constitution of the American Church: Its History and Rationale* (New York: Thomas Whittaker, 1891), 246-247.

[81] Perry, *The General Ecclesiastical Constitution of the American Church*, 99.

It is undeniable that the constitutions or acts of association of the States who ratified the national Constitution and Canons in 1789 remained in force at the moment of accession and subsequently thereafter. Since no language of supremacy, subordination, exclusivity, preemption or finality was incorporated into the TEC Constitution,[82] the State Constitutions were never subordinated to the national Constitution, but endured as competing centers of authority.

77. Dr. Mullin offers here the unsupported assertion that the lack of articulation of the precise distribution of rights and powers between the Dioceses and the General Convention must necessarily be understood as a presumption in favor of the unlimited authority of the General Convention. As will be demonstrated below, this does not comport with the facts available.

78.-79. Dr. Mullin appears to set great store by the circumstance that (as he puts it) the Church adopted a series of Canons *before* it ratified its Constitution, which, he argues, demonstrates that the Constitution was not intended to set limits on the authority of the General Convention. The right to so legislate, in his view, was part of the "fundamental nature of the Church." If the two sessions of the General Convention of 1789 are any guide, however, Dr. Mullin's summary is—at best—a partial one.

According to the Journal, on August 1 the proposed Constitution was twice read aloud to the assembled deputies and debated by paragraphs. It was then resolved:

> That the 1st, 2nd, 4th, 5th, 6th, 7th, and 8th articles *be adopted*, and stand in this order – 1, 2, 3, 4, 5, 6, 7; that they be a rule of conduct for this Convention; and that *the remaining articles be postponed for the future consideration of this Convention*.[83] (Emphasis added.)

Six days *later*, on August 7, the General Convention adopted ten Canons, with the proviso that a committee be authorized to report to the next Convention such additional Canons as might be deemed necessary. The Convention then took up the two articles (the third and the ninth), which had been "postponed" and after amendment agreed to them, following which the Constitution was engrossed for signing (since it had to be printed, it could not be signed the same day).[84] The following day, "the engrossed Constitution of the Protestant Episcopal Church was then read and signed by the Convention."[85] In a letter to the Archbishops of Canterbury and York dated the same day (*August 8*), the signatories affirmed the efficacy of the new constitutional arrangements:

> We, the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the States of New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and South Carolina . . . are now assembled, through the blessing of God, *as a Church duly*

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[82] See the discussion of the language of hierarchy in McCall, "Is the Episcopal Church Hierarchical?" 4-8.

[83] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 72.

[84] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 79-82.

[85] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 82.

> *constituted and organized*, with the happy prospect before us of a future full and undisturbed exercise of our holy religion, and its extension to the utmost bounds of this continent, *under an ecclesiastical constitution*, and a form of worship, which we believe to be truly apostolical.[86] (Emphasis added.)

The adjourned Convention reconvened in Philadelphia on September 30, this time with representatives from the New England States in attendance. The provisional nature of the Constitution became clear on October 1, when the following resolution was adopted:

> That for the better promotion of an union of this Church with the eastern Churches, the General Constitution *established at the last session of this Convention* is yet open to amendment and alterations, by virtue of *the powers delegated to this Convention*.[87] (Emphasis added.)

Approval of the request of the "Eastern Churches" that Article III be modified to allow the Bishops —when sitting as a House—both to originate legislation and "to negative such acts proposed by the other House as they may disapprove" permitted the endorsement of the Constitution by representatives of the New England States and—more importantly—altered the constitutional structure of the General Convention by allowing the establishment of a House of Bishops (the Constitution required that there be at least three Bishops before such a body was organized).[88]

Consequently, on October 15, when the Committee on the Canons, in accordance with its August mandate, reported several additional canons, these were ratified and sent to the newly established House of Bishops for concurrence. The latter returned them the following day with an amendment that the House of Clerical and Lay Deputies approved, after which:

> The Canons now passed, *together with those passed at the last session*, being collected into one body, *and ratified by both houses*, were directed to be entered in the Book of Records and printed with the journal of this Convention.[89] (Emphasis added)

"Some canons had been passed in the preceding session [August 1789];" wrote Bishop White some years later, "but they were reconsidered and passed with sundry others . . ."[90] Even Judge John Andrews—an authority later cited by Dr. Mullin in support of his position—observed in 1883 that "it was evidently from a mere oversight of the convention, that these canons were acted upon the day before the Constitution, which had already been agreed upon, was technically adopted by the

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[86] "An Address to the Most Reverend the Archbishops of Canterbury and York, August 8, 1789, in Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 134.

[87] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 94-95. The use of this language of "delegation" inevitably raises the question of how—if the General Convention's powers are inherent— any power can be delegated *to* it.

[88] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 95-97.

[89] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 109-110.

[90] White, *Memoirs of the Protestant Episcopal Church*, 29-30.

signatures of the members; and that, at the next General Convention, to wit, in 1792, they were, as stated by Dr. Hoffman, re-enacted, in order to remove all doubt as to their validity."[91] Thus, the General Convention itself concluded that the canons ratified in August did not enjoy inherent authority, but were as much in need of "ratification" under the new Constitution as those newly proposed.

***B. The TEC Constitution was modeled upon the form of secular government that existed under the Articles of Confederation and it gave no priority to national legislation***

80. In the absence of explicit language of supremacy, Dr. Mullin attempts in Paragraphs 81-88 to document instances of the *implied* supremacy of the General Convention in the Constitution of 1789, but far from being implied, the case for supremacy is actually impeded by a close review of his arguments.

81. Concerning Article VIII (on the Book of Common Prayer), Dr. Mullin argues that we see here the assertion of the national church's absolute authority in matters liturgical. Article VIII (now Article X) —and the implication of liturgical supremacy that Dr. Mullin reads into it—has governed perhaps the most contested area of Episcopal Church life since 1789, but it does not even contain language to the effect that the Book of Common Prayer be used exclusively in any Diocese. More to the point, few efforts to sustain the principle behind Article VIII by means of more specific national Canons have ever succeeded in restricting liturgical innovations that go against the prevailing orthodoxy of the day, *unless the Bishop and the Diocese affected have been prepared to enforce them.*

82. Similar considerations govern Article VII (now Article VIII)—the future Declaration of Conformity—and the "mandatory national standard" required of all Episcopal clergy (including bishops). Determination of whether or not there has been a violation of the oath has always been a matter for the local Ecclesiastical Authority in the case of priests and deacons (present-day Canon IV.7), or for the members of the House of Bishops, acting as a college rather than as the General Convention, in the case of bishops (present-day Canon IV.17).
However, the very wording of the Declaration of Conformity raises a separate issue pertinent to the question of the General Convention's supremacy. Unlike similar instruments in other denominations regarded as hierarchical (and employing the language of supremacy, subordination, exclusivity, preemption and finality), the Declaration of Conformity was not (and is not) to The Episcopal Church as such but to its "doctrines and worship" (these, in turn, being placed in a subordinate position to the authority of Scripture). The lack of specificity as to who actually determined what these doctrines and worship were to be, makes Dr. Mullin's assertion that it demonstrates the supremacy of the *General Convention* highly questionable. The style of the oath, it should be added, marked a considerable departure from the practice of the Church of England:

> [The] primary end of the sixteenth-century professions was to secure obedience to one's superior. The oaths of canonical obedience, the episcopal oath of fealty to the pope, and the various oaths of supremacy were all oaths of submission. These oaths delineated the hierarchy of the church and bound the swearer to remain loyal to his superior. By

[91] John W. Andrews, *Suggestions on the Law of the Protestant Episcopal Church in the United States of America: Its Sources and Scope* (New York: T. Whittaker, 1883), 58.

> contrast, the modern declaration of conformity is not an oath of submission; the ordinand is not bound to be obedient to a specific superior or general body (such as the General Convention). The ordinand is bound to be obedient to the "discipline" of the Episcopal Church, but this lacks the clarity and the specificity of the sixteenth-century oaths.[92]

It should be added that one of the principle objectives of the negotiations with the English archbishops to consecrate an American episcopate in the English line involved dispensation of the American candidates from the traditional oaths. In the very words of the empowering Act of Parliament:

> That it shall and may be lawful to and for the Archbishop of Canterbury, or the Archbishop of York for the time being, together with such other Bishops as they shall call to their assistance, to consecrate persons being subjects or citizens of countries out of his Majesty's dominions, Bishops for the purposes aforesaid, without the King's license for their election, or the Royal mandate under the Great Seal for their confirmation and consecration, and without requiring them to take the oaths of allegiance and supremacy, and the oath of due obedience to the Archbishop for the time being.[93]

No attempt was ever made simply to create a revised oath substituting the General Convention as the supreme governor of the Church. Instead, a possible model for the national vow was Canon XIII of the "Church of Virginia" as adopted in 1785:

> No priest or minister shall hereafter be received into any parish within this commonwealth unless he first produce to the vestry sufficient testimonials of his having been regularly ordained a priest by some Protestant bishop, *take the oath of allegiance to this commonwealth*, and subscribe to the doctrine, discipline and worship of the Protestant Episcopal Church.[94] (Emphasis added.)

Omitted from the national oath, however, was the feature of "allegiance" to a sovereign, which the Church of Virginia (and the Church of England) both deemed essential.

83. While Article II states that legislation adopted by the General Convention was applicable to all States regardless of whether or not deputies from a particular State were present for its enactment, the possibility must be entertained that the model for the TEC Constitution was that of the Articles of Confederation. A widely-held view of the latter was that, since the role of the Confederation Congress was consultative, any legislation had to be enacted by the State legislatures in order to become binding law, unless accompanied by a "nevertheless be bound" or *non obstante* clause.

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[92] Jonathan M. Gray, "The Sixteenth Century Background to the Current 'Oath' of Conformity of The Episcopal Church," *The Journal of Episcopal Church Canon Law* 1:1 (July 2010): 42-43.

[93] Quoted in Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 87.

[94] *Virginia Convention Journal*, 1785, 9.

The fact that a *non obstante* clause appears in the TEC Constitution should be understood as a rule of "applicability" demonstrating a self-executing law, but not of supremacy. [95] Without an accompanying rule of priority, the Canons of the national church existed alongside those of the Dioceses (which were *also* binding) and could be nullified. The language of Article II tracks that of the Supremacy Clause of the U. S. Constitution as regards the rule of applicability, but lacks the accompanying injunction that federal (i.e. national church) legislation shall be the "supreme Law of the Land." It is hardly credible to contend that such a discrepancy was unintentional, in light of the constitutional debates then taking place in Philadelphia.

84. While there are numerous instances of national Canons—and even the TEC Constitution—employing "mandatory" language, the General Convention remains dependent on the Dioceses for enforcement of such provisions. Throughout the history of TEC, Dioceses, parishes and clergy have frequently defied such national mandates with impunity, even though expected to obey Church rules. That they frequently did not, and yet suffered no penalty, says something about the nature of TEC's polity.

85. Dr. Mullin's most notable deduction of supremacy from absence stems from the failure of the national church to provide itself with a judicial arm beyond the diocesan level. That this was considered a serious lacuna by many churchmen is evident both from the writings of canon lawyers and historians and from recurrent efforts of the General Convention to institute a national judicial system, culminating in the establishment of provincial courts of appeal at the beginning of the twentieth century. All efforts to create a court of "ultimate jurisdiction," however, have come to nothing. Dr. Mullin reads this as evidence of the judicial function inhering in the General Convention itself, but it is hard to see how the failure to specify such authority in the governing instrument can be so understood.

By way of historical comparison, there was no central judiciary under the Articles of Confederation, yet this did not translate into giving the Confederation Congress judicial power; rather, the only judiciary was to be found in the sovereign states (one of the deficiencies which the U. S. Constitution sought to rectify). Francis Hawks, the foremost and earliest of the nineteenth century authorities cited by Dr. Mullin, was in no doubt on this point:

> *In the Church we may be said to have no judicial system. By the constitution, the mode of trying offending clergymen is to be regulated in each State by its own rules.* Some dioceses have made no rules at all. Uniformity in judicial proceedings is therefore wanting . . . The mode as it presents itself operates thus. In the diocese of Massachusetts for instance, before a court composed according to the canons there in force, some clause of the constitution, or some canon of the General Convention, receives a certain interpretation, and under it punishment is inflicted. In South Carolina, a different meaning is attached by the court there to the very same words, and acquittal follows; and thus it may be in some six or more dioceses. In vain will anyone ask what is the law? No man can say. The convict of Massachusetts, doubting, as well he may, under such circumstances, the propriety of his intended punishment, would fain appeal to some tribunal competent to adjust these conflicting interpretations. *But where is such a*

[95] McCall, "Is the Episcopal Church Hierarchical?" 9-10.

*tribunal? No where in the Church.*[96] (Emphases added.)

In the absence of the designation of a supreme judicatory, it must be presumed that that authority continues to reside at the diocesan level.

86. Dr. Mullin argues that the failure to give the State Conventions a direct role in the ratification of amendments to the TEC Constitution reflected the supremacy of the General Convention over the States, yet the process outlined in the Constitution of 1789 was far from unknown to those who had served in the Confederation Congress, where the Articles had been ratified not in state conventions but by the States *in Congress*. This was the perspective of Francis Hawks, a half century after the Constitution had been ratified:

> *By* whom, *in* the General Convention, is a change to be made? The article answers – "by the Church, in a majority of the dioceses." What does it mean by "the Church?" *Is it simply the members of the General Convention? Neither individually, nor as representatives, are they the Church.* Beside, if this only were meant, it would have been said the constitution shall be unalterable, except by a majority of the General Convention; and nothing would have been directed as to making it known to the State Conventions . . . It means a majority of the several dioceses of the Protestant Episcopal Church in these United States. And on any other interpretation, the latter clause of the article is a dead letter. Nay, worse than useless, positively mischievous, for it affects to respect, while it in truth mocks at diocesan independence . . . The matter which has been proposed to these several Conventions must indeed come back to the General Convention, and there must finally be disposed of: *but it is to the General Convention sitting not so much in its ordinary legislative capacity, as in the character of a council composed of many independent dioceses*, represented in the lower House, and met together to deliberate, not upon an occasional canon, but upon the great compact by which all alike, the strong and the weak dioceses, consented to make canons at all. Canons are the result of union *after it is formed*; the constitution is the bond that makes the *union itself*.[97] (Emphases in original; underlined emphases added.)

Fifty years later, Bishop William Perry, clearly inspired by the words of Hawks, offered his own understanding of the amendment process:

> The change of the Constitution is therefore made in General Convention, not by General Convention, but *by the Church in a majority of dioceses*. Consequently the Churches in the States, respectively, *quasi* States or dioceses, are alone competent to alter the Constitution. That this is the proper interpretation of the article is evident from the fact that Title III, Canon 1 §iii., makes it "the duty of the Secretary of the House of Deputies, whenever any alteration of the Constitution is proposed, or any other subject submitted to the consideration of the several Diocesan Conventions, to give a particular notice thereof to the Ecclesiastical Authority in every Diocese;" and this canon, with but

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[96] Francis L. Hawks, *The Constitution and Canons of the Protestant Episcopal Church in the United States* (New York: Swords, Stanford and Co., 1841), 56-57.

[97] Hawks, *The Constitution and Canons of the Protestant Episcopal Church*, 42-44.

> slight and merely verbal changes, has been in force since 1808. Certainly matter thus formally communicated to the Church in every State or diocese "for the consideration of the several Diocesan Conventions," presupposes that the Church in a majority of dioceses is to consider and furnish that action with regard to the proposed alteration which, in the ensuing General Convention, is to be finally agreed or ratified. It is in recognition of this view of the true meaning of this article that . . . *the final vote in the ensuing General Convention must be taken by States and dioceses*. It is also agreed that it is the right of the Church in each State or diocese to make known to the General Convention the action, if any, taken in Diocesan Convention, respecting any proposed alterations of the Constitution or Book of Common Prayer, whether affirmative or dissenting. *We may further infer that if a majority of such Diocesan Conventions should make known their disagreement to the alteration or alterations proposed, it would not be competent for the ensuing General Convention to make these alterations*.[98] (Emphasis in original; underlined emphases added.)

For both Hawks and Perry, a vote by orders was a constitutionally distinctive exercise in which the basic equality of all Dioceses was affirmed and in which the delegates became the corporate embodiment of the diocese that had sent them. Even the most recent edition of the TEC commentary concedes as much:

> Another principle of polity embodied in the Constitution of the Episcopal Church is the equal representation of dioceses in the House of Deputies of General Convention. Before their adherence to the Constitution united the Churches in the several states into a national body, *each was completely independent*. Equality of representation was the only ground upon which they would have consented to unite. Irrespective of size, or numbers of clergy and people therein, each Church was granted the same representation in each order, and in the event of a vote by orders, one vote in each order. *Thus the early phrase "suffrages by States," and still today a vote by orders is also a vote by dioceses*.[99] (Emphases added.)

87.-88. In the matter of accession, Dr. Mullin infers heavily from the very basic language of Article V of the 1789 Constitution:

> A Protestant Episcopal Church in any of the United States not now represented, may, at any time hereafter, be admitted, on acceding to the Constitution.[100]

It should be noted that there is no process of review or approval for revision of a Diocese's constitution or canons *subsequent to* the act of accession. Dioceses have historically been denied the opportunity to come into union with the General Convention because of the terms of their constitution or canons, but no Diocese (prior to 2007) has been sanctioned for provisions purportedly out of harmony with the national Constitution and Canons.

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[98] Perry, *The General Ecclesiastical Constitution of the American Church*, 287-289.

[99] *Annotated Constitution and Canons* (1981-1982), 12.

[100] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 100.

Furthermore, even if one excludes from consideration the five Dioceses who have recently exercised their constitutional right to withdraw, there are no less than fourteen TEC Dioceses whose constitutions lack an Accession Clause (and another fourteen that have acceded to the national Constitution only and not to the Canons). Such diversity is, in itself, far more suggestive of voluntary (and terminable) submission by the Dioceses than would be a precisely specified form of Accession Clause that every Diocese was mandated to include exactly as prescribed.[101]

Accession can theoretically be read either as an act of submission or of conditional compliance. Interestingly, however, it is a term most commonly employed in international law as part of the language of treaty-making, a process necessarily between sovereign individuals. Although employed in the Articles of Confederation, it had no analogue in the United States Constitution and the fact that the lawyers involved in the writing of the TEC Constitution allowed it to be employed suggests that it was intended to signify a potentially terminable process.[102]
Dr. Mullin contends that he found no evidence for the assertion that accession is temporary and reversible. Evidence to the contrary will be presented below.

***C. The Canons adopted in 1789 – and subsequently – never enjoyed supreme authority over the various Dioceses.***

89. Dr. Mullin's introduction of the term "de-facto federalism" (something conspicuous by its absence from his earlier affidavits) represents an attempt to invert the historical record. The General Convention has been "conservative" in exercising its authority not out of self-restraint but because it had no mandate to act on its own initiative within the territory of a sovereign Diocese. This was true during the nineteenth *and* twentieth centuries and it remains the case today.

90. While the bulk of Dr. Mullin's analysis is devoted to the TEC Constitution, he offers up an analysis in Paragraphs 89-98 of the powers supposedly assumed by the General Convention in those Canons which he—wrongly—asserts *preceded* the Constitution itself.

With a proper understanding of the nature of the authority conferred upon (or delegated to) the General Convention by the Dioceses, as well the rule of applicability referenced above in relation to the "nevertheless be bound" language, it should be obvious that Dr. Mullin's references to Canons not grounded in the Constitution itself and employing mandatory language are irrelevant.

The national Canons might, at the same time, be authoritative for the Church as whole and yet dependent for enforcement on the readiness of the local Ecclesiastical Authority to ensure that the diocesan courts enforce the national Canons when they are violated. The whole apparatus of TEC has depended upon the willingness of Dioceses to conform, a fact which, as we shall see, has had

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[101] See A. S. Haley ('Anglican Curmudgeon'), "ECUSA's 'Hierarchy': R.I.P.," January 4, 2010, http://accurmudgeon.blogspot.com/2008/04/ecusas-hierarchy-rip.html. The fourteen Dioceses who have not withdrawn from The Episcopal Church and whose constitution lacks an Accession Clause are Albany, Arkansas, Central New York, Dallas, Long Island, Maryland, Mississippi, Missouri, Northern Indiana, Rio Grande, Southern Virginia, Virginia, West Missouri, and Washington.

[102] McCall, "Is the Episcopal Church Hierarchical?" 20-23. McCall describes the decision to use the term "accession" as an example of what he calls a "category mistake," since Dioceses are clearly not "states" under international law. He notes further that the Articles of Confederation used the phrase "acceding" in reference to joining its "league of friendship."

implications for the expansion of the national church during the twentieth century. The use of mandatory language ("shall" rather than "may") carries no peculiar authority if the agent does not enjoy supreme authority.

91. Canon II—on the "mandatory" requirement for bishops elect to present certificates from their electing State Convention and the General Convention to those bishops charged with performing their consecration—says more about the rules governing membership in the House of Bishops than about diocesan independence or the lack thereof. If no State Convention can be prohibited from electing the episcopal candidate of its choice, equally no bishop can be compelled to perform the act of consecration. Rules governing the behavior of bishops—particularly those concerning episcopal trials—are matters for the House of Bishops assembled as a college, not as the embodiment of the General Convention, of which it is also a part. Even assuming their legitimacy, the recent trials and depositions of certain bishops had no effect on the corporate integrity of the Dioceses that they served, since the local Standing Committee automatically became the Ecclesiastical Authority upon the deposition of the bishop.

92. In the case of Canon III—on episcopal visitations—a significant aspect of the wording quoted by Dr. Mullin is the clause "as often as may be convenient." Even though the aforementioned phrase was removed in 1795, when the Canon was amended and renumbered Canon I, the official commentary still holds that the presence of "mandatory language"—"shall"—was not compulsive. It will be noted that the bishop was not obliged to make a visitation once in three years; he was only advised that it was thought proper that he should do so. Nor was he obliged to make any visitation to a parish unless that parish made provision for defraying his expenses on the occasion of his visitation.[103]

93.-96. The Canons cited here (IV-VIII, X-XI, XIII, XV) all deal with aspects of clergy behavior, including ordination requirements, education, duties and discipline. As such, they do not greatly differ from those canons adopted by the Church in Virginia in 1785. In all respects, it is the Ecclesiastical Authority—in the person of the bishop—who has final responsibility for the clergy of his Diocese (who do promise *him* obedience in their ordination vows). Canonical violations are still a matter for diocesan courts and diocesan bishops. The General Convention has no avenue for taking action, except to express—as it frequently did—its frustration about the degree of local non-compliance. That such Canons could be employed to compel a *Diocese* to do something was not historically an option.

97. Dr. Mullin's invocation of Canon XII on lay discipline as exemplary of General Convention's authority seems a peculiarly implausible example, since the process of repulsion from Holy Communion was one instituted by a parish priest and subject to appeal to the diocesan bishop. It was between these two poles that any debate on the validity of the priest's action was conducted. Indeed, the wording of Canon XII is that action may be taken "according to such rules of process as may be provided, either by the General Convention or by the Conventions in the different States,"[104] suggesting less the reservation of a future right to create a process at a level superior to the Diocese and more that a Diocese that fails to institute formal canons on the subject may choose to function according to whatever procedures the General Convention may subsequently enact.

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[103] *Annotated Constitution and Canons* (1981-82), 774.

[104] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1789, 128.

98. Here again, Dr. Mullin offers an assertion that is not sustained by the historical character of the compact into which the Dioceses entered in 1789. It would not have required great effort to have introduced language confirming the supremacy of the General Convention over the Dioceses (such language was indeed proposed—but not adopted—in the 1890s), not can those involved in drafting the TEC Constitution have been unaware of the legal significance of omitting it. Unlike the Church of England, The Episcopal Church—then and now—lacked both a formal connection with the national government and, more importantly, a judicial system that functioned beyond the State level. The authority of the national church over the State Churches after 1789 was no greater than that of the Confederation Congress over the sovereign States between 1780 and 1789.

## *V. THE EPISCOPAL CHURCH HAS CONTINUED TO UPHOLD THE PRINCIPLE OF VOLUNTARY DIOCESAN PARTICIPATION ASSUMED IN 1789 UP TO THE PRESENT DAY*

- **Although the Dioceses in General Convention play a role in the election of bishops, a diocesan bishop has historically been an autonomous agent. While the House of Bishops may endeavor to direct the behavior of their members, it cannot interfere in the affairs of a Diocese.**

- **An established Diocese is an autonomous corporate entity with which the General Convention cannot interfere. During both the nineteenth and twentieth century, national Canons were frequently ignored by Dioceses.**

- **The General Convention prescribes ordination requirements and clerical practices for priests and deacons, but it is the bishops and Standing Committees of Dioceses who interpret and enforce these requirements and practices.**

- **Despite enacting Canons relating to church property, the General Convention has no responsibility for parish and diocesan property under the Constitution and these Canons expressly apply only to parishes and missions not to Dioceses.**

- **The process of clerical discipline is administered by diocesan courts and there is no national judicatory.**

- **The Church Pension Fund was and is a voluntary contribution scheme for all clergy, which has attained almost universal acceptance not because it was mandatory but because it was and is successful.**

- **The lack of supremacy of the General Convention is explicitly demonstrated in its deference to diocesan agencies, the absence of a judicial apparatus above the diocesan level and the manner in which the national church raises money from its Dioceses.**

99. Dr. Mullin's contention that the General Convention has never considered itself constrained by the Church's Constitution is highly debatable. For more than two centuries, instances can be found of committees appointed by the General Convention declaring not only that proposed resolutions or constitutional and canonical amendments were inexpedient but that they were *incompatible* with the Constitution.

100. With regard to the examples cited of the General Convention's understanding of hierarchical authority, the 1964 declaration of the General Convention seems concerned less with defining internal relationships between church bodies than with articulating the basis on which the Church relates corporately to the outside world. No reference to legislation is evident and the employment of the verb "speaks through" hardly provides an adequate legal definition of authority. The 1994 declaration, by contrast, pertains to legal proceedings that are—by the terms of Article IX—the purview of diocesan courts (except in the case of bishops) and it must be reiterated that use of the word "hierarchical" does not, in itself, create supremacy.

*A. Bishops*

101. Article IV of the Constitution of 1789 enshrined the principle that the choice of a diocesan bishop would be according to rules prescribed by the electing Diocese, and the General Convention's confirmation of that choice is less an affirmation of its supremacy than of the principle that bishops are consecrated for the whole Church. Dioceses can re-elect candidates who have failed to receive the necessary consents (something that occurred during the Nineteenth Century and in the most recent episcopal election in South Carolina) and can refuse to elect a new bishop after the former occupant has been deposed (as once occurred in New York). That the General Convention has instituted a process by which episcopal elections can be confirmed through a majority vote of diocesan Standing Committees (a unit rule) rather than of the lay and clerical deputations in the House of Deputies clearly illustrates that it is *diocesan* approval that is being sought. (Canon III.11.4)

An early example of the limited powers of the General Convention concerns its reaction to the election of William Meade as Assistant Bishop of Virginia without an automatic right of succession. The committee appointed in 1829 objected to "the consecration of a Bishop, subjected, in the very terms of his election, to be deprived of his jurisdiction without any fault on his part," and a subsequent resolution approved by the General Convention urged the Presiding Bishop to decline to perform the consecration until such right of succession was made automatic.[105] The very wording of this resolution says something about the "powers" of the General Convention. It could not compel the Diocese of Virginia to *do* anything, but only deny consent by the wider Church; it did not *command* the Presiding Bishop not to perform the consecration, but merely requested his compliance. "A diocese may indeed make canons and regulations; by which a Bishop thereof will be bound;" explained one of TEC's early chroniclers of this episode, "but no diocese has the authority to make such laws, as strip him of his proper spiritual functions, still less to prostrate completely all his authority, and leave him an object of contempt instead of respect."[106]

The 1832 requirement that the General Convention "consent" to a bishop's resignation resulted from the twin debacles of retired Bishop Samuel Provoost's attempt to regain control of the Diocese of New York in 1812 (he failed) and Bishop Philander Chase's abrupt departure from the Diocese of Ohio in 1831 (and subsequent election as Bishop of Illinois in 1835) following disagreements

[105] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 2*, 1829, 233-234, 237-240.

[106] Hawks, *The Constitution and Canons of the Protestant Episcopal Church*, 30.

with his Diocesan Convention.[107] In both cases, the concern of the General Convention was not to interfere in internal diocesan affairs but to ensure that members of the House of Bishops did not abuse the office with which they had been entrusted. This is further illustrated by the modification of the 1832 Canon (which required a two-thirds vote in the affected Diocesan Convention and concurrent majorities in both orders of the House of Deputies as well as the House of Bishops) in 1844 to make the House of Bishops the sole adjudicator.[108] Apart from denying a retired bishop a seat in the House of Bishops, however, it is debatable what the General Convention can do about a bishop who retires without permission. Further proof that the requirement does not constitute an assertion of supremacy over the Dioceses is found in today's Canon III.12.8(d), which stipulates that the Presiding Bishop must notify the Standing Committee of the affected Diocese "in order that the Standing Committee may be heard on behalf of the Diocese, either in person or by correspondence upon the subject."

Canon III of 1853 (now Canon III.12.4(c)) respecting bishops absent from their Dioceses, merely provides for the Bishop's status as Ecclesiastical Authority to devolve in an orderly fashion upon his Coadjutor or Suffragan Bishop or—failing that—upon the Standing Committee. Under the terms of Article IV of the Constitution, however, the Standing Committee automatically becomes the Ecclesiastical Authority in the absence of a qualified bishop. At no time may the General Convention, the Presiding Bishop or any other national church organization serve as a substitute for the Ecclesiastical Authority, nor intervene in the internal affairs of a Diocese, except at the latter's request.

Article II.8 is an example of TEC's 20th Century adaptation. Historically, TEC proved extremely reluctant to authorize the translation of a bishop once elected and confirmed (the case of Philander Chase referenced above was considered by many to be a scandal). In 1931, a committee of the House of Bishops first recommended an amendment to Article II authorizing translation of bishops and bishops coadjutor, but it was not until 1967 was Section 8, allowing translation after five years and with the acceptance of his resignation of his existing office by a majority of bishops and diocesan Standing Committees, adopted in its current form. Once again, this provision reflects the authority of the House of Bishops over its members, not the authority of the General Convention over the Dioceses.[109]

102. The prescription both of a minimum age for ordination and of a mandatory retirement age, as well as the limiting of consents to bishops with jurisdiction and the provision for the "termination" of bishops who refuse to retire all reflect aspects either of the initial consent process—in which the General Convention has a role—or of the internal operation of the House of Bishops. Insofar as a bishop seeks to remain in good standing with the wider Church or a Diocese wishes to secure the wider Church's consent for a candidate it has elected, they apply, but they reveal nothing about the nature of relationship between the national church and the Dioceses.

103. Dr. Mullin's references in these paragraphs have—by his own admission—to do mainly with "membership in the House of Bishops." The question of whether to admit coadjutor, suffragan and

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[107] *Annotated Constitution and Canons* (1981-1982), 63-65.

[108] *Annotated Constitution and Canons* (1981-1982), 777-782.

[109] *Annotated Constitution and Canons* (1981-1982), 66-70.

resigned bishops to partial or full membership in the House of Bishops, while of great significance for the General Convention, reveals nothing about the constitutional relationship between the General Convention and the Dioceses. Equally, the granting of the right to ordain a suffragan bishop imposes no obligation on a Diocese to elect one; it sprang as much from the wishes of certain Dioceses as it did from the General Convention.

104.-105. Dr. Mullin correctly points out that the General Convention has rejected candidates for the episcopate (including, at his first election, the present Bishop of South Carolina), both on personal and theological grounds. That is its constitutional prerogative. What is remarkable has been its subsequent inability (at least until recently) to sanction or discipline those bishops whose election it has approved but who then proceed to violate or permit the violation by their subordinates of national Canons.

Dr. Mullin has devoted much attention to questions surrounding the pursuit of a common liturgy for TEC during the 1780s, but he ignores how inadequate the efforts to enforce liturgical conformity in subsequent decades actually were, national Canons notwithstanding. Part of the reason for this was that many bishops themselves resisted attempts to tamper with their peculiar authority to authorize special forms of worship within their particular jurisdictions.

Responding to several memorials in 1856 asking for clarity on what certain rubrics in the Book of Common Prayer actually meant, the House of Bishops gave as its opinion that "serious difficulties might arise from an attempt to enforce absolute uniformity in regard to many such details, and that an attempt on the part of the House to effect that, might result in a practical infringement of the rights of administration belonging to the Heads of the respective Dioceses."[110]

A decade later, when the House of Bishops issued a "Declaration on Ritualism," those bishops who endorsed it were "careful to reserve 'each for himself his rights as ordinary of his own diocese, and also his rights as a member of the House of Bishops sitting in General Convention;' and it was also stipulated that a diocesan should act his own pleasure as to the 'publication or reception, in his own diocese, of this document, which, from its manner of preparation and signature, could not be regarded in any sense as official, or of more than ordinary authority."[111]

A pattern of disregard of the national Canons was clearly perceptible throughout the 19th Century. Of Canon XX (Use of the Book of Common Prayer), enacted in 1874, church historian James Addison recorded:

> For thirty years this canon remained in force without producing any perceptible effect upon the steady advance of ritual. Apparently it resulted in only one trial, which ended in an admonition to the offender. In 1904, it was repealed by the General Convention

[110] *Journal of the General Convention*, 1856, 178.

[111] William S. Perry, *The History of the American Episcopal Church, 1587-1883* (Boston: James R. Osgood and Company, 1885), Vol. 2, 348.

without one dissenting voice.[112]

Or consider the verdict of George DeMille concerning a related declaration twenty years later:

> In 1895, a pastoral letter of the House of Bishops had explicitly declared that Reservation [of the Blessed Sacrament] was not sanctioned in the Church. However, it was a notorious fact that Reservation, with its accompaniment of Adoration and Benediction, was openly practiced in a considerable number of parishes.[113]

And practiced, it should be noted, if not with the local bishop's approval and least with his complicity. If any bishop or Diocese chose not to enforce national Canons by failing to sanction parishes who failed to comply, there was nothing that the General Convention could do about it.

The same freedom has continued to be a feature of the 20th century Episcopal Church. While today's controversies ostensibly center on sexual identity and behavior, in practice they involve the same concerns about the validity and meaning of the sacramental offices of Baptism, the Eucharist and Ordination as did the nineteenth century argument over ritualism. It was to regulate this debate that national Canons have supposedly been enacted and yet the historical record has been one of selective enforcement or overt rejection. That such behaviors can occur only with the complicity of a bishop only reinforces the argument that the Diocese is sovereign. A bishop may be deposed from the House of Bishops, but that body cannot negate acts performed prior to his deposition, nor may it simply fill the now vacant office with a more pliable candidate. 20th century General Conventions have been as willing to complain about canonical violations as their nineteenth century forbears and as ineffectual about remedying them.

Witness the testimony of a committee of the House of Bishops on reducing communicant loss in 1928:

> Perhaps the most notable evidence of weakness in pastoral care is the growing *disregard* of the provision for letters of transfer. Canon 44 not only establishes the right of each communicant in good standing to such a letter upon removal to another cure, but it further lays the duty upon every Minister to effect a transfer if possible, and in any case to notify the Minister of the Cure whither the communicant has gone.[114] (Emphasis added)

Or consider the conclusions of the Standing Liturgical Commission in 1940:

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[112] James T. Addison, *The Episcopal Church in the United States of America, 1789-1931* (New York: Charles Scribner's Sons, 1951), 210.

[113] DeMille, *The Catholic Movement in the American Church*, 197.

[114] *Journal of the General Convention*, 1928, 78-79.

> The Commission feels bound to call the attention of the Church to the increasing lawlessness in the conduct of worship . . . This lawlessness is apparent everywhere in the conduct of the Choir Offices. It is unfortunately apparent in many places in the conduct of the order for Holy Communion. It appears upon investigation that not only do Priests alter, omit or interpolate to suit their own wishes, but that in some cases Bishops have apparently definitely authorized such variations.[115]

An even more revealing glimpse of how many bishops understood the matter occurred at a special meeting of the House of Bishops in 1953, which chose to table a memorial from the Diocese of West Missouri condemning the Diocese of Southern Ohio for establishing a joint congregation of Episcopalians and Presbyterians in which the latter "were entitled to the *full sacramental privileges of the Episcopal Church*, but without requiring either Confirmation or an acceptance of the *doctrine, discipline and worship* of this Church."[116] The form of merged liturgy adopted by the congregation was, by any reading of the national Canons, prohibited, yet the House of Bishops showed no desire even to reprove the Bishop of Southern Ohio.

Such canonical flexibility paved the way for the more egregious violations of the late 20th Century. In 1974, after certain bishops (none of them with jurisdiction) ordained a number of women to the priesthood without the approval of the General Convention, the Council of Advice to the Presiding Bishop admitted that the failure to bring charges against the offenders testified to the inability of the House of Bishops to impose discipline:

> We must recognize that, while condemning violations of the constitution and canons and the integrity of the household of faith, we of all people must live within them. We are called upon to recognize that the *House of Bishops is not a judicial body, nor is the Presiding Bishop a judicial officer*. We must accept the fact that the judicial process has run its course in relation to the charges filed in August, 1974, that put the process in motion.[117] (Emphasis added.)

Equally noteworthy was a debate at the General Convention of 1979 on the ordination of homosexual persons at which a resolution asserting a traditional Christian understanding of sexuality that was adopted. In response, the Bishop of Southern Ohio, John Krumm, introduced a statement—signed by twenty of his fellow bishops—rejecting the "recommendations" of the resolution as infringing the "traditional freedom and duty" of bishops and refusing to endorse it in his Diocese because it would "abrogate our responsibilities of apostolic leadership and prophetic witness to the flock of Christ committed to our charge, and it would involve repudiation of our ordination vows as Bishops."[118] "The Anglican appeal to reasonableness," Krumm had written in an essay some twenty years before, "is made clear in the *striking absence of any substantial mass of regulatory detail* either in the Prayer Book or in canon law. So marked is this absence that

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[115] *Journal of the General Convention*, 1940, 472.

[116] *Journal of the General Convention*, 1955, 55.

[117] *Journal of the General Convention*, 1973, 125.

[118] *Journal of the General Convention*, 1979, AA121-AA122, B93-B96, B110-B112.

we often appear quite *anarchical* to outsiders. The rules to which an Episcopalian must adhere are few and limited to what is absolutely necessary in order to secure fellowship and faith."[119] (Emphasis added.)

In 1977, the year after the General Convention had voted to accept the ordination of women, the Theology Committee of House of Bishops issued "A Statement on Conscience," which was intended from canonical disability anyone who expressed conscientious objections to (or support for) the ordination of women in unsympathetic Dioceses. "The statesmanship and self restraint of the leadership of the Church prevailed," was the conclusion of the official commentary in the early 1980s, "or, in another view, *the Church muddled through*. It is doubtful that it could have done so if there had existed clear and established judicial procedures which would have forced a courtroom confrontation between differing views."[120] (Emphasis added.)

The presumption at the time was that this clause contained no sunset provision, but twenty years later the General Convention adopted the following resolution:

> It is the mind of this Convention that, notwithstanding the legislative history surrounding the passage of those Title II Canons relating to the ordination of women, and notwithstanding subsequent actions of the House of Bishops, not in General Convention assembled, the provisions of the canons of the General Convention, insofar as they may relate to the ordination of women and the licensing and deployment of women, are mandatory.[121]

What, however, did the word "mandatory" actually mean? How could such a resolution— or the national Canons pertaining to it—be enforced if the Bishop and Diocesan Convention together resisted? Indeed, the very fact that the General Convention of 2000 contented itself with a resolution requesting the Executive Council to establish a Task Force to "visit, view, assess and assist" the Dioceses of San Joaquin, Fort Worth and Quincy to progress "toward full implementation" of Canons II.8.1, II.16.1(d) and II.17.3 and to monitor progress toward full "compliance,"[122] suggests that the General Convention was fully aware of the constitutional ambiguities. The resolutions of 1997 and 2000 flew in the face of a pattern of episcopal and diocesan autonomy established over the course of more than two centuries.

106.-107. The question of ecclesiastical discipline in respect of bishops remains one of the most controversial aspects of Episcopal jurisprudence. Prior to 2000, there had only been four trials of bishops, two resulting in acquittals, one in indefinite suspension (Bishop Onderdonk of New York in 1844) and one in deposition (Bishop Brown of Arkansas, then retired, in 1925).

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[119] John M. Krumm, "Our Law and Our Liberty," In Howard A. Johnson, ed., *This Church of Ours: The Episcopal Church; What It Is and What It Teaches About Living* (Greenwich, CT: Seabury Press, 1958), 38-39.

[120] *Annotated Constitution and Canons* (1981-82), 614.

[121] *Journal of the General Convention*, 1997, Vol. 1, 109-112, 548-549 (quotation on 112).

[122] *Journal of the General Convention*, 2000, Vol. 1, 338-340, 592-595, 601.

The trial of Bishop Onderdonk provides a perfect case study of what even the official commentary describe as a conviction proceeding from an *ex post facto* law, which "defined an offense and affixed a penalty thereto in a case where no penalty had existed before, and all this after the alleged offense had been committed."[123] Deposed by the House of Bishops for "immorality" (though his supporters alleged it was his high church theology that led him to be indicted), Onderdonk was thereafter unable to perform episcopal acts, yet his Diocesan Convention ignored the General Convention's demand that it request his resignation, rejected calls to pass a resolution declaring that he could never again be a useful Bishop of New York and continued to pay him part of his salary after he was deposed. As a further gesture of defiance, when its members finally consented to initiate a search for a successor, only Onderdonk supporters could win sufficient backing and one was finally elected in 1852.[124]

That same year, when Bishop George Washington Doane of New Jersey was brought before a court of bishops (who ultimately dismissed the charges) for alleged financial mismanagement, the bishop's initial response was to argue that his critics had no right to interfere in the affairs of an autonomous Diocese:

> Against this aggression on the diocese of New Jersey, against this invasion of the most sacred rights of [its Bishop]; against this dictation to him to pursue a course marked out by them, and to his Convention, to pursue that course, under the threat of presentment; if such dictation shall not be obeyed; and, thus, the fear of a presentment be admitted: [the Bishop of New Jersey] most solemnly protests.[125]

108. Dr. Mullin's discussion of the requirement that bishops investigate cases where a candidate for ordination has applied for ordination in another Diocese and been turned down (stipulated in present-day Canon III.6.4(c) [for deacons] and III.8.3(c) [for priests]) ignores the fact that it no way prevents a bishop from proceeding with an ordination once he has has undertaken the required consultation. It reflects both the collegial character of the episcopate and the desirability of a bishop knowing all the facts concerning a candidate for ordination.

Episcopal interference in the affairs of other Dioceses without permission is generally considered a violation of Article II.3, but it was frequently been violated without penalty. As hostility toward high church priests in low church Dioceses came to a head, high church bishops agreed to receive such men into their Dioceses, even when under discipline in their Diocese of origin. Of one priest, whom Bishop Whittingham of Maryland received after he had been convicted of hearing private confessions in defiance of the wishes of the Bishop of Massachusetts, a confidant reported:

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[123] *Annotated Constitution and Canons* (1981-1982), 1040-1043 (quotation on 1043).

[124] George E. DeMille, *The Catholic Movement in the American Church* (Philadelphia: Church Historical Society, 1941), 65.

[125] *The Protest and Appeal of George Washington Doane, Bishop of New Jersey* (Philadelphia: King and Baird, 1852), 11-12.

> [Whittingham] said what a Bishop could do a Bishop could undo, and he released Father Prescott from any obligation to obey the decision of the Court in his Diocese.[126]

The implications of this statement should not be missed. A disciplinary Canon, enacted in 1792 as Canon 2 (Title II, Canon 3, in 1860)[127] provided for the inhibition of clergy who moved to another Diocese while under indictment or discipline in their Diocese of origin. By the logic of Dr. Mullin's earlier arguments one would have expected any bishop to feel bound to acknowledge the authority of a fellow bishop and of his diocesan courts to discipline his own clergy, yet Whittingham chose to defy the authority of national Canons and yet suffered no penalty (not least because there was no sanction that the General Convention could realistically employ).

A similar instance of "boundary crossing" occurred in 1864 when an Ohio clergyman called to serve a parish in Galesburg, Illinois, failed to present letters of transfer to Bishop Henry Whitehouse before preaching for the first time. Whitehouse then brought charges against him in an Ohio church court (the only option since he was canonically resident in Ohio) and when that court found him guilty, Whitehouse refused to accept the letters of transfer on the ground that he had now been found guilty of "misconduct." When the clergyman defiantly returned to Galesburg, Whitehouse persuade his Diocesan Convention to expel the parish, an act that led the Bishop of Ohio to accuse his Illinois counterpart of treating the Ohio's diocesan courts with contempt. This saga helps to demonstrate not only the sovereign character of Episcopal Dioceses and bishops, but also the lack of any process of reconciliation that could be enforced by the purportedly higher jurisdiction of the General Convention.[128]

Throughout the 19th Century, the General Convention continued to demonstrate respect for the autonomy of diocesan bishops. When a Canon was proposed in 1892 that would allow those who had abandoned the Communion of the Church to apply for reinstatement to *any* bishop (not just the bishop who had certified their abandonment), the Committee on Canons of the House of Deputies abruptly terminated debate on the grounds that it would be "unwise to transfer a grave question of ecclesiastical discipline from the Ecclesiastical Authority of one Diocese to that of another at the option of the offender."[129] In 1895, a committee appointed by the Board of Missions of the national church warned against infringing upon the episcopal prerogative:

> The chief work of the Commission on Work among Colored People should be to raise money for the work and call attention to it. It should not in any way dictate, as we are it has not dictated in the past to the individual Bishop as to the expenditure of money

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[126] Charles C. Grafton, *A Journey Godward* (New York: Longmans, Green and Co., 1914), 77-78.

[127] See the discussion of the successor Canon (IV.7) in *Annotated Constitution and Canons* (1981-1982), 1057-1062.

[128] Bruce T. Barton, "Grace Church, Galesburg, Illinois, 1864-1866: The Supposed Neutrality of the Episcopal Church During the Years of the Civil War." *Historical Magazine of the Protestant Episcopal Church* 46 (June 1977): 186-208.

[129] *Journal of the General Convention*, 1892, 242.

appropriated to them.[130]

Despite the expansion of the national church organization between 1901 and 1919, diocesan bishops continued to resist any efforts they perceived as undermining their authority. At a special meeting of the House of Bishops in 1929, one of the petitions presented was denied by the responsible committee on the ground that "the House of Bishops has not jurisdiction over the discipline of individual ministers, this belonging to the Bishop in whose jurisdiction the alleged offense was committed."[131] In New York, Bishop William Manning acquired such a reputation for independence that even those charged with fund-raising for the wartime chaplaincy program of the National Council were careful first to secure his permission in writing.[132]

*B. Dioceses*

109. Article V of the Constitution of 1789, conceived of a process by which, in the words of the official commentary, "an Episcopal Church organized in any state might come into union with those already represented in the General Convention."[133] The introduction of a process (not originally contemplated) for diocesan division in 1838 and of a clause (Section 7) requiring assurances of suitable provision for support of the episcopate in 1871 (a clause not repealed until 1964) did not fundamentally alter the Church's position that the organization of a new Diocese began in an unorganized area (or the Diocese to be divided) and that ratification of this act by the General Convention was the *concluding* act of the process. The second edition of TEC's official commentary even noted that the much trumpeted Section 7 was more honored in the breach than in the observance, and in at least one case a Diocese chose to obtain bonds from its parishes to support the Bishop's stipend rather than to build up an endowment as was intended.[134]

The approach of the early General Conventions to diocesan requests could best be described as passive. "So inflexibly was the Church then organized as a mere federation of dioceses," wrote James Addison, professor of religion at the Episcopal Theological School in Massachusetts in 1951, "that it was baffled by existing conditions. Consequently the policy of the General Convention was to leave each State or western Territory to qualify as a diocese if and when it could, through the use of its own resources. The Convention assumed no responsibility for helping it to grow. It simply waited for it to appear with a signed certificate proving it had grown."[135]

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[130] *Journal of the General Convention*, 1895, 360.

[131] *Journal of the General Convention*, 1931, 168.

[132] Sherrill, *Among Friends*, 184-185.

[133] *Annotated Constitution and Canons* (1981-82), 90.

[134] Edwin A. White and Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* (Greenwich, CT: Seabury Press, 1954), 2nd Edition, 87.

[135] Addison, *The Episcopal Church in the United States of America*, 128.

Accounts of early admissions in Bishop William Perry's monumental *History of the American Episcopal Church*, published in 1895, only reinforce this impression. Of the organizing convention of the Diocese of Kentucky, Perry writes:

> The first convention of the Diocese of Kentucky organized by the choice of the Rev. Dr. Chapman as president and the Rev. Benjamin O. Peers as secretary. Rules of order and a constitution were adopted. Diocesan officers and a deputation to the General Convention were elected. The Rt. Rev. Bishop Ravenscroft of North Carolina was invited to visit the diocese. A diocesan missionary society was formed. Canons were proposed and laid over for action at the next Convention . . . and the standing committee were requested to publish an address to the Episcopalians throughout the State, inviting their interest and cooperation in the Church's work.[136]

Despite the fact that the General Convention had yet to pass on the eligibility of the Diocese of Kentucky to be in union with it, the work of the Diocese proceeded with little or no reference to the national church.

The constantly shifting language of admission during the nineteenth century (rather like the varied wording of diocesan accession clauses) testifies more to a notion of voluntary—and terminable—subscription to a confederation than an absolute submission to the authority of the General Convention. Thus, in 1820, the House of Delegates declared that it "recognizes the Protestant Episcopal Church in Maine as in union with the General Convention."[137] Twelve years later, when the component Dioceses of the "Eastern Diocese"—a diocesan "holding company" covering the whole of New England outside Connecticut—took it upon itself to release the State of Vermont as an independent Diocese, members of the General Convention contented themselves with declaring that they recognized "the separation of the Diocese of Vermont from the Eastern Diocese."[138]

By the late 1820s, the General Convention was giving more scrutiny to the language of the constitutions and canons of Dioceses seeking admission, but its recommended changes were frequently advisory, as when the Diocese of Tennessee was admitted before putting into effect the "recommendation" that it repeal a portion of its canons.[139] Of the Diocese of Michigan, the *Journal of the General Convention* of 1835 reported that since the General Convention of 1832 it had "made the alteration in her constitution which was required, in order to *perfect her admission into connection* with the Church in the United States."[140] (Emphasis added.) Perhaps most controversial of all the early admissions was that of the Diocese of Illinois in 1835, despite its election of Philander Chase as its first Bishop, a circumstance that led the House of Bishops to comment that his manner of appointment "may be thought not entirely in consonance with the regulations of the

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[136] Perry, *The History of the American Episcopal Church*, Vol. 2, 201.

[137] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1820, 516.

[138] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 2*, 1832, 368-369.

[139] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 2*, 1829, 235, 245, 300.

[140] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 2*, 1835, 604.

Church."[141]

An attempt to prescribe demographic and financial guidelines for admission into union met with failure in 1838,[142] and an 1850 attempt to amend Article V of the Constitution to include the phrase "without first obtaining leave of the General Convention, who shall judge of the necessity and expediency of the formation or erection of such a Diocese" was rejected.[143] In the aftermath of the Civil War, the language of accession was modified, not least because of the increasing number of new Dioceses being formed from the division of existing Dioceses. In 1865, the House of Deputies Committee on New Dioceses recommended the "ratification" of the division of the Diocese of Pennsylvania and the admission into union of the new Diocese of Pittsburgh, on the grounds that "both the Bishop and the Convention of the Diocese of Pennsylvania have consented to such separation, and that all the requirements of the fifth article of the Constitution and Canons are fulfilled."[144] That a new Diocese such as Pittsburgh automatically acquired an autonomous status seems evident from this declaration of the Committee on Amendments to the Constitution of the House of Bishops in 1886:

> The division of a Diocese from another, when ratified by the General Convention, gives *autonomy* to the Dioceses so divided. The intention of the [fifth] Article of the Constitution, requiring that such divided Diocese should be under the Constitution and Canons of the original undivided Diocese (until each would exercise its *autonomous* powers and form its own Constitution and Canons) was made for the obvious reason that no Diocese should exist without the protection and guidance of some constitutional and canonical law.[145] (Emphasis added.)

A comparatively late example of the ambiguity inherent in diocesan formation is observable in the 1895 report of the Committee on the Admission of New Dioceses of the House of Bishops. Noting that clergy and laity in the Missionary District of Northern Michigan "did proceed to *organize* a Diocese of the Protestant Episcopal Church, whose boundaries are coterminous with the bounds of the Missionary District aforesaid," the Committee recommended that the Diocese be received into union in light of their accession to the Constitution. (Emphasis added.) However, the resolution finally adopted by the General Convention, while retaining the language previously cited, also declared that "the consent of the General Convention be given to the organization of the new diocese."[146] It was not clear whether the General Convention considered the Diocese of Northern Michigan to be already

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[141] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 2*, 1835, 654. For background on the controversy surrounding Bishop Chase see, *Annotated Constitution and Canons* (1981-82), 778-779.

[142] *Journal of the General Convention*, 1838, 17, 21-22.

[143] *Journal of the General Convention*, 1850, 72, 84-85, 133-134.

[144] *Journal of the General Convention*, 1865, 55.

[145] *Journal of the General Convention*, 1886, 71.

[146] *Journal of the General Convention*, 1895, 53-54.

organized or still to be organized.

The question of territorial transfers between established Dioceses is a subject of considerable ambiguity. When the Diocese of Michigan submitted a resolution in 1937 seeking the General Convention's "approval" of a transfer of territory with the Diocese of Northern Michigan, the Committee on the Admission of New Dioceses commented that "the matter of any change in Diocesan boundaries is effected by agreement between the Dioceses concerned and by mutual amendments to their Diocesan Constitutions," but offered to express the General Convention's "satisfaction with and approval of said change."[147] By contrast, the General Convention of 1973 "gave consent" to a transfer of territory between the Dioceses of Spokane and eastern Oregon, even though the resolution adopted by Spokane's Diocesan Convention in 1972 declared that the territory would "be ceded," provided that the Bishop of Spokane approved and the Diocese of Eastern Oregon concurred by canonical resolution, and made no mention of the General Convention's involvement.[148]

110. Any and all General Convention legislation pertaining to missionary bishops concerns individuals with responsibility for congregations not within an established Diocese and, consequently, directly subordinate to the General Convention. Questions of diocesan autonomy do not apply.

111.-113. While applications for "admission into union" were certainly denied during the nineteenth century, most observers understood these denials as relating to denial of *full* participation in the affairs of the Church. Many of the earliest examples of such rejection reflected either local objections, as was the case with Louisiana in 1835, or the self-evident inability of the Diocese to be self-sustaining, as was the case that same year with Indiana, whose first attempt at a convention boasted one deacon and just two lay delegates.[149] Even as it rejected Indiana, however, the General Convention admitted Illinois, whose primary convention consisted of three clergy and lay representatives of four parishes, suggesting that the bar was not being set very high.[150]

The case of the organization of the Church in California cited by Dr. Mullin is somewhat controversial. Bishop Perry quotes directly the account of William Kip, Missionary Bishop of California, on the early days of Anglicanism on the West Coast:

> It is a fact but little known to the churchmen of the present day that the early founders of the Church on this coast had no idea of uniting with the General Church at the East. There is no recognition of it in any of their proceedings. They ignored the name of the "Protestant Episcopal Church," and called their organization "The Church in

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[147] *Journal of the General Convention*, 1937, 308-309.

[148] *Journal of the General Convention*, 1973, 355-356.

[149] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 2*, 1835, 614, 619.

[150] Percy V. Norwood, "The Primary Convention of the Diocese of Illinois," *Historical Magazine of the Protestant Episcopal Church* 24 (September 1955): 311-323.

> California." In the report of the Missionary Committee at the second convention in 1853, are the significant sentences: '*As a diocese, we ought to manage our own affairs. Whether we ask for admission into union or not,*' etc. Knowing that while in this position no bishop would be consecrated for them, the question was discussed previous to the meeting of the convention, of attempting to procure the Episcopate from the Greek Church.[151] (Emphasis added.)

The language employed suggests that the only possible sanction perceived by California churchmen was denial of consent for a bishop, and the possibility was clearly entertained of corporate existence *outside* the union. In practice, an approach to the Greek Church was clearly considered unworkable, leaving West Coast Anglicans with little choice but to resort to The Episcopal Church for the episcopate. According to D. O Kelley's *History of the Diocese of California* (cited by Dr. Mullin), the 1850 primary convention did elect a Standing Committee and adopt a diocesan constitution and canons, while "no action was taken with a view to seeking recognition by the General Convention, and admission into union with it."[152]

Controversially (it appears to be the only such case on record), the General Convention of 1853 refused to admit California into union because it had not acceded to the TEC Constitution, but still elected William Kip as a missionary bishop to California, despite the fact that a nominal diocesan organization existed on paper.[153] The impression conveyed by the very sketchy account in the *Journal of the General Convention* for that year is less that the General Convention considered itself free to do what it wished, but rather that it sought to provide episcopal assistance through an extra-legal maneuver. Since California was admitted into union in 1856, any controversy surrounding Kip's election was rapidly shelved.

By 1871, concerns about diocesan viability led to the rejection of the proposed division of the Diocese of Illinois into three Dioceses because $30,000 had not been raised in each of the two proposed new dioceses for the support of their bishops.[154] Only three years later, however, a petition from the Diocese of Tennessee elicited some sympathy from the Committee on Amendments to the Constitution of the House of Deputies. "The support of the new Episcopate," its members insisted, "is essentially a matter between the Bishop-elect and the people, who call him to be their chief pastor, and we see no sufficient reason for restraining their action by organic law."[155]

114. In his discussion of Canon 1.11.3(f), Dr. Mullin neglects to provide the complete

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[151] Perry, *The History of the American Episcopal Church*, Vol. 2, 314.

[152] D. O. Kelly, *History of the Diocese of California from 1849 to 1914* (San Francisco, CA: Bureau of Information and Supply, [1915]), 11-13 (quotation on 13).

[153] *Journal of the General Convention*, 1853, 30-31, 37-38, 57; Kelly, *History of the Diocese of California*, 22-23.

[154] *Journal of the General Convention*, 1871, 230-231, 245, 261-362, 367.

[155] *Journal of the General Convention*, 1874, 101-102.

historical context. Until 1901, there was some doubt as to whether the General Convention enjoyed an inherent right to erect *missionary districts* on its own initiative (as opposed to electing *missionary bishops*). Instead, a distinction tended to be made between organized Dioceses and unorganized territory, and although the General Convention began to assume formal responsibility for territory ceded to it by overextended Dioceses as early as 1874, any such cession was always ratified with the formula: "Doubts are entertained by many of the power under the Constitution to permanently alter the territorial extent of the Diocese in this form . . ."[156]

By 1901, when Article VI of the Constitution was amended so as formally to authorize the creation of missionary districts, the majority of new districts were most likely to be erected outside the domestic United States (in Central and South America, the Philippines, Japan and China) and the assumption was that they were likely ultimately to evolve into self-supporting national churches, with native-born clergy and bishops. Even after 1901, the Missionary Diocese (Missionary District until 1967) was subject to the General Convention, which could reorganize it at will. Until 1973, the House of Bishops elected the missionary bishops, who, in turn, exercised ultimate authority over their district's affairs. Even more significantly, until 1970, a missionary diocese was permitted just one General Convention delegate in each order, with the consequence that—in votes by orders —a missionary delegate was counted as just one-quarter of a vote.[157]

An excellent illustration of the contrast between Missionary Districts and Dioceses can be seen in two attempts during the 1940s to reunite the established Dioceses of Kansas and Nebraska with the Missionary Districts of Salina and Western Nebraska, respectively. While that process was successfully accomplished in Nebraska, it failed in Kansas because such "retrocession" required the consent of the affected Diocese (but not of the Missionary District) and Western Kansas ultimately became an independent Diocese in 1970.[158]
The fact that there is today no canonical provision for release of a properly constituted Diocese from union is therefore irrelevant. Since a Missionary Diocese—though today vested with many of the constitutional accoutrements of a regular Diocese[159]—is ultimately under the jurisdiction of the General Convention, the latter *must* make provision for its release. It can make no such provision for a Diocese, which remains a sovereign entity and must choose to exercise that right in and of itself.

115. Dr. Mullin correctly reports the change in the language of Article V.1 of the TEC Constitution effected in 1904, but he attributes too much significance to it. As already discussed in Paragraphs 87-88, diocesan accession may be required for the General Convention to admit a Diocese "into union," but there are no constraints on subsequent qualification or revocation of that accession. Furthermore, as discussed above, Dr. Mullin offers no explanation for why fourteen established dioceses of The Episcopal Church still do

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[156] See the resolution pertaining to the Diocese of Colorado in *Journal of the General Convention*, 1892, 226.

[157] *Annotated Constitution and Canons* (1981-82), 34-37.

[158] *Journal of the General Convention*, 1940, 370; 1946, 328-329.

[159] Missionary Dioceses now elect their bishops and have their own constitution and canons.

not accede to the TEC Constitution.

116. The General Convention has certainly enacted a Canon (III.12) that specifies certain obligations that it expects bishops to perform, but these are an imposition upon the individual bishop not his Diocese. Many of the nineteenth century enactments by the General Convention seek to address the voiced concerns of parishes. The 1856 Canon on Episcopal Visitation, for example, was a response to the fact that denial of episcopal visitation—something periodically used by bishops to sanction parishes of whose liturgical practices they disapproved—meant that Confirmation would not take place and baptized Episcopalians would therefore be unable to receive Holy Communion.

In 1856, when the Church of the Advent in Boston petitioned the General Convention, the two houses of the General Convention were divided over the wording of the new Canon. The House of Deputies not only provided for an investigation of the circumstances but accorded the parish to request the services of another bishop if the investigation ruled in their favor, but the House of Bishops declared that the situation was "beyond the cure of special legislation." The final canon simply stated that both sides in the dispute would abide by the decision of the "council of conciliation."[160] No invasion of diocesan prerogatives was at issue.

Dr. Mullin reads a subordination of diocesan to national Canons into the language of Article IV of the Constitution that is far from self-evident. Standing Committees existed in the Dioceses of Maryland, New York, Pennsylvania and Virginia prior to the ratification of the TEC Constitution in 1789, but there was no reference to them in the Constitution until 1901, only in the Canons. The purpose of Article IV (and of Canon I.12) is to define the relationship that the General Convention understands to exist between it and the Diocese in question, namely to be the Ecclesiastical Authority in the absence of a bishop (the Diocese does not lose its sovereignty if a bishop retires or dies) and to provide the necessary consents for the election of Bishops in other Dioceses. As the official commentary notes:

> Under the authority of Article IV of the Constitution, the rights and duties of the standing committee within a diocese are properly the subject of canonical legislation within each diocese.[161]

117. Dr. Mullin misstates the Canon of 1795 requiring that congregations belong to the Diocese in which they were situated, which was not Canon 1 but Canon 8. Here the concern of the General Convention was not to invade diocesan jurisdiction, but to preserve the integrity of the Diocese, by denying individual congregations any opportunity to assert a right to ignore State lines.[162]

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[160] *Journal of the General Convention*, 1856, 48, 54-55, 64, 68-69, 105, 126-127, 180, 184-185, 187-189, 196-197; *Annotated Constitution and Canons* (1981-82), 787-789.

[161] *Annotated Constitution and Canons* (1981-82), 358.

[162] *Annotated Constitution and Canons* (1981-82), 360-361.

The General Convention has always had the freedom to set its own conditions of membership, but it may not *require* that the Dioceses employ them in their internal affairs. The amendment of what is now Article I.4 to require General Convention deputies to be communicant members of the Church has no bearing on the purported supremacy of the General Convention.

118. The wording of Canon I.13 for the most part suggests that the powers involved lie with the affected Diocese and it explicitly has no bearing on "the legal rights of property of any Parish or Congregation." The other Canons referenced in this paragraph are discussed elsewhere in this affidavit.

119. Canon I.6 was originally enacted solely to provide material for the pastoral letter issued by the House of Bishops at the conclusion of the General Convention. In 1874 what had hitherto been listed as a "recommendation was redefined as a "duty," and in 1910 the objective of supplying information for the bishops' pastoral letter was eliminated.[163] Throughout TEC's history, however, the authority of this canonical requirement has frequently been disregarded by the Dioceses, against which the General Convention has ineffectually fulminated. Evidence of this can be found for both the nineteenth century and the twentieth century. In 1877, the Committee on Canons of the House of Deputies reported as follows:

> [In] the Journal of 1871, those lists only were printed which had been handed in by the ecclesiastical authorities of the Dioceses; and as to the remainder—nearly half of the whole number—it was stated that no such lists had been received. It seems to your committee that it is desirable to print official lists every three years; and they hope that the Bishops, having their attention called to the provisions of the Canon, will hereafter furnish the required official returns. Unless this be generally done the publication of those which are sent in is of little value.[164]

Almost eighty years later, the Committee on the State of the Church reported a similar problem:

> It should be noted that your Secretary had great difficulty obtaining fairly accurate statistics, making the job of reporting the 'State of the Church' a very difficult matter. Meeting after meeting, discussion indicated a strong need for review of the method of obtaining statistics, even going to the grass roots level in finding out why it is so difficult for the parish treasurer and the parish priest to give accurate and up-to-date factual information.[165]

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[163] *Annotated Constitution and Canons* (1981-82), 277, 282, 284-285.

[164] *Journal of the General Convention*, 1877, 82.

[165] *Journal of the General Convention*, 1955, 571. The 1954 edition of the official commentary offered the following verdict: "That the statistics should be misleading is no fault of the canon, which is clear and definite in its requirements, but is due to the *carelessness or indifference* of individual clergymen, and, in some cases, of diocesan secretaries . . . no system, however perfect, will produce perfect results, unless it is used intelligently and by men careful to observe every requirement of the canons." (Emphasis added.) *Annotated Constitution and*

This is hardly language consonant with the notion of a legal violation by a subordinate unit.

120.-121. Canon I.7 reflects the general fascination of Americans at the beginning of the twentieth century with the application of business efficiency to all aspects of life. The commission charged with drafting then Canon 50, while acknowledging that "the accounting methods of the Church have never been extended beyond the limits of the individual dioceses," argued that to achieve the desired result "certain steps are necessary, *which can be taken without in any way infringing upon the rights and needs of the individual dioceses*."[166] (Emphasis added.) Three years after the adoption of Canon 50, a General Convention resolution on the new Board of Church Finance included the revealing language that the Diocesan Conventions be "earnestly requested to make this action effective by appropriate legislation," suggesting that its efficacy was directly contingent upon diocesan cooperation.[167]

By 1922, the Board of Church Finance (which was abolished in 1931) was already reporting a marked reluctance on the part of many Dioceses to follow its recommendation to establish legal corporations to hold their trust funds and complained that implementation of the new system of national church financing was proceeding too slowly. "While in the country [the national budget] is of relatively recently origin," members of the Board insisted, "the importance of it is so quickly accepted that the Dioceses not enforcing this Canon are certainly *behind the times*."[168] (Emphasis added.)

Such language is very far from conveying the notion of legal infraction that informs Dr. Mullin's emphasis on mandatory language. If the national Canons are the laws of the Church, then a failure to enforce them cannot be simply characterized as being "behind the times." Indeed the Canon on Business Methods lacks even a reference to the "duty" of Dioceses to comply. In 1928, the Board of Church Finance declared that the "success or lack of success of the operation of Canons and resolutions of General Convention" depended on the effectiveness of the diocesan finance committees—required by Canon 50—but that many of them were entirely inactive.[169]

The same principles apply to Canon I.7 today. It is as effective as the Dioceses choose to require it to be and there is nothing that the General Convention can do to make compliance more uniform.

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*Canons* (1954), 260.

[166] *Journal of the General Convention*, 1916, 537.

[167] *Journal of the General Convention*, 1919, 163, 193. The concurrence of the House of Bishops was contingent upon a change in the resolution regarding the appointment of a permanent secretary for the Board of Church Finance to "promote harmonious cooperation" between the Board and the Dioceses, with the qualification that the secretary visit the Dioceses only "*when so requested*." (Emphasis added.)

[168] *Journal of the General Convention*, 1922, 567.

[169] *Journal of the General Convention*, 1928, 391-392.

122. Dr. Mullin's assertion that the change in voting methods in Article XI as ratified in 1901 fundamentally altered the basis on which the Dioceses participate in the General Convention is, at best, misleading. There have been numerous attempts to change the general nature of voting procedures in the House of Deputies to make it more 'representative,' all of which have come to nothing.[170]

In 1901, the Committee on Amendments to the Constitution of the House of Deputies, in rejecting a proposal to count divided votes (two affirmative and two negative) as one half-vote in favor and one half-vote against, stated that the General Convention "is constituted by a federation of Dioceses. *Each Diocese is a constituent unit* . . . A divided vote, therefore, operates as a negative, not because it is opposed to the measure proposed, but because it fails to express an affirmative wish on behalf of the Diocese."[171] (Emphasis added.)

In 1964, the same committee described a vote by orders as "a vote by the representatives of the dioceses and Missionary Districts, *who vote in their representative capacity and not in their individual capacity*."[172] (Emphasis added.)

Finally, and perhaps most conclusively, in view of Dr. Mullin's overall assertions, we have the witness of the Committee on Voting Procedures of the General Convention of 1976:

> [An] indispensable ingredient of [the Compromise of 1789] was the concept of the House of Deputies as a *confederation of dioceses and, not as in the revised national government structure, a body of representatives of the Church constituencies in the Diocese* . . . The concept of confederation has persisted and survived repeated efforts to substitute a body representative of and proportional to the Church membership. *It is the polity of the Church*.[173] (Emphases added.)

When one notes the declaration of the third edition of the official commentary that "still today a vote by orders is also a vote by dioceses,"[174] it is hard to see why Dr. Mullin considers that the amendment of 1901 made such a difference.

*C. Ordination Requirements*

123. The Declaration of Conformity is discussed above (Paragraph 82).

124.-126. The ultimate responsibility for priests and deacons rests with the bishop of the Diocese, to whom they take an oath of obedience on ordination. While the General Convention has periodically set standards with which it desires all candidates for ordination to comply, enforcement has rested

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[170] *Annotated Constitution and Canons* (1981-82), 32-41.

[171] *Journal of the General Convention*, 1901, 263.

[172] *Journal of the General Convention*, 1964, 166.

[173] *Journal of the General Convention*, 1976, AA2.

[174] *Annotated Constitution and Canons* (1981-82), 12.

with the bishop and the Standing Committee.
The General Convention provided for diocesan boards of examining chaplains (now Canon III.15) in 1919 and for diocesan commissions on ministry (Canon III.2) in 1970. While it also instituted the General Ordination Exam (GOE) in 1970, the House of Deputies Committee on Theological Education explicitly stared at the time that "any diocese still has the option of preparing and administering its own canonical examinations according to the existing canons of that Diocese."[175] Almost a decade later, the General Board of Examining Chaplains praised the level of diocesan participation but admitted that six dioceses still did not require their candidates to take the GOE (and gave no indication that such failure was an infraction),[176] while its 1984 report stated bluntly that "the final assessment of the examinations rests with the Dioceses."[177]

Even the present language of the Canons suggests that clergy preparation is a matter for the Diocese. Canon III.15.2(a), states that the General Board of Examining Chaplains conducts, administers and evaluates the GOE "for those candidates for Holy Orders who have been identified to the Board by their several Bishops," which is hardly mandatory language. Canon III.15.4 requires certification by a commission on ministry as to a candidate's proficiency prior to advancement to ordination. Such required authorization arguably conflicts with the role of the commission of ministry as defined in Canon III.2, since it supposedly exists merely to advise the bishop and make recommendations, while the legal authority for approval or disapproval of a candidate rests with the bishop and Standing Committee, but such a conflict apparently has yet to arise.[178]

*D. Clerical Practices*

127.-129. That the General Convention has elected to make canonical provision for the rights and responsibilities of clergy is not at issue. That it has the any power to make them mandatory absent the support of individual Dioceses is very much at issue. A bishop oversees the clergy of his Diocese and diocesan courts are responsible for enforcing real or perceived violations.

A better illustration of where the line is drawn on clergy practices might be the remarks of the Joint Commission on the Deployment of Clergy as it unveiled its Model Deployment Plan in 1970:

> Some fear that the Plan will concentrate undue power in a national headquarters. The truth is that the Plan affirms the Diocese over against the national Church. As proposed, clergy placement will continue to be done where it is now done—at the local level, with full elective power in the hands of the local vestry or other local employing agency. Moreover, the Plan strengthens the role of the Bishop by giving him new responsibility for nominating likely candidates to a local vestry.[179]

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[175] *Journal of the General Convention*, 1970, 199.

[176] *Journal of the General Convention*, 1979, B206.

[177] *Journal of the General Convention*, 1985, 350.

[178] *Annotated Constitution and Canons* (1981-82), 490-491.

[179] *Journal of the General Convention*, 1970, 376.

Twenty years later, the establishment of an Executive Office for Church Deployment, saw the language of the sponsoring General Convention resolution modified from "a structure for the coordination, administration and ***direction*** (emphasis added) of functions related to ordained ministry," to that of "a structure for more efficient, creative and effective coordination and administration," revealing a residual concern about concentrations of power at the center.[180]

130. The operative word here is "claimed." The General Convention has adopted Canons in respect of a mandatory age of retirement and the Dioceses have opted to abide by them. However, Canons III.7.7 and III.9.7, relating respectively to the resignation of deacons and priests, contain no analogous provision to Canon III.12.8(c), allowing the House of Bishops to terminate a bishop refusing to retire. Rather, the Canons state that priests and deacons "shall resign from all positions in this Church and the resignation shall be accepted." While they provide moral authority, they enjoy only the force that a Diocese is willing to afford them. They cannot be enforced by the General Convention because there is no mechanism—judicial or otherwise—by which they *can* be enforced.

*E. Tenure of Church Property*

131.-133. The designation of sacred space and the existence of rites of consecration are common to most liturgical churches and are hardly a peculiar characteristic of Anglicanism. With his description of the service of consecration, Dr. Mullin seeks to convey the impression that a temporal claim of the national church was effected upon property used for the purposes of worship, a dubious assertion at best.

134.-135. The precursor to present-day Canon II.6 was originally enacted in 1868, largely to guard against the dangers of an inadequately financed church building, since many Dioceses were finding themselves responsible for properties where the putative congregation had proved unequal to the costs involved. The essential features of this Canon are the reservation of permission to consecrate the property to the *bishop*, for encumbrance of property to the *bishop* (with the advice of the standing committee), and of disposal of the property to the *Standing Committee*. Section 1 was modified in 1871 to also require assurances that the building would not be alienated from those committed to the doctrine, discipline and worship of the Protestant Episcopal Church, but the responsibility for ascertaining this remained with the bishop. Enacted in reaction to the loss of Christ Church, Chicago, during the schism that created the Reformed Episcopal Church, it was—and is—a parochial statute, enforceable only by the bishop and diocesan authorities.[181]

136. Canon III.9.5(a)(2) needs to be read in conjunction with Canon III.9.5(a)(1), which states that a rector "has full authority and responsibility for the conduct of worship and spiritual jurisdiction of the Parish." It is in these aspects that the Rector has use and control of church buildings, not in the temporal aspect.

137. As in present-day Canon II.6, this provision still locates authority in the bishop and the Standing Committee and nowhere else.

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[180] *Journal of the General Convention*, 1991, 257, 783-784.

[181] *Annotated Constitution and Canons* (1981-82), 477-482.

138. This provision was adopted in response to Supreme Court rulings regarding implicit trusts. There has been some debate as to whether the so-called Dennis Canon was properly enacted by the General Convention of 1979, but whether or not this was the case, the language explicitly fails to reference the Diocese as a unit or property held by diocesan corporations. The Dennis Canon may or may not clearly secure parish property from alienation if both the national church and the Diocese are in agreement, but it makes no statement as to what is to be done if a Diocese and the national church disagree as to the alienation of parish property or if a Diocese elects corporately to "alienate" itself from the national church. During the 1970s and 1980s the question of a Diocese acting in violation of the Dennis Canon does not seem ever to have been discussed, but the language cited makes no assertion of supreme authority on the part of the General Convention.

*F. Clergy and Lay Discipline*

139. Prior to 1901, despite warnings of the dangers of such a situation, there was no ecclesiastical court system other than that maintained by the Dioceses. A Joint Committee on Canons appointed by the General Convention of 1853 commended efforts to establish a uniform code of clergy discipline but also warned that it doubted the "constitutional power" of the General Convention to "nullify" diocesan systems already in effect,[182] and when a proposed uniform judicial code came up for a vote at the General Convention of 1856 it went down to defeat.[183]

Fifteen years later, the Committee on Canons recommended against an appellate court system to supplement the diocesan system, but offered an amendment to Article VI of the Constitution giving the General Convention the authority to establish a court of appeal. Significantly, they accompanied this recommendation with the direction not only that the Dioceses be notified (as required under the Constitution) but that "every such Diocesan Convention take formal action upon the proposed alteration, and certify to the next General Convention as to the expediency of attempting the same."[184]

In 1901, a revision of Article VI (now renumbered Article IX) allowed for the establishment of courts of review and a Canon to that effect was adopted in 1904. With the institution of the provincial system in 1913, these became provincial courts of review.[185] To this day, membership of these courts of review is drawn from the Dioceses composing the province and they have no authority to pass sentence (which is reserved to the bishop of the Diocese in question). The problem of diversity of legal interpretation endures, since there is still no common point of appeal beyond the court of review. Without a system for the common interpretation of canon law, it is hard to see how the adjustments of the early twentieth century have greatly altered the situation.

140. According to TEC's official commentary, "the stipulation that a bishop be tried by a

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[182] *Journal of the General Convention*, 1853, 100-101.

[183] *Journal of the General Convention*, 1856, 36-38, 41-43, 163.

[184] *Journal of the General Convention*, 1871, 163-164.

[185] *Annotated Constitution and Canons* (1981-82), 122-123.

court composed of bishops is in accord with the common law principle that one has the right to be tried by one's peers."[186] The change in judicial practice left the Diocese—as a corporate entity—as sovereign as before.

141. Neither the General Convention nor the Dioceses have made an effort to subject laypeople to ecclesiastical trials (indeed, a dubious attempt to amend the Title IV disciplinary canons to allow for that possibility was rejected at the General Convention of 2009). Repulsion from the Holy Communion—in practice rarely exercised—is a power reserved to the parish priest of the layperson in question, with a right of appeal on the part of the latter to the bishop.[187] Disciplinary canons pertinent to the laity are perhaps the last piece of evidence one might wish to cite in proof of the supremacy of the General Convention.

142. During the nineteenth century, TEC was known for its comparatively strict attitudes on the subject of remarriage of divorced persons and yet here, as in much else, enforcement rested with the Dioceses. That the clergy complied with the restrictions was testimony to a general uniformity of opinion not of the General Convention's supremacy. As attitudes toward divorce became more liberal, an acknowledgment of the essential discretionary authority of bishops made itself evident. In 1931, the Joint Commission on Marriage and Divorce remarked that there were "those that feel that if judgment is left to different [divorce] courts in different Dioceses we shall thereby establish ecclesiastical Renos. Of course this is possible, but such a view indicates a serious lack of faith in the mental and moral integrity of the leaders of this Church."[188] Even Dr. Mullin's citation of Canon II.13.3 of 1877 relating to reception of the sacraments by divorced persons testifies to that essential episcopal discretion.

143. The citation of the civil rights provision enacted in 1964 (and of subsequent language adopted in 1994) is particularly glaring because it clearly illustrates the gaping chasm between pious intention and practical enforcement. Unlike the federal government, the General Convention never had any means to compel a congregation in Southern Dioceses (which were the most obvious offenders in the 1960s) to desist from turning away worshippers because of their race or color. While at least one Diocesan Convention did exclude from membership an offending parish, it did so on its own initiative, not to comply with a national canon. The same principle holds for more recent non-discrimination canons; if Dioceses choose to ignore them, there is nothing the General Convention can do to enforce them.

*G. The Church Pension Fund*

144. Dr. Mullin's representation of Canon I.8 is one that has frequently been invoked by those who argue for the hierarchical character of TEC. "From the inception of the Fund," its director insisted in 1980, "the whole Church accepted support of clergy obligations as a

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[186] *Annotated Constitution and Canons* (1981-82), 119.

[187] *Annotated Constitution and Canons* (1981-82), 392-395.

[188] *Journal of the General Convention*, 1931, 473.

binding obligation. The universal support of the Church Pension Fund has served as a cohesive force in the Church."[189] Since almost a century of cheerful compliance has passed since the Fund's inception, during which time congregations of all theological persuasions have, for the most part, happily paid their assessments, it is understandable that many believe it to be mandatory, yet the historical record suggests nothing of the sort.

The question of clergy pensions had been a source of controversy for much of the nineteenth century, as the patchwork of diocesan clergy relief funds proved lamentably unsuited to meeting the needs of the Church's elderly retired clergy. It fell to the then Bishop of Massachusetts, William Lawrence—to this day a highly regarded figure among progressive Episcopalians—to embark upon a crusade to create a national fund that would guarantee a minimum pension to men who might otherwise be rendered destitute. Lawrence naturally turned to his actuarial acquaintances for advice as to how to proceed and, by his own account, provoked considerable professional bewilderment at his obstinate determination to uphold the voluntary principle:

> When I first went to see Dr. Pritchett he said 'Bishop, no voluntary system of pensions has ever succeeded, it must be compulsory.' My immediate answer was, '*Then the Episcopal Church can never have a pension system. You cannot compel a dollar out of any Diocese, parish or individual.*' [Monell] Sayre's problem, therefore, was to invent such a voluntary system as would have in it *the elements of the strongest moral compulsion under the circumstances*: one in which it would clearly pay every parish to enter, one which made such an appeal to the loyalty of the Church as to hold all the elements together and to crystallize that loyalty in canonical legislation.[190] (Emphases added.)

Such testimony would be remarkable under any circumstances; uttered by someone historically so identified with the expansionist national church of the 1910s, it is staggering. In the aftermath of the General Convention of 1913, Lawrence and his supporters carried their campaign to the Dioceses, and Lawrence writes in his memoirs of waiting nervously for news that a majority of the Diocesan Conventions had voted in favor of proceeding, which is, at the very least, suggestive of where he presumed the real locus of authority to lie.[191] But even without such inferences, it is clear that Lawrence believed the system that he had conceived, while imposing upon the Dioceses "the strongest moral compulsion" was voluntary. The Church Pension Fund has sustained its high levels of support among the congregations and Dioceses not because its assessments are mandatory but because the system has more than fulfilled the expectations of its author. "The fact that 100 per cent of the parishes and missions of the Episcopal Church in the U.S.A. participate in the Pension Fund," declared the Joint Commission to Study Clergy Pension Funds and Clerical Salaries in 1958, "proves that the founders have builded well and have hewn to the line."[192]

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[189] Robert A. Robinson, *The Church Pension Fund: A Great Venture of Vision and Faith* (New York: Newcomen Society in North America, 1980), 21.

[190] William Lawrence, *Memories of a Happy Life* (New York: Houghton Mifflin Company, 1926), 353-354.

[191] Lawrence, *Memories of a Happy Life*, 359-360.

[192] *Journal of the General Convention*, 1958, 384.

If one closely examines the record relating to the Church Pension Fund, it becomes even more clear that its purported "mandatory" qualities are illusory. Writing more than thirty years after its establishment, Louis Sanford, Bishop of the Missionary Diocese of San Joaquin, described the Fund as a "voluntary pension system, not supported by public taxes or a large endowment."[193] Nor has the General Convention intervened on those rare occasions when the Fund has sanctioned defaulters, as demonstrated in a 1925 memorial from the Diocese of Harrisburg protesting penalties imposed on the families of all the clergy because a single parish was behind in its assessments.[194] A quarter of a century later, the Joint Committee to Consider Appealing for a Fund to Supplement Clergy Pensions discussed a proposed increase in the rate of assessments as follows:

> If there is doubt that there may not develop full compliance then no step should be taken until the doubt is resolved. If it becomes clear that there will be materially less than full *cooperation*, then the problem would have to be thrown back on the dioceses and their system of supplementary relief grants, the cost being passed on to the parishes perhaps in the usual *diocesan* assessment . . . If there is less than full cooperation on the higher assessment rate by all congregations, the failure to pay the full assessment would result in a reduction in its own rector's pension protection. (Emphasis in original; underlined emphasis added.)[195]

The frequently subtle allusions to the inherently elective characteristics of the Fund can also be seen in a 1973 report of the Trustees to the effect that the General Convention's increase in the assessment rate by three percentage points "has been in effect for over a year-and-a-half and our receipts from parishes reflect an almost total acceptance of this rise."[196]

Far from being the language of mandatory taxation, this is the enduring language of the "elements of the strongest moral compulsion under the circumstances," and one which it "clearly pays" every parish to enter. As an example of the General Convention's illusory supremacy, however, the Church Pension Fund unquestionably falls short.

*H. Conclusion*

Dr. Mullin asserts that his review of national church enactments since 1789 demonstrates that the General Convention has "consistently acted as a body with supreme authority." A shift in national administrative approach by TEC in the early twentieth century in no way undermined the "principle of hierarchy" that had been present from the outset. There is other historical evidence, however, of which Dr. Mullin is apparently unaware (or which he chooses to ignore), that demonstrates the persistence of diocesan autonomy.

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[193] Louis G. Sanford, *The Province of the Pacific* (Philadelphia: Church Historical Society, 1949), 69.

[194] *Journal of the General Convention*, 1925, 200.

[195] *Journal of the General Convention*, 1949, 382-383.

[196] *Journal of the General Convention*, 1973, 702.

a. Deference to Diocesan Authority

Perhaps the most glaring example of decentralization in the nineteenth century can be found in the institution of the Domestic and Foreign Missionary Society (DFMS) of TEC , which, despite initially being the sole incorporated national church agency, was constantly hedged about with restrictions when it came to activities conducted within an established Diocese. Church historian Ian Douglas has painstakingly documented the anguished birth-pangs of the DFMS, whose 1792 incarnation proved so unsatisfactory that all mission work had to be returned to the Dioceses three years later. Even after its successful incorporation, the DFMS continued to be hamstrung by the unwillingness of Dioceses—and bishops—to allow it to operate independently.[197]

An 1829 report to the General Convention recommending the establishment of diocesan auxiliaries to help raise funds for support of DFMS work qualified its recommendation by adding that "these measures are not to be prosecuted where they are not approved by the Bishop of the Diocese, and are never brought into collision with those Missionary Associations, the object of which are more strictly of a local and domestic nature."[198] Such sentiments were reiterated in 1838, when the House of Bishops adopted the following amendment to Article IV of the DFMS Constitution:

> Provided always, that in relation to organized Dioceses having Bishops, the Board [of Missions] shall not adopt any station, nor appoint any Missionary, except upon nomination of the Bishop thereof; and, in any such Diocese, the assignment of a Missionary to a particular station, or the change of a Missionary from one station to another, or a continuance of a station shall rest with the Bishop.[199]

Interestingly enough, six years later a minority report on proposed changes to the third article of the DFMS Constitution criticized the decision to select representatives through diocesan conventions as violating the principle that because the DFMS represented the Church as a whole it should not be subject to diocesan legislation,[200] but apparently this argument cut no ice with the majority.

The General Convention has consistently shown a pattern of acknowledging the sphere reserved to Dioceses. "The respective Dioceses have exercised the privilege of naming themselves and designating their title," concluded the Committee on Canons of the House of Deputies in 1865, in response to a proposal to require Dioceses to adopt the name of the principle city within their jurisdiction. "A desire to keep in view the federative character of the Church, in harmony with the civil and political jurisdictions which characterize us and

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[197] Ian T. Douglas, *Fling Out the Banner! The National Church Ideal and the Foreign Mission of the Episcopal Church* (New York: The Church Hymnal Corporation, 1996), 25-30.

[198] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 2,* 1829, 285.

[199] *Journal of the General Convention,* 1838, 112.

[200] *Journal of the General Convention,* 1844, 83.

distinguish us from the consolidated governments of Europe, was doubtless influential in the decision, which, without exception, operated in giving the title now applied to our Dioceses respectively."[201]

Contemporaneous concerns about the clergy compensation also came up against the wall of diocesan independence, as a special committee appointed to report on an 1868 memorial from the Diocese of New Jersey made clear:

> [Any] action of this Convention in the matter *could not be mandatory, but only advisory in its character*. The Diocese differ from each other not less in their circumstances and exigencies than in their latitude, and at last each one must be allowed to select from the multitude of suggestions the plan which after full consideration is most congenial and appropriate to itself.[202] (Emphasis added.)

Similarly, the Committee on the State of the Church of the House of Deputies declared of an 1898 proposal to guarantee every missionary a minimum salary of $400 that "this matter belongs of right to Diocesan administration."[203]

Such reservations were not confined to monetary matters. In 1841, when the Diocese of New York enacted a canon authorizing the *appointment* of replacement General Convention deputies if the elected delegates were prevented from attending, there were protests that this violated the provision of Article II that called for deputies to be "chosen," but the General Convention declined to take action.[204] Six years later, a resolution proposing that all General Convention delegates be "directly chosen by the conventions of the respective Dioceses" (i.e. elected) was tabled in favor of one simply stating that "the members appointed by the Diocesan convention are, according to the practice of the House of Clerical and Lay Deputies, fully entitled to their seats."[205]

Of a proposed canon to create a church agency to evangelize ex-slaves in the years following the Civil War, the Committee on Canons of the House of Deputies reported in 1883 that "the established and well-recognized powers of the Diocese, under their existing autonomy, are extremely adequate to provide each suitable agency for carrying on the work so contemplated."[206] Even more telling was the official response to an 1889 petition of "Colored Clergy and Laity" seeking from the General Convention an affirmation of human equality regardless of color. The joint committee appointed for the purpose declared that the

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[201] *Journal of the General Convention*, 1865, 91. In response to a similar proposal a quarter of a century later, the same committee declared that it was "not prepared to recommend any legislation so intimately connected with the rights of dioceses." *Journal of the General Convention*, 1889, 99.

[202] *Journal of the General Convention*, 1868, 99.

[203] *Journal of the General Convention*, 1898, 346.

[204] *Journal of the General Convention*, 1841, 19-22.

[205] *Journal of the General Convention*, 1847, 28-29.

[206] *Journal of the General Convention*, 1883, 251.

General Convention had passed no legislation that "admitted or implied that a difference of race or color affords grounds for distinction in legislative rights or privileges," but that questions of jurisdiction and representation in the several diocese, have, under our Constitution, been committed to them and are questions over which the General Convention, as such, has no control."[207]

During the twentieth century, an analogous argument arose concerning what the General Convention of 1952 referred to as the "problem" of allowing the seating of women delegates to the General Convention:

> From its inception the Protestant Episcopal Church in the United States has been strongly democratic in nature and structure . . . This democracy has always characterized the Church and has been consistently apparent in General Convention even when individual dioceses were much less truly democratic . . . Yet the autonomy of these dioceses was respected by the General Convention, even when it insisted upon its own more democratic structure . . . Nor has the General Convention interfered with the right of the several jurisdictions to decide whether their councils and convention shall include women. Such action, by autonomous dioceses, has been respected by the General Convention throughout its history.[208]

An overt concern with equality of the sexes was recorded as early as 1916, when the Committee on Amendments to the Constitution of the House of Bishops rejected a proposal to "accord female communicants of the Church full rights, responsibilities and privileges," on the grounds that this would, by implication, extend to areas of Church life that were "solely within the legislative powers of the respective Dioceses."[209] Three years later, a memorial from the diocese of Lexington seeking the judgment of the General Convention as to the desirability of women serving on diocesan councils was dismissed as an issue "that should and must be determined by the Dioceses themselves."[210]

A similar concern presumably informed the rejection of a 1907 resolution on the appointment of deans to oversee parishes and missions in geographically extended Dioceses,[211] and of a 1958 resolution proposing the establishment of a joint special committee to arbitrate in the litigation concerning the parish of Holy Trinity, Brooklyn, of which it was declared that the General Convention "has neither canonical jurisdiction in the case, *nor any means of implementing an action* that such a committee might regard as desirable in the case."[212] (Emphasis added.)

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[207] *Journal of the General Convention*, 1889, 57-59. This statement appears to have been adopted without recorded dissent.

[208] *Journal of the General Convention*, 1952, 671-672.

[209] *Journal of the General Convention*, 1916, 75.

[210] *Journal of the General Convention*, 1919, 297.

[211] *Journal of the General Convention*, 1907, 328-329, 340-341.

[212] *Journal of the General Convention*, 1958, 224. On the situation at Holy Trinity, Brooklyn, see *Annotated*

b. The Absence of a National Court System

The presence of an identifiable superior judicatory—or court of ultimate appeal[213]—is generally accepted as one of the key markers of a hierarchical church. That there exists no ultimate jurisdiction beyond the Diocese capable of adjudicating the meaning and application of the legislation adopted by the General Convention has always been considered one of the great defects of TEC's constitutional setup.

This situation was confirmed by the General Convention as early as 1804, when the Reverend Ammi Rogers, who had been excluded from the ministry by the Diocese of Connecticut for misrepresenting his credentials in order to obtain ordination in New York directly petitioned the General Convention for relief. The House of Bishops affirmed the action of the Diocese of Connecticut and expressed the "opinion" that Connecticut had jurisdiction because the offender resided there.[214] Nothing daunted, Rodgers returned four years later but still received no sympathy from the House of Bishops:

> [We] are of the opinion that, agreeably to the Constitution of the Church, [this house has] no authority to act on an appeal in regard to the matter stated; and that there is no existing mode by which any Bishop or Bishops of the Church can take cognizance of the conduct of any other Bishop, unless at the desire of the Convention of the diocese to which such a Bishop should belong, and conformably to the rules of procedure established by them.[215]

More than 150 years later, the chancellor of the Diocese of Long Island conceded that little had changed:

> At present each diocesan bishop is a lawgiver, and, consequently, a law unto himself . . . At present the Church is in the same position in which the United States would be without a federal judiciary to enforce the supreme law of the land. We have the supreme law of the Church made quite uncertain by the power of each bishop to declare and pronounce upon it.[216]

Such a lament eloquently demonstrates the central dilemma of today's proponents of supremacy, namely, the absence of a 'federal' judiciary to "enforce the supreme law."

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*Constitution and Canons* (1981-1982), 199-201.

[213] The supreme judicatory need not be a "court." It could be an elected or appointed body – a synod of bishops, for example – but it needs to be defined as such in the constitutional documents, and the General Convention has never been so designated.

[214] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1804, 313-314.

[215] Perry, *Journals of the General Convention of the Protestant Episcopal Church: Vol. 1*, 1808, 353-354.

[216] Edwin A. White and Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* (Greenwich, CT: Seabury Press, 1954), 2nd Edition, 119.

Episcopalians were neither unaware of the problem nor unwilling to propose remedies, but proposals for the creation of a supreme ecclesiastical court were rejected by the General Conventions of 1907, 1913 and 1931.[217]

Even a comparatively mild proposal in 1952 to authorize the creation by Canon of a joint commission "to hear and determine any question of Canon Law, which in its opinion is of general importance and application," and whose opinions should constitute "an advisory interpretation of the law of the Church," could not secure the support of the General Convention. [218] In 1973 the Committee on Canons of the House of Bishops declared a proposal to establish a national appellate court "not germane, inconsistent or unconstitutional,"[219] and the third edition of the official commentary offered the following verdict a decade later:

> [The] pressure for the creation of [an ultimate] court of appeal has eased. It is recognized that the existence of the court of appeal may move the Church closer to ideal uniformity of result, but the question is raised whether the Church has, in fact, suffered materially for not attaining this ideal, and whether the creation of the ultimate court might not, in fact, foster controversy. There is also a point of view that there should be a national canon to provide uniformity in the mode of constituting diocesan trial courts and in the conduct of trials in such courts. Again, the pressure for action is not great enough to cause a change.[220]

c. The Voluntary Character of Diocesan Apportionment

It is a common assumption that sovereign bodies enjoy an inherent ability to "tax" subordinate entities and to impose penalties for failure to comply. Most Diocesan Conventions, for example, make provision for the denial of seating to parishes that are seriously in arrears in their diocesan assessments and, in view of Dr. Mullin's arguments, one might have expected to have observed a similar phenomenon at the national level.

That such has never been the case might be deduced from the report of the Joint Committee on the Study of Quotas for the General Convention of 1964. After noting that total diocesan delinquency in diocesan assessments in 1961 had reached $1.5 million, the committee recommended that the assessment system be replaced by what it called a "partnership principle" or the sharing of revenues between the Dioceses and the national church on 50-50 basis. It also recommended that "the diocesan assessment, for the expense of running a diocese, be continued as *a tax on parishes and missions*, and that *voting rights in a Convocation or Convention be denied parishes and missions not paying their assigned*

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[217] *Journal of the General Convention*, 1907, 303; 1913, 281-282; 1931, 349-350.

[218] *Journal of the General Convention*, 1952, 185-188.

[219] *Journal of the General Convention*, 1973, 85.

[220] *Annotated Constitution and Canons* (1981-82), 1015.

*amount*."[221] (Emphasis added.)

The idea of sanctioning Dioceses for failing to meet their assigned quotas has been discussed before, but has always been dismissed. A 1937 proposed amendment to Article I.4 that would have reduced diocesan representation to one in each order if paying less than 50 percent of the assessment, two if paying at least 50 percent but less than 75 percent, and three if paying at least 75 percent but less than 100 percent was never debated.[222] Twelve years later, a proposed canonical amendment that would have denied Dioceses who failed to meet their apportionment the right to vote at General Convention except with the recommendation of the National Council was rejected as a *violation* of Article I.4.[223] While little was heard of sanctions for the next twenty-five years, the Committee on Structure of the House of Deputies did put forward a modified version of the 1937 proposal that would have accorded one deputy in each order for Dioceses paying 25 percent or less of their assessment and two for those paying between 26 percent and 50 percent. This time the House of Deputies debated the issue but still rejected it.[224]

It should further be noted that the General Convention has periodically repudiated the notion that the national church can compel diocesan assessments. "The National Council," declared the Committee on Budget and Program in 1940, "has neither the desire nor the power to force a Diocese to give a sum which is designated as its share, nor can it accurately determine how far or in what direction a mathematical quota should be modified."[225] Or consider the 1969 report of the Executive Council, which forthrightly declared that 93 percent of its income came through the "voluntary response the jurisdictions make to the quotas established by the General Convention."[226] A year later, the report of a joint session of the two houses of the General Convention on the financial condition of the Church included the following observation:

> Mr. Wilson of Delaware, a long-time former member of the Joint Committees on Program and Budget and a retiring member of the Executive Committee, advocated a *continuance* of the present method of apportionment to, and *voluntary acceptances* by, Dioceses, particularly as that method is to be proposed to this Convention.[227] (Emphasis added.)

In 1976, the Standing Committee on the Structure of the Church noted that the Program Budget "is apportioned to the Dioceses under a plan of apportionment proposed by the

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[221] *Journal of the General Convention*, 1964, 757-777 (quotation on 762).

[222] *Journal of the General Convention*, 1937, 231-232.

[223] *Journal of the General Convention*, 1849, 161-162.

[224] *Journal of the General Convention*, 1994, 752.

[225] *Journal of the General Convention*, 1940, 153.

[226] *Journal of the General Convention*, 1969, 259.

[227] *Journal of the General Convention*, 1970, 209.

Council and adopted by the General Convention. Each Diocese is expected, but not required, to make a voluntary pledge equal to the amount of its apportionment."[228]
Finally, it is worth recalling that even the comparatively mild language of a House of Bishops resolution proposing that the Presiding Bishop and the Executive Council visits with the bishops and diocesan councils of Dioceses giving less than one-fifth of their income to the national church and "encourage said dioceses to increase their contribution so that they are in compliance with the asking of the General Convention," went down to defeat at the General Convention of 1997.[229] It would seem that – in the matter of assessments at least – the General Convention continues to acknowledge the reality of diocesan sovereignty.

## VI. THERE HAS NEVER BEEN A CONSENSUS AMONG INFORMED COMMENTATORS WITHIN THE EPISCOPAL CHURCH AS TO WHETHER THE GENERAL CONVENTION WAS THE SUPREME AUTHORITY IN THE EPISCOPAL CHURCH OR WHETHER DIOCESAN ACCESSION WAS IRREVERSIBLE.

- **There was no obvious consensus among 19th century commentators on the nature of the relationship between the Dioceses and the General Convention and none of the authorities who wrote on that subject acted with the formal authorization of either the General Convention or TEC.**

- **Those who argued for the supremacy of the General Convention grounded their conclusion less in the language of the TEC Constitution than in references to historic traditions and practices of the Church which this Court may be constitutionally precluded from examining.**

- **There is no evidence of a specific prohibition of diocesan withdrawal in the TEC Constitution and Canons.**

- **Other nineteenth century authorities, most notably Thomas Vail, accepted the principle that ultimately a Diocese had "*a right to withdraw from the connexion [with the General Convention] whensoever it may please*."**

- **Between 1895 and 1901, TEC considered including language of supremacy and exclusivity in respect of General Convention legislation but ultimately *rejected* it.**

- **The principle of diocesan autonomy was affirmed by Bishops William Perry (1891), Alexander Garrett (1895) and William Manning (1944) and by Episcopal seminary professors Powell Dawley (1955) and Daniel Stevick (1965).**

***A. Nineteenth century commentators all agreed that there was no language of supremacy pertaining to the General Convention in the TEC Constitution, thus conceding that the authority of the General Convention was a matter of religious tradition not legal force***

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[228] *Journal of the General Convention*, 1976, AA17.
[229] *Journal of the General Convention*, 1997, Vol. 1, 254.

145. The nineteenth century "commentators" upon whom Dr. Mullin relies in the concluding portion of his affidavit may be unanimous, but they are far from unequivocal. Nor can they be accurately represented as reflecting a universal consensus within the Church, as the testimony of Bishops Vail and Perry (cited below) makes clear. Furthermore, as the twentieth century progressed, there was an increasing willingness on the part of commentators to admit the existence of an enduring sphere of diocesan autonomy, which was cast into ever greater relief by the emergence of national church institutions. Many of those making such a concession did not regard this as a commendable state of affairs, but they did accept the existence of constitutional limitations. Only in the last fifteen years has there been an effort to revive supremacist theories first promoted during the mid-nineteenth century, but these are by no means universally accepted.

Dr Mullin's authorities range from Francis Hawks—arguably the first constitutional historian of the Episcopal Church—in 1841, to William J. Seabury in 1912, but he provides no authority for the period after 1919. None of his commentators, let it be noted, enjoyed any sanction from TEC for what they wrote. Worthy and informed though their opinions might be, they expressed a personal point of view, one with which, for example, no diocesan court had any obligation to comply. Arguably gifted with more humility than many, Francis Hawks put the matter bluntly in the introduction to his commentary on the TEC Constitution and Canons:

> As to the policy of law, animadverted on in the following pages, the author has but expressed his ***private opinions***, honestly entertained in love to the Church . . . In no sense is the book put forth as an authority; it may however contribute in some measure to promote, throughout the dioceses, uniformity of opinion interpreting our body of canon law.[230] (Emphasis added.)

Moreover, the language of "supreme legislature" and "superior ultimate jurisdiction" only began to be employed after most of the founding generation of The Episcopal Church had passed from the scene (William White, for example, died in 1836) and it was language that the legal authorities cited by Dr. Mullin frequently struggled to justify from the provisions of the Constitution itself.

146. Dr. Mullin concludes that for Francis Hawks (on whose writings many of the subsequent commentators based their findings), the "supremacy of the General Convention over the dioceses was axiomatic," yet Hawks also believed that before 1789 "in each State, the Church considered itself an integral part of the Church of Christ, perfectly independent, in its government, of any and every branch of the Church in Christendom."[231] Such a perspective led him to a far more dynamic understanding of the compact created in 1789 than that accorded by Dr. Mullin:

> But an union between parties perfectly independent may be formed upon various terms and conditions. Every independent right may be surrendered, or some only may be given up: so, too, a greater or less equivalent may be given for each surrender; we next ask, therefore, what were the terms of the union agreed on? In other words what is the true meaning of the constitution? The instrument itself can of course be expected to do no more than present certain great general principles. It cannot provide by express

[230] Hawks, *The Constitution and Canons of the Protestant Episcopal Church*, vi.

[231] Hawks, *The Constitution and Canons of the Protestant Episcopal Church*, 4.

> declaration for each case, specifically, for this would rather make it a statute book than a constitution; whereas its true purpose is to furnish certain guides to action, in the future formation of a statute book. Its interpretation therefore should be liberal, and rather according to its general spirit, than to its strict letter, when the rigor of literal interpretation, would tend to deny the great end of *union*, contemplated by its framers. Let it never be lost sight of, that in all such matters, as fairly arise under this general constitution, the polar star in interpretation is, that it was made for the purpose of binding us all to "walk by the same rule." And yet it must also be remembered, that no liberality of interpretation should so stretch its powers, as virtually to destroy those diocesan rights, that areas essential to our well-being, as union itself . . . In the government of the United States an ultimate arbiter in interpretation is provided in the Supreme Court. In the Church, however, we possess no such advantage for *we have no tribunal that can authoritatively declare to the whole Church what the meaning of the constitution is*. The House of Bishops may indeed express an opinion if it pleases, and the churches generally respect it, as they should do: but such opinion is neither law, nor authorised judicial exposition of law. Hitherto there has been practically but little difficulty, but it is easy to foresee, as our number increase, the certainty of future conflict. *It is difficult to lay down a general principle on this delicate subject, of the respective rights of the Church at large, and the churches in the several dioceses*. What is desirable is, on the one hand, to promote *such an union as is compatible with diocesan independency*; and on the other, so to uphold the just rights of the latter, as to prevent their merger in the former.[232] (Italics in original; underlined emphasis added)

Scrutiny of the key phrases reveals Hawks as one dedicated to the principle of "union," without ever referring to the General Convention as such; it is the Dioceses and their relationship that concern him.

147. Murray Hoffman, the other great nineteenth century authority cited by Dr. Mullin, presents a different perspective entirely. Hoffman it was who introduced the language of "superior ultimate jurisdiction" to describe the General Convention as well as the notion of "perpetual union." Hoffman himself conceded that his arguments conceived of an authority laid down in legislation:

> We have here a very limited foundation for the legislation of the convention over the whole Church. In truth upon the doctrine of deriving authority from the constitution, *there would be no power in it, except to regulate its own organization, to govern all changes in the Prayer Book, and to direct the trial of Bishops*.[233] (Emphasis added.)

Hoffman's reasoning was impeccable, and for that reason unpalatable to a high churchman such as himself who viewed with concern the prospect of American Anglicans becoming "the dissevered members of separate congregations, and not the compact body of a national church."[234] To avert

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[232] Hawks, *The Constitution and Canons of the Protestant Episcopal Church*, 9-10.

[233] Murray Hoffman, *A Treatise on the Law of the Protestant Episcopal Church in the United States* (New York: Stanford and Swords, 1850), 116.

[234] Hoffman, *A Treatise on the Law of the Protestant Episcopal Church*, 114.

that calamity, he appealed not to to constitutional principles, but to "another and higher view of the question":

> When, then, in 1789, the whole Church of the United States, through its competent representatives, declared "there shall be a General Convention of the Protestant Episcopal Church in the United States," it enunciated the great principle that this was a National Church, and that such a Convention was to be its highest Council. The mere act of establishing this Council involved and attached to it every power inherent in such a body and not expressly refused to it. *Such powers are to be ascertained from the laws and practices of the apostles, the voices of ancient witnesses, the uninterrupted decent from age to age, from council to council, of known, and exercised, and unquestioning sway*.[235] (Emphasis added.)

The authority invoked by Hoffman for the General Convention is precisely that which the courts may be constitutionally prohibited from examining. If the Constitution does not itself contain language of supremacy in respect of the General Convention then it must be concluded that the General Convention is not supreme.

148. Francis Vinton joins Hoffman in insisting that Article II of the Constitution (now Article I.4) "establishes the Supremacy of the General Convention, and the voluntary and permanent subjection to it of any Diocese which has adopted the Constitution,"[236] but neither the language of supremacy nor of "permanent subjection" appear in the original Article or in subsequent revisions.

149. Dr. Mullin is somewhat selective in the portion of Francis Wharton that he chooses to quote. Wharton begins his article by identifying features of the ecclesiastical structure of TEC that suggest a more confederal arrangement:

> When a vote by orders [in the General Convention] is called, each diocese answers as a unit, the smallest diocese having the same vote as the largest. *There is no supreme executive, such as we have become accustomed to in the United States, and such as we have learned to regard as essential to a well constituted State. There is no supreme common judiciary*. There are as many courts as there are dioceses: but each of these courts is supreme . . . *The bishops, also, meet in council very much the in the same way in which the sovereigns of confederated States meet in council . . . No one is bound by the action of the majority, except so far as he chooses to take the obligation upon himself*.[237] (Emphasis added.)

Furthermore, Wharton's ultimate conclusions about ecclesiastical structures are fundamentally negative. "I say this reluctantly," he writes, "because I think such a concentration of power in the

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[235] Hoffman, *A Treatise on the Law of the Protestant Episcopal Church*, 110-111.

[236] Francis Vinton, *A Manual Commentary on the General Canon Law and the Constitution of the Protestant Episcopal Church in the United States* (New York: E. P. Dutton and Company, 1870), 124.

[237] Francis Wharton, "How Far Are We Bound by the English Canons," in William S. Perry, *The History of the American Episcopal Church, 1587-1883* (Boston: James R. Osgood and Company, 1885), Vol. 2, 398.

General Convention is not only out of harmony with our political system, but is in itself unwise."[238] Wharton, then, recognized the inconsistency of the arguments propounded by his contemporaries with the circumstances of the Church's founding, but failed to appreciate the significance of the absence of language of supremacy.

150. In citing John Andrews, Dr. Mullin apparently fails to register that the passage he cites from an appendix to Andrews' work is actually a reproduction of the passage of Hoffman cited above in Paragraph 147.[239] Since Andrews was by no means in harmony with Hoffman, this misattribution is more serious than might at first be imagined. As Andrews subsequently concluded:

> If Judge Hoffman is right in his conclusions, then the dioceses, under whose auspices, and by whose deputies the Constitution was framed, instead of conferring by that instrument upon the General Convention a limited authority to enact canons, lost thereby their own independence and became subordinate to the General Convention as to all powers, legislative or otherwise, that were not carefully reserved to them in that instrument, and shall not be taken from them by amendment of the same. *Surely this could not have been the understanding of the framers of the Constitution, or the meaning of the resolution of June 24, 1786, under the terms of which they acted.* It is submitted with confidence, that the proceedings of the Convention of 1786, which substantially framed the Constitution, in connection with those of the Convention of 1789, which finally adopted it, show conclusively, that *the legal effect of that instrument must be, as its terms indicate, to confer certain limited powers essential to a National Church, upon the new organization created by it,* and that the General Convention is bound to confine its action within the prescribed limits, and to those matters which concern the whole body of members, *leaving respective dioceses independent as to all matters which concern dioceses only.*[240] (Emphasis added.)

Such a conclusion was at marked variance with the expressed views of Hoffman. A little earlier in his treatise, Andrews employed the nebulous language earlier adopted by Frances Hawks to describe the relationship between the General Convention and the Dioceses:

> The line of demarcation between the jurisdiction of the Church, as thus organized, and that of the respective dioceses, may not in all cases be clear, but there is undoubtedly such a line, and it is sufficiently distinct for practical purposes, as is seen from the fact that no serious difficulty has ever arisen between the General Convention and any diocese in the matter of jurisdiction, although *it has always been taken for granted that the Constitution contemplates a federal union of, and not a central government over, dioceses*. Whatever differences of opinion may, at any time, have existed, they have been found gradually to yield to the fair manly Christian sentiment and treatment of the Church at large. *Her dioceses and members are loyal to her, for the reason that their*

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[238] Wharton, "How Far Are We Bound by the English Canons," 400.

[239] John W. Andrews, *Church Law: Suggestions on the Law of the Protestant Episcopal Church, Its Sources and Scope* (Columbus, OH: T. Whittaker, 1883), iii. By 1883, Hoffman's thirty-year old volume was out-of-print.

[240] Andrews, *Suggestions on the Law of the Protestant Episcopal Church*, 59-60.

> *judgments are always appealed to, and fair consideration is given to every honest suggestion; and her conclusions therefore being reached in good faith, as to matters which she believes to come fairly within her jurisdiction, are usually, sooner or later, cheerfully acquiesced in.*[241] (Emphasis added.)

Far from reflecting the deference of a subordinate to the "superior ultimate jurisdiction," this declaration suggests that the Church avoided jurisdictional disputes only because of a mutual agreement to do so. If Dr. Mullin's argument were correct, then the loyalty of Dioceses and members to the national church would be owing to the 'fact' of their subordination, something that John Andrews explicitly rejected.

151. Hill Burgwin's definitive statements stand in stark contrast with the more tentative opinions expressed above. There is no question that Burgwin believed—and throughout his life sought to promote—the supreme authority of the General Convention over what he viewed as the subordinate entities of Dioceses and parishes. What is far less clear is that any other commentator would have shared his view that Dioceses have "no absolute, reserved or organic rights," something hardly borne out by the proceedings of the General Conventions of his day.

152. It is noteworthy that while William Seabury accepted the subordination of the Dioceses, he also believed in the subordination of the General Convention to the Constitution, declaring that the Constitution "*regulates the powers of its supreme legislature, the General Convention,* and constrains, limits, and obliges the Church in the Dioceses which have acceded to it."[242] (Emphasis added.) Even Dr. Mullin's authorities apparently fail to reach a consensus among themselves as to the distribution of power within the Church.

***B. Nineteenth century commentators all acknowledged the absence of a specific prohibition on diocesan withdrawal, although divided on the right of Dioceses to do so***

153. With regard to Dr. Mullin's assertion of the "binding nature of diocesan accession," it is important to recognize that, at no time is any evidence adduced of a specific prohibition of diocesan withdrawal in TEC's Constitution and Canons themselves. James Dator argued that because no Diocese had ever attempted to nullify its accession clause, this was *de facto* proof that no such right existed, an argument that sounds not dissimilar to the position adopted by Dr. Mullin.[243] Elsewhere, however, Dator offered evidence that the Dioceses actually enjoyed an existence governed less by stature than by inherent right:

> Unlike provinces, there is not and has never been a constitutional article or clause devoted to dioceses, save that on the admission of new dioceses. Further, there is not and has not been a canon 'On Dioceses' as such . . . One does not find, for example, a constitutional or canonical statement dividing the United States into a number of dioceses, each within a definite boundary or including certain people as is found to

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[241] Andrews, *Suggestions on the Law of the Protestant Episcopal Church*, 57.

[242] William J. Seabury, *An Introduction to the Study of Ecclesiastical Polity* (New York: Crothers and Korth, 1894), 264.

[243] Dator, *The Government of the Protestant Episcopal Church*, 200-201.

> some extent in Canon Eight on Provinces. Rather, the organization of the Church in the United States into dioceses is and always was assumed by the Church's Constitution and Canons as a given fact.[244]

154. While Dr. Mullin concludes that for Francis Hawks "union [with the General Convention] was perpetual," he also argues that Hawks was "protective of diocesan authority," a position that would seem to be impossible if the General Convention was truly supreme. While it is true that Hawks ultimately concluded that the Dioceses surrendered "such an exercise of independency as would permit them to withdraw from the union at their own pleasure,"[245] it is hard, in the light of his other conclusions, to see how this could be more than the expression of a pious hope.

155. Murray Hoffman's notion of "perpetual union" is nowhere to be found in the Church's Constitution. It does appear, however, in Article XIII of the Articles of Confederation, a compact that was in the process of being dissolved even as TEC was coming into being. Perpetuity was an aspiration, but sustainable only by continued voluntary participation.

156.-158. Vinton, Andrews and Judd simply reproduce the arguments of Francis Hawks, who himself offered no constitutional or canonical basis for his belief that the right of withdrawal was "surrendered" by the Dioceses.

159. Dr. Mullin adduces evidence from the rejection of the Virginia report of 1878 as demonstrating the binding nature of accession, but it is hard to see how a report that was neither approved not adopted by the Diocesan Convention (for reasons that are not stated) can be viewed as the basis for any substantive discussion of the constitutional position of all Dioceses.

More to the point, the Virginia report was not the "only significant suggestion" that Dioceses might be permitted to secede. In 1841—the year that Francis Hawks' commentary on the Constitution and Canons first appeared, a clerical contemporary, Thomas Vail, published his *The Comprehensive Church*, in which he reached the following conclusion:

> [Each] Diocese is absolutely independent, except in certain particulars, wherein, by its own voluntary union with the others, it transfers its own authority to the General Convention. *The connexion or union of each Diocese with the others, through the General Convention, is perfectly voluntary; and any Diocese has a right to withdraw from the connexion whensoever it may please*. The only penalty for so doing exists in nature – the inconveniences attendant upon such a withdrawal and the sense of having departed from the most perfect unity of the Church in our country. An example of such withdrawal is not, we may add, on record, and from the nature of things, will probably never occur.[246] (Emphasis added.)

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[244] Dator, *The Government of the Protestant Episcopal Church*, 196.

[245] Hawks, *The Constitution and Canons of the Protestant Episcopal Church*, 11.

[246] Thomas H. Vail, *The Comprehensive Church or Christian Unity and Ecclesiastical Union* (Hartford, CT: H. Huntington Jr., 1841), 84.

Vail concurred with Hawks in perceiving the union—characterized by a *delegation* of authority by the Dioceses to the General Convention—as desirable and its dissolution as attended by numerous "inconveniences," but still perceived the union as both *voluntary* and *revocable*. It is a telling divergence that calls into question Dr. Mullin's earlier assertion of "an unequivocal and unanimous view of the hierarchical nature of the Church and the lack of independence of its dioceses" by nineteenth century commentators.

160. The resolution of the Diocese of Pennsylvania, though a valid expression of its own opinion, enjoyed no peculiar authority over other sovereign Dioceses. Indeed, it is surely the position of Dr. Mullin that an individual Diocese cannot speak for the Church as a whole.

161.-162. The views expressed by Hill Burgwin and A. S. Richardson are personal opinions regarding a proposition that was—at that time—entirely theoretical. Richardson's use of the terms "might" and "probably" are noticeably tentative and while Burgwin articulates a position congruent with that today espoused by TEC, it is one that had not—in his day—been tested in respect of a Diocese. As noted below (Paragraphs 164-169), on the one occasion during the nineteenth century when a group of Dioceses entered into an ambiguous relationship with the national church, the General Convention studiously avoided adopting the sort of coercive canons that would have comported with Burgwin's approach.

163. The plain fact of the matter is that while diocesan withdrawal—as Dr. Mullin admits—was simply not discussed after the 1880s, there is no evidence to indicate why. The General Convention itself rendered no judgment upon the point (a fact that is noteworthy, given Dr. Mullin's belief in its sovereignty and the views expressed by his authorities). One could as plausibly argue that the lack of discussion reflected a lack of immediate interest in the topic or the desire to avoid bringing a potentially divisive issue to the surface.

***C. The notion of the supremacy of the General Convention was not only rejected by many commentators but demonstrated during revision of the TEC Constitution during the 1890s, when supremacist language was proposed but not adopted***

170. Ironically, even as the church was embarking upon a process of building a national apparatus, the chorus of voices in defense of the supremacy of the General Convention—so feelingly invoked by Dr. Mullin—was being replaced by a very different sort of testimony. Writing in his *The General Ecclesiastical Constitution of the American Church* in 1891, Bishop William Perry opined:

> [By Article V of the Constitution] our fathers proposed to secure the perpetuation of Diocesan independence. As they had come into union, surrendering only those rights and powers to the central or national organization specifically stated in the Constitution or bond of union, so were other State or Diocesan Churches to come in for all time. Whatever may be the action of the future, at our organization and for the first century of our existence, Diocesan independence has been the acknowledged law and rule of our life and being. [247]

[247] Perry, *The General Ecclesiastical Constitution of the American Church*, 262.

Just four years later, Bishop Alexander Garrett made the same point to the first Convention of the Diocese of Dallas. "Every diocese is an independent and sovereign state," he insisted, "held in the unity of the Catholic Church by its episcopate, according to the rule of St. Cyprian. The diocese thus becomes the ecclesiastical unit, a full and perfect integer sufficient of itself for all purposes of growth and development."[248]

Garrett's arguments were only reinforced by the discussions then being conducted in the General Convention in respect of comprehensive revision of the TEC Constitution. At the General Convention of 1892, the Bishop of Quincy introduced a resolution to appoint a joint committee to revise the Constitution and Canons "rendering them more entirely harmonious and freeing them from ambiguities . . . adapting them to the greater enlargement and growth of the Church . . . [and] clothing them with such accuracy and precision of language as shall relieve the Digest from the technical objections which are made to its phraseology by jurists and canonists."[249] These changes were intended to harmonize the Constitution with concurrent proposals to establish a provincial system for the Church and the committee appointed for that purpose issued a carefully phrased warning about the nature of associations above the diocesan level:

> Assuming that the Diocese be taken as the unit of Church Life on the one hand, and the entire communion of the faithful in Christ as its complete integral embodiment on the other, it appears also that the nature of the Episcopate, and through that the order and extension of the whole Divine family, renders essential an organization placing each bishop in a visible relation of *counsel and cooperation* with comprovincials.[250] (Emphasis added.)

As the committee began its deliberations, voices were raised about the uncertain nature of authority within TEC, including that of the Bishop of Chicago:

> Diocesan independence is even more a menace to unity. Twice within ten years, has *the threat of diocesan secession* been heard on the floor of the House of Deputies. The frankness of extemporaneous oratory reveals what might, in time, become the policy of a section or party. When dioceses increase in number, as they will, until they are almost as thick as they were in Asia Minor in the fifth century, *it will be next to impossible to keep all these bound together firmly*, by a bond so remote as the General Convention.[251] (Emphasis added.)

The progress of the Committee on the Revision of the Constitution and Canons was closely followed in the church press. One clerical supporter of a stronger provincial system expressed alarm

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[248] Quoted in G. Thomas Graves, "Catholic Voices: Revisions to Title IV Are Bad Law," *Living Church*, October 22, 2010. See http://www.livingchurch.org/news/news-updates/2010/10/22/catholic-voices-revisions-to-title-iv-are-bad-law

[249] *Journal of the General Convention*, 1892, 49-50.

[250] *Journal of the General Convention*, 1892, 120.

[251] *Living Church*, July 28, 1894, 289-290.

that the proposed Canon 6 on that subject was "based upon the false assumption that the diocese is the organic church unit, *and the committee which is to report to the next General Convention has made the same the same ominous assumption*."[252] (Emphasis added.) As the General Convention of 1895 loomed, a member of the committee made an explicit public declaration:

> [The Constitution] is the instrument which makes the compact between the States (or dioceses now) or 'the Churches in those States' and creates the General Convention, and it is the fundamental law overriding all canons and other laws . . . [The Church] has no Supreme Court, which is the unique and distinguishing glory of the American conception, and if her constitutional compact is broken, she cannot enforce it by arms and armies.[253]

The proposed constitution brought before the General Convention of 1895 differed radically from the 1789 Constitution. Most noteworthy was a new Article III, which declared the General Synod (the renamed General Convention) to be "the Supreme Legislative Authority in this Church." It also gave the Synod "exclusive" power to legislate upon the conditions for ordination and for the "formation, division and rearrangement of Provinces and *Dioceses*, and explicitly declared that "no Diocese or Province shall by its legislation contravene this Constitution or any Canon of the General Convention enacted in conformity therewith." The Article was approved in the House of Bishops.[254] The House of Deputies, by contrast, received the proposed amendment and recommended deferment until the subsequent General Convention.[255] By the time the General Convention assembled three years later, sentiments had greatly altered. The 1898 proposals for constitutional change, while incorporating the new provincial system, were entirely shorn of the language of supremacy and exclusivity that had been proposed in 1895.[256] The Constitution finally approved in 1901 has governed the affairs of TEC for more than a century. When it came to the point, TEC shrank from embracing supremacist language and in doing so confirmed the essential character of the compact first drafted in 1789.

Far from fading as era of the modern Episcopal Church dawned, the voices speaking against the notion of the supremacy of the General Convention only grew during the twentieth century. Consider the view of Bishop William Lawrence, architect of the Church Pension Fund, on the eve of the birth of new national church structure in 1919:

> We are not Congregationalists; we are not a group of independent self-governing parishes. The parish is not the church unit. Nor on the other hand are we a religious autocracy. We are an organic body; the people, the clergy and the Bishop, who is the chief pastor. And we are bound together by spiritual ties, knit into one administration by constitutional bonds, traditions and limitations, so that each order and individual

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[252] *Churchman*, September 22, 1894, 319.

[253] *Churchman*, June 29, 1895, 909-910.

[254] *Journal of the General Convention*, 1895, 42-43.

[255] *Journal of the General Convention*, 1895, 236-237, 274, 284.

[256] See *Journal of the General Convention*, 1898, Appendix XIII, 604-610.

> is dependent on the others, and each does his best work through cooperation with others. The unit of the church is the diocese—the Bishop, clergy and laity.[257]

In 1934, the Joint Commission on Aided Dioceses of the General Convention joined the chorus. "A Diocese," it insisted, "is an ecclesiastical sovereign state and no action can be imposed upon it without its consent . . . The Constitution and Canons of the Church secure that kind of independence to a Diocese which makes change in its territory or jurisdiction unlawful without its consent."[258] Ten years later, Bishop Lawrence's counterpart in New York, William Thomas Manning, articulated the same perspective in an address to the House of Bishops:

> The relation between a Bishop and his Diocese is one of great sacredness and spiritual reality and this relationship exists between the Bishop and his Diocese—not between the General Convention and the Diocese. One of the most universally established and accepted principles in the whole history of the Episcopal Church, in the whole of the Anglican Communion, and in the holy Catholic Church throughout the world, is *the Autonomy, and Integrity of the Diocese*. Everything in our Constitution and Canons, asserts, maintains, and insists upon this principle, and upon this principle the whole system of Anglican and Catholic Church life rests. The Diocese is the unit of the Church's life.[259] (Emphasis added).

Such perspectives continued to be expressed in the aftermath of the Second World War. Powell Dawley, whose *The Episcopal Church and Its Work* has already been cited in relation to the role of the Presiding Bishop, noted disapprovingly in 1955 how the national church remained at the mercy of the Dioceses:

> [Dioceses] still possess an independence far greater than that characteristic in most other Churches with an episcopal polity. While in the early history of the Episcopal Church this may have stimulated its development, today it is not without some serious disadvantages. *Diocesan participation in any national program or effort, for example, must be voluntarily given, it cannot be forced.* Again, while the bishop's exercise of independent power within the diocese is restricted by the share in church governance possessed by the Diocesan Convention or the Standing Committee, *his independence in respect to the rest of the Church is almost complete*. The smooth functioning of church-wide endeavors depends upon his wholehearted co-operation and participation, accepting for his diocese the share and responsibility assigned to it. Neither the General Convention nor the National Council, lacking control over the larger part of the Church's resources, can put men and money to work in missionary districts or other areas of crucial challenge without the *voluntary cooperation of the diocese*.[260] (Emphasis added.)

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[257] William Lawrence, *The American Cathedral* (New York: The Macmillan Company, 1919), 4.

[258] *Journal of the General Convention*, 1934, 505.

[259] Quoted in William D. F. Hughes, *Prudently With Power: William Thomas Manning, Tenth Bishop of New York* (West Park, NY: Holy Cross Publications, 196?), 205.

[260] Dawley, *The Episcopal Church and Its Work*, 115-116. Note also the declaration of George M. Brydon the same

A decade later, a handbook on Episcopal canon law reiterated Dawley's arguments. "The Episcopal Church is not, strictly speaking, a single jurisdiction," declared Daniel Stevick, a faculty member of TEC's Philadelphia Divinity School. "A diocese is free to accept or reject or qualify its national responsibilities . . . diocesan support of the work of the national church is voluntary; commitment can be withheld."[261] Neither Stevick nor Dawley considered this situation desirable, but they acknowledged it as an inevitable consequence of the constitutional structure, more than 150 years since its inception.

## VII. CONCLUSION

- **The Episcopal Church was organized as a federation of sovereign Dioceses, a distinctly different arrangement from the hierarchical Church of England and other hierarchical churches.**

- **The General Convention enacts national Canons pertaining to the general life of the Church, yet remains dependent for their enforcement on bishops, Diocesan Conventions and diocesan courts.**

- **The General Convention may not alter the existing boundaries of a Diocese without its consent or appoint leaders of its own choosing.**

- **The model of government for TEC is neither that of the Church of England nor one derived from the U.S. Constitution, but that practiced under the Articles of Confederation. The Diocese remains the unit represented at the national level and the General Convention has frequently conceded its dependence upon the Dioceses to achieve national goals.**

- **There is no language of supremacy in the TEC Constitution that would give General Convention enactments priority over diocesan legislation, nor does it contain language that upholds the principle of indissoluble diocesan accession.**

171. The Episcopal Church came into being as a federation of sovereign Dioceses, heirs to the autonomous Anglican churches that existed in the various American colonies prior to the Revolution. In the cases of Virginia and Maryland, at least, they were recognized as hierarchical State Churches by the civil authorities prior to 1789. By the terms of the Constitution that they fashioned together, the Dioceses as corporate entities constituted the essential units of the Church. There is no equivalent role in TEC to that played by the Crown

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year that "the Episcopal Church in the United States came into being and still exists as a federated union of dioceses, in which each diocese is a 'sovereign diocese,' with the right and the power to enact canon laws for its own government; and in which the several dioceses have established a central or federal government having such powers only as have been delegated to it by the dioceses." George M. Brydon, *Shall We Accept the Ancient Canons as Canon Law?* (Richmond: Virginia Diocese Library, 1955), 32 f., quoted in Dator, *The Government of the Protestant Episcopal Church*, 4.

[261] Daniel B. Stevick, *Canon Law: A Handbook* (New York: Seabury Press, 1965), 88-89.

and the Archbishop of Canterbury in the Church of England.

172. As a legislative body, the General Convention periodically enacts national canons pertaining to the corporate life of the Church as a whole, yet the efficacy of those canons at the diocesan level is contingent upon the willingness of bishops, Diocesan Conventions and diocesan courts to uphold them. It has been—and is—possible for a Diocese to fail to enforce a national canon without sanction. It has been—and is—possible for a Diocese to amend its Constitution such as to declare a national canon to be of null effect within its jurisdiction (that the latter option has been of relatively recent origin does not mean that it could not previously have been exercised). The General Convention has to this day conceded that it may not reduce or eliminate a Diocese's representation in the General Convention, alter the existing boundaries of a Diocese without its consent, or appoint leaders of its own choosing (its authority over a bishop is relation to his status as a bishop in the Church, not as the leader of a Diocese). "*It was the Dioceses,*" declared the Committee on Amendments to the Constitution of the House of Deputies in 1928, "*who created the General Convention and adopted the Prayer Book.*"[262] (Emphases added) Surely Dr. Mullin is not arguing against the General Convention's own perception of itself?

173. The General Convention may be the highest authority within TEC but it was not—and is not—the "supreme" authority. Dr. Mullin is correct that the TEC Constitution is distinct from the U.S. Constitution for the very reason that it lacks a Supremacy Clause, the very feature that was accepted as essential to the new constitutional arrangements of the post-1789 Republic. TEC, by contrast, retained a model of ecclesiastical government that remained far more reminiscent of the Confederation era and that fundamental difference has endured down to the present day. That many—at times even a nominal majority—may have regretted that fact and desired to change does not alter the fact that they were never successful.

Consider the testimony of the Committee on Voting Procedures to the General Convention of 1976:

> [An indispensable ingredient of [the Compromise of 1789] was the concept of the House of Deputies as a *confederation of dioceses and, not as in the revised national government structure, a body of representatives of the Church constituencies in the Diocese* . . . The concept of confederation has persisted and survived repeated efforts to substitute a body representative of and proportional to the Church membership. *It is the polity of the Church.*[263] (Emphases added.)

The General Convention was—and is—an assembly in which Dioceses enjoyed equal representation and to which the Dioceses delegated (or voluntarily "surrendered") powers as they saw necessary. Throughout its history, the General Convention has acknowledged his status as a body whose effective authority depended upon voluntary compliance. The rights of Dioceses and of individual Bishops have been consistently recognized as inherent and not as grants from the General Convention that may be withdrawn at its pleasure. The General

[262] *Journal of the General Convention*, 1928, 250.

[263] *Journal of the General Convention*, 1976, AA2.

Convention can neither tax not dissolve a Diocese, and a Bishop is ultimately subject only to the judgment of his peers. In the most recent survey of canon law in the churches of the Anglican Communion, TEC ranks as one of the least hierarchical church bodies within it.[264]

174. As demonstrated above, there has been far more diversity of opinion on these matters than Dr. Mullin has seen fit to acknowledge. Even among those commentators who support the idea of supreme authority for the General Convention, there are more legal inconsistencies than might initially be apparent.

175. There is no language of supremacy in the TEC Constitution and efforts to introduce such language have come to nothing. Thus, the General Convention's enactments enjoy no essential priority over diocesan legislation. Nor does the TEC Constitution contain any language demonstrating the concept of indissoluble accession. The General Convention—as the embodiment of the national church—is a voluntary association composed of Dioceses who elected to accede to the Constitution and Canons of that body and that accession is revocable. That a thing has never been tried is not, in itself, proof of its unconstitutionality. There is no question that all those concerned with the founding of the Church desired a permanent union, even as they recognized that it could not be compounded of hierarchical dictation. Ultimately, the Diocese of South Carolina must be considered to have exercised its inherent rights under TEC's Constitution and Canons.

176. Far from being of the essence of its nature, hierarchical structures have served a variety of purposes in TEC that have varied from generation to generation. For much of its existence it was certain individual Dioceses—most notably New York and Pennsylvania—that set the tone for the national church. While episcopacy has been an essential feature of the national Church, it has been an episcopacy in which the independence of diocesan bishops has been jealously guarded. Most of the national structures that have been established over the years have been forced to acknowledge the need to cooperate with the Dioceses. "The dioceses have to understand that collectively they are the national church," Presiding Bishop Edmond Browning told the General Convention of 1997, "We, you, us, together here, are the national church. There is no national church apart from the dioceses gathered here together in this Convention and its elected Council. And the financial support of the General Convention budget is the budget of the dioceses, collectively. It's how we do our mission as a partner church of the Anglican Communion."265

**Response to Affidavit of Walter Edgar**

1.-3. Dr. Edgar's biographical data is uncontested.

4. This point is addressed in detail in my response to the Affidavit of Dr. Robert Bruce Mullin, Paragraphs 11-19 and 42-43.

5.-6. Dr. Edgar is correct in suggesting that South Carolina was not at the forefront of efforts

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[264] Norman Doe, *Canon Law in the Anglican Communion: A Worldwide Perspective* (New York: Oxford University Press, 1998).

[265] *Journal of the General Convention*, 1997, Vol. 2, 51.

to organize at the State level. Early pressure to organize came in States such as Maryland and Virginia where the status of church property was in doubt, which was not the case in South Carolina. Unquestionably, Dr. White's letters to prominent Anglican clergymen around the country acted as a spur to local organization, but it is a far cry from this to arguing that "the actions of the organizers of The Episcopal Church that actually precipitated the formation of a structure for the parishes in South Carolina." As for bishops, the Diocese of South Carolina never sought one in the first place. As the *Convention Journal* of 1786 puts it in relation to discussion of Article VI of the proposed TEC constitution prescribing selection of bishops by diocesan conventions and the confining of the exercise of their office to their own Diocese:

> Objected to; so far as it relates to the establishment of a Bishop in South Carolina.[266]

A bishop with local jurisdiction was not essential to maintain the integrity of a Diocese and South Carolina Episcopalians understood that.

7.-8. The two articles referenced by Dr. Edgar (7 and 11) were indeed agreed to by the Diocesan Convention of 1786. Neither can be considered an acknowledgment of subordination of the Diocese to the General Convention. That the constitution of a federation cannot by one member is a necessity for any sort of common life but conveys nothing of the intrinsic structure of authority within that federation. Article 7, meanwhile, was a simple statement of how a State Church could be admitted to the fellowship of the General Convention but said nothing as to the nature of the relationship between the Dioceses and the national church or the perpetuity of such a relationship.

9. The Diocese of South Carolina *may* have acceded to the TEC Constitution in 1790, although reference to the *Convention Journal* is not terribly informative. It was not until 1806, that an explicit set of "Rules and Regulations for the Government of the Protestant Episcopal Church in South Carolina" was adopted, which included Article XIV, declaring that "no article, canon, rule or other regulation, of any general or state convention, shall be obligatory on any Epis. Church within this state, where the same shall be found to infringe on any of its chartered rights."[267] There was no explicit acknowledgment of diocesan accession to the TEC Constitution and Canons until 1841, over sixty years after the national church had been organized.[268] In any case, the point at issue is not whether the Diocese of South Carolina once acceded but whether it acceded irrevocably. On that point, the discussion contained in my response to Dr. Mullin's affidavit would suggest that it remained free to rescind accession whenever it so chose.

10. Dr. Edgar's example could just as easily be recounted of a congregational church receiving aid and comfort from fellow believers around the country. It says nothing about the

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[266] *South Carolina Convention Journal*, April 1786, reprinted in Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 469.

[267] *South Carolina Convention Journal*, 1806, reprinted in Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, 495-498.

[268] *South Carolina Convention Journal*, 1841, 49.

relationship between the Diocese of South Carolina and the General Convention.

11. The Diocese of South Carolina has attended most meetings of the General convention since the inception of TEC. Such attendance says nothing about the nature of the relationship between the Diocese and the General Convention.

FURTHER, THE AFFIANT SAYETH NOT.

Dr. Jeremy Bonner

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

Notary Public for the State of IL
My Commission expires: 6-15-14

OFFICIAL SEAL
SHERRY A. BOYER
Notary Public - State of Illinois
My Commission Expires Jun 15, 2014

CERTIFIED COPY
2013 OCT 11 AM 9:00

# Exhibit 13

CERTIFIED COPY

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

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

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

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

FURTHER, THE AFFIANT SAYETH NOT.

Mark McCall

Mark McCall

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

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

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

# STATEMENT OF MARK McCALL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Basis for the Opinions Expressed in This Affidavit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hawks:

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

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

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

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

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

Perry:

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

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

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

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

Dawley then notes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[21] William White, *The Case of the Episcopal Churches in the United States Considered* (Philadelphia: Claypoole, 1782), 6-8 [hereafter "White, *Case,*"].

[22] White, *Memoirs of the Protestant Episcopal Church in the United States of America,* 2nd ed. (New York:Swords, Stanford and Co., 1836) 18-19 [hereafter "White, *Memoirs*"].

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

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

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

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

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

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

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[23] Hugh Davey Evans, *An Essay on the Episcopate of the Protestant Episcopal Church in the United States of America,* (Philadelphia: Herman Hooker, 1855), 109-12.

[24] Evans, 112.

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

[26] McConnell, p. 2111.

[27] McConnell 2118. The name of the colonial legislation is significant: "Diocesan Canons." Mullin states in paragraph 46, n. 17 that "one sees no discussion of dioceses, which was an independent ecclesiastical category and not present in early America." Yet in paragraph 92 Mullin himself quotes a 1789 canon that uses the term "diocese."

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

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

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

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

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

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[28] McConnell, p. 2139; Frederick V. Mills, *Bishops By Ballot: An Eighteenth Century Ecclesiastical Revolution* (New York: Oxford U. Press, 1978) 92-94; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford U. Press, 1986) 30; Cobb, Sanford H., *The Rise of Religious Liberty in America* (New York: Macmillan 1902) 87.

[29] H.J. Eckenrode, *Separation of Church and State in Virginia* (Va. State Lib., 1910) 14.

[30] Evans, 116.

[31] McConnell 2127-28.

[32] James L. Underwood and William Lewis Burke, eds., *The Dawn of Religious Freedom in South Carolina* (Columbia, S.C.: Univ. of S. C. Press, 2006) 11, 61-66.

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

Later he states that

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

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

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

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

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

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

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

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

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

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

[34] JGC, I:72.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He then adds:

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

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

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

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

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

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

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

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

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

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

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

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

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

Mullin then adds in note 27:

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

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

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

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

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

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

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

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

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

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

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

96. Note the striking similarities in language:

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

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

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

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

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

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

*Lack of Federal Language*

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

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

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

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

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

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

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

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

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

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

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

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

[54] White & Dykman, I: 12.

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

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

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

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

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

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

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

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

*Lack of Enumerated Powers*

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

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

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

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

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

*2. Vows*

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

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

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

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

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

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

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

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

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

And the oath of due obedience is as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Later in the Examination, the candidate is asked:

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

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

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

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

*3. Lack of a Judiciary*

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

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

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

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

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

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

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

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

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

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

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

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

*4. Amendments to the Constitution*

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

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

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

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

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

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

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

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

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

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

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

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

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

[72] JGC, I: 42.

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

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

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

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

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

*5. Accession to the Constitution*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Legislative Authority Does Not Mean Legislative Supremacy*

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

*Binding Canons*

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

148. Article 2 of the first Constitution provided that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[86] See Exhibit 2, 241-42.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[97] Andrews, preface, p. iii.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[100] Perry, *Constitution,* 262.

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

[102] Dawley 116.

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

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

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

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

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

---

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

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

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

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

172 F. Supp. 2d at 717.

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

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

## CONCLUSION

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

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

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**PUBLICATIONS** (primary author unless otherwise indicated)

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

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"Expectations and Hopes in South Carolina," The Living Church (Dec. 23, 2012)

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# Editor's Preface

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

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

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

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

Robert W. Prichard
Editor

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

Mark McCall[1]

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

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

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

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

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

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

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

*TEC Is an Association*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Dioceses Are the Members of the Association*

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

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

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

that is "entitled to representation" at General Convention.

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

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

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[11] Constitution, Article I.5.

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

[13] JGC, I:42.

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

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

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

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[14] *JGC,* I:83.

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

*Association Law: Members May Withdraw*

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

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

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

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

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

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

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

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

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

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

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

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

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

## II
## Response to Objections

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

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

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

*Objection One: TEC Is a Unitary Organization*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hawks, for example, made precisely this point:

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

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

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

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

Later, Perry reached the same conclusion:

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

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

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

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[32] Hawks, *Constitution*, 8.

[33] Perry, *Constitution*, 99.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Objection Two: Dioceses Give an Unqualified Accession when They Join*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[62] *JGC*, 14-62.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2 of the first Constitution provided that:

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

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

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

[71] JGC, 99.

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

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

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

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

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

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

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

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

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

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

[74] Nelson, *Preemption*, 247.

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

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

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

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

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[75] Nelson, *Preemption*, 250.

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

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

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

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

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

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

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

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

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

> interpretation would tend to defeat the great end of *union*, contemplated by its framers";
> - "It is difficult to lay down a general principle on this delicate subject, of the respective rights of the Church at large, and the churches in the several dioceses."[77]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[82] Perry, *Constitution*, 262.

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

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

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

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

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

explicitly rejected a century later when the Constitution was revised.

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

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

## Conclusion

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

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

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

Jane Holmes DIXON, Plaintiff,

v.

Samuel L. EDWARDS, et al., Defendants.

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

**Declaration of Louis Weil**

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

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

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

***My Background Qualifications***

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

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

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

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

***Types of Religious Polities***

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

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

***The Polity of the Episcopal Church***

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

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

***The Hierarchical Role of the Bishop***

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

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

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

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

(BCP 856) (emphasis added).

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

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

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

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

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

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

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

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

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

(BCP 561-62).

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

***The Bishop as Apostolic Witness***

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

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

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

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

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

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

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

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

Footnotes

***Bishop as Sacramental Provider***

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

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

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

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

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

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

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

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

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

(Smyrn. 8)

***Bishop as Unifier***

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

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

***Bishop as Ecclesiastical Authority***

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

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

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

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

<<signature>>

Louis Weil

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

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# Tom Tisdale letter to Judge Goodstein re TRO (January 29, 2013)

NEXSEN|PRUET

**Thomas S. Tisdale, Jr.**
Member
Admitted in SC

January 29, 2013

**VIA ELECTRONIC AND US MAIL**
**DGOODSTEINJ@SCCOURT.ORG**

The Honorable Diane S. Goodstein
Judge, First Judicial Circuit
P.O. Box 234
Saint George, SC 29477

Re: The Protestant Episcopal Church of South Carolina, et al. v. The Episcopal Church a/k/a The Protestant Episcopal Church in the United States of America
Case No. 2013-CP-18-00013

Dear Judge Goodstein:

I am writing as counsel for The Episcopal Church, the Defendant in this action. Our client received a Temporary Restraining Order ("the TRO") signed by you on January 23, 2013.

The purpose of this letter is to inform the Court that the Defendant is in full compliance with the Court's order. Under these circumstances, the Defendant hereby agrees that the TRO may remain in effect, and that the Defendant will continue to be bound by it beyond the statutory 10 day period when it would normally expire; and will continue to be bound by it unless and until the Defendant requests a hearing on the issues contained in the TRO at some future date. The issues raised by the TRO could then, of course, be addressed at such a hearing upon reasonable notice to opposing counsel.

Unless otherwise advised by the Court, we assume the hearing previously scheduled for Friday, February 1, 2013, will not be necessary.

**Charleston**
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Greensboro
Greenville
Hilton Head
Myrtle Beach
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**Attorneys and Counselors at Law**

Thank you for your consideration of this proposal to maintain the status quo in this matter pending your further order should such become necessary.

With best wishes, I am

Very truly yours,

Thomas S. Tisdale, Jr.

TST/taj
cc: C. Alan Runyan, Esquire (arunyan@speightsrunyan.com)
Andrew S. Platte, Esquire (aplatte@speightsrunyan.com)
Henrietta U. Golding, Esquire (hgolding@mcnair.net)
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# Alan Runyan Letter to Judge Goodstein (January 29, 2013)

**SPEIGHTS & RUNYAN**
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C. ALAN RUNYAN
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FACSIMILE (843) 522-0142

January 29, 2013

The Honorable Diane Goodstein
5200 East Jim Bilton Blvd.
P.O. Box 234
St. George, SC 29477

CERTIFIED COPY
2013 JAN 30 PM 1:11
CLERK OF COURT
DORCHESTER COUNTY

RE: The Protestant Episcopal Church of South Carolina, et al. v. The Episcopal Church a/k/a/ The Protestant Episcopal Church in the United States of America
Case No. 2013-CP-18-00013

Dear Judge Goodstein:

This is to respond to Mr. Tisdale's letter received this afternoon regarding the issue of extending the TRO beyond the statutory period by consent. While we believe there may be a solution that may satisfy the intent of the Defendant's suggestion, there are four issues of concern as it is currently presented.

First, we are concerned that Rule 65 does not appear to allow for a consent "indefinite" TRO (as opposed to one for a stated "period"). The rule also requires a temporary injunction be heard at the "earliest possible time" after the entry of a TRO without notice.

Second, it appears that the Defendant's proposal would limit compliance with the existing TRO to the Defendant alone while Rule 65 (d) and the present TRO extends its applicability beyond just the Defendant.

Third, the Defendant's consent appears to be conditioned on an agreement that it is "in full compliance with the Court's Order," which is not accurate.

Fourth, as worded in the letter, the Defendant would no longer be bound by an extended TRO once it "requests a hearing" as opposed to a further order of the court that would dissolve the TRO.

While it is our present intention to offer evidence of non-compliance with the Court's Order at the hearing on Friday, without waving our right to do so in the future, we believe that there may be a way to forgo the February 1, 2013 hearing.

Since the Defendant has now made an appearance, the Court can issue a temporary injunction. We believe that the entry of a consent temporary injunction under the same terms as the present TRO is appropriate (consistent with my comments above) so long as the parties are afforded the right to seek any subsequent judicial modifications upon such notice as the rules may require.

If the Defendant is amenable to the suggestions outlined above, I will draft a proposed order for Mr. Tisdale's review and, upon agreement, for this Court's consideration.

The Plaintiffs request that the Court keep the time set for the hearing and that the parties adhere to the requirements of the rules as they might relate to the hearing in case an agreement cannot be reached.

Respectfully,

C. Alan Runyan

CAR: els

Cc: Thomas S. Tisdale, Jr., Esquire, ttisdale@nexsenpruet.com
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2013 JAN 30 PM 1:11
CLERK OF COURT
DORCHESTER COUNTY

January 29, 2013

The Honorable Diane Goodstein
5200 East Jim Bilton Blvd.
P.O. Box 234
St. George, SC 29477

Dear Judge Goodstein:

I am in receipt of Tom Tisdale's letter written on behalf of the Defendant, The Episcopal Church which was received at 3:38PM this afternoon. Since I have a few other attorneys to counsel with about Mr. Tisdale's request, I would ask the Court to keep this matter on your docket for Friday, February 1, 2013 at 9:00AM until I have spoken with other counsel and can respond to his suggestion.

I expect to be able to respond this evening.

Respectfully,

C. Alan Runyan

CAR: els

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# Diocese of Quincy
# Opinion and Order
# (September 9, 2013)

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY, ILLINOIS

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| Diocese of Quincy,<br>Plaintiff,<br><br>vs.<br><br>The Episcopal Church, et.al.,<br>Defendants. | ) | Case No. 09-MR-31 |
| The Episcopal Church,<br>Counterclaimant,<br><br>Vs.<br><br>Edward A. Den Blaauwen et.al.,<br>Counterdefendants, | ) | |
| The Diocese of Quincy of the Episcopal Church,<br>Counterclaimant in Intervention,<br><br>Vs.<br><br>Edward A. Den Blaauwen et.al.,<br>Counderdefendants. | ) | |

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Kari A. Brockwandner
Clerk Circuit Court 8th Judicial Circuit
ILLINOIS, ADAMS CO.

**FINDINGS, OPINION AND ORDER**

This matter was taken under advisement following the trial of the Complaint of the Diocese of Quincy and the Trustees of the Funds and Property of the Diocese of Quincy (collectively referred to as DOQ) against The Episcopal Church (TEC) and the Counterclaim of TEC and the Episcopal Diocese of Quincy (EDQ) (collectively from time to time referred to as TEC) against certain individual Counter Defendants members of the Board of Directors of the Diocese of Quincy and/or the Trustees of the Funds and Property of the Diocese of Quincy (collectively referred to from time to time as DOQ Directors/Trustees). The parties submitted written

closing arguments and briefs and final coral closing arguments were heard on June 25, 2013.

Numerous issues were raised based upon the extensive evidence presented and arguments and briefs of the parties. Based upon the evidence, the court can make certain findings of fact. In addition, based upon the evidence introduced, the court could arrive at a number of other findings and conclusions, but for reasons explained below, the court is precluded from doing so.

## I. Neutral Principles of Law

The court previously found in denying TEC's motion for summary judgment and still finds that the "neutral principles of law" standard sanctioned by Jones v. Wolf (1979), 443 U.S. 595, has been adopted in Illinois and is applicable to the present case. (York v. First Presbyterian Church of Anna (1984), 130 Ill.App.3d 611; Aglikin v. Kovacheff (1987), 163 Ill.App.3d 426).

DOQ contends that under the neutral principles standard the court does not need to concern itself with a determination of the nature of TEC as a hierarchical institution. The court agrees with that proposition provided the property dispute between DOQ and TEC, which is at the heart of this litigation, can be determined and resolved by the court without intrusion into ecclesiastical or polity domains. (Jones v. Wolf (1979), 443 U.S. 595; York v. First Presbyterian Church of Anna (1984), 130 Ill.App.3d 611). These cases stand for the proposition that even if a church is subject to a hierarchical structure of government a civil court is not prohibited from deciding a property dispute so long as it can stay clear of having to resolve or become entangled in doctrinal or polity issues of the church. In York and in Aglikin v. Kovacheff 163 Ill. App. 3d 426, which DOQ asserts are dispositive, the parties conceded that there were no doctrinal or polity issues involved in the property dispute. In York, although the general church was hierarchical, it had conceded that a local church had a right to withdraw. In contrast here, TEC has made no such concession and in fact claims the right of diocesan withdrawal is a part of its polity. In Anglican, unlike this case, the parties agreed that the resolution of the dispute did not turn on doctrine or polity.

DOQ contends that applying neutral principles of Illinois law, this court can determine that the not for profit entities DOQ, had title and

ownership of the funds and property which are in dispute and that those corporate entities have, in accordance and compliance with law applicable to not for profit corporations, withdrawn their affiliation from TEC. DOQ asserts that there are no issues of doctrine or polity raised in their pleadings or their case in chief and therefore the court should enter judgment in their favor on their complaint for declaratory relief.

The court finds that DOQ established facts which would prima facie support the relief which they request.

## II. Determination of Property Dispute Without Consideration of TEC's Polity

Based upon the response and counterclaim, TEC asserts that the actions of the DOQ through their respective Directors and Trustees were contrary to the Constitution, Canons and Prayer Book of TEC and have sought a declaration by this court that the counterdefendant Directors and Trustees of DOQ are not in fact the directors of those entities. It further sought a declaration that those directors elected by the Synod of the EDQ remaining loyal to TEC were in fact the directors of those corporate entities. Those are inherently ecclesiastical questions which this court has no authority to determine. (St. Mark Coptic Orthodox Church v. Tanios (1991), 213 Ill.App.3d 700)

As TEC poses the principle issue before the court, however, the legality of the action of the Directors and Trustees of DOQ necessarily is intertwined with TEC's polity and governance. It maintains that the very act of attempting to withdraw or withdrawing the diocese from TEC raises questions of doctrine and polity. In short TEC claims that DOQ's actions raise issues which a civil court is precluded from resolving, because they are dependent upon doctrine and polity.

DOQ correctly responds that Jones specifically held that the neutral principles approach obviates the need for analysis or examination of ecclesiastical polity or doctrine in settling church disputes (Jones, 443 U.S. 595 at 605). At the same time, however, Jones acknowledged, that in the application of the neutral principles analysis of deeds, corporate charters or the constitution of the general church, there may be cases where a court finds that these documents incorporate religious concepts relating to the ownership of property. If religious concepts are incorporated into those

documents then Jones did hold that a court must defer to the resolution of the doctrinal or polity issue by the authoritarian ecclesiastical body. (See, Jones v. Wolf (1979), 443 U.S. 595 citing and quoting Serbian Orthodox Diocese v. Milivojevich (1976), 426 U.S. 696 at 724-25)(As a corollary to the First Amendment prohibition against resolving disputes on the basis of religious doctrine or tenants, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization).

As a result there are certain threshold questions presented by this case. First, does the property dispute between DOQ and TEC involve a question of religious doctrine or polity or can it be resolved purely upon application of neutral principles? Second, if it does involve church polity and doctrine, is TEC clearly hierarchical and is the DOQ a clearly subordinate constituent to that hierarchical structure? Third, if TEC is hierarchical in character what is the "highest court" that has ruled on the question of the property dispute, to which this court must defer?

**III. Evidence of Religious or Doctrinal Concepts in Relevant Documents**

The property question before the court, in applying neutral principles, is who has title to or is entitled to control of the property in dispute. The property includes the bank account of the diocese and real estate which is titled in DOQ and used for the administrative offices of the diocese. Jones instructs the court to consider the relevant documents (property documents, church constitution, corporate charter) in secular terms and not to rely on religious precepts in determining the rights and interests of the parties in the disputed property.

On their face, there is nothing in the governing property documents which invokes or involves doctrinal issues. Thus, this case is distinguishable from Clay v. Illinois Dist. Council of Assemblies of God Church (1995), 275 Ill.App.3d 971, which is relied upon by TEC. In Clay, the court found the property dispute could not simply be resolved by application of neutral principles, because the property in question was specifically subject to a reversionary clause that was intimately related to doctrinal and ecclesiastical issues. There is nothing comparable to that here.

Thus, there is nothing in the governing property documents which would require the court to consider TEC's polity.

TEC is an unincorporated association, so there is no charter for the court to examine for religious concepts relating to ownership of property. TEC does not specifically identify what provisions of its constitution incorporate religious concepts relating to the ownership of property, which would require deference by the court under Jones.

TEC does cite and rely upon the case of St. Mark Coptic Orthodox Church v. Tanios (1991), 213 Ill.App.3d 700. The court in St. Mark acknowledged that deference to religious authority is not automatically required and in Illinois neutral principles could and had been applied to resolve church property disputes where doctrinal controversy was not involved. It further held, however, that where hierarchical religious organizations have established their own rules and regulations for internal discipline and government and have created tribunals for adjudicating disputes concerning the government and direction of subordinate bodies, civil courts are required under the First Amendment to defer to decisions of such tribunals. (Citing, Serbian Orthodox Diocese v. Milivojevich (1976), 426 U.S. 696 at 724-25).

Like the dispute here, the matter in controversy in St. Mark involved certain bank accounts (as well as a power of direction over a land trust). The dissenting parish faction had adopted certain bylaws, which the dissenters contended could be analyzed under neutral principals and a decision made as to who governed the assets. The appellate court rejected that argument, however, finding that the parties had agreed that the real issue presented was who were the "true members" of the board of deacons. The court held that "[a]lthough the court clearly heard sufficient evidence from which it could conclude the August 1988 bylaws were adopted by the board of deacons of the Chicago parish, the question of whether those bylaws "governed" the Chicago parish to the exclusion of the pope's authority to promulgate and approve bylaws and maintain the peace and welfare of the parish was an open one." St. Mark Coptic Orthodox Church, 213 Ill.App.3d 700 at 715).

The appellate court concluded that the questions of whether the dissenting parish's bylaws needed to be approved by the pope, and which bylaws governed the dissenting parish, could not be definitively answered using the neutral principles approach. This was despite the dissenters' claim that the adoption of the bylaws was of a "secular" nature. The court rejected that argument on the grounds that it totally ignored the hierarchical nature of

the church. The court ultimately concluded that the question, of who the true members of the board of deacons of the dissenting parish were, could only be resolved if the court impermissibly delved into matters of church doctrine and polity. Finding that the church was clearly hierarchical and there being no dispute as to the highest judicatory of the church, it upheld the trial court's deference to the general church's determination of who controlled the church property.

DOQ without analysis or argument distinguishes St. Mark because it involved the "ecclesiastical issue" of who the true members were and which bylaws governed. (DOQ Response, p. 20). Admittedly, the parties in St. Mark agreed that was the issue presented for resolution by the court. Here, DOQ and TEC are not in any agreement as to what the issue is.

However, the question, even as framed by DOQ, i.e., whether DOQ could withdraw its affiliation from TEC, does arguably raise the subject of TEC's polity. In other words, the question of the validity of DOQ's actions to withdraw its affiliation with TEC, similar to the dissenting parish's actions in St. Mark, could be intertwined with the question of whether those actions required approval or consent of a higher judicatory authority within TEC.

There is a strong argument that because neither the governing property documents, nor TEC's constitution specifically invoke religious concepts relating to the ownership or control of church property the court should avoid any consideration of polity issues as suggested by Jones. Nevertheless, it is arguable that this case, like St. Mark, raises questions that are related to the subordinate or superior relationship between the parties and therefore presents one of the rare instances where the governing documents cannot be read in a purely secular light, forcing the court to look at the issue of church polity. Maryland & Virginia Eldership of Churches of God Churches v. Church of God at Sharpsburg, Inc. (1970), 396 U.S. 367.

## III. TEC's Polity and Identification of its Highest Judicatory

Relying on the case of Serbian Eastern Orthodox Church v. Milivojevich (1976), 426 U.S.696, TEC maintains that whether the polity of a hierarchical church permits one of its members or parts to unilaterally withdraw is an ecclesiastical question. The parties agree that the definition

of a hierarchical church was set forth in the Supreme Court case of Watson v. Jones (1871), 80 U.S. 679. It was described as one:

> [W]here the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization. (Watson at 722-23).

TEC asserts this definition sets forth a two part test, namely, (1) is the denomination structured in ascending tiers? and (2) do the higher tiers exercise authority over the lower tiers? The court believes DOQ more accurately counters that the Watson test involves a 3 part test, which TEC bears the burden of proving. As DOQ outlined it, in its written Response, TEC was required to establish the following:

1. DOQ was a subordinate member of TEC.
2. TEC has "superior ecclesiastical tribunals" and
3. Those tribunals have "general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership."

TEC asserts, and the court finds, that TEC is comprised of a three tiered structure consisting of congregations, located within geographically designated dioceses. Dioceses seek admission to and upon acceptance become a part and members of the national General Convention. The degree of independence of dioceses and the nature of the association is a matter of dispute between the parties.

TEC asserts that unanimous precedent from other jurisdictions establish that TEC is a three-tiered hierarchical church with the General Convention at the top of the hierarchy.

The court has reviewed the cases cited in TEC's brief in support of this proposition. They certainly contain language supportive of TEC's position. But the court notes a number of factors that render the holdings in these cases distinguishable from the present case. All of these cases involved disputes between a parish or congregation and a diocese of the Episcopal Church. DOQ does not dispute the hierarchical nature of that

relationship and, as discussed below, it is undisputed that the bishop of a diocese is identified as highest ecclesiastical authority of a diocese. As DOQ notes in its reply brief, in virtually all of these cases the issue of hierarchical relationship as between a parish and the diocese or general church was uncontested. These distinctions lead the court to find them less persuasive as far as the circumstances and issues presented by this case.

TEC argues further, however, that this case is not a case of first impression insofar as a dispute between a diocese and the national Church. It refers to a California case which is still pending involving a property dispute between the Diocese of San Joaquin which has attempted to withdraw from TEC. It contends that the parish versus diocese distinction is not valid and it relies and cites the summary judgment opinion issued by the trial court in the case of Diocese of San Joaquin v. Schofield (TEC, First Post Trial Brief at p. 9) which was overturned on appeal on other grounds. (Schofield v. Superior Court (2010), 190 Cal.App.4th 154). TEC contends that the appellate court, in reversing the trial court, nevertheless implicitly recognized the Church as the highest authority in the denomination of the Episcopal Church.

The court does not find Schofield really supportive of TEC's position in resolving the property dispute issue here. In Schofield, the trial court granted summary judgment in favor of TEC, upon grounds that the actions of a diocese in attempting to withdraw from the Church were impermissible under the constitution and canons of the national church and were ultra vires. That summary judgment was reversed. TEC here seeks civil court recognition and declaration regarding the validity of TEC's removal of the DOQ Trustees and Directors and appointment of the corporate successors. Schofield held that TEC's recognition of and identification of the successor to the former Bishop Schofield was an ecclesiastical fact not subject to further adjudication by a civil court. The court also noted that it was an ecclesiastical fact that Schofield was the Bishop of the Diocese of San Joaquin of the Episcopal Church up to a particular date and that he was the presiding Bishop over an Anglican Diocese of San Joaquin at some later point.

The court ruled that despite the acknowledgement of these ecclesiastical facts the matter needed to be remanded to the trial court to resolve the property transfer issues undertaken by the former Bishop Schofield, applying neutral principals considering the powers of the bishop

under applicable church law as well as state corporate, trust, and property law. The court does not find the decision to be terribly compelling or supportive of TEC's argument that the hierarchical status of the General Convention is so clear the court must defer to its decision on the withdrawal and ultimate property dispute. DOQ is not disputing the fact that TEC recognizes Bishop Buchanan as the Bishop of the EDQ. It likewise appears undisputed that the DOQ Standing Committee was the highest ecclesiastical authority of DOQ at the time of the action to withdraw its affiliation with TEC. These ecclesiastical facts do not answer the question of whether the General Convention is the highest judicatory of TEC with ultimate authority over DOQ as a subordinate constituent and to which this court must defer on the claimed polity question of the right of DOQ to withdraw.

TEC also refers to the case of Episcopal Church v. Salazar, a Texas trial court summary judgment opinion which is on appeal. The trial court there applied a strict deference approach, not followed in Illinois, and the decision was based on Texas law not applicable to this case. The court likewise does not find that decision helpful or convincing.

Finally, TEC cites the case of Calvary Episcopal Church v. Duncan (2011) 293 C.D. 2010, a non reported opinion, which is of questionable precedential value. This case involved a stipulation entered into by a dissenting faction of the Diocese of Pittsburg which withdrew from TEC. A settlement was reach and a stipulation entered into between the litigants whereby it was agreed and stipulated that property held or administered by the Episcopal Diocese of Pittsburg for the beneficial use of the diocese would continue to be held by the diocese regardless whether some or even a majority of the parishes of the diocese chose to withdraw from TEC. Thereafter the Pittsburg Diocese took action to withdraw from TEC. TEC did not recognize the withdrawal and named a new Bishop for the diocese and new members for diocesan standing committee.

The issue presented in that case was whether the withdrawing diocese's attempt to control the property of the diocese would violate the stipulation of the parties. The case was disposed of on the basis of the interpretation of that stipulation. It is not apropos to the facts and issues here.

TEC cites Clay v. Illinois Dist. Council of Assemblies of God Church (1995), 275 Ill.App.3d 971, as support for their contention that the test of a

hierarchical church is limited to determining whether there are ascending structures and the denomination exercises some authority over the local church. Clay declared that the Assembly of God denomination is a hierarchical church organization. TEC reads into that declaration an endorsement of its position. However, it does not appear that the hierarchical character of the church was the real contested issue before the court. The court's opinion dealt with whether a summary judgment entered upon the basis of absolute deference was proper. The court applied neutral principles in analyzing the trial court's judgment, but ultimately concluded that the case could not be resolved on neutral principles because a reversionary clause related to the property in question was specifically tied to an ecclesiastical matter.

TEC also cites the case of York v. First Presbyterian Church of Anna (1984), 130 Ill.App.3d 611. It argues that the hierarchy of the United Presbyterian Church was disputed. It claims that the appellate court impliedly found that it was hierarchical on the basis that there existed higher tiers having some authority over lower tiers. The court finds this analysis of York, as it relates to the question of hierarchy, over simplified.

Having determined that there is no definitive, persuasive precedent that resolves the question here, TEC argues that the court can resolve the issue by examining the governing documents, TEC's Constitution and Canons as well as those of the diocese.

TEC refers to, among others, the following governing documents evidencing the hierarchy of TEC:

1. Article 3 of the TEC Constitution of 1789, that the legislation adopted by the General Convention shall become law. (Ex. B-1).

2. Article 2 of the Constitution providing that if a church in a state fails to send representatives to a meeting of the General Convention , the church in the state would still be bound by General Convention . (Ex. B-1).

3. Article 5 required churches in the States seeking admission into the General Convention to accede to the Constitution of TEC. (Ex. B-1).

4. Article 7 which required persons seeking ordination to pledge to solemnly engage to conform to the doctrines and worship of the Protestant Episcopal Church of the United States. (Ex. B-1).

5. Article 4 providing that each bishop was confined to the exercise of his office to his proper Diocese or District. (Ex. B-1)

6. Article 8 provided that the General Convention would establish the Book of Common Prayer, which was described as the fundamental faith document for the Episcopal Church. (Ex. B-1) (Tr. 4/10/13, p.m. p. 32-33)

TEC relies upon the relevant Church Constitution of 1874, at the time DOQ was established as a separate Diocese from the original Diocese of Illinois and the original DOQ Constitution as evidence of its ascending three tiered structure and DOQ's recognition of that structure. (Ex. B126, 135). DOQ acceded to the Constitution and Canons of the Church and recognized the authority of the General Convention. (Ex. B-135).

DOQ in response to the documents relied upon by TEC asserts that those provisions do not unequivocally or clearly establish that the locus of hierarchical control is with the General Convention. Assuming the hierarchical status of TEC, it is still necessary for the court to determine to which ecclesiastical authority it is required to defer to the ultimate polity question regarding the ability of a diocese to withdraw its affiliation with TEC. DOQ counters that the following constitutional provisions highlight the ambiguity surrounding the question of the locus of the hierarchical control of the Church.

The TEC Constitution and Canons identify the Diocesan bishop as "the Ecclesiastical Authority" of a diocese. It further provides that in the absence of the bishop, the diocesan Standing Committee, not some central authority, is the "Ecclesiastical Authority" of the diocese. Cannon IV.15 (Ex. B-121A)).

No bishop, including the Presiding Bishop, can act within a diocese outside of their own, without the consent of the Ecclesiastical Authority, i.e., the diocesan bishop. Art. II, Sec. 3. (Ex. B-121A).

In 1992, the Constitution of DOQ was amended to recite that its accession to the Constitution and Canons of TEC was contingent upon the continuing consent of the Diocesan Synod. (Ex. C-11).

DOQ persuasively argues that when examining TEC's Constitution and Canons from a secular perspective, they are far from clear or evident, as to identifying the highest court or judicatory having authority over the diocese. There is no explicit provision in TEC's Constitution or Canons specifying the office or body having supremacy or ultimate authority over the acknowledged Ecclesiastical Authority of a Diocese, i.e., a Bishop or a Standing Committee in the absence of the Bishop.

There is no provision in TEC's Constitution or Canons which require prior approval of a diocesan constitution or its canons. There is no express prohibition against withdrawal of a diocese. In sum, reviewing the governing documents from a secular perspective, there is no explicit or clearly delineated expression of TEC's claim that the General Convention is the ultimate authority or judicatory of the Church. DOQ notes that TEC's own expert witness, Dr. Mullin, conceded that his description that TEC is governed at the topmost level by the General Convention as the ultimate and supreme source of authority over the Church was not expressed in the Constitution, but was merely reflected or evident. (Tr. 4/30/13 p.m., at 96, 129). Dr. Mullin conceded that his opinions regarding the inherent and reflected supremacy of the central Church was the result of "an extended historical and theological analysis of the development of the Church's hierarchical structure from its earliest days to the present.". (Tr. 4/30/13 p.m., at 13; Ex. A-222 at 4). DOQ's tendered expert witness, Dr. Radner opined that the Church's polity is necessarily connected to theology.

It is clear, on the basis of the Church and Diocesan Constitution and Canons, that TEC is organized with ascending tiers and it is hierarchical in many of its structural aspects. What, however, is much less evident is whether the General Convention constitutes the highest ecclesiastical tribunal with ultimate authority over a diocese. TEC asserted in its written argument that, to the extent any ambiguity existed, the court could look to other extrinsic evidence to "discern the intentions of the parties – the Church and the Diocese – regarding the nature of their relationship." (TEC Final Brief, p. 8).

Much of the evidence in this case and the predominant focus of TEC's written and oral argument relates to that extrinsic evidence. It includes journals of General Convention and Diocesan meetings, various Canons and resolutions both adopted and rejected, historical commentaries and the purported meaning of all this extrinsic evidence in the eyes of their principal witness, Dr. Mullin. It includes as well opinions both legal and theological submitted by officials of DOQ from litigation involving DOQ and a dissenting parish (the so-called St. John's litigation) which the court allowed into evidence over DOQ's objections. (Ex. B-169-77). In the course of that litigation various DOQ officials, including legal counsel, offered opinions and made statements as to the hierarchical nature of TEC, albeit the dispute in that case was between a parish and DOQ. Countering this evidence were volumes of similar Church related documents, Canons and resolutions as well as historical commentaries and writings relied upon by DOQ's opinion witnesses.

Grace Evangelical Lutheran Church v. Lutheran Church-Missouri Synod (1983), 118 Ill.App.3 151, cited and relied upon by both parties, provides relevant and instructive precedent. Grace did hold that a church property dispute is properly resolved by a court determining the polity of the church organization and then deferring to the authoritative determination of the conflict by the highest authority within that organization. This as Grace further held, however, can be the solution only when the highest ecclesiastical authority is easily determined. TEC's reliance on Grace merely begs the question. As Grace also noted a church organization may consist of both hierarchical and congregational aspects. That question is at the heart of the dispute between DOQ and TEC.

Very similar to the facts here, in Grace, the record consisted of voluminous conflicting evidence, which included not only church governing documents, minutes of meetings, as well as opinions from church officials and church historians. The court concluded that as a result of the voluminous, conflicting evidence, it could not constitutionally undertake the extensive inquiry and evaluation necessary to determine the polity of the Synod with the respect to doctrinal issues. Grace, 118 Ill.App.3d 151, 163). This court concludes that it is similarly constitutionally constrained. (See, Werling v. Grace Evangelical Lutheran Church (1985), 139 Ill.App.3d 496; Jones v. Wolf (1979), 443 U.S. 595; This conclusion is supported by the Supreme Court's decision in Maryland & Virginia Eldership of Church of God Churches v. Church of God at Sharpsburg, Inc. (1970), 396 U.S. 367.

(The deference approach is permissible under the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity).

These factors distinguish the cases of St. Mark Coptic Orthodox Church v. Tanios (1991), 213 Ill.App.3d 700 and Serbian Orthodox Diocese v. Milivojevich (1976), 426 U.S. 696, relied upon by TEC. In St. Mark, it was noted that the bylaw amendments of the dissenting parish were required to be submitted to the General Board of the Church for approval. Any amendment was further to be authorized by the Pope. The court had no difficulty in determining that the church was hierarchical. Finally, and perhaps most importantly, all parties agreed as to the identity of the highest judicatory.

Likewise in Serbian, all the parties agreed that the church was hierarchical and there was no dispute as to the sole and supreme adjudicatory authority (The Holy Assembly and Holy Synod). There the court found that the diocesan constitution reaffirmed its subordinate status. Proposed changes in diocesan constitution, corporate by laws and final judgments of the Diocesan Ecclesiastical court were required to be submitted to the Holy Synod or Holy Assembly for approval. Bishops swore an oath of obedience to the Most Holy Assembly. These cases reaffirm that where designations of hierarchical authority are explicit and readily apparent they will be recognized by civil courts. The facts here, however, are quite distinguishable and are much more aligned with Grace.

Based upon this record, the court finds that, despite the general hierarchical structure of TEC, the determination that the General Convention is the highest ecclesiastical authority over the disputed property issue is not readily ascertainable. To reach the conclusion sought by TEC, that the actions of the General Convention and Presiding Bishop must be deferred to as the ultimate adjudicatory of the dispute, would require the court to engage in a searching and impermissible inquiry into the historical and theological analysis of the Church's polity, which formed the basis of Dr. Mullin's opinions and conclusions.

As noted initially, it is debatable whether TEC's constitution even incorporates religious concepts in provisions relating to the ownership of church property in a manner which would invoke the deference standard

referenced in Jones. Regardless, based upon the principles in Maryland Churches and Grace, the court here cannot constitutionally determine the highest judicatory authority or the locus of control regarding the property dispute to which it would be required to defer.

The court finds, therefore, that the declaratory relief that TEC seeks and the deference to the actions of the General Convention, Presiding Bishop and Bishop Buchanan cannot be legally enforced in this action.

## IV. Application of Neutral Principles to Resolve the Property Dispute

Although the property dispute is not constitutionally resolvable by application of a deference standard, the court can, by resort to neutral principles, still attempt to decide the issue.

In applying neutral principles, courts will generally examine language of deeds, the terms of local corporate charters, and the state statutes applicable to church property. (York v. First Presbyterian Church of Anna (1984), 130 Ill.App.3d 11, citing to Jones v. Wolf (1979), 443 U.S. 595 and Maryland & Virginia Eldership of Churches of God Churches v. Church of God at Sharpsburg, Inc. (1970), 396 U.S. 367). Both parties rely on York.

As stated above, the court finds that DOQ met its burden of proof, in its case in chief, that it has title and ownership of the accounts and deed titled in the Trustees. Reviewing its actions under neutral principals of law, DOQ established its withdrawal from association with TEC was compliant with the applicable corporate charter, bylaws, as amended, as well as the not for profit corporation laws.

TEC does assert that when the corporate charter of the Trustees of the Funds and Property was amended to eliminate the reference to DOQ being a diocese of the "Protestant Episcopal Church of the United States of America" the bylaws required the Trustees to be "communicants of the Protestant Episcopal Church." (Ex. B-161). They argue that none of the persons who voted in favor of the amendment were "communicants" of the Church when the vote was taken and it is therefore void. TEC cites no authority for its claim that the amendment is void. The court has found no authority on this point. DOQ relies in part on Section 105/103.15 of the Not for Profit Corporation Act (805 ILCS 105/103.15) in responding that there is

no recognized ultra vires defense under the Act. While there are circumstances in governmental law where an office is automatically rendered vacant by a particular disqualifying event, the court could not find any similar principles applicable in the corporate law context. The Not for Profit Corporation Act provides a procedure for removal of directors (805 ILS 105/108.35). That action has never taken place. TEC's request that the court declare the action void appears to invite the court to improperly inject and rule upon TEC's doctrine and discipline.

Notwithstanding those duly undertaken corporate actions to withdraw, the ultimate question underlying this dispute is whether DOQ can retain control of the property held by it, or under the law of this state, is it compelled to relinquish it to TEC.

TEC argues that York is supportive of its position that the governing documents of the Church and the Diocese conclusively show that the Diocese's property must remain in the Church. York did hold that the governing documents in York demonstrated that the relationship between the departing faction and the central church lacked an explicit mutual understanding of the property rights within the religious structure. TEC discerns from that ultimate holding that, if there is an explicit mutual understanding of the property rights within the church, it would be civilly recognized and upheld.

TEC primarily relies on 3 canons from 1868, 1871 and 1971. DOQ persuasively contests the relevance of the 1868 and 1871 canons as far as the dispute here is concerned. DOQ points out that the 1868 canon (Ex. B-74) merely provides that it is not lawful to encumber or alienate a consecrated church or chapel without the advice and consent of the diocese's standing committee. The 1871 canon similarly provided that no church or chapel shall be consecrated until the Bishop insured that the building and grounds would be secure from the "danger of alienation from those who profess and practice the doctrine, discipline and worship of the Protestant Episcopal Church in the United States of America." (Ex. B-75).

While these provisions are supportive of a claim by the Church or Diocese to a beneficial interest in consecrated church or chapel property, they do not constitute any explicit mutual understanding with respect to TEC's claimed interest in the principal asset which is at the heart of this dispute, the bank account of the Diocese. It is similarly not relevant to the

real estate titled in the Trustees, which apparently is admittedly not a consecrated church or chapel.

TEC also relies on the so-called Dennis Canon, which by all accounts was adopted by TEC following and in response to the U.S. Supreme Court decision in Jones v. Wolf (1979), 443 U.S. 595. Jones, in sanctioning the application of neutral principles to resolve church property disputes, held that:

> "[a]t any time before [a] dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form. (Jones v. Wolf, 443 U.S. 595 at 606).

Following the Jones decision TEC adopted and now relies upon the following canon:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. (Ex. B-78).

DOQ argues that the Dennis Canon, at most, merely applies to parish or mission property. It maintains that the absence of any similar canonical pronouncement as it relates to diocesan property is telling. The court agrees. The court finds the Dennis Canon is, as between DOQ and TEC, a far cry from the "explicit mutual understanding of the property rights" contemplated in York. TEC's written argument concedes that diocesan property is merely "implicitly included in [the Dennis Canon's] reach." (TEC Final Brief, p. 17). This falls short of the type of recommended action described in Jones for religious organizations to undertake to "ensure that a dispute over the ownership of church property will be resolved in accord with the desires of

its members" and to avoid the need for resolution by a civil court. (Jones v. Wolf, 443 U.S. 595 at 604).

Other relevant documents that the court can and should consider in attempting to resolve the dispute would include the Discretionary Agency Agreement between DOQ Directors/Trustees and the Defendant National City Bank. (Ex. A-188). TEC is clearly not a party to the agreement and is not identified as a beneficiary of the agreement. No one from TEC had written authority with respect to the account. The unrebutted evidence established that TEC never had any involvement in any deposits, withdrawals, use or administration of the account. (Tr. 4/23/13, pp.33-37; 77-80). TEC did not specifically address this evidence. There is nothing within the four corners of the Agreement itself which would suggest any trust or other proprietary interest of TEC in the assets held pursuant to the Agreement.

TEC refers to certain deeds held by the DOQ Trustees that have language of trust contained in them. (TEC Initial Brief p. 46). The parties concede that these deeds pertain to missions, who are not parties to this action. TEC further concedes that the resolution regarding those properties "was not contemplated to be resolved at this point in the litigation." (TEC Initial Brief, p. 46). TEC argues that those deeds, however, evidence the expectations that underlay the conveyances to DOQ.

Implicitly, TEC's position and argument in applying a neutral principles analysis to the property documents and governing charters, constitutions and state laws applicable to church property is that the property held by DOQ is subject to an implied trust in favor of TEC.

It asserts that the law "governing the holding of church property", which Jones and York reference in sanctioning the use of neutral principles, can only mean the Illinois Religious Corporation Act. (805 ILCS 110/0.01 - 110/51). Neither DOQ nor the Trustees of the Funds and Property were incorporated under that Act, but were incorporated under the Illinois Not For Profit Corporation Act. (805 ILCS 105/101.01 et.seq.) TEC cites no Illinois authority supporting its contention that the Religious Corporation Act should be controlling or relied upon, under these facts.

There is no evidence before the court that DOQ or the Trustees, by their own or TEC's, Constitution or Canons, were prohibited from

organizing under the Not For Profit Corporation Act. It does not necessarily follow that the existence of the Religious Corporation Act renders it the preemptive authority governing or regulating church property matters to the exclusion of those religious entities organized under the Not Profit Corporation Act which specifically contemplates incorporation of religious organizations. (805 ILCS 105/103.05(a)).

TEC cites and relies upon a Georgia case, Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia (2011), 718 S.E.2d 237, as support for the application of the Illinois Religious Corporation Act to this case. Admittedly, the Georgia Supreme Court looked to state statutes dealing with conveyances of real property to churches even though it found the statute did not strictly apply to the local church in question. Obviously, this opinion is not binding authority on this court.

The court in Christ Church in Savannah claimed that its finding of an implied trust between the local congregation and the diocese was based upon the governing documents adopted by both the local and national churches and "supported by the policy" of the State legislation which it admitted was not directly applicable. The court found this trust evident from the historical roots between the English church and the founding of the Episcopal church in the United States. (Rector, Wardens and Vestrymen of Christ Church in Savannah, 718 S.E.2d 237 at 255). The parties admitted that TEC was hierarchical with the General Convention at the top. It is apparent from this decision that the court's finding of the implied trust was strongly related to the clearly historical subordinate status of the congregation to the diocese. This is an obvious distinction from the facts here. To reach the conclusion that DOQ had similarly subordinated itself to TEC with respect to the ownership, control or disposition of diocesan property would again lead the court to delve into the constitutionally impermissible inquiry into the nature of the polity and relationship between TEC and DOQ.

This extensive historical investigation was, in part, the basis of the critical analysis by the dissent in Christ Church in Savannah, which this court frankly finds to be more persuasive. The majority reached its decision by admittedly reviewing the local and general church documents as they were created, amended, and followed over the course of the quarter millennium that Christ Church interacted with the parent denomination. As the dissent noted, and this court agrees, such reliance upon the historical

narration and discussion of the local church documents to discern their relationship is fraught with danger of overstepping the First Amendment proscriptions against consideration of doctrinal issues.

The Georgia Supreme Court's extensive review and analysis of the historical relationship between Christ Church and the Diocese to conclude that the law of Georgia supported a finding of an implied trust does not compel this court to engage in the same type of inquiry, in applying neutral principles.

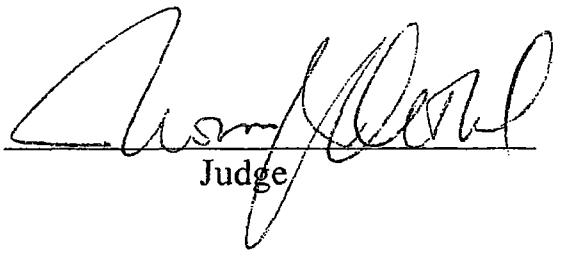
The court does not find that the law of Illinois would establish an implied trust based upon the evidence before the court. The court has concluded that the supreme and ultimate authority of the General Convention over the property of the DOQ cannot be constitutionally determined. TEC references the case of Little v. Chicago Women's Bowling Association (1949), 337 Ill. App. 226 (also relied upon by DOQ) for the proposition that whether a local organization can withdraw from an association depends on whether the local organization had ever subordinated itself to the national organization. Although in Little, the court held that the evidence of the local group's subordination was absent, TEC claims that DOQ is clearly subordinate and references Little's discussion of an abstract decision in Morgan v. Local 1150, United Electrical, Radio & Machine Workers of America, 331 Ill.App.21.

The problem with this analysis is that DOQ's subordinate status is not clear or readily apparent. TEC's request that the court determine the "intention of the parties" to find an implied trust based upon this subordinate status seems to simply circle back and invite the same impermissible inquiry into matters of doctrine and discipline between the parties that is constitutionally prohibited.

## CONCLUSION

Based upon the foregoing, the court finds in favor of DOQ on its complaint for declaratory relief and against TEC and EDQ on their counterclaim for declaratory relief. The court directs the attorneys for DOQ to submit a proposed declaratory judgment order within seven days of the date of this opinion and order.

Entered: September 6, 2013



Judge

cc: counsel of record

# Diocese of Quincy
# Order and Judgement
# (October 9, 2013)

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
OF THE STATE OF ILLINOIS, ADAMS COUNTY

COPY

FILED
OCT 09 2013
Lori R. Siechmacher
Clerk Circuit Court 8th Judicial Circuit
ILLINOIS, ADAMS CO.

THIE DIOCESE OF QUINCY, a not-for-profit corporation, and THE TRUSTEES OF FUNDS AND PROPERTY OF THE DIOCESE OF QUINCY, a not-for-profit corporation,

Plaintiffs,

v.

THE EPISCOPAL CHURCH, an unincorporated association, also known as THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA and/or THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY, INC., a not-for-profit corporation, and NATIONAL CITY BANK, a banking corporation, n/k/a PNC BANK, National Association,

Defendants,

and

THE EPISCOPAL CHURCH,

Counterclaimant,

v.

EDWARD A. DEN BLAAUWEN, CHRIS POTTOFF, LEAH DAY, LE ROY GROFF, FRANK DUNAWAY, MARK L. GAMAGE, BRYCE DEXTER, MICHAEL S. BROOKS, LINDA TERLESKY, WARREN WILKINS, RONALD R. DAMEWOOD, JR., NELL GERMAN, OSCAR P. SEARA, ANDREW AINLEY, KATHI KING, RAMSEY EASTERLING and ALBERTO MORALES,

Counterdefendants,

and

THE DIOCESE OF QUINCY OF THE EPISCOPAL CHURCH,

Counterclaimant-in-Intervention,

v.

EDWARD A. DEN BLAAUWEN, CHRIS POTTOFF, LEAH DAY, LE ROY GROFF, FRANK DUNAWAY, MARK L. GAMAGE, BRYCE DEXTER, MICHAEL S. BROOKS, LINDA TERLESKY, WARREN WILKINS, RONALD R. DAMEWOOD, JR., NELL GERMAN, OSCAR P. SEARA, ANDREW AINLEY, KATHI KING, RAMSEY EASTERLING and ALBERTO MORALES,

Counterdefendants.

No.: 09-MR-31

**(FINAL ORDER AND JUDGMENT)**

## FINAL ORDER AND JUDGMENT

Plaintiffs filed the pending action on March 30, 2009. THE EPISCOPAL CHURCH and THE DIOCESE OF QUINCY OF THE EPISCOPAL CHURCH subsequently filed Counterclaims against various individuals. The Court held a bench trial in this matter on April 9, 10, 22-26, 29-30 and May 1-2, 2013. Numerous witnesses testified and voluminous Exhibits were admitted, the vast majority by stipulation. At the conclusion of the trial, the Court instructed the parties to submit written arguments. Following the submission of written arguments, the Court heard additional oral arguments. On September 6, 2013, the Court entered its Findings, Opinion and Order which was subsequently filed on September 9, 2013.

For the reasons stated in its Findings, Opinion and Order, and based upon the following findings of fact, the Court finds in favor of Plaintiffs on their Complaint for Declaratory Judgment and against THE EPISCOPAL CHURCH and THE DIOCESE OF QUINCY OF THE EPISCOPAL CHURCH on their Counterclaims and Countercomplaint-in-Intervention.

## Findings of Fact

The Court made detailed and lengthy findings of fact in its Findings, Opinion and Order entered on September 6, 2013. Those findings are incorporated herein.

1. THE DIOCESE OF QUINCY (hereinafter "DOQ") is an Illinois not-for-profit corporation incorporated under the Illinois Not-For-Profit Corporation Act (805 ILCS 105/108.35). Its Articles of Incorporation are recorded in Adams County, Illinois. DOQ encompasses the territory of 19 counties in Illinois, including Adams County, with 23 churches, parishes and/or missions. DOQ is governed by its Articles of Incorporation and a Constitution and Canons which act as its bylaws with a Bishop and Standing Committee serving as its Board of Directors. The Synod is the governing body of DOQ.

2. THE TRUSTEES OF FUNDS AND PROPERTY OF THE DIOCESE OF QUINCY

(hereinafter "TRUSTEES") is an Illinois not-for-profit corporation organized and authorized under the Constitution and Canons of DOQ, whose purpose is to receive, manage and disburse funds and property acquired by it for the use of DOQ.

3. THE EPISCOPAL CHURCH (hereinafter referred to as "TEC"), also known as THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, is a New York unincorporated association.

4. The DIOCESE OF QUINCY OF THE EPISCOPAL CHURCH (hereinafter "EDQ") is an Illinois unincorporated association.

5. NATIONAL CITY BANK (n/k/a PNC BANK, National Association) is a banking corporation authorized to do business in the State of Illinois which holds various funds, money and/or endowments of DOQ and TRUSTEES.

6. The Counterdefendants were or are individual office-holders of one or both Plaintiffs.

7. DOQ acceded to the Constitution and Canons of TEC when it was admitted as a member of TEC in 1874.

8. In 1992, the DOQ amended its Constitution making its accession to the TEC Constitution and Canons contingent upon the continuing consent of the DOQ Synod.

9. On or about November 7, 2008, at its 131st annual corporate synod, by action of its representatives empowered to act on behalf of the Diocese and in accordance with its Constitution and Canons and Illinois law, DOQ voted to withdraw from TEC.

10. TEC took no action under the Illinois Not-For-Profit Act to remove the directors of either DOQ or the Trustees either before or after their vote to disaffiliate.

11. On or about January 9, 2009, the Chancellor for TEC wrote to officers of NATIONAL CITY BANK alleging that TEC had an enforceable interest in the funds of DOQ deposited and invested with NATIONAL CITY BANK. In response to that letter, NATIONAL CITY BANK declared on January 6, 2009 that it would not make any further distribution of the funds until the matter was resolved. Since then, the funds have remained frozen.

12. There is no provision in TEC's Constitution or Canons requiring that a diocese receive approval prior to amending its own constitution or canons nor is there anything in the provisions of TEC's Constitution which incorporates religious doctrine relating to the ownership of diocesan property which would require deference.

13. There is no explicit provision in TEC's Constitution or Canons specifying the office or body having supremacy or ultimate authority over a diocese and there is no explicit or clearly delineated expression in TEC's governing documents that the General Convention is the ultimate authority or judicatory of TEC. TEC's own expert witness, Dr. Bruce Mullin, conceded that there is no such express provision in TEC's constitution.

14 There is no express provision in TEC's Constitution or Canons prohibiting a diocese

from withdrawing its association with TEC.

15. The only express statement in TEC's Constitution or Canons defining the "Ecclesiastical Authority" of a diocese such as DOQ is either the Diocesan Bishop, or in the absence of a Bishop, the Standing Committee. At the time DOQ voted to disaffiliate, the Standing Committee of DOQ was the highest ecclesiastical authority of the Diocese.

16. There is no evidence that DOQ or TRUSTEES were prohibited from incorporating or specifying any procedure to be followed with respect to incorporation.

17. TEC is not a party to, nor a named beneficiary of, the Discretionary Agency Agreement between Plaintiffs and NATIONAL CITY BANK. (Ex. A-188) That contract is the controlling document regarding the funds, money, endowments and accounts in dispute.

18. The agreement does not suggest that TEC has any interest or other proprietary interest in the assets in this account.

19. No one from TEC had written authority with respect to the account.

20. TEC has never made deposits to, withdrawals from, used or administered this account.

21. There is nothing within the four corners of that Agreement which would suggest any trust or other proprietary interest of TEC in the assets held pursuant to that Agreement.

22. The parties presented voluminous and conflicting evidence, extrinsic to TEC's governing documents, on the issue of whether there existed any hierarchy above the Diocese in TEC (Page 13).

23. The TEC Canons from 1868, 1871 and 1971 do not contain an explicit understanding of any interest in property owned by DOQ conveying any type of interest to TEC.

24. TEC's "Dennis Canon" does not apply to diocesan property.

25. Neither TEC nor EDQ have any express, implied or other trust interest in the disputed funds, money, endowment or accounts or the Diocesan House.

26. DOQ and TRUSTEES have proven the allegations of their Complaint for Declaratory Judgment by a preponderance of the evidence.

27. TEC and EDQ have failed to prove the allegations of their Counterclaims (with Amendments) or Countercomplaint-in-Intervention.

## ORDER AND JUDGMENT

For these reasons, and for the reasons set forth in its Findings, Opinion and Order

entered on September 6, 2013, it is hereby ordered, adjudged and decreed that judgment is entered in favor of Plaintiffs and Counterdefendants and against Defendants, Counterclaimant and Counterclaimants-in-Intervention with all costs assessed against Defendants, Counterclaimants and Counterclaimants-in-Intervention. Further, the Court hereby enters the following declarations pursuant to 735 ILCS 5/2-701:

A. That the Diocesan House and any and all disputed funds, money, endowments and accounts held by National City Bank n/k/a PNC Bank, National Association are hereby declared to be owned by Plaintiffs without any claim by Defendants, Counterclaimant or Counterclaimants-in-Intervention;

B. That National City Bank n/k/a PNC Bank, National Association is immediately directed to release all holds and restrictions on the above-described funds, money, endowments and accounts of DOQ and TRUSTEES;

C. That all requests by Defendants, Counterclaimant and Counterclaimants-in-Intervention for declarations, injunctive relief and accountings are hereby denied and

D. That the Defendants, Counterclaimant and Counterclaimants-in-Intervention have no claim, right or interest in or to the property or offices of DOQ and TRUSTEES.

Dated this 9th day of October, 2013;

The Honorable Thomas J. Ortbal

Cc: All attorneys of record

# Chart of Respondents' Creation Dates

**Attachment 1**

| *No.* | *Parish* | *Date of Creation* | *Reference in Transcript/ Exhibit* |
|---|---|---|---|
| *1* | *The Protestant Episcopal Church, Of The Parish Of St. Philip, In Charleston, In The State of South Carolina* | *1680* | *Tr., p. 1204, Ln. 3-7 SPH-43* |
| *2* | *The Vestry and Church Wardens of St. Jude's Church of Walterboro* | *1706* | *SJ-15, Tr. P. 949, p. 12-15* |
| *3* | *Vestry and Church-Wardens Of The Episcopal Church Of The Parish Of Christ Church* | *1706* | *Tr., p. 1113, Ln. 25, p. 1114, Ln. 1-4, CC-38* |
| *4* | *The Vestries and Churchwardens of the Parish of St. Andrew (hereinafter "Old St. Andrews Parish Church" or "OSA")* | *1706* | *OSA-13, Tr., p. 1189, Ln. 23-25* |
| *5* | *Christ St. Paul's Episcopal Church* | *1708* | *Tr., p. 319 Ln. 7-25, p. 320, Ln. 1* |
| *6* | *The Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. Helena And The Parish Church Of St. Helena Trust* | *1712* | *Tr., p. 738, Ln. 17-22* |
| *7* | *The Vestry and Church Wardens Of The Episcopal Church Of The Parish Of Prince George Winyah* | *1721* | *PG-17, Tr., p. 1032, Ln. 20-23* |
| *8* | *Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. John's, Charleston County* | *1734* | *SJC-20, Tr., p. 1143, Ln. 11-15* |
| *9* | *St. James' Church, James Island, S.C.* | *Late 1700's* | *Tr., p. 865, Ln. 2-4* |
| *10* | *The Vestry and Wardens Of St. Paul's Church, Summerville* | *Late 1700's* | *Tr., p. 1055, Ln. 17-25, p. 1056, Ln. 1-2* |
| *11* | *The Protestant Episcopal Church, The Parish Of St. Michael, In Charleston, In The State of South Carolina and St. Michael's Church Declaration Of Trust* | *1761* | *SMI-27, Tr., p. 993, Ln. 14-19* |
| *12* | *Church Of The Cross, Inc. and Church Of The Cross Declaration of Trust* | *1767* | *TC-13* |
| *13* | *St. Davids Church* | *1768* | *Tr., p. 711, Ln 17-25, p. 712, Ln. 1-7* |
| *14* | *Trinity Episcopal Church, Edisto Island* | *1770* | *TED-19, Tr., p. 1224, 7-10* |
| *15* | *The Protestant Episcopal Church In The Diocese of South Carolina* | *1785* | *Tr., p. 30, Ln 23-25* |
| *16* | *The Church of the Holy Cross* | *1788* | *HCS-16, Tr., p. 924, Ln. 5-10* |
| *17* | *The Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. Matthew* | *1788* | *SMFM-18* |
| *18* | *The Church of The Epiphany (Episcopal)* | *1804* | *Tr., p.406, Ln. 13-14* |

| No. | Parish | Date of Creation | Reference in Transcript/ Exhibit |
|---|---|---|---|
| 19 | The Church Of The Good Shepherd, Charleston, SC | 1833 | Tr., p. 960, Ln. 18-20 |
| 20 | Church Of The Holy Comforter | 1844 | Tr., p. 520, Ln. 12-17 |
| 21 | Trinity Episcopal Church, Pinopolis | 1846 | Tr., p. 692, Ln. 20-25, p. 693, Ln. 1-10 |
| 22 | Church Of The Redeemer | 1850's | Tr., p. 626, Ln. 12-20 |
| 23 | The Church of St. Luke and St. Paul, Radcliffeboro | 1850's | Tr., pp. 483, Ln 25 – 484, Ln. 1-19 |
| 24 | St. John's Episcopal Church of Florence, S.C. | 1866 | Tr., p. 658, Ln. 10-12 |
| 25 | And The Trustees of the Protestant Episcopal Church of South Carolina, a South Carolina Corporate Body | 1880 | DSC 13 |
| 26 | St. Paul's Episcopal Church of Bennettsville, Inc. | 1897 | Tr., p. 932, Ln. 13-16 |
| 27 | St. Matthews Church | Late 1800's | Tr., p. 848, Ln 22-25, p. 849, Ln. 1 |
| 28 | St. Matthias Episcopal Church, Inc. | 1899 | STM-16 |
| 29 | St. Bartholomews Episcopal Church | 1902 | Tr., p. 762, Ln. 17-21 |
| 30 | St. Paul's Episcopal Church of Conway | 1908 | SPC-10 |
| 31 | Trinity Church of Myrtle Beach | 1939 | Tr., p. 801, Ln. 9-15 |
| 32 | St. Andrews Church – Mt. Pleasant and The St. Andrews Church – Mt. Pleasant Land Trust | 1954 | Tr., p. 381, Ln. 2-8 |
| 33 | Holy Trinity Episcopal Church | 1957 | HT-22 |
| 34 | All Saints Protestant Episcopal Church, Inc. | 1958 | Tr., p. 292, Ln. 4-6 |
| 35 | The Church Of The Resurrection, Surfside | 1958 | Tr., p. 585, Ln. 4-11 |
| 36 | St. Luke's Church, Hilton Head Island | 1969 | Tr., p. 447, Ln. 22-25, p. 448, Ln. 1-3 |
| 37 | The Church Of Our Saviour, Of The Diocese Of South Carolina | 1981 | OS-17 |
| 38 | Christ the King, Waccamaw | 2010 | Tr., p. 356, Ln. 20-24 |

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

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Case No. 2013-CP-18-00013

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The Protestant Episcopal Church
in the Diocese of South Carolina et. al. . . . . Respondents,

v.

The Episcopal Church (a/k/a The Protestant
Episcopal Church in the United States of
America) and The Episcopal Church in South Carolina . . . . . Appellants.

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties. It does not include certain materials the Respondents designated for inclusion but subsequently consented to remove, and in addition to the designated materials, the record includes selected pages of transcript that the Respondents inadvertently failed to designate.

Respectfully submitted,

August 5, 2015

Blake A. Hewitt
BLUESTEIN NICHOLS
THOMPSON & DELGADO