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# Secularizing a Religious Legal System: Ecclesiastical Jurisdiction in Early Eighteenth Century England

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## ABSTRACT

*The early eighteenth-century English ecclesiastical courts are a case study in the secularization of a legal system. As demonstrated elsewhere, the courts were very busy. And yet the theoretical justification for their jurisdiction was very much a matter of debate throughout the period, with divine-right and voluntaristic conceptions vying for precedence. Placed in this context, the King's Bench decision in Middleton v Crofts (1736) represented an important step in the direction of limiting the reach of ecclesiastical jurisdiction, and did so on grounds that undermined divine-right justifications of the ecclesiastical court system as a whole.*

## KEYWORDS

*Secularization, Eighteenth Century, Ecclesiastical Courts, Middleton v Crofts, Canon Law*

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# I. Introduction

Explaining how religion goes from a significant and explicit force in public life to an essentially private affair is a complicated business. Political historians of early modern England divide into two camps on the matter. Until comparatively recently, the conventional answer was that religion ceased to be a significant force in public life after the Revolution of 1688.[1] Since the mid-1980s, a "revisionist" narrative has developed that places the date at 1750 or beyond.[2] Thus, the role of religion in early eighteenth century English life is a hotly debated topic among historians of the period. This article contributes to that debate. Specifically, it examines a range of contemporary printed sources showing that the constitutional position of the courts of the Church of England remained a divisive subject throughout the mid-1730s at least. At one level, the article represents a companion piece to earlier work quantifying the significant volume of litigation the church courts were handling during the period.[3] The fact that the ecclesiastical courts were as busy as they were throughout the country meant that the theoretical debate about whether they should exist at all had a very practical dimension. At another level, the article contributes to the historiographical debate noted above in a moderately revisionist direction. Finally, at the broader level suggested in the title, it provides a case study of one step in the secularization of a religious legal system.

What did the step toward secularization look like in 1730s England, and how did it happen? Three points emerge from the evidence surveyed here. First, as sketched in Section II, incompatible visions of religious authority in general and the legitimacy of the English ecclesiastical courts were publicly debated well before the 1730s. Second, as shown by the survey of printed literature in Section III, there was widespread support for voluntaristic and divine-right visions. Third, as explained in Section IV, a watershed moment occurred in 1736 when the King's Bench held, in *Middleton v. Crofts*, that the Church's canons of 1603 were not, by their own force, binding upon lay people in England. While defenders of the Church's courts may have had history on their side, the reformers had the politics of the moment on theirs. The decision was a victory for the newer, voluntaristic understanding of religious institutions over the older, divine right understanding. Viewed in that way, the decision represented a significant step in the secularization of English society.

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1 *See*, *e.g.*, David L. Keir, The Constitutional History of Modern Britain Since 1485, at 427 (D. Van Nostrand Co. 8th ed. 1966) ("As the sway of Latitudinarian ideas extended, questions of ecclesiastical organization and independence came to excite little interest among the clergy.").

2 *See*, *e.g.*, J.C.D. Clark, English Society, 1660–1832: Religion, Ideology and Politics During the Ancien Regime (2d ed. 2000); The Church of England, c. 1689–c. 1833: From Toleration to Tractarianism (John Walsh et al. eds., 1993).

3 *See* Troy L. Harris, *The Work of the Ecclesiastical Courts, 1725-1745*, *in*, Studies in Canon Law and Common Law in Honor of R.H. Helmholz (Troy L. Harris ed., 2015).

## II. Background to the Debate over the Constitutional Position of the Eighteenth Century Church of England

As in earlier periods of political change, the proper jurisdictional boundaries between Church and State were very much a subject of discussion at the constitutional level in early eighteenth century England. The bloodless ouster of the Roman Catholic monarch James II and in favor of the Protestants William and Mary (dubbed "The Glorious Revolution" by later Whig historians) forced people to rethink the conceptual bases for many of the Church's institutions, including the ecclesiastical court system. Why this should have been so is not difficult to understand. If the Lord's anointed was not secure on his throne, was the one anointing any more secure on his? Stated in more traditional theological terms, was the government of the Church of divine or human establishment? The Act of Union of 1707 created one British state in which there were two established religions, the episcopalian Church of England in South Britain and the presbyterian Church of Scotland in North Britain, officially putting an end to hopes of one kingdom professing one official religion. If episcopal government were of divine origin, then why give up the fight to bring the Church of Scotland into line? If the Church of England's government were of merely human origin, then why did the Church possess powers not enjoyed by other voluntary associations? For example, by what right did the ecclesiastical court system exist, and by what right did it enforce against lay people the canons of 1603, to which Parliament had not assented? Although such ecclesiological questions had long been the staple of debates between Churchmen and dissenters, such questions now divided the Church of England bishops themselves. The nature and legitimate extent of ecclesiastical jurisdiction was therefore an important battleground in the struggle to define the constitutional position of the Church after 1688.

The starting point for understanding the constitutional role of the Church of England in the eighteenth century is the Act of Union of 1707 uniting the Kingdoms of England and Scotland. The essence of the eighteenth century British constitution, according to Blackstone, consisted in the sovereignty of Parliament.[4] However, Parliament's jurisdiction had a practical, if not theoretical, limit:

> Upon these articles, and act of union, it is to be observed, 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again, but an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union." 2. That whatever else may be deemed "fundamental and essential conditions," the preservation of the two churches, of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitutions of either of those churches, or in the liturgy of the church of England, would be an infringement of these "fundamental and essential conditions," and greatly endanger the union.[5]

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4 1 William Blackstone, Commentaries *142-43.

5 *Id.* at *97-98. To the same effect is Andrew MacDowall Bankton, 1 An Institute of the Laws of Scotland 22 (Stair Soc'y 1993) (1751); 2 *id.* at 453 (Stair Soc'y 1993) (1752).

Historians have largely ignored or minimized the role of the Church of England and controversy surrounding its courts in their accounts of the eighteenth century British constitution.[6] But if "the constitutions of either of those churches" could only be altered at the risk of destroying the union as Blackstone maintained, then it is little wonder that attempts to tinker with any fundamental feature of the Church of England, such as its court system, should be the subject of vigorous debate. One could view Blackstone's statements regarding the constitutional position of the Church of England as simply lip service to the text of the Act of Union. Alternatively, one could read Blackstone as alluding to deeply-felt religious sentiment. But both readings risk obscuring the elephant in the room, namely, the latent tension between Parliamentary sovereignty and the constitution of the Church of England as it existed in 1707.

The latent tension between Parliamentary sovereignty (premised upon a voluntaristic theory of government) and divine right episcopacy became patent in the Bangorian Controversy. Sir Leslie Stephen described the Bangorian Controversy as "one of the most intricate tangles of fruitless logomachy in the language."[7] Given this daunting assessment, it is no surprise that few historians have ventured into that particular theological thicket. Nor shall I rush in where others have feared to tread, except to show that the Bangorian Controversy was not simply a fight about words, it was also a fight about the ecclesiastical courts.

According to the conventional historiographical treatment of the Bangorian Controversy, it was an argument over the nature of the institutional Church, in which Benjamin Hoadly, then bishop of Bangor, challenged the legitimacy of divine right theories of episcopacy, arguing instead that the Church was a merely voluntary association.[8] His effort to extend Lockean contractarian theory to the Church was attacked by a coalition of nonjurors (*i.e.*, those unwilling to swear allegiance to the Hanoverian monarchs) and High Churchmen including William Law, Thomas Sherlock, and Andrew Snape. In the end, the passions ignited were so intense that Convocation (the Church's version of Parliament) had to be prorogued, thereby bringing the combatants in the Bangorian Controversy to an uneasy truce,[9] without resolving the points at issue. Historians have tended to treat the Bangorian Controversy as revolving around the abstract themes of Church "government" and "discipline." But those abstract themes were embodied in concrete ways, namely, the ecclesiastical courts. Indeed, the principal combatants in the Bangorian Controversy were well aware that their ideas had consequences for the Church's courts.

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6 *See*, *e.g.*, Albert V. Dicey & Robert S. Rait, Thoughts on the Union Between England and Scotland (Macmillan & Co. 1920); 10 William S. Holdsworth, A History of English Law 41-42, 241, 423-24 (6th ed. 1938); 11 William S. Holdsworth, A History of English Law 4-21 (6th ed. 1938); Keir, *supra* note 2, at 427; Frederick W. Maitland, The Constitutional History of England: A Course of Lectures 332 (Cambridge Univ. Press 1950); Norman Sykes, From Sheldon to Secker: Aspects of English Church History, 1660-1768 (Cambridge Univ. Press 1959).

7 Leslie Stephen, 2 History of English Thought in the Eighteenth Century 156 (Peter Smith 3d ed. 1949) (1876).

8 *Id.* at 157-60; *see also* Henry D. Rack, *"Christ's Kingdom Not of This World:" The Case of Benjamin Hoadly Versus William Law Reconsidered*, *in* Studies in Church History 275-91 (Derek Baker ed., 1975); Norman Sykes, Church and State in England in the XVIIIth Century 292-93 (Cambridge Univ. Press 1934).

9 Sykes, *supra* note 7, at 53.

The title of Hoadly's sermon ("The Nature of the Kingdom, or Church, of Christ") pointed to the fundamental premise of Hoadly's argument: the Church was nothing more nor less than the Kingdom of Christ, which, as Christ told Pilate, was not of this world.[10] Because Christ was the sovereign law-giver in the Church, human attempts to add to or detract from the laws Christ gave were attempts to erect an *imperium in imperio* in Christ's kingdom: "it evidently destroys the rule and authority of Jesus Christ, as King, to set up any other authority in his Kingdom."[11] The laws Christ gave were, according to Hoadly, entirely concerned with enabling the Christian to attain everlasting happiness in the next life, the granting or withholding of which was the only reward or punishment contemplated by Christ's law: "They are declarations of those conditions to be performed, in this world, on our part, without which God will not make us happy in that to come."[12] In case the implications of this argument were not clear enough already, Hoadly specifically described what situation was incompatible with his view of the Church:

> If any men upon earth have a right to add to the sanctions of his law; that is, to increase the number, or alter the nature, of the rewards and punishments of his subjects, in matters of conscience, or salvation: they are so far from kings in his stead; and reign in their own kingdom, and not in his. *So it is, whenever they erect tribunals, and exercise a judgment over the consciences of men; and assume to themselves the determination of such points, as cannot be determined, but by one who knows the hearts; or, when they make any of their own declarations, or decisions, to concern and affect the state of Christ's subjects, with regard to the favor of God: this is so far, the taking Christ's Kingdom out of his hands and placing it in their own.*[13]

Needless to say, there was not much room in this view of the Church for ecclesiastical courts judging the internal forum, nor their ultimate weapon, excommunication.

Although Hoadly ostensibly aimed his attack at the nonjurors' theory of the Church as a divinely-ordained institution, his denial of the powers claimed by Church of England clearly implicated the ecclesiology of High Church Tories and Whigs as well. Drawing out the antinomian implications of Hoadly's position, Sherlock claimed that Hoadly's heresy was dangerous to civil as well as religious society, arguing that Hoadly had sapped the foundations of the moral law and, therefore, the basis upon which magistrates of all sorts ensured the existence of moral society.[14] Like Sherlock, Snape engaged in a *reductio ad absurdum* attack upon Hoadly's position. If Hoadly's principles were carried to their logical conclusion, Snape argued, then:

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10 *John* 18:36.

11 Benjamin Hoadly, The Nature of the Kingdom, or Church, of Christ 28 (London, James Knapton & Timothy Childe 1717).

12 *Id.* at 17.

13 *Id.* at 14 (emphasis added).

14 Thomas Sherlock, Some Considerations Occasioned by a Postscript from the Lord Bishop of Bangor to the Dean of Chichester, Offered to His Lordship (London, John Pemberton 1718).

> [A]ll articles and creeds are destroyed at once, which were settled by men so assembled [i.e. "by legal authority, in due subordination to the civil magistrate"]. All acts of general councils were void and null from the beginning. Nay, even the decrees of the council at Jerusalem, held by the Apostles themselves, were never of any force; they sat there as usurpers, they never had a right to make any laws, which belongs solely and peculiarly to their King Christ Jesus. All, without exception, who have ever gathered themselves together in a synodical meeting, to join in the framing such canons, rules or ordinances, as have been thought proper to oblige others to a unity of profession, are, in your Lordship's notion, no better than invaders of Christ's Kingdoms, erectors of an illegal tribunal, and exercisers of an authority, that was never committed to them.
>
> Upon these principles, I do not see how your Lordship can offer to take your place in the provincial synod: how you can require subscriptions or declaration of those whom you ordain, or exercise almost any act of episcopal jurisdiction.[15]

In short, Snape implied, it was self-defeating for Hoadly to seize upon Christ's statement to Pilate because, on Hoadly's own terms, the council that decided to include the Gospel of John in the canon had no legitimate rule-making power. More to the point, Snape defended the legitimacy of "episcopal jurisdiction" as such, including the right to participate in making canons "to oblige others to a unity of profession."

A similar point in defense of the Church's coercive power was made by the nonjuror William Law. In his refutation of Hoadly's view that the Church's sentence of excommunication carried no weight with God, Law argued that

> the power of excommunication, is a judicial power, which belongs to particular persons which they have a right to exercise from the authority of Christ; and that persons so excommunicated are not to be looked upon [as Hoadly argued], as persons who are only to be abhorred and avoided by Christians, as any man may avoid those he dislikes, but as persons who are to be avoided by Christians, because they lie under the sentence of God, and are by his authority turned out of his Kingdom.[16]

Thus, Law rejected Hoadly's notion of the Church as a voluntary association and, with it, the idea that excommunication was an illegitimate, human invention. Quite the contrary, Law argued, the coercive authority of the Church was directly from God.

Although the Bangorian Controversy is generally taken to have died down as quickly as it erupted, such was not the case. To the contrary, one of the central themes of the Bangorian Controversy, the legitimacy of ecclesiastical jurisdiction,

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15 Andrew Snape, A Letter to the Bishop of Bangor, Occasioned by His Lordship's Sermon Preach'd Before the King at St. James's, March 31st, 1717, at 35-36 (London, Jonah Bowyer 1717).

16 William Law, Three Letters to the Bishop of Bangor 112 (London, W. Innys and J. Richardson 9th ed. 1753).

continued to be debated, albeit in different contexts, well after the prorogation of Convocation in 1717.

## III. The Debate over Ecclesiastical Jurisdiction in the 1730s

There was widespread support for both the voluntaristic and divine-right view of ecclesiastical authority, and the legitimacy of the ecclesiastical courts was an important aspect of the debate in the 1730s over "Church power."[17] Much of the fight over the ecclesiastical courts was, no doubt, inspired by the rise of the courts' chief defender, Edmund Gibson, Bishop of London, as Prime Minister Sir Robert Walpole's ecclesiastical minister. But while one might have expected Gibson's enemies to attack his support of the ecclesiastical courts, it is rather more surprising to discover that the attacks were couched in terms drawn, more or less explicitly, from the Bangorian Controversy. This Section surveys a variety of printed sources in which the debate played out: bishops' visitation charges, treatises on English canon law, and pamphlets supporting or attacking Parliamentary proposals to reform the ecclesiastical courts.

### *A. Visitation Charges*

One way in which political debates of the day were carried on outside London was through sermons, often printed for consumption by a wider audience than those present in person. What the assize sermon was to the assizes, the visitation charge was to the ecclesiastical courts. Not surprisingly, therefore, the visitation charge was often the occasion for clergy to reflect upon the nature of the post-Revolutionary Church and the place of the ecclesiastical courts in it. Bishops' and archdeacons' visitation charges to the clergy under their jurisdiction are of particular interest in this regard because the visitation was the occasion upon which the disciplinary jurisdiction of the ecclesiastical courts was exercised. Indeed, it is probably no coincidence that some of the most thorough defenses of the Church's government were published as visitation charges.[18] Those opposed to the Church's coercive

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[17] Clark, *supra* note 3, at 348-61; Norman Sykes, Edmund Gibson, Bishop of London, 1669-1748: A Study in Politics & Religion in the Eighteenth Century 150-51 (1926).

[18] For example, Edmund Gibson used a visitation charge to attack Matthew Tindal's *Christianity as Old as the Creation* because Tindal attempted to ground the moral law entirely upon unaided reason. *See* Edmund Gibson, The Charge of Edmund, Lord Bishop of London, to the Clergy of his Diocese; in His Visitation Begun in the Cathedral Church of St. Paul, the 28th Day of May, 1730. Concerning the Proper Methods of Opposing and Defeating the Present Attempts of Infidels Against the Christian Religion. (London, Sam Buckley 1731). Between 1717 and 1726, Roger Altham, Archdeacon of Middlesex published eight different charges to the clergy of his archdeaconry explicitly directed against the Hoadlyite vision of the Church, while his successor in that office, Daniel Waterland, regularly employed his visitation charges to Hoadly's views on the Trinity and the Lord's Supper. *See, e.g.*, Roger Altham, The Harmony of the Sacred and Civil Polity: Or, The Sovereignty of Jesus Christ no Injury to the Civil Power: A Third Charge Delivered to the Clergy of the Archdeaconry of Middlesex (London, G. Strahan 1719); Roger Altham, Church Authority Not an Universal

jurisdiction did not, on that account, refrain entirely from publishing visitation charges, but they generally stressed only the obligations voluntarily assumed by the clergy. After briefly explaining what visitations entailed, this section examines several visitation charges in detail.

Bishops were expected to visit their dioceses in the first year after their enthronement (the "primary visitation") and every third year thereafter (the "triennial visitation"), archdeacons conducting visitations in the years in which there were no episcopal visitations.[19] A "visitation" connoted something more specific than mere physical presence, however: "But a visitation, as we would use the word here, implies some act of jurisdiction and coercive authority and generally speaking has a cognizance of causes annexed to it."[20] Thus, visitations were primarily conceived of as judicial events in which coercive jurisdiction was exercised; as a result, the frequency with which bishops and archdeacons held visitations would seem to be one way of gauging beliefs about the legitimacy of ecclesiastical jurisdiction. In practice, however, the conduct of visitations was complicated by a variety of factors,[21] and just how faithful the eighteenth century episcopate was in fulfilling the expectation of triennial visitations is a matter of some debate.[22] However that may be, the printed visitation charges reveal two very different accounts of and justifications for the Church's coercive jurisdiction. Whereas High Churchmen tended to rely upon the traditional argument that the canon law received its legitimacy through ancient usage and confirmation by Convocation, Low Churchmen argued that only those laws to which individual clergymen had necessarily given their assent were binding.[23]

### *1. High Church Visitation Charges*

Because the chief object of the visitation was the inspection of persons and things subject to ecclesiastical jurisdiction, the role of the ecclesiastical courts in the discipline and government of the Church was a recurring theme in visitation

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Supremacy: A Fourth Charge Delivered to the Clergy of the Archdeaconry of Middlesex (London, G. Strahan 1720); Daniel Waterland, The Sacramental Part of the Eucharist Explained in a Charge delivered in Part to the Clergy of Middlesex at the Easter Visitation, 1739 (London, Innys & Manby 1739).

19 *See Canon 60*, *in* Synodalia 281 (Edward Cardwell ed., Oxford, Oxford Univ. Press 1842).

20 John Ayliffe, *Of Visitations Provincial, Episcopal, &c.*, *in* Parergon Juris Canonici Anglicani 514 (London, 1726).

21 Sykes, *supra* note 9, at ch. 3.

22 Viviane Barrie-Curien, *The Clergy in the Diocese of London in the Eighteenth Century*, *in*, The Church of England, *supra* note 3, at 86; Jeremy Gregory, *The Eighteenth-Century Reformation: The Pastoral Task of Anglican Clergy After 1689*, *in*, The Church of England, *supra* note 3, at 67; Mark Smith, *The Reception of Richard Podmore: Anglicanism in Saddleworth, 1700-1830*, *in*, The Church of England, *supra* note 3, at 110; Sykes, *supra* note 9, at ch. 3.

23 To be sure, the distinction between "High" and "Low" is not a hard-and-fast one. I use the terms simply to designate two different ways of thinking about ecclesiastical jurisdiction. "High Churchmen" (equivalent modern terms would be "right-leaning," "conservative," or "traditional" Churchmen) were generally sympathetic to divine-right theories of ecclesiastical authority. "Low Churchmen" (whose counterparts today would be styled "left-leaning," "liberals" or "progressives"), on the other hand, viewed the Church as essentially human in origin and thus like other voluntary associations of people.

charges, particularly among High Churchmen such as Edmund Gibson and Richard Smalbroke. Indeed, Gibson devoted a great deal of attention to the subject of visitations early in his career, while Archdeacon of Surrey. A collection of Gibson's early writings on the subject published in 1717 contains themes that ran through many visitation charges.[24] In discussing archdeacons' supervision of parish church fabric, Gibson recommended proceeding informally at first:

> In laying out the several steps and methods to be taken in a parochial visitation, I have pursued the course which I conceive to be strictly legal; by a citation in form, and by the attendance of register and apparitor, as well to make due proof of the citation, as to render the admonition for repairs a proper foundation for proceeding directly to ecclesiastical censures, in case they are disobeyed. But I have found by experience, that it is in many respects much more for the ease and convenience of archdeacons, and not less for the benefit of the Church, to proceed in that work unattended by officers, at least for the first time: and if it shall appear, that the directions which the archdeacon gives for repairs, in his own person and upon his own view, are disregarded (as they very rarely will be,) then may he have recourse to the other more solemn and judicial way.[25]

Other bishops, too, used their visitation charges to encourage discriminating use of the Church's courts. Under Canon 109, the primary responsibility for initiating proceedings in the ecclesiastical courts for morals offenses within the parish lay with the churchwardens. In addition, however, the clergy themselves were authorized to present such offenders, under Canon 113. Richard Reynolds, Bishop of Lincoln, saw in this dual responsibility an opportunity to reform the manners of the people, although, like Gibson, Reynolds stressed the use of the ecclesiastical courts only as a last resort.[26]

Nor did Gibson shrink from suggesting how his clergy could make use of the ecclesiastical courts:

> Two vices I will name in particular, which are more common and more daring than the rest, drunkenness and swearing: But notwithstanding they are so very common, and that the Canon concerning presentments makes express mention of those two by name, yet I believe they are seldom found among the crimes presented: For what reason I cannot conceive, unless it be, that the laws of the state have appointed temporal penalties for them. But as there is nothing in those laws that has taken away the authority of the Church, so is there no cause why the exercise of that authority in these particulars should be discontinued; at least, till we see the temporal laws executed with greater zeal and better effect.[27]

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24 Edmund Gibson, Of Visitations Parochial and General (London, B. Barker & C. King 1717).

25 *Id.* at iv-v.

26 Richard Reynolds, The Bishop of Lincoln's Charge to the Clergy of the Archdeaconries of Huntington, Bucks, and Bedford 5-6 (John Wyat 1727).

27 Edmund Gibson, Directions Given to the Clergy of the Diocese of London, in the Year 1724, at 39 (London, Edward Owen 1744).

Visitation charges also frequently touched upon the importance of the payment of ecclesiastical revenues, particularly tithes. Gibson, for example, was concerned that clergy would allow themselves to be deprived of the ecclesiastical revenues that were their due, to their own prejudice and to the prejudice of their successors.[28] Similarly, Richard Smalbroke, while Bishop of St. David's, warned his clergy to be on their guard against spurious claims to a partial or total exemption from the payment of tithes (i.e. a *modus*).[29] The reasons offered for this advice suggest that bitter experience might have been Bishop Smalbroke's tutor in Clergymen's Law:

> This is a piece of prudence that would be extremely advantageous to the interests of the ecclesiastical body in general, of which every minister is a trustee as well as a member. And indeed, till this method be practiced more universally, every successor in a parochial cure is unavoidably in a state of ignorance for several years, and liable to be imposed on by those that are ready to make use of so inviting an opportunity; who, though very ignorant in other respects, are often very knowing in those affairs, within the narrow limits of their own parish, to which they have been bred and have confined their thoughts. Affairs, in which clergymen have been little instructed, and therefore come into an active state of life raw and unskillful in secular business, and that more especially from the retirements of the university. And if the impositions upon almost every clergyman during the first years of his incumbency on a parochial cure were duly computed, the benefit of the method now recommended would appear in a much clearer light.[30]

The efficacy of the ecclesiastical courts as an instrument of Church government was subject to practical limitations, however. Because the Toleration Act meant that Trinitarian Protestants were no longer obliged to worship in the Church of England, a too-ready use of the courts, for example to enforce payment of tithes, could backfire, as John Dudley, Archdeacon of Bedford, pointed out:

> If we betake ourselves to methods which the laws direct in vindication of our rights or injured characters, 'tis no unusual thing for the more obstinate and illiterate sort immediately to turn their backs upon the Church to desert and forsake its worship and communion. The next step is to shelter themselves in a conventicle, and by this means they imagine, they shall fully avenge themselves upon their own pastor, by running into the embraces of such as are industrious to promote separation from the Church, to foment and encourage divisions and schisms.[31]

In sum, many bishops and archdeacons used their visitations as opportunities to recommend the use of the Church's judicial machinery to carry out the twin goals

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28 *Id.* at 70-71.

29 Richard Smalbroke, The Charge of the Right Reverend, Richard, Lord Bishop of St. David's 33-34 (London, John Wyat 1726).

30 *Id.* at 34-35.

31 John Dudley, A Charge to the Clergy Within the Archdeaconry of Bedford 29 (London, 1736).

of inspection of persons and things. Significantly, the authority of the courts and canon law was not so much defended as assumed. The case was very different with other bishops and archdeacons, however.

### *2. Low Church Visitation Charges*

One might expect Low Churchmen such as Hoadly to ignore or denounce the ecclesiastical courts in their visitation charges. In fact, however, their approach was rather more subtle. When Low Churchmen visited their jurisdictions at all, they tended to stress their view of the Church as a voluntary association, admitting the obligation of only those laws to which clergymen had explicitly assented. Hoadly, for example, plainly implied that, apart from the Act of Uniformity (which bound laity and clergy alike), clergymen were obliged to obey the law of the Church only insofar as they had voluntarily engaged to do so.[32]

A similar tack was taken by Thomas Sharp, Archdeacon of Northumberland. In his visitation charge of 1731 on the "Different Degrees of Obligation to the Ecclesiastical Laws," Sharp virtually rejected the authority of any laws to which individual clergy had not explicitly consented.[33] According to Sharp, the clergy's explicit agreement to observe the rubrics of the Prayer Book made that obligation of the highest order.[34] With respect to the rest of the ecclesiastical laws of England, however, Sharp treated them and the courts in which they were applied as virtually foreign to the concerns of the clergy:

> I apprehend we may look upon ourselves as discharged from all such [laws] as are by length of time, and through desuetude, antiquated and grown obsolete, though they were never actually repealed by any proper authority. . . . Of this sort are the provincial and legatine constitutions. . . . I should indeed except the spiritual courts. I do not know what weight the old constitutions may have in them. To those who study the canon law they may be perhaps of great service; but with respect to the parochial clergy, whose obligations I am now considering to conform themselves to the canon laws, these old constitutions seem to have lost their force and credit; and serve at present like old coins, rather for matter of curiosity or criticism, than for immediate use.[35]

The canons of 1603 stood midway between the Prayer Book and the "old constitutions," in point of obligation. However, even many of these, Sharp contended, were impracticable, and the clergy were not bound by such if they could claim an express or tacit dispensation from their observance.[36]

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32 Benjamin Hoadly, A Charge Delivered to the Clergy, At the Primary Visitation of the Diocese of Sarum, in the year MDCCXXVI, at 14 (London, James & John Knapton 1726).

33 Thomas Sharp, The Rubric in the Book of Common Prayer and the Canons of the Church of England 5 (London, J. & P. Knapton 1753).

34 *Id.* at 6.

35 *Id.* at 9-10.

36 *Id.* at 11-14.

That Low Churchmen saw visitation charges as a natural opportunity for reiterating their antipathy toward theories of divine-right episcopacy is shown with particular clarity in the 1731 charge of William Bowman, vicar of Dewsbury. In arguing that the clergy claimed powers they did not rightfully possess, Bowman echoed Hoadly's argument in the Bangorian Controversy that the existence in England of a Church with temporal authority created an *imperium in imperio*. He pointed to two powers in particular, the power to make laws for the Church and the power to excommunicate offending members. With respect to the first power, Bowman virtually quoted Hoadly, arguing that,

> If indeed the clergy of any nation have a power of making laws and canons independent of the civil powers, if they can assemble together in Convocation, when and where they think proper, to inquire into offenses and regulate the Church, they are so far from being subjects, that they are really the presidents and princes of the earth; kings of temporal kings, to whom all mankind are subjects. If they can do this, what should hinder them from unthroning majesty? What should hinder them from making laws contrary to laws, and overturning nations at pleasure?[37]

With respect to the power of excommunication, Bowman likewise endorsed Hoadly's position:

> By authoritative absolution and excommunication, the clergy sometimes mean an absolute power of admitting into, or excluding from, the kingdom of heaven, whom they think proper; at other times a power of admitting them into, or excluding them from their society upon earth, in a judicial way.
>
> In the later case, I have showed before they have no authority, but what they derive from the civil power; as it appears likewise from the procedure of all our ecclesiastical courts.[38]

To the contrary, Bowman argued, the power of excluding people from heaven belonged to God alone.[39] In this 1731 charge, therefore, one can see not only the continuation of the Bangorian Controversy into the 1730s but also its continuation in a context particularly related to the exercise of ecclesiastical jurisdiction, an archdeacon's visitation.

One wag published a versification of Bowman's sermon, in which the foregoing passage concerning Convocation's power of enacting canons was rendered thusly:

> Fine times indeed, were priests permitted
> To make what acts and laws best fitted
> Their int'rest or their inclination,

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37 William Bowman, The Traditions of the Clergy Destructive of Religion: With an Enquiry Into the Grounds and Reasons of Such Traditions 21-22 (London, Stephen Austen 1731).

38 *Id.* at 23.

39 *Id.* at 23-25.

> Without leave of the heads o' th' nation,
> In Convocation meet, debate,
> And what they pleas'd to regulate!
> For thus o'er princes they'd be Kings,
> And crowns and scepters useless things.
> This once allow'd, the rogues would soon
> Kick all their princes from the throne:
> Laws against laws they wou'd enact,
> And ev'ry nation be ransacked:
> All Kingdoms be turn'd topside turvy,
> To gratify their humour scurvy.[40]

Bowman's observations regarding excommunication received similarly witty treatment:

> Authoritative absolution
> Is ev'ry way a gross delusion;
> A saucy impudent pretension,
> An insolent high Church invention.
> Sometimes this term in clergy hands
> For pow'r without all limits stands,
> Of shutting out of, or admitting
> Such men to heav'n as they think fitting:
> It signifies, at other times,
> A pow'r, for some enourmous crimes,
> To vote men in the Church communion,
> Or seperated [sic] from its union.
> In one sense I've already shewn,
> Our bold pretenders pow'r have none,
> But what they from the state receive,
> Which pow'rs of every sort must give.
> No argument like matter of fact is;
> Remember therefore what's the practice
> O' th' courts ecclesiastical,
> Since popery receiv'd its fall;
> Then every word, I've utter'd here,
> True as the Gospel will appear.[41]

Not everyone was so sanguine about the import of Bowman's sermon, however. One anonymous author responded that the Church's authority over its members was entire, notwithstanding the legislative supremacy of Parliament.[42] Had Bowman responded to this argument, he might have pointed out that, even if all authority came from God, the question of who had authority to decide between conflicting claims of "ecclesiastical" and "civil" society remained.

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40 Christopher Crambo, Mr. Bowman's Sermon, preach'd at Wakefield in Yorkshire Versify'd 25 (London, H. Cook 1731).

41 *Id.* at 27.

42 Remarks on a Pamphlet Intitled, The Traditions of the Clergy Destructive of Religion, &c. 27-28 (London, J. Wilford 1731).

### *B. English Canon Law Texts*

Visitation charges were not the only form of practical literature that implicated the constitutional position of the Church and its courts. A characteristic feature of eighteenth century legal literature in general and the literature of the canon law in particular was its use of historical evidence to lend legitimacy to a particular political viewpoint. This section takes a close look at the work of two of the most important practitioners of the craft, Edmund Gibson and John Ayliffe.

By the early eighteenth century there were numerous specialized treatises on aspects of ecclesiastical jurisdiction which often had a clear polemical element. For example, William Bohun's book, *The Law of Tithes*, carried on a tradition among common lawyers begun by John Selden (1584-1654),[43] of attacking the divine-right theory of tithes.[44] Other treatises addressed specific topics such as *quare impedit*,[45] testaments,[46] spousals,[47] and executors.[48]

The single most controversial defense of the ecclesiastical courts in the early eighteenth century was Edmund Gibson's "Introductory Discourse, concerning the Present State of the Power, Discipline, and Laws, of the Church of England," contained in his *Codex Juris Ecclesiastici Anglicani* (1713).[49] As Holdsworth noted, Michael Foster, later judge of the King's Bench, wrote a "very able pamphlet" attacking Gibson's high-flying view of the ecclesiastical courts.[50] What Holdsworth did not point out was, first, that Foster's attack came over twenty years after the *Codex* was first published, when Gibson was at the height of his political power as Walpole's ecclesiastical minister and, second, that Foster's attack repeated some of the most important arguments advanced by Hoadly during the Bangorian Controversy. Although Holdsworth made no mention of the fact, Foster's argument was itself subjected to a withering critique by John Andrews, an advocate of Doctors' Commons. Because the thrust-parry-riposte of the exchange illustrates the resilience of issues raised in the Bangorian Controversy, it is worth examining in some detail.

Like the Bangorian Controversy and the visitation charges, the Gibson-Foster-Andrews debate over the constitutional position of the Church revolved around two

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43 John Selden, The Historie of Tithes (Da Capo Press 1969) (1618).

44 William Bohun, Law of Tithes 13-14 (London, W. Meadows 4th ed. 1760). Blackstone, too, contributed his two-cents' worth on the subject. *See* 2 William Blackstone, Commentaries *25.

45 John Mallory, Quare Impedit (London, Thomas Astley 1737).

46 Henry Swinburne, A Brief Treatise of Testaments and Last Wills (Garland Pub. 1978) (1590).

47 Henry Swinburne, A Treatise of Spousals, or Matrimonial Contracts (London, Daniel Brown 2d ed. 1711).

48 Thomas Wentworth, The Office and Duty of Executors (London, Andrew Crooke 3d ed. 1641). This work originally appeared anonymously and is sometimes attributed to Sir John Doddrige; subsequent editions appeared as late as 1774.

49 Edmund Gibson, Codex Juris Ecclesiastici Anglicani: Or, the Statutes, Constitutions, Canons, Rubrics, and Articles of the Church of England, Methodically Digested Under Their Proper Heads, at xvii-xxxi (London, R. Whitledge 1713). For a brief account of Gibson and the context and contents of the *Codex* see J.H. Baker, Monuments of Endlesse Labours: English Canonists and Their Work, 1300-1900, at 95-107 (1998).

50 12 Holdsworth, *supra* note 7, at 136, 610.

related issues, the legitimacy of the Church's coercive jurisdiction and the authority of the canon law. Gibson made explicit the divine-right premise upon which his "Introductory Discourse" depended:

> The power which is vested in the bishops, for the due administration of government and discipline in the Church of England, appears by the form of consecration to have a twofold original, from the word of God, and from the laws of the land.[51]

As a result of this "twofold original," Gibson argued, the Church's coercive jurisdiction over spiritual matters existed by divine right, but the specific manner in which the Church exercised that jurisdiction was derived from the Crown.[52] The specific statutory basis of the courts' jurisdiction, Gibson argued, was the Henrician Statute of Appeals,[53] which recited that the body politic of England had two aspects, the spirituality and the temporality, each with its own sphere of jurisdiction derived from the royal duty to administer justice. These two jurisdictions, moreover, "do conjoin together in the due administration of justice, the one to help the other."[54] Thus, Gibson attempted to reconcile divine-right episcopacy and the jurisdiction it entailed with the authority of "the laws of the land" to declare how that jurisdiction could be exercised. So far, so good. But Gibson did not identify "the laws of the land" with Parliamentary statutes alone.

According to Gibson, the sources of English ecclesiastical law were three in number: the common law, the canon law, and the statute law. Consistent with Blackstone's later classification, Gibson treated the common law as the common custom of the realm and therefore part of the *jus non scriptum*: "And as the spirituality is an essential part of the English constitution, and of a distinct nature and administration from the temporality; so hath it its common customs, and *jura non scripta*, as well as the temporality."[55] The canon law had two aspects, according to Gibson, the foreign and the domestic. Prior to the Reformation the foreign canons were in force in England "by virtue of their own authority." After the Reformation those canons continued in force on the basis of consent, usage, and custom.[56] Domestic canons, by contrast, were those enacted by the provincial convocations and confirmed by the King. They were binding upon the whole realm, including the laity, Gibson argued.[57] Finally, statutes were, from the standpoint of the ecclesiastical law of England, Parliamentary enactments designed to supplement the law of the Church. In recognizing Parliament's authority over the Church, Gibson warned that all things are lawful but not all things are helpful. Indeed, usurpation of spiritual functions by the temporality posed a danger to the "general frame of our constitution."[58]

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51 Gibson, *supra* note 50, at xvii.
52 *Id.* at xvii-xviii.
53 Ecclesiastical Appeals Act 1532, 24 Hen. 8, c. 12 (Eng.); *see also* Submission of the Clergy Act 1533, 25 Hen. 8, c. 19 (Eng.).
54 Gibson, *supra* note 50, at xix (quoting Ecclesiastical Appeals Act 1532, 24 Hen. 8, c. 12 (Eng.)).
55 *Id.* at xxvii.
56 *Id.* at xxviii.
57 *Id.* at xxix-xxx.
58 *Id.* at xxxi.

Foster took issue with both of Gibson's arguments, denying that the Church had any power by divine right, much less the power to pass canons binding upon the laity without Parliamentary consent. He premised his attack on Gibson's *Codex* on grounds that plainly echoed Hoadly's famous sermon:

> When our blessed Savior was questioned by Pilate, concerning a kingdom he was charged to have aspired after, in opposition to the government under which he lived, he confessed that he came into the world in order to set up a kingdom in it; but he, at the same time, satisfied the Roman governor, that his kingdom could give no reasonable ground of jealousy to Caesar; for it would not interfere with any of Caesar's rights. It was not a kingdom of this world; it was the empire of truth and righteousness in the hearts of his faithful subjects; whose obedience he intended to reward in his kingdom, in the future invisible state.[59]

The result of this view of the Church was that any power the Church had was by virtue of human law alone. Indeed, a recurring theme in Foster's critique of Gibson's *Codex* generally and the "Introductory Discourse" in particular was that, by ascribing to the Church powers founded upon the divine law, Gibson was following in the footsteps of the medieval popes.[60] The end result of such an *imperium in imperio*, Foster warned, was popery: "And if the principle of a right of jurisdiction, underived from the civil magistrate, doth not always lead to the popery of the Church of Rome, it leads to a state of things, equally mischievous and more absurd; I mean popery at our doors."[61]

With respect to the authority of Convocation to adopt canons binding upon the laity, Foster again echoed themes of the Bangorian Controversy:

> If the *Codex* should ever fall into the hands of a person utterly unacquainted with the history and constitution of England, he would probably conclude from this, and other passages I shall have occasion to mention, that the two legislatures his Lordship [i.e. Gibson] speaks of have, from time to time, been assembled for the different ends mentioned by him, as often as the exigencies of Church or State required it; the one to frame laws for the Church, the other for the State. He would likewise conclude, that in point of authority, the two legislatures are equal, within their respective provinces; and that one hath not ordinarily intermeddled, in the proper business of the other. These conclusions, I think, a reader, utterly ignorant of our history and laws, would naturally draw from his Lordship's manner of expressing himself here, and in other places, concerning our two legislatures as now subsisting among us. But how would he be surprised to be told, that the present age is indebted to our spiritual legislature for no more than one short body of laws [i.e. the canons of 1603], compiled within these last 200 years? That, indeed, other canons and constitutions were framed by our ecclesiastical legislature, so long ago as the reigns

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59 Michael Foster, An Examination of the Scheme of Church-Power, Laid Down in the Codex Juris Eccelsiastici [sic] Anglicani, &c. 1 (London, J. Roberts 1735).

60 *Id.* at 4-5.

61 *Id.* at 23.

> of Queen Elizabeth and Charles I. But that the authority of the former [i.e. the canons of 1597], through some defect in the royal instrument of confirmation, expired with the Queen: And that the latter [i.e. the canons of 1640] were universally exploded as soon as made; and never had any other effect, than to draw a severe censure from the temporal, upon the spiritual legislature. These things, I say, would probably give some surprise to a person, who hath learned from his Lordship to conceive otherwise concerning our ecclesiastical legislature. But his surprise will be greatly increased, when he comes to be informed, that this legislature is absolutely under the control of the other; which hath set bounds to it, over which it dares not pass: That even the subjects of its inquiry and debate, as well as the extent of its ordinance in point of obligation, are prescribed by statute law, that it cannot so much as attempt any canons or constitutions, without a royal license: And that none of its ordinances are binding, even against the private customs of a single parish.[62]

The response to Foster's attack came not from Gibson himself but from one of the advocates of Doctors' Commons, John Andrews. Andrews rejected the premise of Foster's argument and, with it, the conclusions he derived:

> The first objection, then is, that his Lordship [i.e. Gibson] by deriving the episcopal power from a twofold original, viz. from the word of God, and from the laws of the land, is either contradictory, or setting up a claim of independency on all human authority.
>
> The law of God is one of the grounds of the laws of England, an essential and constituent part thereof, and by being incorporated therewith does not thereby lose its divine original, unless the author would insinuate that claiming a right from the law of God is setting up a foreign power. A recognition therefore of a right under a divine authority, cannot be called an original grant by the laws of the land; yet where a statute is declaratory, what is thereby declared may with great propriety be said to appear by that statute.[63]

Moreover, Andrews denied that basing the jurisdiction of the Church upon divine law entailed erecting an *imperium in imperio*:

> That the temporal and spiritual jurisdictions are separate and distinct, both flowing from the Crown, as the fountain of jurisdiction, and under his majesty as supreme head of both; is the language of all our laws, and the opinion of all our greatest lawyers.[64]

Thus, the basic issue was the constitutional position of the Church: did the sovereignty of the King-in-Parliament over temporal matters extend to ecclesiastical matters as

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62 *Id.* at 112-114.

63 John Andrews, An Answer to a Late Pamphlet Entitled An Examination of the Scheme of Church-Power Laid Down in the Codex Juris Ecclesiastici Anglicani, &c 5 (London, J. Roberts 1735).

64 *Id.* at 38.

well (as Foster argued) or did sovereignty over ecclesiastical matters reside in the King-in-Convocation (as Andrews maintained)?

Andrews also addressed the authority of Convocation to legislate for the country. Noting that Foster had asserted that, "the subject is bound by no laws, to which he is not a party in person or by representation," Andrews countered that,

> I believe he will hardly persuade the gentlemen of Great-Britain, especially those of the House of Commons, so far to part with their temporal rights, as to discharge all those subjects of Great-Britain from their obedience to the laws made by them in Parliament as part of the legislature, who have no vote in the choice of members, who are at least three parts in four, and are therefore not otherwise represented than by the implication of law.[65]

No, Andrews argued, the premise of Foster's attack on Convocation served equally to undermine the authority of Parliament. Nor did Foster's common law sources undermine Convocation's authority, Andrews maintained. After reviewing the cases upon which Foster relied, Andrews concluded that, "as I am informed, there never yet has been any one determination in our courts of justice, that in matters spiritual the laity are not bound by the canons: And if there had, the Examiner [i.e. Foster] is not guilty of concealments of that kind, and would, no doubt, have mentioned it."[66]

Not content to meet Foster on legal grounds alone, Andrews also published a considerably less technical (and more personal) attack. Seizing upon Foster's obvious allusion to Hoadly's sermon, Andrews began his sarcasm-laden attack:

> The author of the *Examination of the Scheme of Church-Power*, opens his scene as a divine, with the use and doctrine that an eminent prelate of our Church put our savior's words to Pilate to, when he said his Kingdom was not of this world, and he preached a famous sermon upon: his shewing himself the disciple of such a teacher, must recommend him, he knew, to the favorable opinion of a great many worthy persons; and dispose them to look upon him as some sort of Churchman, or Christian at least; and it is possible he may be one or the other. But it was proper for him, to prevent suspicions, to give us notice of it at his first setting out, because his whole design speaks him not to be the one, and several expressions which he lets fly, not too much of the other.[67]

In case Foster's guilt was not sufficiently established by his association with Hoadlian theology, Andrews made a point of further associating Foster with the disaffected Parliamentary opposition to Walpole's ministry generally. Thus, Foster

> discovers mines, catches the Bishop [i.e. Gibson] laying trains, sees him at work deep under-ground, undermining the laity; he shews the clergy in

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65 *Id.* at 93-94.

66 *Id.* at 100-01.

67 John Andrews, An Examination of the Scheme of Church-Power Laid Down in the Codex Juris Ecclesiastici Anglicani, &c Set in Its Proper Light 1 (London, J. Roberts 1736).

> all bad lights he can; thus acting, but stupidly, the Craftsman; the Bishop of London is his Sir R __ rt, and the Ministry his Ministry.[68]

As Andrews's allusion to Walpole suggested, ecclesiastical jurisdiction was very much an issue in Parliament as well as the press in the 1730s.

John Ayliffe (1676-1732) shared much of Foster's view of the constitutional position of the post-Revolutionary Church. Ayliffe's *Parergon Juris Canonici Anglicani* (1726; 2d ed. 1734) combined a mastery of the medieval *Corpus Iuris Canonici* and contemporary continental literature with a Whig prejudice in favor of the sovereignty of the common law and Parliament. The significance of Ayliffe's work has gone largely unnoticed by historians, however. Holdsworth recognized that Ayliffe's *Parergon* was a book "of great authority" and contained "full references . . . to the authorities in the civil and canon law, and to the English statutes and decisions."[69] Holdsworth did not, however, explore the connections between Ayliffe's work and the work of contemporary continental jurists nor did he consider what Ayliffe's use of English sources might reveal about his view of the post-Revolutionary Church. Ayliffe's work as a canonist has escaped the attention of other historians as well. G.D. Squibb focused upon the men of Doctors' Commons;[70] Ayliffe was an Oxonian. Daniel Coquillette and Peter Stein focused upon English writers on the civil law;[71] Ayliffe's work in the *Parergon* was as a canonist.

Ayliffe opened the *Parergon* with "An Historical Introduction," in which he reviewed the current state of historical scholarship regarding the development of the Roman canon law in England. It is a case study in the use of historical evidence in service of a political position regarding the constitutional role of the Church and its courts. Ayliffe's "Historical Introduction" shows the continuing engagement of English canonists with continental canonical learning, even as men like Ayliffe looked to Parliament and the common law courts for guidance about the development of the canon law.

The "Historical Introduction" merits detailed analysis for several reasons. First, as the name implied, it was a survey of the major historical sources of the canon law, from the Apostolic Constitutions to Ayliffe's own day, with a particular focus upon the canon law in force in England. Second, Ayliffe's citations revealed that many of the authors upon whom he relied were his contemporaries on the continent. Third, in addition to citing his contemporaries, Ayliffe also cited ancient and medieval authors as if they were his contemporaries, giving the work of his fellow canonists a certain timeless quality. Fourth, although the "Historical Introduction" shows that Ayliffe was well aware of the work of continental historians of the canon law, his substantive discussion of the canon law in England is almost

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68 *Id.* at 38.

69 12 Holdsworth, *supra* note 7, at 612.

70 George D. Squibb, Doctors' Commons: A History of the College of Advocates and Doctors of Law (1977).

71 Daniel Coquillette, The Civilian Writers of Doctors' Commons, London: Three Centuries of Juristic Innovation in Comparative, Commercial, and International Law (1988); Peter Stein, *Continental Influences on English Legal Thought, 1600-1900*, *in*, 3 La Formazione Storica del Diritto Moderno in Europa 1105-25 (B. Paradisi ed., 1977).

entirely devoid of reference to the continental canonists. The significance of this approach is that Ayliffe, like the canonists of the Reformation period,[72] remained in touch with continental developments, even as he recognized the emergence of a substantial body of native law. Fifth, in view of the substantial body of continental canonical scholarship that was available to him, Ayliffe's decision to focus upon the emergence of a native body of canon law clearly reflected his own staunchly Whig political principles.[73] English canon law was still part of the *ius commune*, but Ayliffe sought to move it toward a posture of greater insularity.

Ayliffe divided his "Historical Introduction" into three main topics: the canon law in general, the leading books on the canon law and their authors, and the canon law as it existed in England.[74] Throughout, Ayliffe's "Historical Introduction" was characterized by Whiggish anti-Catholicism and, at points, echoed the main themes of Hoadly's sermon. Nonetheless, Ayliffe argued for the power of Convocation to pass canons binding the laity, even without the consent of Parliament. In this regard, Ayliffe's position was closer to that of Gibson than Hoadly.

The central argument of the "Historical Introduction" is that the canon law of England predated the rise of the medieval papacy and therefore should not be confused with the "papal law." Thus, Ayliffe distinguished three aspects of the "canon law." First, there was the canon law "properly and strictly speaking . . . which consists only of the canons of general and provincial synods." Next was "papal-law, . . . [which] entirely depends upon papal usurpation and authority." Finally, the law of the Church (*jus ecclesiasticum*) "takes in the state and government of the Church, and the laws at this day received from and by the Church."[75] In the course of his discussion, Ayliffe cited numerous early modern canonists as well as several of his contemporaries: Hunold Plettenberg (1632-1696),[76] Henri Justel (1620-1693),[77] Pierre de Marca (1594-1662),[78] Jacques Sirmond (1559-1651),[79] Edmond Martene (1654-1739),[80] Jean Morin (1591-1659),[81] David Blondel (1591-1655),[82] Christian Thomasius (1655-1728),[83] and Marcus Antonius Cucchus (d. 1565).[84]

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72 Richard H. Helmholz, Roman Canon Law in Reformation England ch. 4 (1990).

73 Coquillette, *supra* note 72, at 209-14.

74 Ayliffe, *supra* note 21, at iii-iv.

75 *Id.* at vii.

76 Hunold Plettenberg, Introductio ad Jus Canonicum (n.p., Schlegel 1692).

77 Henri Justel, Bibliotheca Juris Canonici Veteris (Paris, Billaine 1661).

78 Pierre de Marca, Illustrissimi viri Petri de Marca archiepiscopi Parisiensis dissertationum De concordia sacerdotii et imperii, seu, De libertatibus ecclesiae Gallicanae libri octo (Paris, Cleri Gallicani 3d ed. 1704).

79 Jacques Sirmond, 1-4 Concilia Antiqua Galliae cum Epistolis Pontificum, Principum Constitutionibus, et Aliis Gallicanae Rei Ecclesiaticae Monumentis (Paris, Sebastiani Cramoisy 1629-1666).

80 Edmond Martene, 1-3 De Antiquis Ecclesiae Ritibus Libri Quatuor (Rouen, G. Behourt 1700-1702).

81 Jean Morin, Commentarius Historicus de Disciplina in Administratione Sacramenti Poenitentiae (Antwerp, Frederici à Metelen 1682).

82 David Blondel, Pseudo-Isidorus et Turrianus Vapulantes (Geneva, Petri Chouët 1628).

83 Christian Thomasius, Institutiones Jurisprudentiae Divinae (Frankfurt & Leipzig, Weidmannus 1688).

84 Marcus Antonius Cucchus, Institvtionvm Ivris Canonici Libri Qvatvor (Lyon, G. Rovillivm 1574).

With reference to the canon law "properly and strictly speaking," Ayliffe began by summarizing the available historical scholarship touching the Apostolic Constitutions (*Constitutiones apostolicae*), a collection of materials from the early Church. The Apostolic Constitutions were significant because they contained eighty-five canons, "the Apostolic Canons," fifty of which Dionysius Exiguus (d. *c.* 525) included in his influential collection of canons.[85] For Ayliffe's purposes, however, the significance of the Apostolic Canons lay in the fact that historical scholarship had shown that the canons were not of apostolic origin. Rather, "there have been several matters intermix'd therein, which are entirely foreign to their first state and purity, from whence papists at this day confirm their dogmas and opinions."[86] But while Ayliffe concurred with the conclusion of Bishop William Beveridge (1637-1708)[87] that the Apostolic Canons dated from the third century, he recognized that they were "one of the chief pillars on which the policy of the Church and the canon law itself is founded."[88] In his discussion of the Apostolic Canons, Ayliffe again cited a number of early modern and contemporary scholars of the canon law, including Caesar Cardinal Baronius (1538-1607),[89] Severin Binius (1573-1641),[90] Gregor Haloander (1501-1531),[91] Gerhard von Mastrict (1639-1721),[92] Melchior Canus (1525-1560),[93] Jean Cabassut (1604?-1685),[94] Lucas Osiander (1534-1604),[95] and Andre Rivet (1572-1651).[96]

Because of the persecution of Christians, Ayliffe argued, the Church was unable to legislate for itself prior to the reign of Constantine (306-337). The grant of Constantine's license to the Church to assemble and pass laws for its own regulation was a mixed blessing, however. In language that might have come straight from Benjamin Hoadly or Michael Foster, Ayliffe argued that, since Constantine's time, the clergy have "in several countries, contrary to the welfare and peace of the commonwealth, and the legal establishment of the civil power, erected themselves *into an independent state*, and do claim to assemble, whenever they think proper to disturb the quiet of the community."[97] Nonetheless, one result of such assemblies had been the creation of various local bodies of canons. Besides the canons adopted by General Councils and accepted throughout the Church, there

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85 *Law, Canon: To Gratian*, *in* 7 Dictionary of the Middle Ages 395-413 (Joseph R. Strayer ed., New York, Scribner 1986).

86 Ayliffe, *supra* note 21, at v-vi.

87 William Beveridge, Codex Canonum Ecclesiae Primitivae Vindicatus ac Illustratus (London, R. Scott 1697).

88 Ayliffe, *supra* note 21, at vi.

89 Antoine Pagi, 1-4 Critica Historico-Chronologica in Universos Annales Ecclesiasticos Caesaris cardinalis Baronii, ad annum 1198 (Antwerp, 1705).

90 Severin Binius, 1-37 Conciliorum Omnium Generalium et Prouincialium Collectio Regia (Paris, Typographia Regia 1644).

91 Gregor Haloander, 1-6 Corpus Iuris Civilis, 6 vols. (Basel, Hervagen 1575).

92 Gerhard von Mastrict, Historia Juris Ecclesiastici et Pontificii, Seu de Ortu, Progressu, Incremantis, Collectionibus, Auctoribusque Juris Ecclesiastici & Pontificii Tractatio (Halle, Zietleri 1719).

93 Melchior Canus, *Loci Theologici, in* Melchioris Cani Opera (Cologne, Mylius 1605).

94 Jean Cabassut, Notitia Conciliorum Sanctae Ecclesiae (Venice, Balleonium 1669).

95 Lucas Osiander, 1-6 Kurze Beschreibung der Kirchen History in Centurias (Frankfurt, Nicolaum Bassaeum 1597).

96 Andre Rivet, Critici Sacri Libri IV (Geneva, Iacobi Chouet 1642).

97 Ayliffe, *supra* note 21, at viii (emphasis added).

were various regional bodies of law, including collections of canons from Africa, France, Britain, and Spain.[98]

Having established that the English Church had its own canon law before the rise of papal lawmaking in the late eleventh-early twelfth centuries, Ayliffe surveyed the major texts and commentators associated with what he called the "papal law." The rise of papal lawmaking reflected the rise in papal claims and pretensions, Ayliffe suggested. The thin edge of the wedge, he claimed, was the mangling of Justinian's *Digest* by various of "the pope's creatures," particularly the clergy. Their purpose, Ayliffe maintained, was "to enlarge their rights and privileges by frequent interpolations and various readings of the text." The goal, predictably, was "to establish an independent power in the Church, and to call Kings and Princes before them for a pretended salvation of their souls."[99]

In England, the papal usurpation began with Augustine of Canterbury who succeeded in subverting the ancient Christianity of the noble Saxons.[100] This resulted in the reception of the bulk of the papal canon law, subject to the regulation of the common law:

> It likewise sufficiently appears that the canon law was received here in England, tho' under certain limitations and restrictions from the common law of the realm, since the greatest part of the decretal constitutions in the canon law have been found to have been sent hither by several popes upon controversies here among us in ecclesiastical causes.[101]

Ayliffe ended the "Historical Introduction" with a brief discussion of the place of the English canon law in the English legal system overall. Ayliffe identified the "three foundations" upon which the laws of England were built: general customs, statute law ("which is made by King, Lords, and Commons"), and foreign laws that have been received and "confirmed by usage and length of time."[102] On the basis of these foundations, Ayliffe argued that the canons of 1603 bound the clergy and laity alike,

> tho' not particularly confirmed by Parliament; because they were made in pursuance of the authority given by Parliament, and confirmed by Royal Assent. For tho' indeed no Canons of England stand confirmed by Parliament, yet they are the laws which bind and govern in ecclesiastical affairs. For the Convocation may with the King's License and assent had under the Great Seal, make canons for the regulation of the Church, and that as well concerning laics as ecclesiastics.[103]

Ayliffe's "Historical Introduction," like Gibson's "Introductory Discourse," reflected the balancing act carried on by High Church Whigs generally. They wanted to affirm both the sovereignty of the King-in-Parliament over temporal

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98 *Id.* at xiv-xv.
99 *Id.* at xxvii.
100 *Id.* at xxx.
101 *Id.* at xxix.
102 *Id.* at xxxiii.
103 *Id.* at xxxiv.

matters and the sovereignty of the King-in-Convocation over ecclesiastical matters. To avoid the problem of an *imperium in imperio* required a strong commitment to the idea of royal supremacy and the actual presence of a sitting Convocation. Both were lacking in the early eighteenth century. The precariousness of the High Church Whig constitutional theory was betrayed in Ayliffe's discussion of the substantive canon law, where he relied extensively upon common law decisions when considering disputed points. Although he was plainly aware of continental canonical scholarship, it was of interest to him only for its historical, not its legal, analysis.

### *C. The Ecclesiastical Courts in Parliament*

The events of 1688 served to undermine the authority of the Church in a number of ways. For present purposes, suffice it to note that the ouster of James II in favor of William and Mary was accomplished with the support of those who dissented from the Church of England, and those dissenters were rewarded with the Toleration Act of 1689. That the Church experienced a number of additional Parliamentary assaults in the period 1731 to 1736 has been noted by several historians.[104] But little has been done to place those assaults in the context of the ongoing debate over the constitutional position of the post-Revolutionary Church of England in general and the status of the ecclesiastical courts in particular. Examination of the pamphlet literature surrounding the various proposals to limit the courts' jurisdiction, however, reveals that there are important affinities between the arguments in favor of those proposals, on the one hand, and arguments we have seen aired in the Bangorian Controversy.

#### *1. The Bill to Prevent Suits for Tithes*

The attacks of the 1730s upon "Church power" began with a frontal assault upon the clergy's chief source of financial support, namely, tithes. The nature of the obligation, if any, to pay tithes had been a point of contention for many years, the Quakers' insistence that ministry should be supported entirely by voluntary contributions being perhaps the most famous example of dissent from prevailing assumptions. But beneficed clergy were not the only ones entitled to receive tithes. Prior to the Reformation, tithes arising in many parishes had been "appropriated" to various religious houses. The right to continue receiving the tithes so appropriated passed with the former monastic lands into lay hands after the Reformation. According to Blackstone, more than one-third of the parishes in England had been appropriated to religious houses at the time of the dissolution.[105] Thus, the right to receive tithes was a matter of interest not only to the clergy but also to a good many landed proprietors, and thus of wider political significance than might first appear.

Early in 1730/1, a bill was introduced into Parliament that would, "prevent suits for tithes, where none, nor any composition for the same, have been paid

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[104] *See, e.g.*, Norman C. Hunt, Two Early Political Associations: The Quakers and the Dissenting Deputies in the Age of Sir Robert Walpole 72-112 (Clarendon Press 1961); Sykes, *supra* note 18, at 149-66; Stephen Taylor, *Sir Robert Walpole, the Church of England and the Quakers Tithe Bill of 1736*, 28 Hist. J. 51 (1985).

[105] 1 William Blackstone, Commentaries *374.

within a certain number of years."[106] All of the bill's sponsors appear to have been Whigs of one sort or another.[107] The ostensible problem at which the bill was directed was the difficulty of proving that no tithes were owed on certain lands. Under 2 & 3 Edw. 6, c. 13, suits could not be maintained where the land in question had been discharged from the payment of tithes. According to the preamble of the bill, however, the documents proving such discharge,

> are by length of time burnt, lost, destroyed or defaced, and the said lands, tenements and hereditaments altered, severed or divided, and held and enjoyed by distinct purchases, conveyances or descents, and their old names, boundaries and descriptions by enclosures or otherwise wholly lost, so as it would be difficult now, and impossible in time to come to make out such discharges.[108]

Thus, the bill to prevent suits for tithes, if passed, would have cut off all claims for tithes asserted by both laymen and the clergy, in both ecclesiastical and civil courts where the tithes had not been paid for a specified number of years. The bill was read for the first time on 4 March 1730/1,[109] and the bill's second reading was ordered twice, on 12 March and 18 March 1730/1. It was not heard from again.

Although the bill to prevent suits for tithes had a relatively short Parliamentary career, it was long enough to provoke several interesting publications. The first salvo was fired in an anonymous pamphlet, variously attributed to Edmund Gibson and Thomas Sherlock.[110] The author attacked both the ostensible evils at which the bill was directed as well as the proffered remedy therefor. Specifically, he denied that owners of lands exempt from tithes had been remiss in preserving the evidence necessary to prove their exemptions; even if they had, he pointed out, such evidence could be discovered in the records of the Chancery and Court of Augmentations.[111] Likewise, the author argued, the assertion that many tithe suits were frivolous and vexatious was itself frivolous, given that most such suits were successful and many of the plaintiffs were actually lay impropriators.[112]

Nor was the author impressed with the bill's proposed solution to the alleged evils. As he pointed out, "The law concerning exemption from tithe, as it stands at present, is thus: If tithe be demanded by the incumbent, and the proprietor of the lands pleads an exemption, the incumbent insists upon common right as the general rule of law; and it rests upon the proprietor to prove the exemption."[113] The reason for placing the burden of proving an exemption upon the landowner, the author argued, was that the landowner was in a comparatively better position

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106 21 HC Jour. (1730) 650 (Eng.).

107 Romney Sedgwick, 2 The House of Commons, 1715-1754, at 64, 123, 323, 357 (1970). *See also* Archibald S. Foord, His Majesty's Opposition, 1714-1830, at 125 (1964).

108 7 House of Commons Sessional Papers of the Eighteenth Century 33 (Sheila Lambert ed., 1975).

109 21 HC Jour. (1730) 659 (Eng.).

110 Thomas Sherlock, Remarks Upon a Bill Now Depending in Parliament, Entitled, A Bill to Prevent Suits for Tythes, Where None, nor Any Composition for the Same, Have Been Paid Within a Certain Number of Years (London, 1731).

111 *Id.* at 3.

112 *Id.*

113 *Id.* at 1.

than the incumbent to know if the land at issue was exempt from tithes. Moreover, he maintained, shifting the burden of proof from the landowner (to prove an exemption) to the incumbent (to prove the right of receipt) as the bill proposed was likely to result in the extinction of all tithes in many places because clergy were often unwilling to go to court to enforce their rights.

In a most revealing answer to the foregoing pamphlet, William Arnall, one of Walpole's own pamphleteers, argued that the question was not what the law was but what the law ought to be. Arnall maintained that the forced payment of tithes was not justified by nature and, indeed, was a violation of liberty of conscience.[114] More significant for our purposes was Arnall's argument that, contrary to conventional wisdom,[115] the right to receive tithes was not founded upon "common right" but only upon various Acts of Parliament.[116] Thus, Arnall explicitly challenged the notion that the Church had any enforceable right to tithes that was not given to it by Parliament. This argument, which was echoed by an anonymous author, was premised upon the same voluntaristic axioms about the respective powers of Church and State defended by Hoadly in the Bangorian Controversy.[117] In an anonymous reply to Arnall,[118] the author noted (accurately, if Blackstone is to be believed[119]) that the clergy's right to receive tithes was founded upon common right, as modified by specific Acts of Parliament.

### *2. The Petition from Derby*

In 1732 and 1733 there continued to be much debate in the press over tithes generally as well as proposals to repeal the Test and Corporation Acts, but no new Parliamentary bills were introduced until 1733. With respect to the development of opposition politics, however, a significant change seems to have taken place. Whereas the opposition Whigs' 1731 bill to prevent suits for tithes had been a solo effort, by 1733 opposition Whigs and Tories had made common cause. The *Journals of the House of Commons* for 13 February 1732/3, state that the House received a petition from certain inhabitants of Derby, "complaining of the grievances occasioned by the administration of ecclesiastical jurisdiction" within the diocese of Coventry and Lichfield. The petition requested the Commons, "to take the same into consideration, and to provide such effectual remedy for the same, as shall most

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114 William Arnall, Animadversions on a Reverend Prelate's Remarks Upon the Bill Now Depending in Parliament, Entitled, A Bill to Prevent Suits for Tythes, Where None, nor Any Composition for the Same, Have Been Paid Within a Certain Number of Years 12-13 (London, J. Peele 1731).

115 *See, e.g.,* 2 William Blackstone, Commentaries *28 ("[I]t is now universally held, that tithes are due, of common right, to the parson of the parish, unless there be a special exemption." (citation omitted)).

116 Arnall, *supra* note 115, at 11-15.

117 An Answer to the Remarks Upon the Bill Now Depending in Parliament, Concerning Tythes, Lately Published in the Whitehall Evening-Post 2-3 (London, J. Roberts 1731).

118 Observations on the Animadversions on a Reverend Prelate's Remarks Upon the Bill Now Depending in Parliament, Entitled, A Bill to Prevent Suits for Tythes, Where None, nor Any Composition for the Same, Have Been Paid Within a Certain Number of Years 6 (London, J. Roberts 1731).

119 2 William Blackstone, Commentaries *28.

conduce to the public good of the said diocese, and as to the House shall seem meet."[120]

The petition was referred to a committee, one remarkable feature of which was its leadership.[121] Given Sykes's judgment that the ecclesiastical courts bill was "a thoroughgoing attack upon the jurisdiction of the Ecclesiastical Courts and might well cause a panic among their defenders,"[122] one might have expected the committee to have been dominated by Whigs. In fact, however, Sir Nathaniel Curzon, a Tory MP for Derbyshire was not only a member of the committee (along with a wide assortment of ministerial and opposition Whigs) but also chaired the committee and presented the bills that ultimately came out of that committee. Thus, a petition ostensibly from country gentlemen was referred to a committee of Whigs chaired by a well-known Tory. That the opposition Whigs were motivated by "liberal" anticlericalism is a plausible enough explanation for their actions, but why did Tories such as Curzon support an attack on ecclesiastical jurisdiction? A plausible explanation is that theirs was a "conservative" antipathy toward the instruments of (Whig) episcopal governance; they were Jacobites.

What began as a matter of local concern quickly mushroomed. On 15 February 1732/3, two days after receipt of the Derbyshire petition, the Commons voted to instruct the committee handling the petition to consider not only the abuses alleged in the Lichfield consistory court, but also alleged abuses in the ecclesiastical court system throughout England. On 9 March 1732/3, the committee issued its report which recommended, *inter alia*, that three separate proposals, each aimed at changing some aspect of the ecclesiastical court system, be introduced into the Commons. The first proposal eventually ripened into "A Bill for the Better Regulating the Proceedings of Ecclesiastical Courts" (the "Church courts bill"). The second proposal resulted in "A Bill for Settling Rates for the Better Repairs of Churches and Chapels, and Providing Ornaments for the Same" (the "Church rates bill"). The third proposal did not reach the bill stage, but would have restrained clandestine marriages, in many ways a precursor of Hardwicke's Marriage Act of 1753.[123]

### *a. The Church Courts Bill*

The Church courts bill would have changed the procedures followed in the ecclesiastical courts in seven important ways. First, it would have eliminated any criminal suits begun by inquisition or denunciation; the only such suits that would have remained would have been those begun by accusation, with the accuser required to post with the court a bond promising "to prosecute such suit or information with effect, and to pay _____ costs to the defendant or party accused, in case such defendant shall not be found guilty; or if the suit or prosecution be abated or discontinued for the space of _____."[124] Second, it would have eliminated

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120 22 HC Jour. (1732) 37 (Eng.). No copy of the original petition appears to have survived.

121 *Id.*

122 Sykes, *supra* note 18, at 151.

123 Marriage Act 1753, 26 Geo. 2, c. 32 (Eng.); *see* R.B. Outhwaite, Clandestine Marriage in England, 1500-1850, at 75-97 (1995).

124 7 House of Commons Sessional Papers of the Eighteenth Century, *supra* note 109, at 119.

the ecclesiastical judge's fact-finding role in criminal cases by authorizing "any of his Majesty's courts of record" to issue prohibitions to any ecclesiastical court, upon the suggestion of the defendant that he was innocent. After the issuance of such a prohibition, the record in the ecclesiastical court was to be certified to the court issuing the prohibition, where the issue of guilt would be determined in a trial by jury; if the defendant were found guilty, the case would then be sent back to the ecclesiastical court *via* a writ of consultation, where the judge of the ecclesiastical court would impose his sentence. If the defendant were acquitted in the jury trial, then he was entitled to his costs in both courts.[125] Third, the courts bill would have changed the procedure regarding excommunication in criminal causes. Specifically, under the bill an ecclesiastical judge could refer a contumacious defendant to the Chancery only after he had been cited twice. The Chancery was to then issue a "writ of contumacy" compelling the defendant to appear before the ecclesiastical judge. That this writ would have been all bark and no bite is suggested by the bill's provision that, if the defendant ignore the writ, "a second writ of contumacy shall issue, and so from time to time, until the defendant or defendants" shall appear. Moreover, the worst that a contumacious defendant faced was attachment of his goods and chattels, not imprisonment. Fourth, the bill provided that all money received in commutation of penance was to be given to the overseers of the poor to be distributed in accordance with the orders of the justices of the peace, rather than the judges of the ecclesiastical courts. Fifth, the bill proposed an unspecified statute of limitations on all criminal actions and a prohibition against being prosecuted twice for the same offense. Sixth, the bill would have removed all civil disabilities attaching to excommunication.[126] Finally, the bill would have prohibited the *ex officio* issuance of any process to compel the proving of a will or the taking out of letters of administration; only upon the application of a party interested in the decedent's estate could any such process issue.

Edmund Gibson responded anonymously to the Parliamentary scheme regarding the Church courts, leveling four specific objections against the bill. First, he pointed out that the fact-finding procedure of the ecclesiastical courts was no different from that of the Chancery, in which the Chancellor alone determined disputed issues of fact. Second, he argued that the temporal courts themselves recognized the validity of the canonical procedure. For example:

> When a cause of property is depending before them, and is found to turn upon the point of marriage or no marriage, the judges of Westminster-hall do not send that fact to be tried by a jury, but they send it to the ecclesiastical court, to be examined and determined by the rules and methods of that court, to which the cognizance of matrimonial causes properly belongs.[127]

Third, Gibson suggested that the ineffectiveness of the temporal courts in executing the laws against vice that were already on the books counseled against enlisting

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[125] *Id.* at 120.

[126] *Id.* at 121.

[127] Edmund Gibson, Remarks upon a Bill now Depending in Parliament, For the Better Regulating the Proceedings of the Ecclesiastical Courts 2 (London, G. Sumptor 1733).

those courts' help in enforcing all the other crimes of which the ecclesiastical courts had cognizance. Finally, Gibson argued that curtailing the ecclesiastical courts' criminal jurisdiction would hamstring the ability of bishops to discipline their clergy:

> it is easy to foresee what the consequences must be, if negligent or irregular incumbents were allowed to go on securely, as long as they can prevail with the churchwardens not to present them; when they know at the same time that the hands of the bishop are tied up, and have no cause to apprehend that any other accuser will be found, so zealously disposed, as to undertake the prosecution at his own charge.[128]

Consistent with his earlier published reform proposals, Gibson had no objection to limiting the use of excommunication to spiritual causes. But the bill was ambiguous, arguably eliminating the availability of excommunication in both temporal and spiritual causes. If the more expansive reading were adopted, Gibson argued,

> the Church of England will be thenceforth deprived of a right which belongs to every Christian church, and which all other churches actually enjoy at this day, viz. the right of judging what persons are fit or unfit to be excluded from Christian communion, and restored to it.[129]

That the True Church had any such right to judge "what persons are fit or unfit to be excluded from Christian communion, and restored to it" was, of course, precisely what Benjamin Hoadly had denied in the Bangorian Controversy.

The Church courts bill was not only unnecessary but also unwise, some authors argued. Gibson gave two practical reasons why passage of the bill would be imprudent: failing to require the probating of wills would prejudice individuals' property rights and effective elimination of the ecclesiastical courts' jurisdiction would discourage the study of the civil law, the knowledge of which "is so useful and even necessary in all transactions with foreign powers, as being the known rule of conducting public treaties, and the only rule in which the several powers in Europe agree." An anonymous author repeated may of Gibson's arguments and added that tinkering with the ecclesiastical courts in the manner proposed would upset the nation's delicately-balanced constitution:

> But if be enacted, that the same fact, now triable by the ecclesiastical judge be tried by a jury, according to the customs of Westminster-hall, all contests relating to the regularity or validity of any controverted verdict, and indeed every dispute that arises while the cause is under jurisdiction of the secular court, will be determinable in the House of Lords, and is therefore depriving his Majesty of a part of his supremacy and ultimate jurisdiction, to the increase of power in other branches of the legislature. And such alteration, by enervating the power of the Crown, and throwing too much into another scale, must necessarily tend to the destroying of

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128 *Id.* at 3.
129 *Id.*

> that balance, by the due preservation of which, we can alone be free from any apprehensions of anarchy on the one hand or tyranny on the other.[130]

Moreover, the author argued, the bill exposed subjects to a greater danger of frivolous criminal prosecution, due to the difference in evidentiary standards of the common law and ecclesiastical courts:

> the courts of common law admit of one evidence only, and convict upon the bare testimony of one single witness; whereas, by the civil and ecclesiastical law, no man can be convicted of any fact, but by the concurrent attestation of two credible persons. Many therefore would be convicted in the common law, where there is only one evidence to a fact, who would never have been so much as prosecuted in the ecclesiastical court, under its present situation and economy; since it is notorious, men cannot be convicted there upon the bare testimony of one single evidence.[131]

Arguing in support of the bill's proposed alterations, William Bohun sought to focus attention upon the alleged financial burden of the ecclesiastical courts.[132] In the end, the bill passed the Commons and was sent to the Lords, where it died after the second reading. The bill was reintroduced after the 1734 election and elicited many of the same objections that had been advanced against it the year before. [133] But the moment had passed, and nothing came of the effort.

### *b. The Church Rates Bill*

Compared with the Church courts bill, the Church rates bill was a model of simplicity. It contained three major provisions, each of which increased the responsibilities of the justices of the peace at the expense of the ecclesiastical courts. First, it transferred authority for confirming Church rates from the ecclesiastical courts to the JPs, with a right of appeal to the Quarter Sessions. Likewise, it shifted jurisdiction for the prosecution of those who failed to pay their assessments from the ecclesiastical courts to the JPs. Third, it required the churchwardens to lay their accounts before the JPs, rather than any ecclesiastical authority.[134]

The Church rates bill excited relatively little attention in the press, possibly because the bill did not propose abolishing Church rates altogether, only changing the mechanism for their confirmation and collection. While such a transferal of jurisdiction from the ecclesiastical courts to the justices of the peace would seem to be entirely to the disadvantage of the former, disadvantaging the Church courts was

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130 The State of the Ecclesiastical Courts Delineated 6-7 (London, J. Brotherton 1733).

131 *Id.* at 17.

132 William Bohun, A Brief View of Ecclesiastical Jurisdiction As It Is at This Day Practised in England 1 (London, J. Peele 1733).

133 *See, e.g.*, Some Thoughts on Last Year's Scheme For the Better Regulating Proceedings in the Ecclesiastical Courts; Put Together on Occasion of An Appearance of the Revival of It (London, J. Roberts 1734).

134 7 House of Commons Sessional Papers of the Eighteenth Century, *supra* note 109, at 123.

not necessarily the same thing as conferring a positive benefit upon the JPs. Quite the contrary, a reasonable justice might well have regarded refereeing disputes over Church rates as an unwelcome addition to his judicial burden, especially if there were "frequent differences . . . which occasion great delays" over the collection of Church rates, as the bill asserted.

Gibson published a brief response to the bill, arguing that confirmation of rates had always been part of the bishop's jurisdiction, pursuant to his duty to ensure that churches were kept in good repair.[135] Moreover, he suggested, if proceedings in the ecclesiastical courts were too slow, as the bill's preamble asserted, then the proper remedy was to make Church rate causes subject to summary procedure in the ecclesiastical courts, not to transfer jurisdiction over them to the JPs.[136] No one seems to have replied to Gibson's pamphlet and, in the end, the Church rates bill was defeated at its third reading in the Commons.

### *c. The Clandestine Marriage Recommendations*

The third proposal that came out of the Derbyshire petition was for a bill to prevent clandestine marriages. The same Committee that produced the Church courts bill and the Church rates bill presented four specific recommendations to be included in a bill on clandestine marriage, three of which the Commons voted to approve. The first proposal was that no marriage license be issued without the affidavit of one of the parties to be married, specifying their ages, qualities, and parishes. The second was that anyone seeking a marriage license should post a bond, which would be forfeitable in the event that the license had been procured on the basis of false information. Third, the committee proposed that no marriage license should be granted to anyone under age without the consent of that person's parent or guardian. Finally, it was proposed that no clergy in prison or subject to the rules of any prison (*e.g.*, the Ordinary of Newgate) should be allowed to perform the office of matrimony.[137] The Commons rejected only the third proposal. Although the Commons voted to receive a bill, none was ever introduced, and no published debate regarding this bill or its 1735/6 reincarnation appears to have taken place.[138]

## *3. The Quakers' Tithe Bill*

As the proximate cause of the failure of the Church-Whig alliance, the Quakers' tithe bill of 1736 has received more scholarly attention than the other Parliamentary assaults upon the ecclesiastical courts of the 1730s.[139] Suffice it to say that this bill successfully combined the strategic advantages of several earlier proposals. It provided that, with respect to tithes under an unspecified amount, Quakers could be prosecuted only before the justices of the peace, with an appeal lying to the Quarter Sessions. The JPs were not allowed, however, to hear suits where the

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135 Edmund Gibson, Remarks Upon a Bill Now Depending in Parliament, Intituled, A Bill for Settling Rates for the Better Repairing of Churches and Chapels, and Providing Ornaments for the Same 1 (London, 1733).

136 *Id.* at 3.

137 22 HC Jour. (1733) 125 (Eng.).

138 *See* Outhwaite, *supra* note 124, at 16.

139 Sykes, *supra* note 18, at 163-66; Taylor, *supra* note 105.

Quaker challenged the underlying right to receive tithes.[140] Thus, the bill drew upon venerable dissenting rhetoric against paying tithes and against the power of the ecclesiastical courts while not actually endangering anyone's right to receive tithes and, in fact, enlarging the JPs' jurisdiction over tithe cases—all while forcing Walpole to choose between his Quaker allies who naturally favored the measure and his episcopal allies who did not. Indeed, the bill's coalition of supporters was formidable enough to get the bill through the Commons, but not strong enough to secure passage in the Lords. That the Quakers' tithe bill was understood to represent an attack upon, *inter alia*, the ecclesiastical courts—an attack during which Benjamin Hoadly was conspicuously absent without leave—has been amply demonstrated elsewhere.[141] Suffice it to say that the debate surrounding this bill, like the other debates we have examined, reflected the same fundamental cleavage between voluntaristic and divine-right views of ecclesiastical jurisdiction that characterized the Bangorian Controversy.[142]

## IV. Middleton v. Crofts: A Hoadlyite Court Victory

Lord Chief Justice Hardwicke's opinion for a unanimous Court of King's Bench in *Middleton v. Crofts* vindicated Hoadly's vision of the Church as a voluntary association by denying Convocation a status equal to that of Parliament. Although the specific question in the case was whether the canons of 1603 bound the laity, the underlying issue was the lawmaking authority of the monarch acting through Convocation. The traditionalist argument that the canons were binding upon the laity was that the monarch had authorized Convocation to make laws regarding spiritual matters and that the authority to do so was valid regardless of whether the laws regulated the belief and practices of clergy or laity. If the monarch had such power, then the conclusion followed. But, to the reformers, to admit the authority of the monarch to legislate for the laity through Convocation was to deny the principle that Parliamentary was the sovereign lawgiver. As other historians have demonstrated,[143] Gibson, Andrews, and the other traditionalists probably had the better legal and historical arguments. But Hardwicke had the advantage of an idea whose time had come.

The facts of the case were these: Thomas Crofts promoted a cause against John and Ann Middleton in the consistory court of the diocese of Hereford, alleging that the Middletons were married clandestinely, without banns or license as required by the canons of 1603. The Middletons sought a prohibition from the King's Bench, on the basis that the statute 7 & 8 Will. 3, c. 35, which provided for recovery in the temporal courts of penalties against parties to a clandestine marriage, was the sole remedy in such cases. The first issue Hardwicke addressed in *Middleton v. Crofts*

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140 7 House of Commons Sessional Papers of the Eighteenth Century, *supra* note 109, at 259-65.

141 Taylor, *supra* note 105, at 66-68.

142 *Id.* at 65-66.

143 *See*, *e.g.*, George R. Bush, *Dr. Codex Silenced:* Middleton v. Crofts *Revisited*, 24 J. Legal Hist. 23 (2003); Richard H. Helmholz, *The Canons of 1603*, *in*, English Canon Law: Essays in Honour of Bishop Eric Kemp 23, 25 (Norman Doe et al. eds., 1998) ("The argument most forcefully pressed in *Middleton* was based on logic, not precedent.").

was whether the canons of 1603 bound the laity, and he held that they did not, because they had not been confirmed by Parliament:

> Now the constant practice ever since the Reformation (for there is no occasion to go further back) has been, that when any material ordinances or regulations have been made to bind the laity as well as the clergy in matters ecclesiastical, they have been either enacted or confirmed by parliament; of this proposition the several acts of uniformity are so many proofs; for by these the whole doctrine and worship, the very rites and ceremonies of the Church, and the literal form of public prayers are prescribed and established.[144]

But Hardwicke stopped short of denuding the ecclesiastical courts of all non-Parliamentary authority. Quite the contrary, Hardwicke's answer to the second issue raised in *Middleton* left most of the ecclesiastical courts' jurisdiction intact. That issue, Hardwicke stated, was,

> If lay persons cannot be prosecuted or punished by force of these canons, whether the [ecclesiastical] court had jurisdiction of such a cause against them by the ancient canon law, received and allowed within the realm of England.[145]

Hardwicke's discussion of this issue reflected the conventional wisdom of the eighteenth century: to the extent that the Roman canon law had been received in England it was to be given effect:

> I have had occasion already to mention the rule laid down by my Lord Coke in Cawdrie's case, that such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm, and are not contrary or repugnant to the laws, statutes and customs thereof, nor to the damage or hurt of the King's prerogative, are still in force within this realm, as the King's ecclesiastical laws of the same.
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> * * *
>
> It remains then to be inquired, whether that part of the canon law which prohibits clandestine marriages, hath been received and allowed in England.
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> * * *
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> That the jurisdiction of proceeding by ecclesiastical censures against lay persons marrying clandestinely, has been received, used, and allowed, in England, was said, by Dr. Andrews in his argument to appear by many entries in the registry of the see of Canterbury, some whereof he

144 Middleton v. Crofts (1736) 26 Eng. Rep. 788, 792.
145 *Id.* at 789.

> cited particularly; and it must be admitted, that a long course of such precedents would be of great weight in a case of this nature, though a few instances would not, because they might pass *sub silentio*, and the parties might choose to submit, rather than undergo the expense and clamor of a suit for a prohibition.
>
> It is therefore more material, that this jurisdiction hath received the sanction of a judgment of this court in the case of *Mattingley* versus *Martins*, Pasc. 8, Ca. 1, Jones, 257.
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> * * *
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> This resolution is in point, and I can find no authority against it; it is also supported by the stronger reason, because though clandestine marriages have always been complained of as a great grievance, and highly detrimental to the public and private families, yet lay persons contracting such marriages, must, without such a jurisdiction in the spiritual court have been absolutely unpunished, until the late statute of W. 3, cap. 35, was made; which is not to be believed.[146]

The significance of this part of the opinion should not be overlooked. Hardwicke treated the canon law as part of English customary law, thereby putting it on an equal footing—so far as Parliamentary sanction was concerned—with the common law. Blackstone echoed this view:

> The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions.
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> * * *
>
> The third branch of [the *leges non scriptae*] are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.[147]

To be sure, when called upon to resolve a doubtful point regarding the ecclesiastical courts' jurisdiction, common lawyers such as Hardwicke were more impressed by precedents from their own courts, such as *Mattingley v. Martins*, than a list of precedents from the ecclesiastical courts. Nonetheless, even after *Middleton v Crofts*, the center of the Church courts' criminal jurisdiction, the ancient canon law, held.

That the decision in *Middleton v Crofts* was fundamentally at odds with Gibson's view of the relationship between Parliament and Convocation hardly needs to be pointed out. Interestingly enough, one of the Church's defenders before

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146 *Id.* at 798-800.

147 1 William Blackstone, Commentaries *63, *79.

the judges of the King's Bench was none other than Dr. John Andrews, advocate of Doctors' Commons and defender of Gibson's *Codex* in the controversy with Michael Foster. Indeed, Andrews advanced, and the court rejected, several of the same arguments in *Middleton* that he had used against Foster. Although Gibson himself prepared an answer to Hardwicke's arguments against the binding force of the canons of 1603, he ultimately chose not to pursue the matter.[148]

While *Middleton v. Crofts* was consistent with the view of the Church as a voluntary association, it was primarily a victory for Parliamentary sovereignty over ecclesiastical legislation authorized merely by the monarch and Convocation. The step, while a significant one, was not a leap toward a secular society. Ecclesiastical legislation was only one source of legal obligation. Indeed, it is doubtful that, in the early eighteenth century, legislation occupied as significant a place in the life of the law as customary law. Certainly, the canons of 1603 were only a tiny part of the "king's ecclesiastical law," the vast bulk of which even Hardwicke acknowledged to be in force, even though it had not been ratified by Parliament. Nor does the decision appear to have had a significant effect upon the actual work of the ecclesiastical courts, most of which consisted of property-related litigation of one sort or another.[149] Indeed, the very fact that much of the litigation in the eighteenth century ecclesiastical courts was property-related suggests that opposition to tinkering with ecclesiastical jurisdiction may have owed as much to concern for the security of property as it did to concern for true religion. Nevertheless, by recognizing Parliamentary sovereignty over legislation affecting conduct of the laity, *Middleton v. Crofts* represented an important step toward secularization of English society.

## V. Conclusion

The Bangorian Controversy and the debate over Parliamentary proposals to alter the jurisdiction of the ecclesiastical courts raised fundamental questions about the constitutional position of the post-1688 Church in general and its courts in particular. These questions were also discussed in the less overtly polemical literature of visitation charges and legal treatises, and there were very real disagreements regarding the legitimacy of the ecclesiastical courts and the canon law they applied. Everyone who wrote on the subject had an opinion, it seems, and there were many people writing on it. Men such as Gibson and Ayliffe attempted, explicitly or implicitly, to reconcile the contractarian political implications of the Hanoverian succession with divine-right theories of episcopal authority, while others such as Hoadly attempted to extend Lockean contractarian ideas from the state to the Church and its courts.

Hardwicke's innovation in *Middleton v. Crofts* was, within a generation, accepted as authoritative in the ecclesiastical courts themselves.[150] But its conclusion was neither obvious nor inevitable in 1736. To understand how this particular step toward secularization came about requires an appreciation of the four points traced in this article: (1) the voluntaristic view of religious authority

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148 Bush, *supra* note 144; Sykes, *supra* note 7, at 203-04.
149 Harris, *supra* note 4.
150 *See* Lloyd v. Owen (1753) 161 Eng. Rep. 161; Bush, *supra* note 144, at 24.

had a long and distinguished intellectual pedigree; (2) it had widespread support; (3) while historical authority was against such voluntarism, (4) the politics of the moment (including a precarious hold on power by a coalition including legally-protected dissenters from the traditional view of authority) favored it.