On supremacy:

From “Is The Episcopal Church Hierarchical?”, pp. 11-13.

<http://anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf>

So, how are we to interpret the silence in the TEC constitution regarding hierarchy? To begin, two points are paramount. First, it is a fundamental principle of many legal systems, including both United States constitutional law and Anglican canon law, that power is generally reserved to a local body if not explicitly granted to the central body. As summarized by the foremost expert on Anglican canon law, Norman Doe, in the context of provincial assemblies: “It is a general principle of Anglican canon law that, unless a power is clearly reserved by law, the provincial assembly is not competent to interfere with the internal affairs of a diocese or to usurp the jurisdiction of a diocesan assembly.”[[1]](#endnote-1) As noted below, this is the principle of subsidiarity, which is a principle found also in Unites States constitutional law, European law, Anglican self understanding, Roman Catholic social teaching and the explicit “fundamental principles” of TEC’s founders.[[2]](#endnote-2)

The second point is this: *two of the most active participants in the general conventions that organized TEC and drafted its first constitution were James Duane and John Jay.*  Six weeks after Duane ruled in the *Rutgers* case that the lack of a routine technical term indicating hierarchical priority substantially eviscerated a New York statute, he was a delegate to the first interstate convention that in October 1784 established the fundamental principles of what was to become the TEC constitution.[[3]](#endnote-3) The first of these principles was that “there be a general convention.” Duane was again a delegate to the general convention in 1785, one of only two from New York, and served on the committee that drafted the first constitution.[[4]](#endnote-4) He was also made a member of the executive committee that was selected to correspond with the churches in the United States and the Archbishop of Canterbury to obtain consecrations for American bishops.[[5]](#endnote-5) He was once again a delegate to the 1786 convention.[[6]](#endnote-6)

John Jay was a delegate to the general convention in June 1786, which occurred right in the middle of his work on the response to the states' nullification of the Treaty of Peace.[[7]](#endnote-7) It was this convention that amended and then approved the constitution drafted the year before. Although Jay arrived late, after the constitution had been adopted, he had to have been aware of the terms of the constitution since the draft was a primary item on the agenda. After his arrival, Jay took a leading role in drafting a response to the Archbishop of Canterbury from the convention.[[8]](#endnote-8) He did not attend the adjourned session of the convention in October 1786, undoubtedly because it occurred just as he was delivering his report to Congress with his proposed solution to the treaty crisis, including the resolutions containing the legal language that would later become the Supremacy Clause of the United States Constitution. It is inconceivable that these two sophisticated lawyers, known to this day for their role in developing our jurisprudence concerning legal hierarchies, would have inadvertently drafted a constitution devoid of hierarchical language. They well understood what a league of sovereign entities was and how to express that structure legally--and how not to. In this context, the silence in the TEC constitution becomes deafening; as in the Articles of Confederation era and in the *Rutgers* case, silence means a lack of a central hierarchy.

Indeed, there is conclusive proof that this omission of a central hierarchy was intentional, not inadvertent. The primary imperative driving the Anglican churches in America to break formally with the Church of England was the Oath of Supremacy that all prospective bishops and clergy were required to swear.[[9]](#endnote-9) It was the paradigm of legal language recognizing a hierarchical body: allegiance was pledged to the British monarch as the “only supreme governor” of the church.[[10]](#endnote-10) American clergy were both unwilling and unable to give this oath. One of the main tasks of the early general conventions was to obtain the agreement of the Church of England bishops to consecrate American bishops without this oath. James Duane was on the committee that developed a plan to achieve this objective, and he was the one who presented it to the general convention. He was one of six members on the committee designated to implement the plan, along with the first three prospective bishops, William White, Samuel Provoost and William Smith (Smith was never consecrated) and two other prominent lawyers, one a member of the Continental Congress and the other the mayor of Philadelphia.[[11]](#endnote-11) Between October 1785 and October 1786, no fewer than six letters were exchanged between the general convention and the English bishops on this topic.[[12]](#endnote-12) Both Duane and Jay played major roles in drafting this correspondence.[[13]](#endnote-13) The agreement reached was that the Oath of Supremacy would be replaced for American bishops by the recital “I do solemnly engage to conform to the doctrine and worship of the Protestant Episcopal Church….”[[14]](#endnote-14) Submission to a *hierarchy*, the monarch, was explicitly replaced not by submission to a different hierarchy, but by a pledge of *doctrinal* conformity. On this basis, after much negotiation as to what that doctrine really was, the British Parliament passed an act expressly exempting “for the time being” American bishops from the Oath of Supremacy. It surely is no coincidence that the Archbishop of Canterbury advised the general convention of the new act of Parliament by letter dated July 4, 1786, precisely ten years after the Declaration of Independence.[[15]](#endnote-15)

Thus, the two primary legal influences on TEC’s structure, the English Act of Supremacy and the United States constitutional framework, were of preeminent interest at precisely the time TEC was organized. None of the participants in creating TEC’s structures would have missed the significance of removing the hierarchy stipulated by English law. It was their primary objective. Nor could it have been accidental that just as the United States was creating a hierarchical federal government, with the two chief jurisprudential sources of the supremacy clause having been authored by the very people guiding the formation of TEC, the young church elected not to include an explicit central hierarchy in its governance. And although the TEC constitution has been amended many times since its adoption, including several times since the major decisions of the Supreme Court on religious hierarchies in the 1970’s, that original structure has never been changed.[[16]](#endnote-16)

On metropolitical authority:

From “Bishops’ Statement On The Polity Of The Episcopal Church,” pp. 15-16.

<http://anglicancommunioninstitute.com/wp-content/uploads/2009/04/bishopsstatement_pdf.pdf>

In this context, we must again emphasize that our vows contain no pledge of obedience to a metropolitan or central hierarchy as is explicit in the episcopal oaths taken in churches that have such hierarchies. For example, Serbian Orthodox bishops swear an “Episcopal-Hierarchical Oath” that they will “always be obedient to the Most Holy Assembly,” the very body identified in that church’s constitution as “the highest hierarchical body.”[[17]](#endnote-17) Similarly, Roman Catholic bishops are required to answer in the affirmative the following questions:

Are you resolved to build up the Church as the body of Christ and to remain united to it within the order of bishops under the authority of the successor of the apostle Peter?

Are you resolved to be faithful in your obedience to the successor of the apostle Peter?[[18]](#endnote-18)

A Bishop in the Church of England is required by canon law not only to swear an oath of allegiance to the monarch as already noted, but also to take “the oath of due obedience to the archbishop and to the metropolitical Church of the province wherein he is to exercise the episcopal office.”[[19]](#endnote-19) This oath is as follows:

In the Name of God, Amen. I, *N.*, chosen Bishop of the Church and See of *N.* do profess and promise all due reverence and obedience to the Archbishop and to the Metropolitical Church of *N.* and to their Successors : So help me God, through Jesus Christ.[[20]](#endnote-20)

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

Archbishop: In the declaration you are about to make, will you affirm your loyalty to this inheritance of faith as your inspiration and guidance under God in bringing the grace and truth of Christ to this generation and making Him known to those in your care?

Ordinand: I, AB, do so affirm, and accordingly declare my belief in the faith which is revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness; and in public prayer and administration of the sacraments, I will use only the forms of service which are authorized or allowed by Canon.[[21]](#endnote-21)

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

I will firmly believe and hold the catholic faith, according to the tradition of the apostles, of general councils and of other holy fathers, especially of the eight holy universal councils ... as well as of the general councils..., and to preserve intact this faith unchanged to the last dot, and to defend and preach it to the point of death and the shedding of my blood, and likewise to follow and observe in every way the rite handed down of the ecclesiastical sacraments of the church.[[22]](#endnote-22)

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

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

we cannot but be extremely cautious, lest we should be the instruments of establishing an Ecclesiastical system which will be called a branch of the Church of England, but afterwards may possibly appear to have departed from it essentially, either in doctrine or in discipline.[[23]](#endnote-23)

Indeed, we received the Episcopate only after a special enactment of the British Parliament exempted our Bishops from “the oaths of allegiance and supremacy, and the oath of due obedience to the Archbishop for the time being,” accepting our vows of conformity in substitution, and after our state churches passed an “Act of General Convention” “declaring their steadfast resolution to maintain the same essential Articles of Faith and discipline with the Church of England.”[[24]](#endnote-24)

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

On unlimited/supreme authority:

From “Is The Episcopal Church Hierarchical?”, p. 6.

<http://anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf>

All of these terms are common in the law and used in legal drafting to express the concept of hierarchy. When a legal instrument identifies a highest or final authority, this is the language used. It is important to note that hierarchy in the law is unrelated to whether the hierarchy possesses limited or unlimited power or authority. The highest body may have limited power. For example the federal government in the United States, the highest body in our system, is constrained by limits imposed by the constitution and the fundamental principle of our law that the reservoir of power is with the people and not in a “royal prerogative.” On the other hand, in many legal relationships several entities possess overlapping unlimited power. One such relationship familiar to everyone is joint ownership of property. It is a basic precept of property law that each joint owner enjoys unlimited use of the property.[[25]](#endnote-25) Any owner of a joint bank account can withdraw the entire amount. Similarly, unless restricted by agreement, any partner of a partnership can act for and impose legal duties and liability on the entire partnership.[[26]](#endnote-26) In the law of agency, which together with contract law is the foundation of the law governing religious societies, a principal retains complete unlimited power notwithstanding any delegation of power to an agent.[[27]](#endnote-27) If a principal and agent with power of attorney are sitting side-by-side, either has full legal power to act and bind.[[28]](#endnote-28) As will be explained below, the traditional rule of priority among bodies with unlimited or equal power is the “last in time” rule: the final word prevails. To change this result requires the use of the language of supremacy. Thus, the notion that power is unlimited is not relevant to an inquiry concerning hierarchy absent the language of supremacy, subordination, preemption or finality that is the indication of a hierarchical body.

1. Doe, p. 55; see also the Tenth Amendment to the United States Constitution, 1 U.S.C. Organic Laws, p. LXIII (2000). Strictly speaking, TEC does not have a provincial assembly since a province is defined as a group of dioceses under the jurisdiction of a metropolitan. See Doe, p. 48. Since TEC has no metropolitans, and indeed no authority higher than the diocesan bishop, it has no provincial assembly. Not even General Convention would constitute a provincial assembly under this definition. What is significant, however, is the general principle this presumption expresses, a principle found in many legal systems. [↑](#endnote-ref-1)
2. See p. 32, *infra.* [↑](#endnote-ref-2)
3. *Pennsylvania Journals* (1790), p. 8. [↑](#endnote-ref-3)
4. *Journals of General Conventions,* pp. 15, 18. [↑](#endnote-ref-4)
5. Id., pp. 25, 57. [↑](#endnote-ref-5)
6. Id., p. 49. [↑](#endnote-ref-6)
7. Id., p. 33. [↑](#endnote-ref-7)
8. Id., p. 43. [↑](#endnote-ref-8)
9. *The Case,* pp. 6-7. [↑](#endnote-ref-9)
10. See n. 17, *supra.* [↑](#endnote-ref-10)
11. *Journals of General Conventions,* pp. 23-25; Mills, p. 239. [↑](#endnote-ref-11)
12. Id., pp. 14-62. [↑](#endnote-ref-12)
13. For the role of Jay, see Marshall, pp. 237-38. [↑](#endnote-ref-13)
14. *Journals of General Conventions,* pp. 23, 53. [↑](#endnote-ref-14)
15. Id., pp. 55-56. [↑](#endnote-ref-15)
16. Bishops White and Provoost were consecrated at Lambeth Palace in 1787, the year the United States constitution was adopted. Both the TEC and United States constitutions were ratified in 1789. As noted in n. 34, *supra,* Duane and Jay are recognized by legal scholars studying federal supremacy, not by TEC historians, for their seminal roles in developing supremacy jurisprudence. [↑](#endnote-ref-16)
17. *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 716-18 (1976). [↑](#endnote-ref-17)
18. Catholic Church, *Rites of Ordination of a Bishop, of Priests, and of Deacons,* United States Conference of Catholic Bishops, 2003. [↑](#endnote-ref-18)
19. The Canons of the Church of England (2008), C 14, <http://www.cofe.anglican.org/about/churchlawlegis/canons> (accessed on Mar. 16, 2009). [↑](#endnote-ref-19)
20. Book of Common Prayer (1662), Cambridge Univ. Press, 1987. [↑](#endnote-ref-20)
21. Common Worship, <http://www.cofe.anglican.org/worship/liturgy/commonworship/texts/ordinal/bishops.html>, (accessed on Mar. 16, 2009). [↑](#endnote-ref-21)
22. Council of Basel, (Mar. 26, 1436), <http://www.ewtn.com/library/COUNCILS/FLORENCE.HTM#15>

    (accessed on Mar. 16, 2009). [↑](#endnote-ref-22)
23. *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835,* William Stevens Perry, ed., vol. I, p. 36, Claremont Mfg. Co., 1874. [↑](#endnote-ref-23)
24. Id., pp. 55-58. [↑](#endnote-ref-24)
25. 7 *Powell On Real Property* sec. 50.03. [↑](#endnote-ref-25)
26. Gregory, sec. 194, p. 313. [↑](#endnote-ref-26)
27. Id., sec. 83, pp. 156-57. [↑](#endnote-ref-27)
28. *See e.g.,* N.Y. Gen. Obligation Law sec. 5-1501 (a widely used power of attorney grants the power “in my name, place and stead in any way which I myself could do, if I were personally present…”). [↑](#endnote-ref-28)