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CAUSE NO. 141-237105-09

THE EPISCOPAL CHURCH ET AL., Plaintiffs, AND ANNE T. BASS ET AL., Third-Party Defendants and Counterclaimants, v. FRANKLIN SALAZAR ET AL., Defendants.	))))))))))))))))	IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS. 141st JUDICIAL DISTRICT

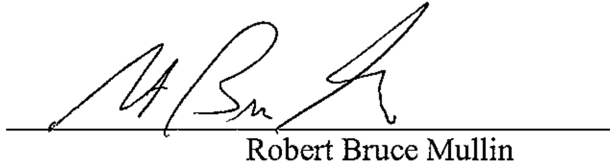
THIRD AFFIDAVIT OF DR. ROBERT BRUCE MULLIN

Before me, the undersigned authority, personally appeared **Dr. Robert Bruce Mullin**, who, being by me duly sworn, deposed and said:

1. My name is Robert Bruce Mullin. I am of sound mind, capable of making this Affidavit, and have personal knowledge of the facts herein stated.

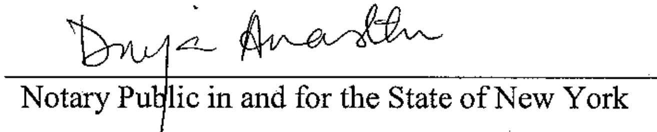
2. Attached to this Affidavit is Statement by me regarding the history, formation, and governance of The Episcopal Church. In making this Statement, I personally reviewed the historical documents cited therein. It is my belief that the representations made in the Statement are true. The opinions expressed therein I continue to hold.

3. My qualifications are set out in the attached Statement.



Robert Bruce Mullin

SUBSCRIBED AND SWORN TO BEFORE ME on this 13th day of October, 2010.



Notary Public in and for the State of New York

DIVYA AVASTHI
Notary Public, State of New York
No. 01AV6197655
Qualified in Queens County
Commission Expires December 8, 2012

STATEMENT OF ROBERT BRUCE MULLIN

1. I am an historian and teacher at the General Theological Seminary in New York City, one of the accredited seminaries of The Episcopal Church ("the Church"). I serve as the Professor of Modern Anglican Studies and the Society for the Promotion of Religion and Learning Professor of History and World Mission. I have held these positions since 1998. I received my Bachelor's degree in history from the College of William and Mary and my Ph.D. in the History of Christianity from Yale University in 1984. I also received Master's degrees in religion from Yale Divinity School and from the Berkeley Divinity School at Yale, another accredited seminary of The Episcopal Church.

2. Since 1984, I have been teaching, researching, and publishing in the area of religion in America, with a special focus on The Episcopal Church. Prior to obtaining my current positions, I taught in these fields at North Carolina State University, Duke Divinity School, the University of North Carolina, Wesleyan University, and Yale University.

3. In connection with litigation involving certain former members of The Episcopal Church who have claimed the right to control and use Episcopal diocesan and parish property for the mission of other churches, I have been asked by the Church's Presiding Bishop to render expert opinions in the following general area within my professional expertise: The current and historical hierarchical organization and structure of The Episcopal Church and the consequent reasons why dioceses and parishes of the Church, as opposed to their individual leaders, may not, consistent with the Church's polity, articulated in its Constitution, canons, and Book of Common Prayer, unilaterally withdraw or disaffiliate from the Church and its governing body, the General Convention, or, in the case of parishes, their dioceses.

4. My conclusions are based on over 30 years of study and publication in the fields of American history, American religious history, the history of The Episcopal Church, and the history of the Anglican Communion. In addition to the general knowledge that I have gained in that work, in preparation for this statement I have extensively surveyed the Journals of the General Convention of The Episcopal Church; the diocesan journals of many of the Church's dioceses; the Church's Constitution and canons; the standard commentaries on the Church's Constitution and canons; the Constitutions and canons of many of the Church's dioceses; various Episcopal journals that cast light on the understanding of the Church's relationship to property; relevant contemporary historical sources that shed light on the question of churches and property law; contemporary literature on various questions concerning the history of the Church; the standard Episcopal Church histories; modern monographs on the history of the Church; comparative studies of other denominational families in order to identify Episcopal distinctiveness; and journalistic accounts that shed light on the Nineteenth- and Twentieth-Century history of the Church. I have also incorporated the understanding of the international Anglican Communion that I have acquired through almost 20 years of participation in ecumenical dialogue. Finally, I have incorporated the insights I have gained from having directed a number of doctoral dissertations in the field of Episcopal/Anglican studies.

INTRODUCTION

5. The following is an analysis of the question of whether and to what extent The Episcopal Church has been and has understood itself to be a hierarchical church over its history, and of the subsidiary question of whether, consistent with the Church's polity, a diocese may exercise a purported right to withdraw from participation in and the governance of the General Convention of the Church. The present disagreements within the Church flow

from two distinct positions. On the one side are those persons wishing to separate themselves and their dioceses from the Church and join a rival church, arguing that their dioceses are not subject to the Church's central legislative body, the General Convention. On the other side is the Church itself and the persons in those dioceses who wish to remain in the Church who hold that the General Convention represents and legislates for the whole Church and that dioceses may not unilaterally absent themselves from the General Convention's governance.

6. The separatists' fundamental thesis is that The Episcopal Church is not hierarchical but is rather a confederation, or a strictly voluntary association of independent dioceses. The separatists therefore argue that entire dioceses (not merely individual members) may detach themselves from the Church at will and join a different denomination of their choosing. Indeed, some profess a right to join a different Anglican church within the United States that they contend should be recognized both nationally and internationally as an authentic Anglican entity.[1]

7. This argument relies on a number of specific claims. Most basically, it assumes that the Constitution of the Church should be seen as analogous to the United States Constitution. In this view, the Constitution preceded, defines, and limits the authority of the General Convention. That body and the laws or "canons" it has passed are seen as later

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[1] Some of the recent statements advancing aspects of this view are Mark McCall, "Is the Episcopal Church Hierarchical?" (Anglican Communion Institute, 2008); George Conger, "The Concept of Hierarchy in the Episcopal Church of the Nineteenth Century," (Anglican Communion Institute, 2010); "Bishops' Statement on the Polity of the Episcopal Church" (2009), available at www.anglicancommunioninstitute.com/2009/04/bishops-statement-on-the-polity-of-the-episcopal-church/; Affidavit of the Rt. Rev. William C. Wantland, The Episcopal Church in the Diocese of Connecticut v. Ronald S. Gauss (Sept. 28, 2009); Declaration of the Rt. Rev. William C. Wantland, The Episcopal Diocese of San Diego v. St. John's Parish (Episcopal), Fallbrook, California (Oct. 10, 2009); and Affidavit of the Rev. Canon George A. M. Conger, The Episcopal Church in the Diocese of Connecticut v. Ronald S. Gauss (Oct. 7, 2009).

additions which individual dioceses may accept or reject at will. Secondly, when dioceses have formally subscribed or "acceded" to the Constitution and canons of the Church (as every diocese is required to do), this has represented merely a temporary and mutual agreement between independent sovereigns (the Church and the diocese) — in legal terms, a treaty rather than a contract, and one that can be unilaterally rescinded by either party. These claims have no basis, as a systematic study of the nature of The Episcopal Church – not undertaken by those cited in note 1 – will demonstrate.

8. I understand that a "hierarchical" church has been defined by the courts to be, in essence, a religious denomination that is organized as a united body of constituent regional and/or local affiliates with a common convocation or ecclesiastical head, and in which the regional bodies and individual worshipping congregations are subject to the rules, regulations, and authority of that common convocation or ecclesiastical head. This definition, which I have been asked by counsel for the Presiding Bishop to accept as legally sound, also comports with my understanding, as a researcher and teacher in church history and polity, of what constitutes a hierarchical church in the United States. Under this definition, The Episcopal Church has been, and has understood itself to be, throughout its existence without question a hierarchical church. That being so, as I demonstrate below, the separatists' arguments fall.

9. What follows in Part I is a brief discussion of the English roots of The Episcopal Church and an overview of the hierarchical structure of the Church. Parts II through V then contain an extended historical and theological analysis of the development of the Church's hierarchical structure from its earliest days to the present. This analysis also responds to a series of essays and other statements that have recently claimed that there is no – or perhaps only partial – hierarchical authority vested in the General Convention of the Church and that

ultimate authority in the Church is vested in its dioceses and not the synodical or general Church. That discussion will focus on five areas of inquiry:

Evidence from the period of the organization of the Church from 1784 to 1789 (Part II);

Evidence from the first Church canons and subsequent Constitution in 1789 (Part III);

Evidence from actions by the General Convention from 1790 to the present (Part IV);

Evidence from Nineteenth-Century commentators on the polity of the Church (Part V); and

Evidence from the Civil War era (Part VI).

10. What will become evident is that the Church has understood itself as a hierarchical church, governed ultimately by its General Convention, from its very beginning. What will also become clear is that the ultimate source of authority in the Church is the General Convention, not its individual dioceses, and that every diocese, once formed and admitted into union with the General Convention, remains bound by the rules of the Church and may not unilaterally withdraw or disaffiliate from the General Convention.

I. THE EPISCOPAL CHURCH IS HIERARCHICAL.

A. Formation from English Roots

11. The Episcopal Church has its roots in the extension of the Church of England into the colonies of the New World. Permanently planted in the colonies in 1607, the Church of England was present in all of the original colonies during the Colonial period.

12. From its beginning, the Church of England has been a national church, whose bishops make up and are subordinate to the Church's Synod, or governing body. The Church of England was, and is, a three-tiered hierarchical church, governed at present by a national synod

at the topmost level, with regional, geographically-defined "dioceses" at the middle tier, and local congregations (usually called "parishes") at the lowest tier.[2] Each diocese was, and is, under the oversight of a bishop who visits and oversees the parishes and other congregations of the diocese. Congregations in the New World colonies were under the oversight of the Bishop of London, who appointed a special representative to the colonial congregations.

13. The governmental authority of the Church of England was historically rooted in synodical bodies of bishops and clergy meeting in convocation. Since the coming of St. Augustine to Britain in the Sixth Century, the English Church has been organized synodically, and since the mid-Eighth Century it has been grouped into two provinces, Canterbury and York. In these two provinces the clergy (both bishops and priests) would gather in what was known as Convocation for the passing of legislation and governance.

14. The synodical principle was crucial in Anglicanism. Nineteenth-Century American canonist, John Fulton, explained the authority of the synod over individual bishops.

> " [W]e must remember that the Bishop was himself, in fact as well as theory, the executive and representative of an authority superior to his own. The episcopate of the whole world was held to be a unit to which, as a never dying College of Apostles, was committed the ingathering and safe-keeping of the Flock of Christ. Of this Sacred College every Bishop in his Parish was the representative. ... And as the power of the Episcopate was exercised by one Bishop over the people of one Parish, so the Bishops of every Province, acting in their corporate capacity, exercised the power of their united Episcopate over every Bishop and every Parish within their jurisdiction. ... Even when he [a Bishop] had been validly elected, duly consecrated, and canonically constituted Bishop of his See, they still retained the power to try him for malfeasance, to reverse his unwise judgments, and if need were, to withdraw the jurisdiction they had given him. The Provincial

[2] This is somewhat complicated by the formal relationship between Church and State, which involves Parliament and the Crown in key decisions.

Synod, therefore, in which the Bishops of the Province assembled twice a year, was a real power in every parish."[3]

15. The Eighteenth-Century and present governmental structure of the Church of England was given shape by events of the English Reformation which, in the words of one scholar, "incorporated the Church of England with the constitution of the realm."[4] Through the Acts of Supremacy and Uniformity, the older synodical governance of the Church of England was grafted upon the political structure of the realm, and the provinces fell under the authority of King and Parliament. The King became the "Supreme Governor" of the Church of England, and the Church became the official or "established" church of the realm.

16. Synodical legislation, once approved by the Crown, was binding on all parts of the Church of England. For example, in 1603-1604, canons were passed which governed the English Church on a variety of levels. They dictated worship practices; outlined the duties and responsibilities of clergy and other church officials; dictated educational requirements for clergy; outlined the proper maintenance of church property; and set forth a system of discipline. These canons bound all clergy and church officials and served as the basis of governance of the Church. They were national in nature and were an essential part of the national Church. Indeed, they were expressly binding even upon members who chose not to be present at their enactment.[5]

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[3] John Fulton, Index Canonum: The Greek Text, An English Translation, and a Complete Digest of the Entire Code of Canon Law (New York, 1872) at 44-45 and 99. This principle continues to be reflected in the current Constitution of The Episcopal Church.

[4] James S. M. Anderson, The History of the Church of England in the Colonies and Foreign Dependencies of the British Empire, 2 vols. (London: Francis and John Rivington, 1845-8) at 1:130. Anderson here was quoting Henry Hallam, The Constitutional History of England.: From the Accession of Henry VII to the Death of George II.

[5] Canon CXL of the Canons of 1603-1604.

17. The model of the Church of England as a national church was further embodied in Article XXXIV of the Articles of Religion (the Sixteenth-Century statement of doctrine) which enunciated an important responsibility of a national church:

> "Every particular or national Church hath authority to ordain, change and abolish, ceremonies or rites ordained only of man's authority, so that all things be done to edifying." BCP (1662) at 708.

The revision of liturgy and ceremony could only properly be undertaken on the national level.[6]

18. The concept of diocesan autonomy that is being advocated in some quarters had no standing in the world of Anglican Christianity in the Seventeenth and Eighteenth centuries. The central governing model was the national Church. Furthermore, church division, or schism, was deemed one of the most onerous of sins. The great Litany, the oldest part of the Book of Common Prayer, stated, "from all false doctrine heresy and schism…Good Lord deliver us." BCP (1662) at 70.

19. The American Revolution created a crisis for the Church of England congregations in this country. Political independence meant that American worshipping congregations could no longer be part of the Church of England, because, *inter alia*, the leaders and members of these congregations could no longer take an oath of loyalty to the English Crown as the Church of England's rules required. Independence also meant that the Church of England liturgy would have to be revised to remove prayers that reflected royal supremacy. But the American Anglicans fervently wanted to retain their Anglican identity, traditions, and mode of worship, as well as their church buildings and other properties, in the new country. A new general church had to be formed, therefore, to succeed to the old.

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[6] American Episcopalians would later also connect national organization and liturgical reform.

20. As I set out more fully below, in 1784, Anglicans from several of the colonies gathered for the purpose of "the revival" of their church "which had existed before the Revolution"; and in 1785, clergy and laity from the former congregations of the Church of England in seven new states met in what was styled as the first meeting of the "Convention of the Protestant Episcopal Church."[7]

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.

22. The canons and thereafter the Constitution of the newly-formed Episcopal Church set out a structure that mirrored that of the Church of England – and was significantly different from that of the new United States, whose Constitution was also adopted in 1789. As its predecessor, the new Episcopal Church was a three-tiered hierarchical church, governed by a national parliamentary body and comprised of regional bodies containing local parishes.[8] And, the American Church continued the English principle of bishops in synod, requiring the consent of the General Convention to the consecration of every new bishop and contemplating discipline of bishops. 1789 Const. Art. 6; Canon II. JGC 1789 at 1:99-100. The American

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[7] William Stevens, Perry, ed. Journals of the General Conventions of the Protestant Episcopal Church in the United States, 1785-1835, 2 vols. (Claremont, N.H.: The Claremont Manufacturing Co., 1874) at 1: 11-29. The Journals of the General Convention of the Protestant Episcopal Church have been published individually as well as in collected reprints. From this point forward they will be cited as "JGC" unless otherwise noted, and all references to General Conventions through 1835 will be from these volumes.

[8] JGC 1789 at 99-100 (Articles 1-3 of 1789 Constitution, describing General Convention), 101 (setting out Deputies by state and parish).

Church was distinctive, however, in allowing lay participation in church governance and having both lay and clerical representatives elect bishops, as well as in lodging the highest authority in the Church in its General Convention.

B. The General Church

23. The same basic three-tiered structure exists today. At the highest tier is The Episcopal Church, traditionally a national body that in the Twentieth Century has expanded into several other countries. Next are regional, geographically-defined dioceses, which belong to, are subordinate to, and are under the jurisdiction of the Church. Finally, there are local worshipping congregations, generally called parishes or missions, which belong to, are subordinate to, and are under the jurisdiction of the Church and the individual dioceses in which the congregations are located.

24. As stated above, at the topmost level the Church is governed by its General Convention, a bicameral legislative body made up of a House of Bishops, composed of most of the Church's active and resigned bishops, and a House of Deputies, composed of clergy and lay representatives elected from each of the Church's dioceses. Const. Arts. I.2, .4. Legislation must be approved by both houses. Const. Art. I.1.

25. The General Convention establishes the policies, rules, and programs of the Church. It has adopted and from time to time amends the Church's governing documents, its Constitution, canons, and Book of Common Prayer. Together, these documents are the ultimate authoritative statements governing the spiritual and temporal affairs of the Church and are applicable to every tier of the Church as well as to the persons in those tiers, including bishops, other clergy, and laity.

26. The General Convention is the body that articulates the Doctrine, Discipline, and Worship of the Church and cannot be limited by actions of other bodies in the Church, including its dioceses or bishops.

27. The "Chief Pastor and Primate" of the Church is its Presiding Bishop, who is elected by the General Convention. The Presiding Bishop is charged with, among other duties, responsibility for leadership in initiating and developing policy and strategy in the Church and speaking for the Church as to the policies, strategies, and programs authorized by the General Convention. Const. Art. I.3; Canon I.2(4).

28. Between meetings of the General Convention, an elected Executive Council of bishops, priests, and laypersons manages the fiscal and programmatic affairs of the Church under the direction of the Church's Presiding Bishop as Chair. Canons I.4(1), (3).

C. The Dioceses

29. At the next level, the Church is comprised of 111 dioceses in the United States and other countries. Episcopal Church Annual (2010) at 16-19. All dioceses are "formed, with the consent of the General Convention and under such conditions as the General Convention shall prescribe by General Canon or Canons." Const. Art. V.1.

30. All dioceses and their clergy acknowledge the applicability to them of the Constitution and canons of the general Church and their authoritative nature. All dioceses, as a condition of their formation as entities in "union" with the General Convention, promise "an unqualified accession to the Constitution and Canons of this Church." Const. Art. V.1; *see also* Canon I.10(4) (new diocese "shall have . . . acceded to the Constitution of the General

Convention in accordance with Article V, Section 1 of the Constitution").[9] All clergy at their ordinations subscribe to the following written declaration (known as the "Declaration of Conformity"):

> "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." Const. Art. VIII; Ordination Services of the Book of Common Prayer at 513, 526, 538.

Since 1979 this oath has become part of the public service of ordination, emphasizing to the congregation as well as the candidate its importance and solemnity.

31. In addition, a bishop-elect is required by the Prayer Book to promise to "guard the faith, unity, and discipline of the Church" and to "share with [his or her] fellow bishops in the government of the whole Church." Book of Common Prayer at 518. And, all persons accepting "office[s]" in the Church "shall well and faithfully perform the duties of [those] office[s] in accordance with the Constitution and Canons of [the] Church and of the Diocese in which the office is being exercised." Canon I.17(8).

32. The governing body of each diocese is generally called its "Convention," or sometimes its "Council" or "Synod," and is comprised of the Bishop of the diocese, other bishops and clergy, and lay members elected by the worshipping congregations in that diocese.

33. Each diocese's Convention has adopted, and from time to time amends, its own Constitution and canons that supplement, and must not be inconsistent with, the Church's

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[9] The term "unqualified" was added to Article V in 1982, when that provision was reworded; the new version was adopted with virtual unanimity. JGC 1982 at D-28, C-23. Only the lay and clerical deputies from the Diocese of Haiti voted against it. Divided votes were recorded by the clerical deputies from the Diocese of Lexington and the lay deputies from the Diocese of the Northern Philippines. Records of the General Convention, Group 312, Archives of The Episcopal Church, Austin, TX (through communication with Archivist, May 3, 2010).

Constitution and canons. Const. Art. V.1; Canon I.10(4). The Constitution and canons of each diocese are authoritative for the governance of the diocese and the worshipping congregations in that diocese. As a matter of history, dioceses have generally required of all parishes accession to the Constitutions and canons of the general Church and of the diocese.

34. Each diocese has a diocesan bishop, a person elected by the diocesan Convention and ordained as a bishop by at least three bishops with the consent of the leadership of a majority of the other dioceses. Const. Art. II.1, .2; Canons III.11(1), (3), (4).[10] The diocesan bishop serves as the "Ecclesiastical Authority" and chief executive officer in charge of both spiritual and temporal affairs within that diocese. Const. Arts. II.3, .5; Canon III.12(3), IV.15. The diocesan bishop is advised by, and as to certain matters shares authority with, a "Standing Committee," a body of clergy and laity elected by the diocesan Convention. Const. Art. IV; Canon I.12(1). When a diocese has no bishop, the Standing Committee serves as the Ecclesiastical Authority. Const. Art. IV; Canon IV.15.

D. The Parishes

35. At the third level of governance, the 111 dioceses together contain the Church's approximately 7,400 worshipping congregations. Episcopal Church Annual, supra, at 16-19. Most of these congregations are called parishes; others, usually newly-forming congregations that do not meet all of the requirements for parish status, are generally called missions; and still

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[10] In one instance in the Constitution and canons the diocesan Bishop is referred to as the "Ordinary," Const. Art. II.8, where it is clear that the term is used to differentiate between the diocesan bishop and a coadjutor. Claims in the "Bishops' Statement" (pp. 3-4) that the use of this term suggests an authority in diocesan bishops to preempt General Convention are baseless. I have found no support for such claims in either the legislative history or in contemporary accounts of the legislation. *See* JGC 1964 at 267-268; The Living Church (October 26, 1964) at 5.

others include cathedrals, chaplaincies at educational institutions, and other institutions. *See, e.g., id.* at 132-34 (listing congregations in the Diocese of Alabama).

36. An Episcopal parish has a governing body called a "vestry," which is comprised of the rector of the parish and lay persons elected by the voting membership of the parish. Canons I.14(1)-(3). Members of the vestry serve as officers of the parish. Canons I.14(1), (2).

37. The rector of a parish in the Church is a priest elected by the vestry in consultation with the bishop of that diocese and is in charge of the spiritual and temporal affairs of the parish. Canons I.6(1); I.17(4); III.9(3)(a), (5).

E. Anglican Communion Membership

38. The Episcopal Church is "a constituent member of the Anglican Communion." *See, e.g.,* Constitution Preamble. The "Anglican Communion" is a name generally used to describe a worldwide fellowship among a group of churches "in communion with the See [*i.e.*, seat of the Archbishop] of Canterbury." *Id.* The churches of the Anglican Communion have their roots in the Church of England and were generally established in their respective countries or regions by English immigrants or missionaries adhering to the Church of England's doctrine and worship.

39. Each individual member church, or "Province," within the group is self-governing and autonomous: Each of the 38 individual member churches has its own prime bishop (in the United States, the Presiding Bishop), governing bodies, Constitution, canons, and Prayer Book. While The Episcopal Church is a hierarchical church, the Anglican Communion is not.

40. The term "Anglican Communion" dates back only to the mid-Nineteenth Century, long after a number of the churches that currently comprise the Anglican Communion were

formed; and the first meeting of the bishops of those churches as such did not occur until 1867.[11] Since that time, the bishops of the churches in the Communion have generally met every ten years for united worship and common council at gatherings known as "Lambeth Conferences." They were never understood to be a legislative sessions. Indeed, at the very outset the Archbishop of Canterbury noted, "such a meeting would not be competent to make declarations or lay down definitions on points of doctrine."[12] Because the member churches of the Anglican Communion are not themselves "governed" by the Lambeth Conference or by the Archbishop of Canterbury, Lambeth resolutions are not binding on a particular member church.[13]

41. The historic tradition of the Anglican Communion as regularly enunciated through the Lambeth Conferences is that each Province forms its own constituent units and exercises jurisdiction within its own geographic territory, and not within the geographic territory of any other Province. Indeed, Anglican churches have inherited this principle from their Roman Catholic predecessor and its adoption of canons at the Council of Nicaea in 325 A.D.

II. THE HIERARCHICAL NATURE OF THE EPISCOPAL CHURCH WAS EVIDENT DURING THE CHURCH'S ORGANIZATIONAL PERIOD, 1784-1789.

42. The founders of The Episcopal Church thus created a national church with an authoritative General Convention. 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, and the goal of a General Convention was to continue

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[11] Colin Podmore, Aspects of Anglican Identity (London: Church House Publishing, 2005) at 36-38.

[12] Quoted in, The Five Lambeth Conferences... (London: Society for Promoting Christian Knowledge, 1920) at 6.

[13] *See* "Lambeth Conference," in Don S. Armentrout and Robert Slocum, eds., An Episcopal Dictionary of the Church (New York: Church Publishing, 2000) at 291-292.

this practice of national legislation. Only such an organization could assure a united Church and the reception of the episcopate from the Church of England.

A. Development of the General Convention

43. The hierarchical nature of The Episcopal Church was clear from the very beginning of its organization in the decade of the 1780s. An obvious illustration is the name that was assumed. In contrast with the political trends at the time that strove to establish a federation of states (*i.e.*, The United States of America), Episcopalians strove to establish a unified church (The Protestant Episcopal Church in the United States of America). This was in keeping with their heritage of a national Church -- *i.e.*, a church representing the communicants of a sovereign state. Political independence necessarily divorced them from the Church of England, and made the organization of their own church, in the model of the English church, a crucial concern. But unlike the Church of England, where the topmost authority of the Church was vested in Parliament and the Crown, The Episcopal Church placed ultimate authority in a General Convention consisting of a House of Bishops and a House of clerical and lay Deputies. The inclusion of laity in the Church's governance structure was another innovation, one that may be attributed in part to William White of Pennsylvania, the architect of the organization of The Episcopal Church in America, whose organizational plan was laid out in The Case of the Episcopal Churches in the United States Considered (1782).[14]

44. Early movement towards organization of the Protestant Episcopal Church in the United States of America was in evidence at a meeting of clergy and laity in New Brunswick, New Jersey, in May 1784. This led to a first, informal "convention" of clergy and laity from

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[14] William White, The Case of the Episcopal Churches in the United States Considered, edited by Richard G. Salomon ([Philadelphia]: Church Historical Society, 1954).

different states in New York City later in 1784, which then called for a formal meeting of a "general convention" in Philadelphia, Pennsylvania, in 1785.

45. The first principle of ecclesiastical union recommended by the members at the New York meeting was that "there shall be a general convention of the Episcopal Church in the United States of America."[15]

46. For this to occur, members of the newly-forming Episcopal Church would need to be officially represented in the General Convention (there were no official representatives at the New York meeting). Thus, the New York meeting called for the Episcopal Church in each state to organize and send delegates to a meeting in Philadelphia in 1785.[16] Hence, the second recommendation by the members of the meeting for ecclesiastical union was that "the Episcopal Church in each state, send deputies to the convention, consisting of clergy and laity."[17] *Id.*

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[15] William White, Memoirs of the Protestant Episcopal Church in the United States of America, 2nd ed. (New York: Swords, Stanford, and Co., 1836) at 80.

[16] An exception is the Episcopal Church in Maryland, which had been an established church during colonial times. Episcopalians there found it necessary between 1783 and 1784 to organize a successor entity to the Church of England in order to retain the property that had been held during colonial times by Church of England parishes. *See* the documents reprinted in William Stevens Perry, ed., Historical Notes and Documents Illustrating the Organization of the Protestant Episcopal Church in the United States of America (Claremont, HH: The Claremont Manufacturing Co, 1879) at 20-24. A similar situation arose in Virginia, where the church was organized in 1784-1785 to protect its properties. *See* George MacLaren Brydon, Virginia's Mother Church and the Political Conditions Under Which it Grew, 2 vols. (Philadelphia: Church Historical Society, 1952) at 2: 447-453.

[17] In the discourse of the 1780s, the language referred to Episcopalians organizing themselves into state conventions at the behest of the newly-forming General Convention; one sees no discussion of dioceses, which was an independent ecclesiastical category and not present in early America.

47. What ones sees here is that, far from dioceses "creating" the General Convention, it was the need for delegates to establish the General Convention that led to the subsequent organization of the State conventions that at a later date would be called "dioceses."[18]

48. The various states chose different means for gathering to choose deputies to the General Convention. In Pennsylvania and New York, Episcopalians organized themselves for the first time into formal state conventions, calling themselves "The protestant Episcopal church in the state of Pennsylvania"[19] and "the Protestant Episcopal Church in the State of New York."[20] In other states, such as New Jersey, Episcopalians simply came together, without formally organizing, to choose delegates,[21] and in still others, such as Delaware (which had only two congregations in the state), there is no evidence that any meeting was even held.[22]

49. In each of these instances the national nature of the Church was clearly recognized. These state meetings did not speak of state churches. Rather, they referred to the Episcopal Church in a given state. I have found almost no evidence of any language of the

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18 This historical fact is in itself enough to demonstrate the error in the claims of the authors of the "Bishops' Statement" (p. 4ff) that the dioceses created the General Convention.

19 Journal of the Meetings Which Led to the Institution of a Convention of the Protestant Episcopal Church in the State of Pennsylvania (Philadelphia, 1790) at 12.

20 Journals of the Conventions of the Protestant Episcopal Church in the Diocese of New York (New York: Henry M. Onderdonk, 1844) at 6.

21 Proceedings of a Convention of the Protestant Episcopal Church in the State of New Jersey (NP, 1785) NP.

22 Charles A. Silliman, The Episcopal Church in Delaware, 1785-1954 (Wilmington: The Diocese of Delaware, 1982) at 6.

Episcopal churches or of the Episcopal Church of a given state.[23] A unified national model was clearly presupposed.

50. The first meeting of the General Convention was in Philadelphia in September of 1785, with representatives from seven states and presided over by William White. This Convention undertook three primary projects.

51. First, it began the task of revising the Book of Common Prayer, which, we have seen, under Anglican principles only a national church could do.

52. Second, it addressed a letter to the Archbishops and other bishops of the Church of England requesting the bestowal of the office of the episcopacy. In the members' view, this request could not be made by any body lesser than the General Convention itself. Thus the Convention stated in its letter to the English bishops:

> "[I]t was not until this Convention that sufficient powers could be procured for addressing your Lordships on this subject." JGC 1785 at 1: 26.

This view was subsequently affirmed by the English archbishops and bishops who responded by stating that they would not consider any candidates for the episcopacy who did not come with the approval of the General Convention.[24]

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[23] Here again, Maryland was the exception. In the early 1780s, one finds occasional reference to the "Protestant Episcopal Church of Maryland." *See* supra n. 16. But, significantly, after acceding to the Church's Constitution in 1789, it began referring to itself as "The Protestant Episcopal Church in the State of Maryland." Viz, Journal of a Convention of the Protestant Episcopal Church in the State of Maryland Held in St. Paul's Church in the Town of Baltimore (Baltimore, 1789).

[24] The English bishops required a testimony from the General Convention for prospective bishops, even providing the wording: "We whose names are under written, fully sensible how important it is that the sacred office of a Bishop should not be unworthily conferred, and firmly persuaded that it is our duty to bear our testimony on this solemn occasion without partiality or affection, do in the presence of almighty God, testify that A.B. is not, so far as we are informed, justly liable to evil report either for error in religion or for viciousness of life, and that we do not

53. Third, the General Convention in 1785 drafted a proposed Constitution, which in a modified form would be approved in 1789. This version included a series of "whereas" clauses that explained why such a General Convention was necessary:

> "The...Deputies being now assembled, and taking into consideration the importance of maintaining uniformity in doctrine, discipline, and worship in the said Church, do hereby determine and declare: That there shall be a General Convention of the Protestant Episcopal Church in the United States of America...." *Id.* at 1: 21.

54. The General Convention, therefore, was to be the instrument to "maintain[] uniformity in doctrine, discipline, and worship" in the American Church. In the words of the Hon. Murray Hoffman, the leading Nineteenth-Century expert on Episcopal Church law:

> "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 fulfil the primitive law of unity and perfection in a national Church—what else could have met the exigencies of those days? [25]

Further,

> "From the foundation of Christianity, there has never been a Church without a body in which resided the ultimate and absolute power of government....It is

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know or believe there is any impediment or notable crime, on account of which he ought not to be consecrated to that holy office, but that he hath led his life, for the three years last past, piously, soberly, and honestly." *Id.* at 1:55. It was only through such assurance that the English bishops were able to persuade Parliament to pass "An Act to empower the Archbishop of Canterbury, or the Archbishop of York, for the time being to consecrate to the Office of a Bishop, Persons being Subjects or Citizens of Countries out of His Majesty's dominions." This act presupposed that only bishops who were members of a larger Church would be eligible for such ordinations, and not individual bishops reflecting lone dioceses: "And be it furthermore enacted, that a certificate of such consecration shall be given under the hand and seal of the Archbishop who consecrates, containing the name of the person so consecrated, with the addition as well of the country whereof he is a subject or citizen, as of the Church in which he is appointed Bishop." *Id.* at 1:56 (emphasis added). The candidates must be from organized churches, and not simply from independent dioceses.

[25] Murray Hoffman, A Treatise on the Law of the Protestant Episcopal Church in the United States (New York: Stanford and Swords, 1850) at 114.

> anomalous and contradictory to speak of such a Church without it. When then, in 1789, the whole Church of the Untied 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." *Id.* at 54.

The role of the General Convention in securing uniformity in worship and discipline was for Hoffman the crowning achievement of the organizational period.

55. The General Convention met twice in 1786, in Philadelphia in June and Wilmington, Delaware, in October. In both meetings, the authority of the General Convention over the state conventions was reasserted. One such instance involved the ratification of the Book of Common Prayer. The General Convention of 1785 had invited the state conventions to comment on proposed changes to the Prayer Book, and the result was a cacophony of voices and liturgical diversity. As William White described, this evidenced "the necessity of a duly constituted ecclesiastical body"; moreover, a system in which the individual states exercised controlling authority "appeared so evidently fruitful of discord and disunion, that it was abandoned from this time." White, Memoirs, supra at 115 (emphasis added). Hence, Article IX of the proposed Constitution was reworked to permit state conventions to determine whether to use the proposed revised Prayer Book only 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." JGC 1786 at 1:42. This declaration of the authority of the General Convention alone to adopt changes in the Book of Common Prayer was crucial in asserting the national nature of the Church.

56. The General Convention meeting in Wilmington in 1786 approved the election and credentials of William White of Pennsylvania and Samuel Provoost of New York to the

episcopate and sanctioned them to proceed to England to be ordained. Significantly, however, the Convention rejected William Smith of Maryland. Although he had been elected by the church in Maryland, the Convention had doubts about his morality and refused to sign a testimonial. Smith never became a bishop. Hence, from the very beginning the General Convention exercised final authority on who might become a bishop.[26]

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 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." JGC 1786 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 on the lowest level possible,

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[26] *See* the extensive correspondence reproduced in William Stevens Perry, ed., Historical Notes and Documents Illustrating the Organization of the Protestant Episcopal Church in the United States of America (Claremont, NH: The Claremont Manufacturing Co., 1874) at 334-341.

Episcopalians chose a different course. As a cardinal example, the General Convention would ratify its own Constitution![27]

B. The Connecticut Experience

59. While William White and the Episcopalians of the southern and middle states were planning to organize by means of a General Convention, some Episcopalians in the northern states were acting on a different front. In response to the publication of White's Case, which called for the organization of The Episcopal Church before bishops could be secured, Episcopalians in Connecticut, New York, and Massachusetts argued that the office of the bishop was essential for any church organization. Despite this difference, they held the same view as their southern counterparts of the preeminence of a national church over its dioceses.

60. In 1783, Connecticut clergy elected Samuel Seabury to seek episcopacy from the Church of England. Although elected by the clergy of Connecticut, he was always understood to be representing a larger community. For example, Seabury's application for the episcopacy received the testimonial of clergy from New York.[28] One contemporary described the office he sought as "Bishop for America."[29]

61. For a variety of reasons, the English bishops refused Seabury's request. Seabury did, however, receive the support of the unestablished (and politically marginal) Episcopal Church of Scotland, which consecrated him to the episcopate.

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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."

28 Francis L. Hawks and William Stevens Perry, ed., Documentary History of the Protestant Episcopal Church in the United States of America, 2 vols. (New York: James Pott, 1864) at 2 :217.

29 E. E. Beardsley, Life and Correspondence of the Right Reverend Samuel Seabury, D.D. (Boston: Houghton, Mifflin and Co, 1881) at 104.

62. Once consecrated by the Episcopal Church of Scotland, Seabury's actions confirmed that he regarded himself, and was regarded, as a bishop of the American Church. For example, he claimed the right to ordain candidates from states other than Connecticut. Among his early ordinands, two were from New Jersey, and one was a candidate from Maryland.[30]

63. Thus, when Seabury and his supporters from Connecticut and Massachusetts joined the General Convention in 1789 and signed the newly-adopted Constitution, they did so not in the spirit of an autonomous diocese, but as representing a part of The Episcopal Church. In order to accommodate Seabury and the New England churches, the Constitution was modified to reflect their view of the importance of the episcopate, by allowing a separate House of Bishops and making lay deputies optional. No modification was made, however, affecting the powers of the General Convention vis-à-vis the rest of the Church.

64. Unlike the representatives from the Church in the other states, Seabury and his supporters had not been officially chosen to represent the Church in their states at the 1789 General Convention. For this reason, on October 1, 1790, the Convocation of the Episcopal clergy of Connecticut affirmed a resolution stating, "we confirm the doings of our Proctors in the General Convention at Philadelphia, on the 2d day of October 1789."[31] Also in 1790, the clergy in Connecticut formally adopted the Constitution and Prayer Book. However, even before this action was taken, Seabury urged the clergy in that state to use the Prayer Book that had been adopted by the General Convention in 1789.[32] And, in 1792, the convention of the Protestant

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[30] Beardsley, Seabury, *supra*, at 238.

[31] Joseph Hooper, ed., Diocese of Connecticut: The Records of Convocation, A.D. 1790-A.D. 1848 (New Haven, Printed for the Convention, 1904) at 35.

[32] Paul Victor Marshall, One Catholic and Apostolic: Samuel Seabury and the Early Episcopal Church (New York, 2004) at 261-63.

Episcopal Church in Connecticut decreed that a congregation that did not approve the "the Constitution of the Protestant Episcopal Church as settled by the General Convention at Philadelphia in October 1789" could not be a member of The Episcopal Church in Connecticut.[33]

C. Conclusion

65. The goal of Episcopalians in the organizational period was the creation of a national Church with an authoritative General Convention. A national church was crucial for the continuance of the Episcopal Church in America. Only such an organization could assure a united Church and the reception of the episcopate from the Church of England. Significantly, in 1801 General Convention adopted the Articles of Religion, including Article XXXIV with its claim that "every particular or national Church hath authority to ordain, or change Ceremonies or Rites of the Church." The Episcopal Church had organized itself, among other reasons, to adopt and revise its liturgy.

III. THE HIERARCHICAL NATURE OF THE EPISCOPAL CHURCH WAS REFLECTED IN THE 1789 CONSTITUTION AND CANONS.

66. The Constitution of The Episcopal Church as it developed between 1785 and 1789 was a unique document, in that it reflected a political vision far different from that in other contemporary political discourse. The Church's first canons – adopted before the Constitution was ratified – echoed the same vision.

A. Relation of the General Convention to the Church Constitution

67. It is a common misunderstanding to assert parallels between the organization of The Episcopal Church and the federal government, and to interpret the Church Constitution in terms of the federal Constitution of the United States. The Federal Constitution created and

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[33] Diocese of Connecticut: The Records of Convocation A.D. 1790 - A.D. 1848 at 40-41.

empowered the structures of the national government (*i.e.*, Congress, the Executive, and the courts), carefully delineating their powers. 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.[34]

68. Rather than the creation and empowerment of the General Convention, the Church Constitution's primary goal was to ensure continuing meetings of the General Convention – whose existence and authority was assumed. As William White explained, the Constitution was expressly written so that further meetings of the General Conventions would occur:

> "In order that the present convention might be succeeded by bodies of the like description, they framed an ecclesiastical constitution…." White, Memoirs, *supra*, at 24.

69. None of the actions taken at the first meeting of the General Convention was explicitly authorized by any language found in the Constitution. The General Convention acted on its own authority and did so for the well-being of the Church. The Constitution gave no indication of how and by whom episcopacy would be extended to the fledgling Church. Instead, the General Convention assumed the authority, just as it had in authoring a Constitution.

70. This unique relationship of the Convention to the Constitution gave to the Church Constitution a number of distinctive aspects.

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[34] 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. *See* "Is the Episcopal Church Hierarchical," pp. 3 and 21ff. A far better understanding of the Constitution and canons is found in James A. Dator's dissertation, "Government in the Protestant Episcopal Church in the United States of America—Confederal, Federal or Unitary," (Ph.D. diss., American University, 1959). Dator, after exhaustive independent analysis, finds the polity of the Church to be "unitary" and thus purely hierarchical.

1. Lack of "Federal" Language

71. Although written in the same period as the federal Constitution, the Church's Constitution is strikingly bare of language of federation. That is, the Church's Constitution lacks any language suggesting that the Church exists as the 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.[35] Although it was written by persons well versed in the U.S. constitutional discussions of the 1780s, including the concepts of a confederation of independent sovereign units and the reservation of rights to local units, the Church's Constitution in no way reflects those concepts.[36]

72. The Church Constitution differed from the U.S. Constitution in its lack of language limiting national power or reserving authority to more local units. The Church Constitution had no language such as that found in the Tenth Amendment to the Federal Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Nor is there any language in the Church Constitution parallel to the following language of the Ninth Amendment to the Federal Constitution reserving rights and powers to the local levels:

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[35] The most notable use of federal language in any discussion of the Church's polity is found in Clara O. Loveland in The Critical Years: The Reconstitution of the Anglican Church in the United States of America, 1780-1789 (Greenwich, CT: The Seabury Press, 1956) at 62-118, in which she refers to the entire agenda of William White as the "federal plan for reorganization." As early as the 1840s, commentators began referring to the Church as a federal system, but as Dator shows, this misuses the term "federal." The use of this term may reflect the "de-facto federalism" that I describe below and a desire to use common political terms to describe the Church.

[36] James Duane, one of the persons on the 1785 drafting committee of the Church Constitution, had been a signer of the Articles of Confederation and was a strong backer of the new federal Constitution.

"The enumeration in this Constitution, of certain rights, shall not be construed to deny or disparage others related by the people."[37] Clearly this silence (so out of step with the political culture of the time) is remarkable and patently deliberate. As will be shown below, this distinctive aspect of the Church's Constitution was recognized by Nineteenth-Century legal experts.

73. Thus, while the U.S. Constitution conceives of the Federal Government as one of limited powers with the residuum of authority remaining in the states, the Church Constitution assumes the plenary authority of the General Convention and is a mechanism through which the General Convention grants powers to, and sets limits on, the Church in the states and, later, dioceses. For example, concerning the episcopate the Constitution stated:

> "Art. 4. The Bishop or Bishops in every State shall be chosen agreeably to such rules as shall be fixed by the Convention of that State."

(This provision exists in Article II.1 today.) 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. There was thus no understanding that the

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[37] Some have recently attempted to invent such a principle in the structure of The Episcopal Church by quoting one of the early resolves of the Episcopal Church in Pennsylvania, "That no powers be delegated to a general ecclesiastical government, except such as cannot be conveniently exercised by the clergy and laity, in their respective congregations." Convention Journals of Pennsylvania, 1785-1814 at 6. (As described below, another attempt was made in 1895 to reserve powers to the dioceses, but it was also rejected.) They, however, fail to acknowledge that such language was never considered in any of the drafts of the Constitution, much less adopted as part of it, nor is there any language in the Constitution of power being "delegated" to General Convention by local bodies. Wantland in his affidavit for The Episcopal Church in the Diocese of Connecticut v. Ronald S. Gauss (¶ 5) makes the claim of the reservation of powers, but offers no evidence to support it.

state conventions reserved the right to elect bishops; rather, they were given the authority to elect bishops by the General Convention.

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 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.[38] 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 and that this is an argument against the hierarchical nature of the Church.[39]

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[38] It is common knowledge that, as the result of the minimal attention that the English congregations in the colonies received from the Bishop of London, those congregations developed a habit of self-governance that was generally uncharacteristic of Church of England parishes. But clergy from those parishes looked to the Church of England as the ultimate governing authority before the Revolution, and then worked toward the creation of the unified American Church afterward.

[39] This is a major claim of McCall. *See* "Is the Episcopal Church Hierarchical?" pp. 26-30. The "Bishops' Statement" repeats this misunderstanding (pp. 13-14), as does Conger in his affidavit in The Episcopal Diocese of San Diego vs. St. John's Parish, Fallbrook (¶¶ 28-31). Indeed, a key part of McCall's argument (and a point taken up in the "Bishops' Statement" and

76. This is a misreading of the facts. 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.[40]

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by others), is the assertion that the Constitution of the Church lacks any language of supremacy. *E.g.*, McCall, "Is the Episcopal Church Hierarchical?" (pp. 1-11), and "Bishops' Statement" (p. 8). Besides the obvious refutation of that argument in the consistent mandatory language of the Constitution and canons (to be discussed below), what these critics ignore is the far more striking fact that the document, composed by such legal experts as James Duane, has no principle of federalism or the reservation of powers to the state conventions. Moreover, despite the claims of Wantland and others that the Church is a "confederation" of dioceses, language of confederation is also conspicuously absent from the Constitution.

[40] As shown below, *e.g.* at ¶¶ 101 and 109, there are multiple instances of the mandatory language of supremacy in the Church's canons. 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).

2. Lack of Enumerated Powers

77. As is well known, the Federal Constitution carefully delimits the rights and powers of each branch of the U.S. Government. By contrast, the Church Constitution acknowledges a General Convention without specifically defining its authority, thus placing no limitations on that authority. Indeed, as noted, William White attested that the primary function of the Church Constitution was simply to describe the structure of the General Convention, define its membership, and mandate its continued existence. The Constitution was never intended to set or prescribe the scope of, and in that way set limits on, the General Convention's authority.

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!

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.

B. Evidence in the 1789 Constitution of the Supremacy of the General Convention

80. The supremacy of the General Convention over the whole Church, including over the Church in the states (and, later, dioceses), was made clear in early constitutional provisions governing seven important aspects of Church governance and life.

81. The first was liturgical. The first Constitution reflected the General Convention's absolute authority in revising the Book of Common Prayer and in making use of the Prayer Book mandatory throughout the Church. Article 8 stated that "[a] Book of Common Prayer . . . when established by this or a future General Convention, shall be used in the Protestant Episcopal Church in these United States, which shall have adopted this Constitution." (Emphasis added.) The Book of Common Prayer had (and has) been seen as one of the foundations of Anglicanism, and the General Convention has always had sole authority to define its content for use in The Episcopal Church. As the General Convention of a "particular or national Church" (to use the language of the Articles of Religion), it alone had the authority "to ordain, change, and abolish, Ceremonies or Rites of the Church."

82. A second place was the establishment of compulsory requirements for admission to holy orders, including a mandatory declaration for ordination. Article 7 provided that "[n]o person shall be admitted to holy orders" unless certain requirements were met, "[n]or shall any person be ordained" until he subscribed to a specific oath:

> "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." Art. 7 (emphasis added).

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

83. A third area was the binding nature of the General Convention's legislation. During the meetings leading up to the ratification of the Constitution in 1789, attendance was erratic. Hence, Article 2 of the Constitution provided that if any state Convention failed to send Deputies to the General Convention, "the Church in such State shall nevertheless be bound by the acts of such Convention." Art. 2 (emphasis added). Here again, submission to the decisions of the General Convention was not optional. This followed the principle stated in Canon CXL of the English Canons of 1603-1604.

84. It is important to note the mandatory language used in these provisions. There is no question but that all units of the Church – dioceses, parishes, clergy – had no option but to obey these Church rules.

85. A fourth area was the lack of 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). In these circumstances, the General Convention – like the English Parliament – could legislate in areas on which the Constitution was silent.

86. The fifth and sixth areas involved the authority to ratify and amend the Constitution. As previously noted, one of the singular aspects of the Church Constitution was the manner of its own ratification. In 1786, the draft Constitution was amended so that ratification took place within the General Convention itself, and not by the state conventions, as had been proposed by an earlier version. Thus, the 1786 version stated:

> "The Constitution of the Protestant Episcopal Church in the United States of America, when ratified by the Church in a majority of 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 has been represented at the time of ratification." Art. 9. (Emphasis added.)

In the secular political process of the ratification of the federal Constitution, much weight was put on the participation of the states themselves. In the Church context, however, this power was vested in the General Convention. Similarly, Article 9 also committed the amendment power to the General Convention:

> "This Constitution shall be unalterable, unless in General Convention, in a majority of 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." Art. 9.

Unlike in the U.S. Constitution (or in a less hierarchical polity such as that of the Presbyterian Church), there is no step in the amendment process where an amendment needed to receive the approval of the states (or in the case of Presbyterians, the presbyteries) themselves. The General Convention had – and still has – sole power to amend its Constitution.

87. Finally, and perhaps most fundamentally, was what was required for a state convention to become a part of the General Convention. Article 5 provided:

> "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." Art. 5.

For a state convention to join the General Convention, it had to acknowledge the powers of the General Convention. Accession was not optional. Indeed, as will be shown, in a number of instances state conventions were denied membership because they failed adequately to accede.

88. Some have recently argued that this language of accession is temporary and reversible.[41] As will be shown below, in an extensive review of Nineteenth-Century commentary and practice I have found no evidence for such an interpretation.

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[41] This argument lies at the core of McCall's paper. *See* "Is the Episcopal Church Hierarchical?" p. 20ff.

C. Evidence in the 1789 Canons of the Supremacy of the General Convention

89. The General Convention's legislative authority has from the very beginning been unrestricted. In practice, however, the Convention has historically been conservative in exercising its authority, and has acted only when it considered such action necessary for the well-being of the Church. Many decisions have been expressly delegated to the individual dioceses, thus giving to some the impression of a "de-facto" federalism. But this is not a true federal system. These diocesan functions were not inherent rights, but were powers granted by General Convention. Moreover, as will be shown, the General Convention has over time increased its direct mandates to dioceses and parishes.

90. The authority of the General Convention can be seen from the issuing of the earliest canons. As noted above, one compelling piece of evidence of the supremacy of the General Convention is in the fact that it passed canons before adopting the Constitution. But the early canons also reveal the supremacy of the General Convention in two other respects: From 1789, the General Convention asserted the right to pass canons in a number of areas that had no foundation in the Constitution itself, and in so doing often used mandatory language that confirmed the supremacy of the General Convention's authority.

91. The first such area concerned the selection of bishops. Although the Constitution delegated to state conventions the right to set the rules for electing their own bishops, the canons confirmed the General Convention's plenary authority in this area. Thus, Canon II of 1789 set out the mandatory requirement that "[e]very Bishop elect, before his consecration, shall produce" to the consecrating bishops certificates from the electing state convention and the General Convention. Canon II (emphasis added).

92. A second area in which the General Convention asserted its authority in a mandatory fashion on a subject not addressed by the Constitution involved the duties of bishops.

Canon III commanded that "[e]very bishop shall, as often as may be convenient, visit the churches within his Diocese or district, for the purpose of examining the state of his Church, inspecting the behaviour of the Clergy, and administering the apostolic rite of Confirmation." Canon III (emphasis added).

93. A third area concerned requirements for ordination. The authority to dictate ordination requirements is nowhere made explicit in the Church Constitution, yet from the very beginning the General Convention assumed this responsibility. Four of the original canons passed by the same Convention that ratified the Constitution made mandatory certain details relating to ordination: Canon IV provided that "Deacon's orders shall not be conferred" on anyone until he reached the age of 21, "nor Priest's orders" until the age of 24; and "[n]o man shall be consecrated a Bishop of this church" until the age of 30. (Emphasis added.) Canon V commanded that "[n]o person shall be ordained" unless he produced a certificate showing a potential for gainful employment within the Church. (Emphasis added.) Canon VI required that "[e]very candidate for holy orders shall be recommended to the Bishop" by the convention's Standing Committee and set out the precise language for the recommendation, which "shall be signed by the names of a majority of the committee." (Emphasis added.) Finally, Canon VIII set the appropriate times for ordination: "the stated times of ordination shall be on the Sundays following the Ember weeks." (Emphasis added.)

94. A fourth area concerned clergy education. The Constitution nowhere specifies that this was in the purview of the General Convention, yet Canon VII assumed the right of the General Convention to establish mandatory learning requirements, providing that "[n]o person shall be ordained in the Church" until he has "satisfied the Bishop and . . . two Presbyters . . . that he is sufficiently acquainted with the New Testament in the original Greek, and can give an

account of his faith in the Latin tongue, either in writing or otherwise, as may be required." (Emphasis added.)

95. A fifth area involved the duties of clergy. Here, too, the Constitution was silent, but the General Convention exercised authority by imposing mandatory requirements in this area. These included Canon XI (providing that ministers "shall" prepare and present confirmands to the Bishop and "shall" inform the Bishop of the state of the congregation); Canon XIV (all persons in the Church "shall" duly celebrate Sundays); and Canon XV (all ministers "shall" keep a register of baptisms, marriages, and funerals in the parish). In addition, Canon X expanded on the Constitutional requirement that the Prayer Book "shall be used," mandating that "[e]very minister shall . . . use the Book of Common Prayer, as the same shall be set forth and established by the authority of this or some future General Convention...and no other prayer shall be used besides those contained in the said book." (Emphasis added.)

96. A sixth area concerned clergy behavior and discipline. The right of the General Convention to establish rules of behavior and discipline for clergy was not specified in the Church Constitution, but from the very beginning the General Convention asserted its authority to do so. Canon XIII thus prohibited clergy from "resort to taverns," "base or servile labor," "drink or riot," and "spending...their time idly," and provided that offenders "shall be liable" to sanctions "according to such rules or process as may be provided either by the General Convention or by the Conventions of the different States." (Emphasis added.)

97. Similarly, in Canon XII the right to discipline laity for "wickedness of life" is asserted, although nowhere found in the Constitution. Here again, the General Convention not only described a list of offenses for which laity could be punished, but required that offenders

"shall be repelled from the Holy Communion" and reserved the right to establish the process for prosecution of those offenses. (Emphasis added.)

98. In sum, the powers exercised in these original canons came not from enumerated powers found in the Constitution, but from the right of the Church to self-governance; and their mandatory nature reflected the nature of the General Convention's authority. In this way, they reflect the same over-arching powers that lay behind the English Canons of 1603-1604.

IV. THE SUPREMACY OF THE GENERAL CONVENTION HAS CONTINUED TO BE REFLECTED IN GENERAL CONVENTION ACTIONS FROM 1790 TO THE PRESENT.

99. Since the promulgation of the Constitution and canons of 1789 and up to the present, the General Convention has continued to exercise its authority over bishops and other clergy and their dioceses and parishes and to legislate on such matters as requirements for ordination, clerical practice, discipline, and church property. These actions confirm that the Church Constitution (unlike the U.S. Constitution) was never intended to limit the actions of the General Convention. Rather, the Church has always regarded the General Convention as having full authority to legislate for the well-being of the Church.

100. At various times the General Convention has explicitly defined its understanding of its hierarchical authority to take such actions, as shown in the following two examples. In 1964, the General Convention formally defined the levels of authority in the Church:

> "The Protestant Episcopal Church accepts as its authority the Holy Scriptures, the Nicene and Apostle's Creeds and speaks through the Book of Common Prayer and the Constitution and Canons of the Church. The Protestant Episcopal Church speaks also through the Resolutions, Statements and actions of the General Convention. In these ways the Church speaks at the highest level of responsibility for the Church to the Church and to the world." JGC 1964 at 312-313.

Likewise in 1994, the General Convention, in reordering its clergy disciplinary judicial system, made the following declaration:

"Disciplinary proceedings under this Title [IV] are neither civil nor criminal, but ecclesiastical in nature and represent determinations by this Church of who shall serve as Members of the Clergy of this Church and further represent the polity and order of this hierarchical Church. Clergy who have voluntarily sought and accepted ordination in this Church have given their express consent and subjected themselves to the discipline of this Church and may not claim in proceedings under this Title constitutional guarantees afforded to citizens in other contexts . . . ." Canon IV.14.1 (emphasis added).

A. Bishops

101. The General Convention, using the mandatory language of supremacy, has continued to exercise authority over the selection of bishops, providing for consents to be given by a majority of bishops and Standing Committees when the General Convention is not in session,[42] and requiring that bishops-elect be ordained by no fewer than three bishops. Const. Art. II.2; Canon III.11(6). In 1832, it adopted Canon XXXII ("On Episcopal Resignations") (now Canon III.12(8)) which required the General Convention's consent for a bishop to resign; and in 1853, it adopted the Canon III ("Of Bishops absent from their Dioceses because of Sickness, or other sufficient reason") authorizing bishops to take temporary leave from their dioceses provided they turn over ecclesiastical authority to the Standing Committee. Consent of the larger church is also required for the "translation" of a bishop, that is, the election as diocesan bishop of a person who is a diocesan bishop or bishop coadjutor of another diocese. Const. Art. II.8. These provisions reflect the teaching of the ancient canons that a bishop serves only with the consent of the larger Church.

102. Using similar language, the General Convention amended the Constitution in 1901 to provide a minimum age (30) for the ordination of bishops (Const. Art. II.2); to specify that consents to episcopal ordinations be given only by bishops with jurisdiction (in addition to

[42] This provision was first adopted in 1799 as Canon II ("Of the Consecration of Bishops in Recess of General Convention"), and is now found in Canon III.11(4).

consents by the House of Deputies or Standing Committees as provided earlier) (*Id.*); and to provide that bishops may not resign without the consent of the House of Bishops (Const. Art. II.4, now II.6). In 1943, the General Convention went further and provided a mandatory resignation age for bishops (72) (Const. Art. II.9), and provided for the House of Bishops to declare a bishop's position "terminated" if this requirement was not obeyed (Canon 43.7(c), now III.12(8)(c)).

103. Further, in its amendment of Article I.2 of the Constitution in 1901, the General Convention expanded the membership of the House of Bishops beyond only diocesan bishops to include coadjutors and resigned bishops, so that membership in the House became based not on diocesan representation but episcopal status. No longer was the House of Bishops a house of diocesan bishops, but it now included other bishops as well. In the same vein, the General Convention authorized the ordination of suffragan bishops in 1910 and made them non-voting members of the House of Bishops (Const. Art. II.4); it gave the vote to suffragans in 1943 (Const. Art. I.2(1)); and in 1982, it created the position of "Assistant Bishop" with full membership in that House (*id.*).

104. The General Convention also has exercised authority over the selection of bishops by reversing the decisions of dioceses in a number of instances. In 1795, the consecration of the Bishop of Vermont was refused, on the ground that the state had not yet acceded to the Constitution. JGC 1795 at 1: 205. In 1801, consent to the consecration of the Bishop of New Jersey was withheld on account of questions about the election. JGC 1801 at 1: 264. In 1844, the House of Deputies refused to consent to the consecration of the Bishop of Mississippi because of financial concerns about the candidate in question. JGC 1844 at 71. In 1847, consent was refused in the case of an Assistant Bishop of Illinois because of canonical concerns.

JGC 1847 at 37. In 1874, consent to the consecration of the Bishop of Illinois was withheld on churchmanship grounds. JGC 1874 at 97-100. A majority of the Standing Committees refused to consent to the consecration of James DeKoven as Bishop of Illinois in 1875, also because of questions concerning his churchmanship. Four candidates have been rejected in the Twentieth and Twenty-First Centuries, the most recent in 2009 when the Bishops and Standing Committees rejected the consecration of the Bishop of Northern Michigan.

105. In each of these cases the diocesan choice for bishop was overturned according to canonical procedures established by the General Convention. Furthermore, in each case the diocese accepted the decision without protest.

106. The General Convention has also made bishops subject to discipline and removal by the general Church, as set forth in Title IV of the Church's canons. Grounds for such discipline or removal include "Abandonment of the Communion" of the Church under Canon IV.9 and violation of the Church's or diocese's Constitutions or canons or of the vows required of a bishop-elect in the Ordination Service for a bishop under Canon IV.1.

107. Yet another acknowledgment of the General Convention's authority to dictate to individual dioceses is clearly seen in an example relating to the trial of bishops. In the 1840s, the House of Bishops brought to trial the popular Bishop of New York on charges of "immorality and impurity" and suspended him from the office of Bishop.[43] Even though the clergy and laity of the diocese continued to be loyal to the bishop, and indeed refused to replace him, they accepted the decision stating, "The event, so unlooked for, and so distressing to the friends of the Church, has been patiently submitted to by the Diocese." JGC 1849 at 179. If ever there were a

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[43] James Elliott Lindsley, This Planted Vine: A Narrative History of the Episcopal Diocese of New York (New York: Harper and Row, 1984) at 151-154.

place to expect arguments for diocesan autonomy or impassioned claims of the lack of a national hierarchy it would be here. But no such language has been found.

108. The General Convention has also dictated to bishops concerning the ordination process. In 1804, Canon IX ("Of Candidates who may be refused order") stated that a bishop could not ordain a candidate until he had inquired whether the candidate had ever directly or indirectly applied for orders in another diocese and been turned down. Furthermore, the canon stated, "When any bishop rejects the application of any candidate for Orders, he shall immediately give notice to the bishop of every state or diocese." JGC 1804 at 1: 324.

B. Dioceses

109. The General Convention has consistently exercised authority over the formation of dioceses, here too using the mandatory language of supremacy. In 1795, it set minimum sizes for the establishment of new dioceses (Canon I ("Of Episcopal Visitation")); in 1835, it provided a mechanism for combined dioceses to be divided (Canon I ("Of the Election of Bishops")); and in 1838, it provided for the division of existing dioceses with the General Convention's consent (Canon VIII ("On the Organizing of New Dioceses Formed Out of Existing Dioceses")). It continued to exercise its authority to determine whether or not a diocese should be formed as part of the Church. In 1967, it provided a mechanism by which territory might be transferred from one diocese to another, and this too required the permission of the General Convention. Const. Art. V.6.

110. In 1835, the General Convention provided for the election by it of "Missionary Bishops" to exercise episcopal functions in areas in which the Church was not organized, asserting that the "jurisdiction of this Church extend[ed] in right, though not always in form, to all persons belonging to it within the United States . . . ." Canon II of 1835 ("Of Missionary

Bishops"). The canon further provided that "each Missionary Bishop shall have jurisdiction over the Clergy in the district assigned him."

111. The General Convention has always had the authority to form and admit new dioceses to membership, and the admission and division of dioceses has been in no way automatic. In 1817, the Convention refused the petition of the proposed Diocese of Ohio for membership in Convention because there was not sufficient evidence that the proposed diocese had acceded to the Constitution of the Church. JGC 1817 at 1:459. In 1835, a petition from the Diocese of Indiana was rejected because there were doubts whether it would have sufficient number of clergy to warrant diocesan status. JGC 1835 at 2:614.

112. The case of the Church in California is particularly illuminating. The Constitution drafted by organizers there contained no mention of the Protestant Episcopal Church, and indeed there was talk of forming an independent church consisting of "California, Oregon, ... and the Sandwich [Hawaiian] Islands."[44] Accordingly, in 1853, when the organizers had elected a bishop and petitioned General Convention to become a diocese, not only was the proposal rejected and the bishop denied consecration, but the Convention instead made California a missionary district and appointed a missionary bishop to oversee it.[45]

113. There are also cases in which requests for division of a diocese have been rejected. In 1871, the petition of the Diocese of Illinois to subdivide into three dioceses was

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[44] *See* D. O. Kelly, History of the Diocese of California from 1849 to 1914 (San Francisco: Bureau of Information and Supply, [1915]) at 9 through 11; Lionel U. Ridout, Renegade, Outcast, and Maverick: Three Episcopal Clergymen in the Californian Gold Rush (San Diego: San Diego University Press, 1973) at 58.

[45] JGC 1853 at 57-58. Conger misinterprets the case of the organization of the Diocese of California, and attempts to argue that it shows the decentralized nature of the formation of dioceses. *See* "The Concept of Hierarchy in the Episcopal Church of the Nineteenth Century" pp. 15-16.

rejected because of doubts that each of the new dioceses could adequately support a bishop (as called for in Art. V of the Constitution).[46]

114. In 1979, the General Convention adopted Canon 1.10(3)(b) ("Transfer of Area Missions") (now Canon I.11(3)(f)) providing that "Missionary Dioceses" outside of the United States could, with the consent of the General Convention, be released from union with the General Convention to form or become part of another province of the Anglican Communion – an opportunity never provided by the General Convention to any other dioceses of the Church.

115. Finally, an amendment to the Constitution in 1904 made explicit three principles. The first was that dioceses could only be formed with the consent of the General Convention. Art. V.1. Since 1835 this had been the case for the dioceses created from the division of existing dioceses, but now it was the case for all new dioceses. The second concerned the content of the diocesan accession to the Church's rules. The Constitution of 1789 had required that in order for a new diocese to become part of the General Convention it must first accede to the Church's Constitution. Art. 5. It had, however, always been assumed that accession to the Constitution implied accession to the Church's canons, as well, and many dioceses explicitly acceded to both the Constitution and canons.[47] This requirement was made explicit in an amendment to the Constitution in 1901. Art. V.1. Third, the Convention in 1904 clarified that all new dioceses

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[46] JGC 1871 at 231, 245, and 361.

[47] *See*, for example, the early Constitutions of Dallas, Colorado, Illinois, and Quincy. A number of writers have either misunderstood or misinterpreted this point. In particular see Wantland's Affidavit in The Episcopal Diocese of San Diego v. St. John's Parish, ¶ 11; and "Bishops' Statement," p. 5., both claiming that dioceses self-organize and then are admitted into union. An existing diocese, however, cannot begin the process of dividing and organizing a separate diocese without the permission of General Convention, and as we have seen above in the case of Illinois, this approval is in no way automatic. And, after subsequently organizing itself, the new diocese must submit its Constitution with its accession clause to the Church in order to become recognized as a diocese of the Church.

were required to make such an accession. Art. V.1. Until then a distinction had been made between new dioceses (which had never acceded) and dioceses created from the division of older dioceses (which were viewed as already having acceded). In 1904, the Constitution expressly required accession of every new diocese, including those created from existing dioceses. Thus, Art. V.1. now reads:

> "When it shall appear to the satisfaction of the General Convention, by a certified copy of the proceedings and other documents and papers laid before it, that all the conditions for the formation of a new diocese have been complied with and that it has acceded to the Constitution and Canons of this Church, such new Diocese shall thereupon be admitted to union with the general Convention."

116. The General Convention from its earliest days exercised authority over the relationship between bishops and their dioceses. In 1808, the Convention required that the bishop deliver a "Charge to the Clergy" at least every three years. Canon XXIII ("Of Episcopal Charges and Pastoral Letters"). In 1856, the Convention required that bishops visit their congregations at least once every three years, and a procedure for a panel of bishops to impose further requirements upon a bishop who failed to do so was established. Canon II.1 ("Of Episcopal Visitations"). The same canon also affirmed the authority of the bishop to administer both word and sacrament during such visits. Relations between bishops and their dioceses were further regulated by the Convention by requiring that each diocese have a Standing Committee to advise the bishop. Canons adopted in 1795 and 1808 stipulated certain tasks for Standing Committees. In 1832, however, the Convention dictated that each Standing Committee's duties, "except so far provided by the Canons of the General Convention, may be prescribed by the Canons of the respective Dioceses." Canon IV.1 ("Of Standing Committees"). This provision subordinating the canons of the dioceses to those of the Church was placed in the Constitution in 1901. Art. IV.

117. The Convention's exercise of authority over the conduct of the dioceses can be further seen in a wide variety of constitutional and canonical provisions. In 1795, it required that congregations could only be members of the diocese in which they were situated. Canon I ("Of Episcopal Visitation"). In 1856, Article II of the Constitution was amended to require that deputies elected by the dioceses to the General Convention be "Communicants in this Church."

118. The Convention has also set forth requirements and conditions for the formation and operation of parishes and other worshipping congregations under the oversight of the dioceses (such as in current Canon I.13, "Of Parishes and Congregation"), as well as detailed rules and procedures under which dioceses must select, train, ordain, deploy, and supervise the clergy of parishes and other worshipping congregations (found in current Const. Arts. VIII, X and Canons I.8, .12, .13; II.3; III.5-.12, .15).

119. The General Convention has also required each diocese to report regularly to the Church concerning its activities and official actions. Canon I.6(5)(a) requires dioceses to forward to the Secretary of the House of Deputies and to the Archives of the Church "immediately upon publication, two copies of the Journals of the Convention of the jurisdiction, together with Episcopal charges, statements, and such other papers as may show the state of the Church in that jurisdiction," while Canon I.6(4) requires dioceses to file annual reports "in the form authorized by the Executive Council" to that body. These canons date from 1804.

120. In 1916, the Convention implemented a series of provisions, first contained in Canon 50 ("On Business Methods in Church Affairs") and culminating in current Canon I.7, requiring parishes to adopt numerous business practices relating to such matters as audits of accounts, maintenance of adequate insurance for church property, ensuring the integrity of treasurers, and expanded reporting to the diocese.

121. In 1919, the General Convention required each diocese to establish a Finance Committee to ensure adequate fiscal oversight of the diocese and all its parishes and other congregations.

122. The General Convention in 1901 eliminated the last vestige of diocesan voting when it amended the Constitution to provide that amendments to the Constitution be adopted, not "in General Convention, by the Church in a majority of the States" as the Constitution of 1789 had provided (Art. 9), but by a majority in both Houses, the Deputies voting by orders. Art. XI.

C. Ordination Requirements

123. The Constitution was amended in 1901 to strengthen the clergy's required "Declaration of Conformity" of 1789 by providing that each person to be ordained "solemnly engage to conform" to the "Discipline" of the Church in addition to its "Doctrine" and "Worship." Art. VIII.

124. The General Convention has continually asserted its authority over ordination in other respects. In 1795, it established the procedures for candidates' preparation for the ordained ministry. Canon VI ("Of the Preparatory Exercises of a Candidate for the Ministry"). In 1808, it set rules of conduct for candidates (Canon VIII ("Of the conduct required in Candidates for Orders")); and in 1804, it first set rules, modified over time, regarding the ordination of candidates previously rejected for ordination (Canon IX ("Of Candidates Who May Be Refused Orders")).

125. In 1795, the Convention also exercised authority over the education requirements for ordinands (Canon IV ("Of the Learning of those who are to be Ordained")), further directing in 1801 that the House of Bishops establish a mandatory "Course of Ecclesiastical Study" for ordinands. JGC 1801 at 1: 268. Over time, those requirements have grown into an elaborate

system, reflected in Title III of the present canons, prescribing the required areas of theological education. Since 1970, every diocese has been required to have a Commission on Ministry to assist the bishop in the selection of persons for ministry, but here too, the power of such commissions is also limited by the Church's canons:

> "The Commission on Ministry may adopt rules for its work, subject to the approval of the Bishop, *Provided*, the same are not inconsistent with the Canons of the General Convention and the Diocese." Canon III.2(3).

126. Numerous other ordination requirements set by the General Convention over time deal with such matters as age, health, prior education, testimonials, and minimum time frames for ordination. *See, e.g.*, Canons III.5, .6, .8.

D. Clerical Practices

127. The General Convention has continued to dictate clerical practices, adopting a canon in 1795 restricting clergy from ministering in the parish of other clergy without consent (Canon V ("Of the Officiating of Ministers of this Church in Churches or within the Parochial Cures of other Clergymen")) and other canons in 1804 considerably expanding the requirement that clergy keep records of their sacramental actions (Canon XI ("Providing for an accurate view of the State of the Church from time to time")); providing the required procedure for induction of rectors (Canon I ("Concerning the Election and Induction of Ministers into Parishes or Churches")); and establishing rules for clergy desiring to move from one diocese to another (Canon III ("Concerning Ministers removing from one Diocese or State to another").

128. The Convention in 1804 also adopted canons governing procedures for resolving differences between clergy and congregations (Canon II ("Respecting the dissolution of all pastoral connection between Ministers and their Congregations") and Canon IV ("Respecting differences between Ministers and their Congregations")). The Convention's concern for the

responsibility of clergy with regard to Episcopal visitations culminated in a canon in 1832 setting forth their duties (Canon XXVI ("Of the duty of Ministers in regard to Episcopal Visitation")).

129. The Twentieth Century brought important new requirements for clergy prescribed by the General Convention. In 1904, the Convention defined the role of parish rectors vis-à-vis lay vestry members stating:

> "The control of the worship and the spiritual jurisdiction of the Parish, are vested in the Rector, subject to the Rubrics of the Book of Common Prayer, the Canons of the Church, and the godly counsel of the Bishop. All other Ministers of the Parish, by whatever name they shall be designated, are to be regarded as under the authority of the Rector." Canon 15.1(1) ("Of Ministers and their Duties").

130. Finally in 1955, the General Convention adopted a mandatory retirement age (72) for all deacons and priests (having passed one for bishops earlier), and dictated the terms under which clergy could continue in limited employment thereafter. Canon 45.8 ("Of Ministers and their Duties"). Just as in the case for bishops, the General Convention claimed the authority to decide when and how ordained ministry should be ended as well as when and how it should begin.

E. Tenure of Church Property

131. Treatment of church property, a long-held Anglican concern, was incorporated into the early Church governance in a number of ways and has continued to be refined over the years.

132. The Anglican concern for the sanctity of Church property and its protection for the mission of the Church can be seen in the Church's inclusion in its Book of Common Prayer in 1799 the service "The Form of Consecration of a Church or Chapel." That rite, or "liturgy,"

formally set apart a church building for the sacred work of worship and has been included ever since.[48]

133. The early versions of the Prayer Book adopted by the General Convention directed that the "Bishop, sitting in his chair, shall have the instruments of Donation and Endowment, if there be any, presented to him," indicating that the property was being dedicated to the interests of the Church, and was being set apart from "all unhallowed, worldly and common use." The "instruments of donation" that parishes used in the early Nineteenth Century stated that such property was being appropriated and devoted to the worship and service of God, according to the ministry and doctrine of The Episcopal Church and by a congregation in communion with the Church. BCP 1789 at 572.[49]

134. These principles put into effect by the General Convention through the Prayer Book over time came to be expressed in the canon law of the Church as situations arose that required that such principles be made more explicit.

135. Thus, in 1868, the General Convention passed Canon I.21 ("Of the Consecration of Churches"), which provided as follows:

> "I. No Church or Chapel shall be consecrated until the Bishop shall have been sufficiently certified that the building and ground on which it was erected have been fully paid for, and are free from lien or other incumbrance.
>
> "II. It shall be not lawful for any Vestry, Trustees, or other body authorized by law of any State, or territory, to hold property for any Diocese, Parish, or Congregation, to incumber or alienate any consecrated Church or Chapel without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese in which such Church or Chapel be situated.

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[48] Massey Hamilton Shepherd, The Oxford American Prayer Book Commentary (New York: Oxford University Press, 1950) at 563-8.

[49] This ritual was removed from the Book of Common Prayer in 1979, but as will be shown, by that time the principle was firmly embedded in the Church's canons.

> "III. No consecrated Church or Chapel shall be removed, taken down, or otherwise disposed of for an "unhallowed, worldly, or common use," without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese in which such Church or Chapel may be situate."

Section 1 of Canon I.21 was strengthened in 1871 to read as follows:

> "I. No Church or Chapel shall be consecrated until the Bishop shall have been sufficiently certified that the building and ground on which it was erected have been fully paid for, and are free from lien or other incumbrance; and also such building and ground are secure, by the terms of the devise, or deed, or subscription by which they are given, 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."

136. This language is currently found in Canon II.6. Three times during the Twentieth Century the General Convention acted to explicate rules concerning the tenure of Church property. In 1904, the Convention adopted a canon providing:

> "For the purposes of his office, and for the full and free discharge of all functions and duties pertaining thereto, the Rector shall, at all times, be entitled to the use and control of the Church and Parish buildings, with the appurtenances and furniture thereof." Canon 15.1(11) ("Of Ministers and their Duties").

This language is currently found in Canon III.9.(5)(a).(2).

137. In 1940, the General Convention adopted Canon 57(4) ("Of Parishes and Congregations") extending the earlier restrictions on alienation to all church real property:

> "No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage or administer real property for any Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese."

This canon is now I.7(3).

138. A third canon concerning the treatment of property was set forth by the General Convention in 1979. New Canon I.6(4) ("Of Business Methods in Church Affairs") (now Canon I.7(4)) clarified that all parish property was held in trust for the Church and the Diocese:

> "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. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission, or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to this Church and its Constitution and Canons."

This canon is often referred to as the "Dennis canon" after its principle author, Walter Dennis, later Suffragen Bishop of New York, or "the 1979 Trust Canon." Similar language was also added in what is now Canon II.6(4).

F. Clergy and Lay Discipline

139. In 1832, the General Convention in Canon XXXVII ("Of Offenses for which Ministers shall be tried and Punished") amended earlier canons to specify the grounds on which priests and deacons could be disciplined, including "violation of the Constitution and Canons of [the] Church." Dioceses were permitted to hold ecclesiastical trials, but only "until otherwise provided for by the General Convention"; thus, trial on the diocesan level was not an inherent right of dioceses, but a task delegated to them by the Convention. While such trials may still be conducted by diocesan courts, a plenary system for the diocese to follow is now prescribed by Title IV of the Church's canons, and review of decisions of such trial courts has been conducted outside the dioceses by Courts of Review in the Provinces ever since the provincial system was established by canon (Canon 29 ("Of Courts of Review of the Trial of Presbyters and Deacons")) in 1904.

140. In 1841, the General Convention by amendment to Article 6 removed the right to try bishops from the dioceses and gave it to the bishops themselves. It since has adopted Canon IV.5 ("Of the Court for the Trial of a Bishop") and Canon IV.6 ("Of Appeals to the Court of Review of the Trial of a Bishop") that set forth the procedure for trials of and appeals by bishops.

141. The General Convention has also made provision for the discipline of laity. The original Canon XII of 1789 ("Notorious Crimes and Scandals to Censured") had provided that persons engaged in offensive conduct "be repelled from the Holy Communion"; and in 1817, Canon III ("For Carrying into Effect the design of the second Rubric before the Communion Service") further specified the procedures to be followed in this regard, also providing that persons could be deprived of "all privileges of Church membership, according to such rules or process as may be provided by the General Convention." Modern versions of the General Convention's specifications are now set forth in the "additional directions" or "rubrics" of the Prayer Book (p. 409) and in Canon I.17(6).

142. The General Convention has exercised its authority over the laity through its rules concerning Holy Matrimony starting in 1808 when it passed a joint resolution determining that the Church "shall not unite in matrimony a person who is divorced, unless it be on account of the other party having been guilty of adultery." JGC 1808 at 1: 348. A stronger statement was contained in the 1868 Canon II.13 ("Of Marriage and Divorce"); and in 1877, Canon II.13.3 added provisions against divorced persons receiving the sacraments without the consent of the bishop. Over time, such restrictions have been relaxed considerably, but the terms on which marriages can be performed in the Church are still prescribed in detail by the Convention in Canons I.17 and I.18.

143. Still another important way in which the Convention has exercised its authority over the laity is through the passage of non-discrimination legislation. In 1964, in the midst of the Civil Rights struggle, the canon respecting laity ("Of Regulations Respecting the Laity") was amended to state:

> "Every communicant or baptized member of the Church shall be entitled to equal rights and status in any Parish or Mission thereof. He shall not be excluded from the worship or Sacraments of the Church, nor from parochial membership, because of race, color, or ethnic origin." Canon 16.

In 1994, the language was expanded to prohibit exclusion on the basis of "marital status, sex, sexual orientation, disabilities or age, except as otherwise specified by Canon." Canon I.17(5). Similar language can be found in Title III.1(2) ("Of the Ministry of All Baptized Persons"), in which it is required that no person shall be denied access to the discernment for any ministry because of "race, color, ethnic origin, national origin, marital status, sex, sexual orientation, disabilities or age, except as otherwise provided by these Canons."

G. The Church Pension Fund

144. The care of retired clergy and their families had been a long-standing concern for The Episcopal Church. Notwithstanding an ambitious capital campaign early in the Twentieth Century, the General Convention determined that a national pension system could not succeed unless contributions were mandated from every parish and other institution in the Church.[50] Hence, in 1916, Canon 56 ("Of the Church Pension Fund") was adopted authorizing the newly-created "Church Pension Fund ... to levy upon and to collect from all parishes and congregations of the Church and any other societies or organizations in the Church ... assessments based upon the salaries of the clergymen employed by them respectively in the office and work of the

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[50] Harold C. Martin, Outlasting Marble and Brass: The History of the Church Pension Fund (New York: Church Hymnal Corp., 1986) at 81ff.

Ministry." The substance of this canon is now in Canon I.8(3). Contributions to the Pension Fund were thus not voluntary. Never before in its history had the Church mandated a payment from every congregation. Few actions by the General Convention show its authority over the temporal affairs of the Church as much as does the passage of the Canon forming the Church Pension Fund.

H. Conclusion

As demonstrated above, the General Convention has consistently acted as a body with supreme authority. Indeed, the recognition of the supremacy of General Convention was so taken for granted by 1901 that the revisers of the Constitution felt free to drop the language of the original Article 2 that bound dioceses to actions of General Convention even when their parties were not present. From their perspective, that passage from the old Constitution seemed anachronistic. With the exception (as will be seen) of the Civil War period, no diocese had failed to attend meetings of the General Convention since 1820, and the authority of the General Convention had never been challenged. The leading commentator on the revised Constitution, William J. Seabury, acknowledged as much:

> "[The General Convention] has always, moreover, been regarded not only as a Legislature in the system, but as the Supreme Legislature therein. The inference was inevitable from provisions incorporated in Article 2, from the beginning, declaring that the Church in each Diocese adopting the Constitution shall be bound by the duly consummated acts of General Convention, whether such Diocese has been actually present by its Deputies in that body or not. No such provision appears in the amended Constitution. It is here presumed to have been taken for granted that, as this supremacy in legislation has been established from the beginning of the System, and had always been and still was acquiesced in by all the Dioceses, it was not necessary to continue the stipulation."[51]

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[51] William J. Seabury, Notes on the Constitution of 1901 (New York: Thomas Whitaker, 1902) at 38 (emphasis added).

Seabury acknowledged that from the perspective of 1901, the Church had so developed organizationally (particularly as exhibited by those organizational principles highlighted in the revised Constitution itself) that the specific sanction found in the Constitution of 1789 was now superfluous.[52]

Some have suggested that it was through certain developments of the early Twentieth Century—such as the formalization of the Office of the Presiding Bishop and the establishment of the Executive Council and the Church Pension Fund—that the Episcopal Church's hierarchical nature became more pronounced.[53] This is to confuse the principle of hierarchy with the way in which it is administered. Indeed, these developments underscore the conclusion that the General Convention's authority has always been unlimited, because these changes (with the exception of the election of the Presiding Bishop) have occurred without any changes in the

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[52] Some have recently asserted that the removal from the Constitution in 1901 of the provision that dioceses absent from a meeting of the General Convention "shall nevertheless be bound" by the acts of the General Convention suggests that the General Convention's authority since then has not been supreme. As noted, this was not the opinion of commentators at the time. Furthermore, as we have seen, in 1901 a number of new Constitutional provisions were added in which the General Convention assumed, and asserted, its supremacy over the entire Church. There was a self-conscious concern to show the authority of General Convention. Indeed, when the original version of the amendments to the Constitution that would be ultimately adopted in 1901 was presented in 1895, it included a proposal to insert into the Constitution a provision reserving rights to the dioceses, which stated: "The powers not committed to the General Synod or Provincial Synods by the Constitution, nor prohibited by it to the Dioceses are reserved to the Dioceses respectively." JGC 1895 at 649. This language was pointedly rejected and viewed as "revolutionary." *See* John H. Egar, "General Convention or General Synod – Which?" The Churchman, September 14, 1895, at 279. The rejection of the proposal in combination with the new provisions adopted in 1901 that so clearly assume the supremacy of the General Convention prove that the deletion of the "shall be bound" provision merely reflected the fact that such language was no longer necessary because the principle was so deeply embedded in the Church.

[53] This is the point argued by Robert Prichard in "The Making and Re-Making of Episcopal Canon Law" (2010), available at www.anglicancommunioninstitute.com/2010/02/the-making-and-re-making-of-episcopal-canon-law/ at 2-4.

Constitution or any actions by the dioceses to expand the Convention's authority. This is evidently because the authority has existed from the beginning.

V. NINETEENTH-CENTURY COMMENTATORS UNEQUIVOCALLY VIEWED THE GENERAL CONVENTION AS THE SUPREME AUTHORITY IN THE EPISCOPAL CHURCH AND DIOCESAN ACCESSION AS IRREVERSIBLE.

145. Given the background of the formation of the General Convention and its actions in adopting and amending the Church's Constitution and canons over the years, as described in the foregoing parts of this statement, 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.[54]

A. Supremacy of the General Convention

146. Francis Hawks, the first historiographer of The Episcopal Church and author of the first commentary on the Church's Constitution and canons, wrote in 1841 of the authority of the General Convention as reflected in Article 2 of its Constitution:

> "[T]he rights of the whole united Church were protected with equal care. The union was not sacrificed to diocesan independence. If any diocese sees fit to neglect its privilege of representation, and sends no delegates, it is nevertheless, as much bound by the acts of the General Convention, as if it had its full complement of representatives in the House."[55]

The supremacy of the General Convention over the dioceses was axiomatic for Hawks and is a basic theme in his volume.

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[54] This historical evidence is addressed only by Conger, in "The Concept of Hierarchy in the Episcopal Church of the Nineteenth Century." Unfortunately, he dismisses most of the sources without analysis, misreads one (John W. Andrews, by ignoring his recognition that the General Convention was the "highest Council" of the "National Church"), ignores another (Francis Wharton), and instead relies on a passing line in Thomas Vail's The Comprehensive Church, a minor work of apologetics and not an academic review of polity.

[55] Francis L. Hawks, The Constitution and Canons of the Protestant Episcopal Church in the United States (New York: Sword, Stanford and Co., 1841) at 21.

147. Murray Hoffman was the best-known authority on the laws of The Episcopal Church in the first half of the Nineteenth Century. His Treatise on the Law of the Protestant Episcopal Church in the United States (1850) was often cited as the standard authority on church law. In it he described the power of the General Convention as follows:

> "[T]he power of the Convention of 1789 involved the power of rendering the system of government stable and enduring. Its office was not to establish a fugitive coalition, but a perpetual union. It possessed the right of instituting and providing for the continuance of a body in which should reside all authority necessary for the purpose and commensurate with the object of the Church; a body of superior ultimate jurisdiction."[56]

148. In 1870, Francis Vinton, another Nineteenth-Century commentator and Professor of Ecclesiastical Polity and Canon Law at the Church's General Theological Seminary, published the first full commentary since Hawks. Using a question-and-answer style, he asked, "What is the relation of the General Convention to the Diocesan Conventions?" To which he answered:

> "It is that of a Supreme Legislature, whose Constitution is the fundamental Law of the Protestant Episcopal Church in the United States, and whose Canons either overrule or sanction the Canons of the several Diocesan Conventions."[57]

149. A fourth authority, Francis Wharton, a legal scholar, clergyman, and expert in both civil and canon law, wrote in the 1880s, addressing the topic of "Distribution of Sovereignty" as follows:

> "After a careful and anxious scrutiny of the constitution and canons of our General Church, the power of General Convention seems to me unlimited, while

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[56] Murray Hoffman, A Treatise on the Law of the Protestant Episcopal Church in the United States (New York: Stanford and Swords, 1850) at 110 (emphasis added).

[57] 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 & Co., 1870) at 62.

> that of the Diocesan Convention is only that which the General Convention is pleased to concede."[58]

Wharton contrasted the circumscribed powers of the U.S. government in the national Constitution with the virtually unlimited powers of the General Convention in the Church's Constitution:

> "It would have been easy for the constitution of our Church to have limited the powers of the General Convention. We have several examples of such limitations in the constitution of the United States. Congress can pass no law taking away jury trials, or destroying the liberty of the press, or interfering with the right of the people to assemble together, or restraining religious liberty. It would have been within the power of those who framed our ecclesiastical constitution to have provided that General Convention shall pass no law depriving the dioceses of certain enumerated rights, or conflicting with certain leading sanctions of our faith. It would have been within their power, also, to have provided, in analogy with corresponding clauses of the constitution of the United States, that all legislative powers not expressly granted to the General Convention be reserved to the dioceses. So far, however, from these or similar limitations on the power of the General Convention being introduced, that power on the face of the constitution is unlimited." *Id.* at 2: 400.

150. Still another expert analyst of Episcopal Church law was John W. Andrews, a lawyer and leading layman from Ohio, whose work was regularly cited as authoritative. In an 1883 work, he wrote:

> "From the foundation of Christianity there never has been a Church without a body in which resided the ultimate and absolute power of government....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 it was a National Church, and that such a Convention was to be its highest Council."[59]

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[58] This essay, "How Far We Are Bound by English Canons," forms part of the appendix of William Stevens Perry, ed., The History of the American Episcopal Church 1587-1883, 2 vol. (Boston: James R. Osgood and Co., 1885) at 2: 400.

[59] 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) at 85.

151. Yet another legal expert was Hill Burgwin, the author of many learned articles on the polity and laws of The Episcopal Church and Chancellor of the Diocese of Pittsburgh from 1887 to 1895. In "The National Church and the Diocese," he wrote, in 1885:

> "1st. That our National Church within the proper scope of ecclesiastical legislation, and subject to the Divine law and that of the One Catholic Church is under no restriction or limitations, whatsoever, as to its power of legislation.
>
> "2d. That our Dioceses are the creation of the National Church, and have no absolute, reserved or organic rights, nor any of which they may not be deprived in due legal course of legislation, by the National Church."[60]

152. Finally, in 1912, William J. Seabury, Professor of Ecclesiastical Law at the General Theological Seminary and author of An Introduction to the Study of Ecclesiastical Polity, described the power of the General Convention as follows:

> "The common government [of the Church]...has direct and immediate authority over the individual members of its component parts and dependencies. This authority results from the provisions of the Constitution whereby the acts of General Convention, constitutionally performed, are made obligatory upon the Church in each Diocese, whether the consent of such church has been given or not (Art. 2); and whereby such acts so performed are declared to have the operation of law."[61]

B. The Binding Nature of Diocesan Accession

153. The question of whether dioceses have the right to leave The Episcopal Church, or to nullify or withdraw their accession to the Constitution of the Church was a topic from time to time discussed by scholars in the Nineteenth Century. The following is a summary and

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60 Hill Burgwin, "The National Church and the Diocese," American Church Review 45 (April, 1885) at 424.

61 William J. Seabury, An Introduction to the Study of Ecclesiastical Polity, 2nd ed. (New York, 1912) at 264.

analysis of these discussions – firmly and overwhelmingly rejecting any such right by the dioceses.

154. Francis Hawks, who, as noted above, wrote the first commentary on the Constitution and canons, explained that union was perpetual. In listing the rights surrendered when a diocese acceded to the Constitution and came into union with the General Convention, he named as the first:

> "Such an exercise of independency as would permit them to withdraw from the Union at their own pleasure, and without the assent of other dioceses."[62]

While in other respects protective of diocesan authority, on the issue of secession he was adamant that dioceses could not leave without the consent of the General Convention.

155. Murray Hoffman in his Treatise on the Law of the Protestant Episcopal Church in the United States had emphasized the authority of the general Church and referred, as previously noted, to the work of 1789 as the creation of a "perpetual union." He specifically addressed the question of secession in 1863 in a separate work in which he affirmed Hawks and added:

> "Before the ratification of the Constitution, there was no bond holding the Churches of this continent together, but the bond of a common faith. The work begun in 1784, and consummated in 1789, constituted a National Church; bound every member of the Church in every diocese which then or hereafter adhered to it, to one strict system of duties and obligations."[63]

156. Francis Vinton addressed the question of secession in his 1870 work, and under the category, "Admission of New Dioceses," he asked:

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[62] Hawks, The Constitution and Canons of the Protestant Episcopal Church in the United States at 10-11.

[63] Murray Hoffman, Remarks Upon the Question of What is Schism? According to the Law of the Protestant Episcopal Church in the United States of America (New York: Edmund Jones and Co., 1863) at 18-19.

"Q. How may a New Diocese be admitted into union with the other Dioceses and with General Convention?

"A. By 'acceding' to the Constitution and Canons of the Protestant Episcopal Church in the United States.

"Q. Does the act of 'acceding' to the Constitution imply the right of any Diocese to secede from the union established by the Constitution?

"A. No. Dr. Hawks says, 'The several Dioceses surrendered…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.'"[64]

157. The expert analyst John W. Andrews in Appendix C ("Of the Constitution") of his Church Law (at 101), also reiterated and quoted this principle enunciated by Hawks.

158. The same principle was articulated in an 1885 monograph by S. Corning Judd, a leading authority on Church law and Chancellor of the Diocese of Chicago, who wrote a commentary on Hawks, "Notes Upon Dr. Hawks's Comments on the Constitution." In it, he reprinted Hawks's statement on dioceses being bound and approved of Hawks's assertion that dioceses could not leave the Church by saying:

"The churches in the several States, having once united and consented to jurisdiction on the terms and conditions specified in the general constitution, the authority of the General Convention…became supreme save as otherwise provided in the constitution."[65]

159. One suggestion contrary to the assertion that dioceses could not secede appeared in a report to the Diocese of Virginia in 1878. Some in the Diocese during the decade of the 1870s had complained about the growth of ritualistic practices in the larger Church, and a study was commissioned, "On Diocesan Autonomy and Federal Relations," in which it was asserted

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[64] Vinton, A Manual Commentary on the General Canon Law and the Constitution of the Protestant Episcopal Church in the United States at 143 (emphasis added).

[65] William Steven Perry, The History of the American Episcopal Church, 2 vols. (Boston: James R. Osgood and Co., 1885) at 2: 404.

that the Diocese had the right to leave. In support of its assertion, this report invoked political principles of secession which were dear to the hearts of unreconstructed Virginians, but had little to do with the polity of the Church. This report was never approved or adopted by the Diocese, but, as shown below, ironically served to prompt others in the Church to state what would be the result of such an attempt.

160. The first such response is found in a study commissioned by the Diocese of Pennsylvania which carefully outlined the organization of the Diocese and its relationship to the General Convention and concluded:

> "[W]e hold it to be a fundamental rule of law governing the Episcopal Church and every other religious body in Pennsylvania that while individual members may separate from our Church and decline any further communion with us, according to the dictates of their own consciences, no Congregation or Diocese can undertake to depart in form of worship, discipline, or essential Articles of Faith, as established by the General Convention ..., without imperiling not only their Church membership and organization as a part of the Episcopal Church, but also the rights of property in the Church edifices and other possessions which have been conferred upon them by members of our communion, which they hold in trust, to use the same for purposes of worship adopted by the General Convention..., which it would be a clear misappropriation to use for any other purpose."[66]

Thus, in this view, a diocese that attempted to sever its connection with the General Convention would lose its property, which was held in trust for the larger Church, and a diocese could no more secede from the larger Church than a parish could secede from its diocese.

161. A similar point was made by another legal expert referred to above, Hill Burgwin, Chancellor of the Diocese of Pittsburgh, in "The National Church and the Diocese." Burgwin argued that the Virginia assertion was wrong on both historical and legal grounds and outlined

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[66] Journal of the Proceeding of the Ninety-Fifth Convention of the Protestant Episcopal Church in the Diocese of Pennsylvania (Philadelphia, 1879) at 292-293.

what would be the consequences, including those relating to diocesan property, of any attempt for a diocese to withdraw from the larger Church:

> "But suppose ... that the Convention of a Diocese...should...resolve to withdraw from Union with the National Church, and thereupon set up an independent organization, what would be the ecclesiastical and civil status of the different parties concerned? As to the former, all those who should remain faithful to the National Church, whether as individuals or Parishes, however small a remnant, ... would compose the Protestant Episcopal Church in that Diocese; if not strong enough to organize themselves as a Diocese, they would be taken under the fostering care of the National Church, and perhaps be organized temporarily as a Missionary Jurisdiction.
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> "As to the others, their act would be that of individuals only, being beyond the scope of their powers as members of the Convention. It would be of no legal effect, and the Diocese would still remain potentially, and when subsequently reorganized, actually in Union with the National Church, while any subsequent organization of the majority would be simply schismatical, especially after their Bishop had been deposed, as he would be at once.
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> "Not only would this be the ecclesiastical status of all the parties as held by the National Church, but they would be regarded in the same light by the civil law, and with this most important consequence, that all the property in the Diocese held in trust for Church purposes, whether by the Diocese at large, by Parishes, or by any other corporations or individuals, would remain for the use and benefit of those whom the law held to be, though in a minority, yet members of the ... Church ..., and her lawful representatives in the Diocese concerned. The Courts would permit no property to be diverted by any unlawful schism, ... from the purposes of the original trust, ..."[67]

162. Even those commentators who argued for other rights of dioceses recognized that an attempted act of secession would be unavailing. A. S. Richardson, an Episcopal layman from the Diocese of Texas, in 1886 argued that if a diocese refused to accept a decision by the General Convention, the results would be severe, particularly as to diocesan property:

> "The Diocese might be deprived of its church buildings and other property, as under the laws of the land it might, and probably would be held to belong to the

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[67] Burgwin, "The National Church and the Diocese" at 454-455.

organization adhering to the General Convention, as being 'the representative of the Protestant Episcopal Church in the United States of America.'"[68]

163. So unthinkable has it been for Episcopalians for a diocese to claim the right to leave the Church that after the 1880s the topic was never again seriously discussed until the present period.

VI. THE CASE OF THE PROTESTANT EPISCOPAL CHURCH IN THE CONFEDERATE STATES OF AMERICA DOES NOT SUPPORT PRESENT-DAY SECESSIONIST CLAIMS.

164. Some have claimed that the experience of The Episcopal Church during the Civil War provides support for the right of dioceses to withdraw from the General Convention.[69] Such is not the case. From the Southern perspective, no right was ever asserted. Rather, Southern Episcopalians claimed that political changes had forced them to take action. The earliest statement by a Southern bishop on how the secession of the southern states would impact the Episcopalians in the South was by the Rt. Rev. Leonidas Polk, Bishop of Louisiana, and was issued in January of 1861. Far from invoking any principle of diocesan sovereignty, Bishop Polk noted that it was the political decision by Louisiana to separate from the Union that led to the present situation:

> "The State of Louisiana having, by a formal ordinance, through her Delegates in Convention assembled, withdrawn herself from all further connection with the United States of America, and constituted herself a separate Sovereignty, has by that act, removed our Diocese from within the pale of 'The Protestant Episcopal Church in the United States.'"[70]

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[68] A. S. Richardson, "Can the General Convention Prescribe the Qualifications of Members of Diocesan Convention?" Church Review 48 (August, 1886) at 141.

[69] This claim is found in Conger, "The Concept of Hierarchy in the Episcopal Church of the Nineteenth Century," pp. 7-11; Wantland, Affidavit in The Episcopal Church in the Diocese of Connecticut v. Ronald S. Gauss ¶ 7.

[70] Journal of the Twenty-Third Annual Convention of the Protestant Episcopal Church in the Diocese of Louisiana (New Orleans, 1861) at 30.

Such a forced separation was based on secular political, not theological, factors. For Polk, it was like the situation that occurred at the end of the American Revolution. Political changes forced the reorganization of the Church so that the liturgy could be revised to reflect the new situation:

> "Our separation from our brethren of 'The Protestant Episcopal Church in the United States' has been effected because we must follow our Nationality. Not because there has been any difference of opinion as to Christian Doctrine or Catholic usage. Upon these points we are still one. With us it is a separation, not division, certainly not alienation. And there is no reason why, if we should find the union of our Dioceses under one National Church impracticable, we should cease to feel for each other the respect and regard with which purity of manners, high principles and manly devotion to truth, never fail to inspire generous minds. Our relations to each other hereafter will be the relations we both now hold to the men of our Mother Church of England." *Id.* at 31.

Although Polk was one of the leading Episcopal supporters of the Confederacy, eventually taking the rank of General and dying in combat in Georgia during the war, he nowhere invoked any inherent right of secession by a diocese of the Church.

165. The Bishop of South Carolina expressed a similar view of the Church in 1862:

> "[I]t is my judgment that the Constitution of the Church in the United States made citizenship in the United States a condition precedent and necessary in membership in that body; that no citizen, holding and owing allegiance to a foreign power, could be a member of that General Convention....This idea of citizenship being necessary to jurisdiction, has always fully pervaded the English Church; and from that Church they, who sat in the Convention of 1789, and framed the Constitution."[71]

166. Such language shunning church division should not be surprising. As has been noted, a prayer against schism or church division was one of the oldest in the Book of Common Prayer. It was liturgically recited at least once a week. This reinforcement of the sinfulness of

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[71] Journal of the Proceedings of the Seventy-Third Annual Convention of the Protestant Episcopal Church in South Carolina (1862) at 24.

willful church division lay behind Polk's distinction between a separation forced upon a church because of political factors and a voluntary decision to divide the Church.

167. Nor is there any evidence from the Northern side of any right of secession. Since Northern church leaders did not acknowledge the legitimacy of political secession, they did not recognize the organization of a Southern Episcopal Church. The actions of the General Convention clearly showed that it did not recognize the departure of the Southern dioceses. At the meeting of the General Convention in 1862, there was no recognition that the absent Southern Dioceses had separated from the Church - they were listed in the roll call (JGC 1862 at 26); their bishops were merely noted among the list of bishops as "absent," (*id.* at 16), and the Southern clergy were included in the appended list of clergy (*id.* at 282). In the House of Deputies, a claim that the Southern dioceses were absent because of willful separation (and hence guilty of the sin of schism) was formally rejected, and the absence of the Southern dioceses was left unexplained.[72]

168. At the meeting of the General Convention in 1865, representatives of two Southern dioceses (North Carolina and Texas) were welcomed and resumed active participation, with no re-admission ritual that would have signified that the Church had been divided. JGC 1865 at 38. Furthermore, at this meeting, a proposal was made to divide the Church into geographical provinces, and the provinces proposed included other Southern dioceses that had not yet sent Deputies to the meetings of the General Convention. *Id.* at 49.

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[72] *See* Robert Bruce Mullin, "After Establishment What? The Paradox of the History of the Episcopal Church in America," in Douglas A. Sweeney and Charles Hambrick-Stowe, ed., Holding on to the Faith: Confessional Traditions in American Christianity (Lanham, MD: University Press of America, 2008) at 96-100.

169. In all this, there was no talk indicating that the oath of acceding to the Constitution could be or was abrogated.[73] The end of the Civil War led Southern Episcopalians not to accede anew, which might have made sense if accession were only like a voluntary treaty between equals, but simply to return to membership in the General Convention on the basis of their previous unbroken accession. The period of secession was a period of the forced separation of the Church, but not its division. Thus, we see that the Diocese of Virginia in its Convention of 1866 simply voted to resume its active "relations with" the General Convention:

> "Whereas, the conditions which rendered necessary the separate organization of the Southern diocese no longer exist, and that organization has ceased by the consent and action of the Dioceses concerned; and whereas, the Diocese of Virginia, unchanged as are her principles, deems it most proper, under the existing circumstances, to resume her interrupted relations with the Protestant Episcopal Church in the United States: therefore,
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> "Resolved, That the Diocese do accordingly now resume its connection with the General Convention of the Protestant Episcopal Church in the United States, and that the Bishop be requested to send a copy of this preamble and resolution to the Presiding Bishop, and one to the Secretary of the house of clerical and lay deputies.[74]

170. Thus, throughout the Nineteenth Century, both theory and practice rejected the idea that a diocese might willfully leave the larger Church on the basis of supposed diocesan independence.

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[73] If, as McCall claims, that accession was like a treaty between two sovereign powers which could be broken by either party, one would expect to see some discussion of requiring anew the oath of accession.

[74] The Journal of the Seventy-First Annual Council of the Diocese of Virginia (1866) at 29 (emphasis added).

CONCLUSION

171. The Episcopal Church has been hierarchical from its very beginning, with the General Convention at its apex. The hierarchical principle has been more fully formulated over the years, but was present from the very beginning. The Church is the child of a hierarchical church, the Church of England, and has attempted to continue that sense of hierarchy in a way that reflected democratic political principles. It is also clear that from the beginning the hierarchical principle was understood in a different manner from that in other churches. Final ecclesiastical authority was not vested in a monarch, a primate, or even a Constitution, but in the General Convention. But it was a hierarchical principle nonetheless.

172. The General Convention – with its House of Bishops and House of Clerical and Lay Deputies – represents the highest authority within the Church. It determines the Book of Common Prayer and who shall be bishops in the Church. Its legislation instructs on education, clerical responsibilities, rules for ordination, discipline, and many other vital matters. Over the history of the Church, it has been the final authority. The relationship of the General Convention to the Constitution of the Church is fundamentally different from the relationship of the Federal Government to the U.S. Constitution. The General Convention was the author of the Church's Constitution and alone has the power to amend it, and its legislative actions are not limited by the Constitution, as is the case in the Federal system.

173. Contrary to those who stress the similarities between the Church's Constitution and that of the United States, what is far more striking are their dissimilarities. The Constitution contains none of the federal language found in the U.S. Constitution. It neither limits the power of the General Convention nor explicitly reserves any powers to the dioceses or states. From its very beginning, the General Convention has been free to legislate in areas not mentioned in the

Constitution. It has legislated on issues of education, discipline, and ordination requirements and has dictated how congregations and dioceses are to operate.

174. This sole unqualified authority of the General Convention was regularly recognized by earlier commentators. They affirm that the General Convention had supreme authority over every unit of the Church.

175. We have also seen that there is virtually no tradition in the history of the Church claiming the right of dioceses to voluntarily withdraw from the General Convention, and, indeed, the overwhelming testimony of the commentators surveyed rejected any such action. The Church was united and central by purpose, because in only that way could it be The Protestant Episcopal Church in the United States of America. It was to be "a perpetual union" according to the great legal expert Murray Hoffman, and only in so doing could it fulfill its mission.[75]

176. The authority of the General Convention is the center of the hierarchical nature of The Episcopal Church. Its authority gives unity and leadership to the Church. It was the case in the 1780s. It has continued to develop over the course of intervening years, and it is the case today.

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[75] Hoffman, A Treatise on the Law of the Protestant Episcopal Church in the United States of America at 114.