"THE SERVANT OF TWO MASTERS": THE INFLUENCE OF CHURCH/STATE PARADIGMS ON THE RISE AND FALL OF CLERGY DISQUALIFICATION CLAUSES IN THE UNITED KINGDOM AND UNITED STATES

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By

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# Table of Contents

I. Introduction

II. Two Church/State Paradigms
   A. U.K.: Church of England’s “Establishment” Paradigm
   B. U.S.: Thomas Jefferson’s “Separation” Paradigm
   C. Critiquing National Paradigm Descriptions

III. Disqualification Clauses in the United Kingdom
   A. Traditional Disqualification: 1553 – 1801
      1. The Case of the Borough of Newport
   B. Statutory Disqualification: 1801-2001
   C. Justifications for Disqualification

IV. Disqualification Clauses in the United States
   A. Colonial Disqualification: 1607-1776
   B. Disqualification and Disestablishment: 1776-1833
   C. Modern Disqualification: 1833-1978
      1. McDaniel v. Paty
   D. Justifications for Disqualification

V. Church/State Paradigms and the Relationship to Disqualification Clauses
   A. Relevance of Church/State Paradigms to Disqualification
   B. Application to Current Debates

VI. Conclusion
I. INTRODUCTION

“And he saith unto them, ‘Whose is this image and superscription?’ They say unto him ‘Caesar’s.’ Then saith he unto them, ‘Render therefore unto Caesar the things which are Caesar’s and unto God the things that are God’s.’”

The peril involved in divided loyalties, as referenced in the New Testament distinction between “things which are Caesar’s” and “things that are God’s,” is demonstrated in a humorous fashion in 18th century Italian playwright Carlo Goldoni’s *The Servant of Two Masters.* The Servant of Two Masters amusingly portrays overworked and underpaid Truffaldino, the title character, adopting a second master without informing the first. Defending the decision, he reasons: “Two wages. Two men’s meals. Am I mad? Not half.” While The Servant of Two Masters questions whether it is madness to attempt pleasing two masters, centuries-old traditions and statutes in both the United Kingdom and United States answered in the affirmative by prohibiting clergy from serving in the House of Commons and, following the American Revolution, in many U.S. state legislatures. These clauses squarely addressed Truffaldino’s predicament by declaring that, for clergy, God and Caesar were incompatible masters.

On February 6th, 2001, in a politically-charged vote, Tony Blair’s Labour government successfully shepherded the Removal of Clergy Disqualification Act through the House of Commons, thus ending the prohibition on clergy serving in the House stretching back over 450 years. Across the Atlantic, 23 years earlier, a unanimous U.S. Supreme Court handed down a decision striking down Tennessee’s constitutional

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1 *Matthew* 22:19-21 (King James).
3 *Id.*
4 *Id.*
5 See *Removal of Clergy Disqualification Act, 2001 c. 13 (Eng.)*.
prohibition against clergy serving in the state legislature.\textsuperscript{6} These two events, although seemingly unrelated, are two very different methods of achieving the same result, and are the product of centuries of debate, political conflict, and war. Interestingly, despite this rich political and historical background, comparatively little has been written on the subject of clergy disqualification clauses. Indeed, this fact was noted over 200 years ago in \textit{The Case of the Borough of Newport}, where counsel for one of the opposing parties declares, “There are but few instances in the Journals of the House of Commons, in which this law of parliament is recognized…”\textsuperscript{7} This paper hopes to redress that situation by carefully exploring the development, rise and fall of clergy disqualification clauses. In doing so, it concludes, ironically, that the establishment of the clauses in both countries is directly traceable to the two \textit{opposite} national church/state paradigms employed in the United Kingdom and United States.

This paper has four purposes: 1) Analyze the history and character of the two opposing national church/state paradigms governing relations between clergy and government in the United Kingdom and United States; 2) Review the founding, development, and downfall of clergy disqualification clauses in both countries; 3) Connect the establishment of the clauses to the two opposing national church/state paradigms and identify factors common to the debate in both countries; and 4) Highlight potential applications of the findings to current debates.

Section II of this paper begins the analysis by examining the background and history of the national church/state paradigms employed in both the United Kingdom and United States. In doing so, it analyzes the various facets of the “establishment” paradigm.

\textsuperscript{7} \textit{The Case of the Borough of Newport}, 2 Lud. E. Cas. 269 (1785).
governing Britain’s church/state relations. It then goes on to examine the various, and more complex, facets of the “separation” paradigm governing the United States’ church/state relations. Section II concludes by examining the possibility of oversimplifying these paradigms and how that impacts the analysis.

Having established these two opposing paradigms as the starting point for our analysis, Section III examines the historical development of clergy disqualification clauses in the United Kingdom, beginning with their existence as a traditional bar to service from 1553 until 1801. Part of this analysis includes a close examination of the 1785 controversy *The Case of the Borough of Newport*, referenced above, which summarizes the existing issues under traditional disqualification. 8 This section then proceeds to examine the clause’s existence as a statutory matter from 1801 until their repeal by Blair’s government in 2001. Section III concludes by examining the varied justifications for clergy disqualification clauses in the United Kingdom throughout their 450 year existence.

Section IV examines the background and history of clergy disqualification clauses in the United States, beginning with their transportation to America by English colonists. This section also examines the rise and fall of the clauses through the disestablishment era of 1776-1833, and their rapid downfall after the U.S. Civil War, culminating in the 1978 Supreme Court decision in *McDaniel v. Paty*. 9

Section V connects the establishment of clergy disqualification clauses in the United Kingdom and United States to the differing church/state paradigms employed in both countries and examined in Section II. In the United States, the existence of the

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8 Id.
9 *McDaniel, supra* note 6.
clauses came about, I argue, as a result of the post-revolutionary impulse to separate church and state. In the United Kingdom, in stark contrast, the existence of the clauses came about as a result of the Church of England’s established status. Finally, Section V concludes by applying the lessons learned from the origins and downfall of clergy disqualification clauses to current social and religious debates in the United Kingdom and United States. This section is not intended to be comprehensive, but merely provides additional context to contemporary and weighty issues of church/state relations.

II. TWO CHURCH STATE PARADIGMS

“[W]e think the Legislature of Great-Britain is not authorized by the Constitution to establish a religion, fraught with sanguinary and impious tenets…These rights, we, as well as you, deem sacred.”

ADDRESS TO THE PEOPLE OF GREAT BRITAIN – ADOPTED BY CONTINENTAL CONGRESS, OCTOBER 26, 1774

Examining the rise, development, and fall of clergy disqualification clauses in the United Kingdom and United States, and their relevance to current social and political debates, requires analyzing the political values underlying these clauses. Such values must be examined in light of each country’s greater national church/state paradigm.

These paradigms, while perhaps initially appearing obvious, must be explored by analyzing the religious background and various church/state theories applicable to both countries. In doing so, this paper makes the descriptive claim that the United Kingdom and United States operate under two opposing church/state paradigms: that of Thomas Jefferson’s “separation” and the Church of England’s “establishment.” By “paradigm,” I refer to the scientific meaning of explaining observed phenomena, applied in a legal and historical context.  

Although potentially vulnerable to oversimplification, a charge

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10 Journal of the Continental Congress, (Ford ed.), I, 72 (as quoted in ANSON PHELPS STOKES AND LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES, 53 (Harper & Row) (1964)).
examined below, these paradigms provide an important starting point for our analysis. Consequently, we examine both countries, and their respective paradigms, in turn.

A. U.K.: Church of England’s “Establishment” Paradigm

On June 2, 1953, Princess Elizabeth Alexandra Mary Windsor entered the west door of Westminster Abbey and proceeded to the Chair of State at the south side of the High Altar.\(^\text{12}\) Shortly afterward, she had the following series of questions posed to her by the Archbishop of Canterbury:

Will you to the utmost of your power maintain the Laws of God and the true profession of the Gospel?

Will you to the utmost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law?

Will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England?

And will you preserve unto the Bishops and Clergy of England, and to the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or any of them?\(^\text{13}\)

To these questions, Elizabeth responded, as custom dictated, “All this I promise to do.”\(^\text{14}\) Today, the world is familiar with Queen Elizabeth II as head of state for the United Kingdom. Most Americans, however, are likely unaware of her role as head of the Church of England, and the critical role the monarchy plays in the United Kingdom’s “establishment” paradigm.

\(^{12}\) The Form and Order of Service that is to be Performed and the Ceremonies that are to be Observed in The Coronation of Her Majesty Queen Elizabeth II in the Abbey Church of St Peter, Westminster, on Tuesday, the second day of June, 1953, available at http://www.oremus.org/liturgy/coronation/cor1953b.html (last visited, April 7, 2006).

\(^{13}\) Id.

\(^{14}\) Id.
In comparison to the United States’ “separation” paradigm, examined below, the
United Kingdom’s church/state paradigm, is a comparatively simple framework of
“establishment.” While a close examination of this national church/state paradigm could
go back Pope Gregory the Great’s determination to re-establish Christianity in Britain
during the 6th century, it is more helpful for our purposes to examine the relatively
recent establishment of the Church of England as the United Kingdom’s established faith.
The Church of England was officially established as the state religion in 1533 following
the infamous battle between King Henry VIII and the Catholic Church. Early in his
reign, Henry VIII was designated “Fidei Defensor” (Defender of the Faith) by the Pope in
honor of his opposition to Luther’s stance regarding the seven sacraments. This
appellation, however, was deemed imprudently bestowed when what began as a dispute
over the annulment of Henry’s marriage to Catherine of Aragon eventually culminated in
a 1533 separation between the Roman Catholic Church and the Church of England.
This separation was followed shortly thereafter by passage of the Supremacy Act of 1534
which declared the monarch head of England’s state and church, thereby formally
displacing the Pope as spiritual leader. This Act had the basic effect of conferring upon
Henry VIII practically all of the powers previously reserved exclusively for the Pope.

In 596, Pope Gregory the Great dispatched a missionary monk named Augustine to convert Ethelbert, King
of Kent. Impressed with the prestige of Rome and the cultural and spiritual characteristics of Augustine
and his compatriots, Ethelbert, and his subjects, converted in 597. Id. at 15-16.
16 Id. at 324-325.
17 Carl H. Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American
18 See KNAPPEN, supra note 15, at 324-325.
19 Act of Supremacy, 26 Hen. VIII, c. 1, (1534)(Eng.); See KNAPPEN, supra note 15, at 324-325.
20 See generally CHURCH AND STATE IN ENGLAND, CYRIL GARBETT 56-57 (Hodder & Stoughton, London)
(1950); KNAPPEN, supra note 15, at 325. The Act of Supremacy was preceded by the 1533 Act of Appeals
which forebade ecclesiastical appeals to go outside of the realm. Consequently, Henry VIII was able to
成功fully force Thomas Cranmer, Archbishop of Canterbury, to grant the annulment without fear of
reversal by Rome. Id.
In consequence, as head of the Church, Henry VIII and Britain’s future monarchs were entitled to supervise and discipline Church of England clergy.\textsuperscript{21} Meanwhile, confiscation of church lands allowed the monarch to distribute them according to political necessity.\textsuperscript{22} All these measures considerably strengthened the monarchy at the expense of the Church.\textsuperscript{23}

This established state faith, although subject to major trials under the Catholic reigns of Queen Mary (1553-1558)\textsuperscript{24} and James II (1685-1688), was ensured upon the joint assumption of the throne of William and Mary in 1688.\textsuperscript{25} This securely established position of the Church of England is reflected by the service of the lords spiritual in the House of Lords.\textsuperscript{26} Although declining in relative number throughout the 17\textsuperscript{th} and 18\textsuperscript{th} centuries, due to the politically-motivated appointment of large numbers of temporal lords by the monarchy, the representatives of the established church continued to exercise, according to one account, authority “out of all proportion to their numbers.”\textsuperscript{27} Indeed, M.M. Knappen, author of the 1942 volume \textit{Constitutional and Legal History of England}, declares that the lords spiritual “retained a position of moral influence that made them a power to be reckoned with, even in the worst of eighteenth-century decadence.”\textsuperscript{28}

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\textbf{21} KNAPPEN, \textit{supra} note 15, at 327. \\
\textbf{22} \textit{Id.} \\
\textbf{23} \textit{See Id.} \\
\textbf{24} \textit{Id.} at 334-335. Mary’s reign, in particular, saw the re-establishment of the Roman Catholic Church’s supremacy, and a violent persecution of Protestants. It is believed, however, this persecution actually strengthened the Protestant movement. The Protestant Bishop Latimer, when about to be killed by burning at the stake, remarked to a fellow bishop who was to die with him: “Be of good comfort, Master Ridley, and play the man. We shall this day light such a candle by God’s grace, in England, as I trust shall never be put out.” This persecution ended with the assumption of Elizabeth I to the throne in 1558. \textit{Id.} at 335. \\
\textbf{25} Esbeck, \textit{supra} note 17, at 162; \textit{See KNAPPEN supra} note 15, at 349. \\
\textbf{26} KNAPPEN \textit{supra} note 15 at 275-276. \\
\textbf{27} \textit{Id.} at 482. \\
\textbf{28} \textit{Id.} at 483.
\end{flushright}
Perhaps partially due to episodes such as the “worst of eighteenth-century decadence” referred to by Knappen, the Church of England has experienced various expansions and constrictions of strength.\(^{29}\) One significant constriction was the disestablishment of the Anglican Church of Ireland in 1869 and the Anglican Church of Wales in 1920.\(^{30}\) Despite these disestablishments, and persistent calls for similar disestablishment of the Church of England by various political organizations such as the National Secular Society and the British Humanist Association, the “establishment” church/state paradigm under the Church of England remains secure.\(^{31}\) Today, the current position among mainstream British political actors is that Parliament should not disestablish the Church of England unless bid to do so by the Church’s General Synod.\(^{32}\) In consequence, it is quite clear that the United Kingdom operates under an “establishment” framework.

How does this “establishment” paradigm impact Britain’s adherents to other sects of Christianity? Since the establishment of this framework in 1534, the United Kingdom’s Catholics and Non-Conformists have required some level of official state toleration. James Oldham, author of *English Common Law in the Age of Mansfield*, addresses the subject of who needed toleration by stating that, as a technical matter, it was anyone “not a member of the Church of England, or, in Scotland, of the Presbyterian church.”\(^{33}\) When examining the United Kingdom’s national church/state paradigm, it is

\(^{29}\) *See e.g. Id.* at 544 (discussing the disestablishment of the Church of Ireland Church of Wales).

\(^{30}\) *Id.* While Ireland was primarily Catholic, Wales was overwhelmingly Nonconformist.

\(^{31}\) Church and State in Britain; available at [http://www.centreforcitizenship.org/church2.html](http://www.centreforcitizenship.org/church2.html) (last visited April 7, 2006). Today, the established Church of Scotland, which is Presbyterianism, also appears to be withstanding calls for disestablishment. KNAPPEN, supra note 15, at 544.

\(^{32}\) Church and State in Britain; available at [http://www.centreforcitizenship.org/church2.html](http://www.centreforcitizenship.org/church2.html) (last visited April 7, 2006).

helpful to examine disabilities placed on Catholics and Non-Conformists under this “establishment” framework.

Significant disabilities pertaining to Protestant Dissenters were codified in the Corporation Act (1661) and the Test Act (1673).\(^{34}\) The Test Act restricted the ability of the Crown to appoint civil and military officers by requiring all such officers to repudiate the Catholic doctrine of transubstantiation.\(^{35}\) The Corporation Act required undergoing the Church of England sacramental rites in order to be seated in either government office or municipal membership.\(^{36}\) Dissenters struggled under these acts until their repeal by Parliament in 1828.\(^{37}\) For example, in 1754, a famous Corporation Act case occurred where the Corporation of the City of London enacted a regulation levying fines against any person refusing to stand or serve as sheriff.\(^{38}\) In *Chamberlain v. Evans*, the court struggled with the situation where nonconformists were selected for Sheriff and refused to pay or conform.\(^{39}\) Following thirteen years of litigation, the House of Lords affirmed the decision supporting the nonconformists.\(^{40}\) Despite occasional victories, however, religious toleration was a slowly developing protection for Britain’s Dissenters throughout the 18\(^{th}\) and 19\(^{th}\) centuries.\(^{41}\)

Anti-Catholic legislative provisions during enforcement of the Corporation Act and Test Act were noticeably harsher, driven by memories of the Stuart uprisings in 1715.

\(^{35}\) KNAPPEN, *supra* note 15, at 444.  
\(^{36}\) GARBETT, *supra* note 20, at 83.  
\(^{37}\) KNAPPEN, *supra* note 15, at 543  
\(^{38}\) See OLDHAM, *supra* note 33, at 240-41.  
\(^{40}\) OLDHAM *supra* note 33, at 241.  
\(^{41}\) See *Id.* at 240-243.
and 1745.\textsuperscript{42} Blackstone himself acknowledged that the laws were harsh, and recommended altering them in the near future when “all fears of a pretender shall have vanished.”\textsuperscript{43} The famous 18th century Chief Justice of the King’s Bench, Lord Mansfield, described disabilities against Catholics in terms of national security: “The statutes against Papists were thought, when they passed, necessary to the safety of the state: Upon no other ground can they be defended.”\textsuperscript{44} These national security concerns, however, were not enough to prevent Parliament from enacting the Catholic Relief Act in 1778.\textsuperscript{45} That Act relieved Catholics of disabilities pertaining to the ownership and transfer of landed property.\textsuperscript{46} The Catholic Relief Act also served as a precursor to the Roman Catholic Emancipation Act of 1829, which abolished the anti-Catholic tests for service in office.\textsuperscript{47}

In examining the history and development of church/state relations in the United Kingdom, it is clear that the United Kingdom possesses an “establishment” church/state paradigm. It is equally clear that, as part of that paradigm, significant elements of the population, including Catholics and Protestant Dissenters, labored under various restrictions to their political and economic lives in the early 19\textsuperscript{th} century. These restrictions, however, were gradually removed, particularly with repeal of the Corporation Act and Test Act in 1828, and passage of the Roman Catholic Relief Act of

\textsuperscript{42} Id. at 239.
\textsuperscript{43} Id. (Quoting BLACKSTONE COMMENTARIES, 4:57).
\textsuperscript{44} Foone v. Blount, 2 Cowp. 464 (1776) (as cited in OLDHAM, supra note 33, at 243).
\textsuperscript{45} The Catholic Relief Act, 18 Geo. 3, c. 60 (1778)(Eng.); OLDHAM, supra note 33, at 246.
\textsuperscript{46} Id.
\textsuperscript{47} KNAPPEN supra note 15, at 543. The early to mid 19\textsuperscript{th} century was an era of significant reforms pertaining to religion and its relationship to the state. In 1858, the House of Commons abolished a clause in its oath of office requiring members to swear on the Christian faith. This act allowed Jews to serve in Parliament. In 1888, after a long battle regarding the election of an avowed Atheist to Parliament, members-elect were allowed to substitute an affirmation for the oath which concluded with the words “So help me God.” Id.
Having examined this “establishment” paradigm, we turn now to the “separation” paradigm characterizing church/state relations in the United States.

B. U.S.: Thomas Jefferson’s “Separation” Paradigm

At first glance, determining the national church/state paradigm characterizing the United States seems deceptively simple. Almost every American high school student is aware of Thomas Jefferson’s famous phrase found in an 1802 letter: “[A] wall of separation between church and state.” Combined with the First Amendment Establishment Clause, it appears clear that the correct church/state paradigm, on both the state and federal level, is one of strict “separation.” This is misleading, however, and, given that church/state relations are a question fiercely fought over by America’s finest minds, any examination of the United States’ church/state paradigm must be undertaken with hesitation and humility. Doing so requires examining America’s experience with established churches and the post-Revolutionary disestablishment battles, reviewing contemporary commentary regarding church/state relations in the United States during various periods, and texts of various Supreme Court cases following the removal of church/state battles from the states to the federal level. Although imperfect, all these help illustrate the “separation” paradigm exemplified by Jefferson’s famous “wall of separation.” Consequently, all are examined below.

It is clear that a serious analysis must begin with the colonial period and carefully account for the revolutionary experience. America’s initial church/state paradigm, as a result of early American colonies inheriting the tradition of an established church from

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48 Id.
49 Writings of Thomas Jefferson (Monticello ed.), XVI, 281-282. (as cited in ANSON PHELPS STOKES AND LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES, 53 (Harper & Row) (1964)).
50 See U.S. CONST. AMEND. I.
Great Britain, is largely one of “establishment.” The tradition of an established church was continued in the New World out of the belief that political stability necessitated a formal religious establishment. Indeed, the first legislative body to meet in North America, assembling at Jamestown in 1619, established the Church of England as the colony’s official faith and legislated measures for its support. This establishment drive, however, was not limited to Virginia. Prior to 1776, nine of the thirteen colonies had some form of an established, or government-sponsored, church. New England colonies, with the exception of Rhode Island, were associated with Congregationalism. Maryland, Virginia, North Carolina South Carolina, and Georgia possessed official relations with the Church of England while New York and New Jersey were alternately associated with the Anglican and Dutch Reformed Churches. Rhode Island, Pennsylvania and Delaware enjoyed the greatest amount of liberty of conscience, even for non-Christians and those without an established church. The result of these established churches was that, by 1776, a vast majority of American colonists had direct exposure to an established church, sponsored and funded by taxpayer monies.

The outbreak of the American Revolution marks the decisive turn in the American national church/state paradigm from that of “establishment” to one of “separation.” Wartime loyalties significantly impacted this alteration. During the conflict itself, most major religious bodies supported the colonial cause, with the notable exception of the

51 See generally Anson Phelps Stokes and Leo Pfeffer, Church and State in the United States 24-25 (Harper & Row) (1964).
52 Esbeck, supra note 17, at 1414-15.
53 Stokes & Pfeffer, supra note 51, at 6-7.
54 Id. at 36-37.
55 Id.
57 Stokes & Pfeffer, supra note 51, at 8.
58 See Id. at 36-40.
Anglicans who had taken an oath of allegiance to the king.\textsuperscript{59} In particular, Congregationalists in New England, Presbyterians in the middle colonies, and Baptists generally were strong supporters of American independence.\textsuperscript{60} Perhaps as a result of Tory sympathies held by the Anglicans, and the significant backlash against them, church disestablishment efforts received strong support during and following the Revolution.\textsuperscript{61} Virginia led the way in 1776 by removing penalties against those who did not attend services of the established church, and in 1779 by discontinuing payment of salaries to clergymen.\textsuperscript{62} Virginia’s disestablishment efforts were carried to full fruition in 1786 with the Bill for Establishing Religious Freedom which officially dissociated the Commonwealth from the Anglican church.\textsuperscript{63}

Virginia’s disestablishment efforts were largely led by Thomas Jefferson, although he received strong support from such individuals as James Madison and George Mason.\textsuperscript{64} Jefferson, in his \textit{Notes on Virginia}, clearly distinguishes between the civil sphere and religious domain, declaring:

\textsuperscript{59} See AHLSTROM, \textit{supra} note 56, at 361. Ahlstrom notes that, while Anglican clergy were largely loyalists, the Anglican laity in the South joined the Patriot cause and contributed significantly in leadership. \textit{Id}

\textsuperscript{60} STOKES & PFEFFER, \textit{supra} note 51, 36-38. In addition to prominent Protestant denominations, colonial Catholic and Jewish populations also actively supported the patriot cause. Stokes & Pfeffer note that, among Catholics, “There were practically no Tories among them.” \textit{Id}. In addition, approximately one hundred Jews served in the American Navy or Army. This is an astonishingly high number considering that the total number of Jewish colonists in America at this time numbered in the hundreds, rather than thousands. \textit{Id}

\textsuperscript{61} See \textit{Id}. at 158-159. Sydney Ahlstrom summarizes the post-war Anglican church by saying that “its fragments lay scattered from Portsmouth to Savannah.” He further explains that 2/3 of Virginia’s rectors left their parishes during the conflict. At the war’s conclusion, there were a mere five priests remaining in New Jersey, four in Massachusetts, one in New Hampshire, and none in Rhode Island or Maine. AHLSTROM, \textit{supra} note 56, at 358.

\textsuperscript{62} STOKES & PFEFFER, \textit{supra} note 51, at 65-68.

\textsuperscript{63} \textit{Id}. at 69.

\textsuperscript{64} See AHLSTROM, \textit{supra} note 56, at 376; STOKES & PFEFFER, \textit{supra} note 51, at 52.
But our rulers have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate power of government extend to such acts only as are injurious to others.\textsuperscript{65}

This effort by Jefferson to control the “legitimate power of government” was emulated in other colonies. Although North Carolina’s final disestablishment would also wait until 1786, that state dissociated itself from the Anglican church with its 1776 constitution providing “That there shall be no establishment of any one religious church or denomination in this state…”\textsuperscript{66} New York, curiously enough, disestablished the Anglican church from state government in the constitution of 1777, but permitted the Episcopal church to remain established in four counties, the faith being especially strong in Westchester County.\textsuperscript{67}

Other states were disestablished with varying degrees of rapidity up through Massachusetts’s decades-long battle to preserve state Congregationalism, a battle finally concluded in 1833.\textsuperscript{68} The enduring power of Congregationalism in the Bay State is explained by the fact that the church’s strong support for the patriot cause helped it avoid the fate befalling the established Anglican churches in the South who generally supported the British.\textsuperscript{69} Massachusetts’ first step toward disestablishment took place in 1780 with a state constitution, largely drafted by John Adams, providing for guaranteed individual religious freedom coupled with a requirement for towns and villages to support the “maintenance of public Protestant teachers of piety, religion, and morality in all cases

\textsuperscript{65} Thomas Jefferson, \textit{Notes on the State of Virginia}, (as cited in JEFFERSON’S WRITINGS 285 (Merrill D. Peterson ed.) (1984)).
\textsuperscript{66} STOKES & PFEFFER, supra note 51, at 72.
\textsuperscript{67} \textit{Id.} at 73.
\textsuperscript{68} \textit{Id.} at 76-78.
\textsuperscript{69} MASS. CONST. OF 1780, Art. III.
where such provision shall not be made voluntarily.”

An 1820 state constitutional convention submitted proposals to the voters to liberalize this requirement by extending the same public financing to non-Protestant religious teachers. This proposal, however, was defeated by a vote of about 20,000 to 11,000. In 1833, the voters of Massachusetts finally adopted a constitutional amendment disestablishing Congregationalism by a ratio of 10 to 1. This lopsided result may be due to a serious public schism in the Congregational church at the time pertaining to church property.

On the federal level, church/state battles were not nearly as fierce as at the state level. Debate surrounding ratification of the Constitution indicates that the framers viewed religious issues primarily as matters of state concern. Indeed, in over eighty of the Federalist Papers by Madison, Hamilton, and Jay, there is only a single mention of religion. Early U.S. Presidents behaved largely in conformity with this concept that religion was primarily a state concern. Among the earliest presidents, Thomas Jefferson’s administration adopted the strictest view of separation between church and state. A famous illustration, and important for the purposes of this paper, is found

70 STOKES & PFEFFER, supra note 51, at 77.
71 Id.
72 Id.
73 Id.
74 Id. at 531. The battle, eventually resulting in 81 Massachusetts’ churches seceding from the Congregationalist Church, related to whether church property belonged to church members collectively or the parish society. The legal question pitted both sides against each other for years and was eventually resolved by the state Supreme Court. Id.
76 Id.; STOKES AND PFEFFER, supra note 51, at 91.
77 STOKES & PFEFFER, supra note 51, at 91. This single reference is from James Madison, who cites “A zeal for different opinions concerning religion” as being among the “latent causes of faction” which appear in civil society. PAUL LESTER FORD, ed., The Federalist, 57 (as cited in Id.).
78 Id. at 87-90.
79 See Id. at 53. A famous example is Jefferson’s refusal to issue a presidential Thanksgiving Day proclamation. He may have had this in mind on the occasion of his second inaugural: “In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of
among Jefferson’s comments on church/state relations in his 1802 letter in response to
the Danbury Baptist Association. Coining the famous “wall” analogy, Jefferson writes:

Believing with you that religion is a matter which lies solely between man and his
God, that he owes account to none other for his faith or his worship, that the
legislative powers of government reach actions only, and not opinions, I
contemplate with sovereign reverence that act of the whole American people
which declared that their legislature should “make no law respecting an
establishment of religion, or prohibiting the free exercise thereof,” thus building a
wall of separation between Church and State. Adhering to this expression of the
supreme will of the nation in behalf of the rights of conscience, I shall see with
sincere satisfaction the progress of those sentiments which tend to restore to man
all his natural rights, convinced he has no natural right in opposition to his social
duties. (emphasis added).^{80}

This phrase, although merely referencing the commonly held belief that religion
was primarily a matter for states to address,^{81} is central to the American “separation”
paradigm. The phrase’s meaning, although often misunderstood and manipulated,
remains an apt illustration of the church/state relationship in the United States. It also
demonstrates why early church/state battles were largely fought on the state level.
Despite this relative calm on the federal level, however, church/state relations would
again become a matter of federal concern, as exemplified by multiple 20th century U.S.
Supreme Court cases.

By the 1830s, however, with disestablishment largely complete on the state level,
and adoption of the federal government’s Establishment Clause,^{82} it may be argued that

the federal government...
Americans had adopted Mr. Jefferson’s “wall” and its accompanying “separation” paradigm of national church/state relations. Concluding this may be aided by reference to outside opinion. Fortunately, Alexis DeTocqueville commented broadly on America’s church/state relations in his Democracy in America, a result of nearly one year traveling in the United States between 1831-1832. Strikingly, despite decades of disestablishment battles, DeTocqueville commented that, upon arriving in America, “the religious aspect of the country was the first thing that struck my attention.” His surprise at finding the “spirit of religion” marching in step with the “spirit of freedom” led him to inquire as to its cause among the clergy of many different sects. His answer is important and demonstrates the tremendous change in America’s church/state paradigm in the decades following independence:

To each of these [clergy] I expressed my astonishment and explained my doubts. I found that they differed upon matters of detail alone, and that they all attributed the peaceful dominion of religion in their country mainly to the separation of church and state. I do not hesitate to affirm that during my stay in America I did not find a single individual, of the clergy or the laity, who was not of the same opinion on this point. (emphasis added).

DeTocqueville’s confirmation that the United States had essentially adopted a “separation” paradigm of church/state relations is largely supported throughout the remainder of the 19th and into the 20th centuries. As the 19th century progressed, the heavy influx of Catholic immigrants led to increased Protestant vigilance of Mr. Jefferson’s “wall,” arising from issues as wide-ranging as funding for private schools to

83 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Introduction, (Alfred A. Knopf pub.) (1945). During his travels, DeTocqueville covered approximately 7,000 miles by steamer, stagecoach, and horseback. He also succeeded in visiting every present-day state east of the Mississippi River, with the exceptions of Maine, New Hampshire, Vermont, Florida, Illinois, and Indiana. Id. at 308.
84 Id. at 308.
85 Id.
86 Id.
87 See e.g. HAMBURGER, supra note 81, at 3.
increased Catholic political power.\textsuperscript{88} Perhaps in response to such pressures, in 1878 the
U.S. Supreme Court explicitly endorsed Jefferson’s “wall” analogy by referencing it
“almost as an authoritative declaration of the scope and effect of the [First]
Amendment.”\textsuperscript{89} Moving into the 20\textsuperscript{th} century, as many of the church/state debates moved
from the legislatures into the courts, the Court issued multiple decisions addressing
America’s church/state relations.

The 1943 case \textit{West Virginia State Board of Education v. Barnette} provides
famous commentary by the U.S. Supreme Court on America’s church/state paradigm and
its relationship to free speech.\textsuperscript{90} \textit{Barnette} addressed a situation where public school
teachers compelled students to recite the Pledge of Allegiance.\textsuperscript{91} Examining this
requirement, the Supreme Court declared:

\begin{quote}
If there is any fixed star in our constitutional constellation, it is that no official, 
high or petty, can prescribe what shall be orthodox in politics, nationalism,
religion, or other matters of opinion or force citizens to confess by word or act 
their faith therein. If there are any circumstances which permit an exception, they 
do not now occur to us.\textsuperscript{92}
\end{quote}

\begin{footnotes}
\item[88] \textit{Id.} at 37-42. Philip Hamburger writes extensively about the anti-Catholic bias underlying these
separation efforts. In particular, Hamburger cites concerns about increasing political power by Catholics, 
and the fear that Catholic politicians would be entirely beholden to the Pope. In response to these fears,
Hamburger cites an interesting speech delivered by Cong. Eustis of Louisiana: “I am in favor of 
maintaining and keeping up the divorce between Church and State which has been established by our great 
fathers. But, sir, that very same reason which makes me a deadly enemy of Catholic interference with our 
institutions, makes me blush for my countrymen when I see the Protestant Church soiling its robes by 
dragging them int eh mire of politics. Your legislatures are filled with gentlemen who wear white cravats 
and black coats. Your Congress has a large population of these clerical gentlemen. And I ask you, with all 
due respect and all due courtesy to gentlemen of the cloth, to show me a Catholic priest or an accredited 
agent of the Church of Rome in this hall. Gentlemen who talk about the Pope of Rome ought to recollect 
that poor old man, who is the object of such terror to them, is now in custody of a guard of French 
soldiers.” \textit{Id.} at 41.
\item[91] \textit{Id.} at 625-626.
\item[92] \textit{Id.} at 642.
\end{footnotes}
This strong endorsement of the “separation” paradigm’s central concept was explicitly reaffirmed in 1947 in *Everson v. Board of Education*.*93* Addressing a New Jersey effort to transport children by bus to parochial schools, as well as public schools, the Court clearly examined the issue in light of the “separation” paradigm: “The First Amendment has erected a wall of separation between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”*94*

Modern Court doctrine, although not as ringing as Everson’s “high and impregnable” declaration, adheres to the “separation” paradigm and Mr. Jefferson’s “wall.” In *Lemon v. Kurtzman*, the case governing contemporary First Amendment Establishment Clause doctrine, the Court acknowledges that this wall “is a blurred, indistinct, and variable barrier depending on the circumstances of a particular relationship.”*95* The important fact for this paper, however, is that while the case’s so-called “Lemon test” governing Establishment Clause doctrine has been severely criticized,*96* it remains faithful to the central tenets of a “separation” paradigm.*97*

In sum, although an imperfect analogy, Jefferson’s “wall” of separation agreeably illustrates the “separation” paradigm governing U.S. church/state relations. Born out of the revolutionary impulse to separate church and state, the “separation” paradigm was largely triumphant by the 1830s. This paradigm continues to govern today, and its power is demonstrated in the famous “fixed star” commentary in *Barnette*. Indeed, to use the

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94 Id. at 18.
96 See e.g. *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993): “As to the Court’s invocation of the *Lemon* test: like some ghoul in a late-night horror movie, that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.” Id. at 398 (Scalia, J., dissenting).
97 See e.g. Id. at 615-622 (Addressing potential for excessive entanglement between church and state in both the Rhode Island and Pennsylvania programs providing aid to private schools).
Barnette Court’s language, the idea that an “official, high or petty, can prescribe what shall be orthodox” in religion is the very antithesis of the American “separation” paradigm. Having examined this American “separation” paradigm, it is helpful for us to analyze some important critiques of the preceding paradigm descriptions.

C. Critiquing National Paradigm Descriptions

The above analyses argue that the United Kingdom and United States each operate under the opposite national church/state paradigms of “establishment” and “separation,” respectively. These paradigms, however, may be subject to justifiable criticism in that they are overly simplistic in certain specific aspects. As a result, any serious analysis of church/state relations must examine and respond to these critiques.

Of the church/state paradigms analyzed, the United Kingdom’s “establishment” paradigm appears to be the most secure. While it may be argued that repeal of disabilities against Dissenters, Catholics, and other religious faiths make the Church of England’s establishment a mere harmless tradition, it is clear that the established church wielded tremendous power at certain points in Britain’s history. Even today, while subject to declining church attendance, the Church of England enjoys special representation in the House of Lords and imposes certain restrictions on the monarch as its spiritual head. In consequence, while it may be debated what practical import an “establishment” paradigm entails for the United Kingdom, it is clear that it is the operable paradigm to begin analyzing Britain’s clergy disqualification clauses. This is especially true given the strength of the monarchy at the time clergy disestablishment was instituted in the United Kingdom, a subject addressed fully in Section III.

98 See note 24, supra.
99 See Albert, supra note 75, at 918.
In contrast, labeling the United States’ paradigm of church/state relations as “separation” is not as simple. For example, although the United States’ paradigm of “separation” is broadly exemplified by the Establishment Clause of the First Amendment and by DeTocqueville’s observations on American attitudes toward separation, it may be argued that the correct American church/state paradigm is much more nuanced. For example, Professor Erwin Chemerinsky argues that there are, in fact, three primary approaches to America’s separation between church and state: “strict separation,” “neutrality,” and “accommodation.” Each of these theories possesses merits and drawbacks, the exploring of which is beyond the scope of this paper. Fortunately, it is enough for our purposes to place them under the general paradigm of “separation” and explore some of its facets in the hope of minimizing oversimplification.

Absent historical context, it may easiest to associate Jefferson’s “wall” analogy with the “strict separation” paradigm referenced by Chemerinsky. American history, however, is replete with divergences from a “strict separation” paradigm, such as the opening of the Continental Congress in 1774 with prayer, a practice that continues in today’s House of Representatives and Senate. Another example is the traditional proclamation of days of Thanksgiving, first issued by Congress in November of 1777, calling for Americans to “join the penitent confession of their manifold sins,” and to offer “their humble and earnest supplication that it may please God through the merits of Jesus Christ, mercifully to forgive and blot them out of remembrance.”

100 Notes 82 and 86, supra.
102 STOKES AND PFEFFER, supra note 51, at 83.
103 Id. at 83-84.
Skeptics arguing for an increasingly nuanced account of “separation” are not limited to 18th century examples. In 1962, Justice Potter Stewart railed against the perceived misuse of Jefferson’s “wall” metaphor as an accurate description of U.S. church/state relations, by saying that jurisprudence is not “aided by the uncritical invocation of metaphors like the ‘wall of separation,’ a phrase nowhere to be found in the Constitution.” Over 20 years later, Chief Justice William Rehnquist agreed, by writing in 1985 that “unfortunately, the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”

Some legal historians agree with Stewart and Rehnquist. In particular, Chicago Law Professor Philip Hamburger addresses the issue in his 2002 book *Separation of Church and State*. According to Hamburger, Jefferson’s “wall” is meant to describe the simple fact that the federal Congress had no authority over religion and religious liberty, leaving states to address the issue. This modest interpretation of the phrase, however, has largely been ignored. Indeed, Hamburger explores how the “wall” metaphor came to develop a more robust meaning than Jefferson intended. Hamburger does so by carefully exploring the religious freedom debates prevalent in the United States during the 19th century, including those pitting Catholics against Protestants. In exploring these battles, Hamburger explains that Jefferson’s “wall” became a valuable

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105 *Wallace v. Jaffree*, 472 US 38, 92 (1985). In *Jaffree*, Rehnquist responds to the statement recounted above in *Reynolds* that Jefferson’s “wall” analogy may not be considered “authoritative” on the extent of the Establishment Clause, in light of the source: “Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.” *Id.*
108 *See* HAMBURGER, supra note 106, at 193-390.
109 *Id.* at 191-251.
new weapon in anti-Catholic arsenals. Arguing that Roman Catholics favored
imposition of a state Catholic faith, propagandists adroitly portrayed the church/state
issue as one of Protestant-backed separation and patriotism against Catholic efforts to
establish a state faith.

While Hamburger makes clear that the “wall of separation” analogy developed
into something far different than Jefferson intended, it is equally clear that it has been
adopted in the 20th century as an important, if sometimes controversial, ideal. Referenced
in debates ranging from school funding to the Pledge of Allegiance, the “wall of
separation” is a ubiquitous staple of U.S. Supreme Court decisions. An excellent
example, in addition to those referenced earlier, is found in the 1948 case McCollom v.
Board of Education. Justice Jackson concluded his McCollom concurrence by warning
that, should the Court persist in the experiment of a strict separation of church and state,
“we are likely to make the legal ‘wall of separation between church and state’ as winding
as the famous serpentine wall designed by Mr. Jefferson for the University he
founded.”

Philip Hamburger’s and Justice Jackson’s observations on the “wall of
separation” framework are important because they demonstrate that the American
church/state paradigm is not so easily defined. Congressional prayer, thanksgiving
proclamations, and commentary by Supreme Court justices are only a few indicia of
caution in this regard. While it is clear that the most applicable paradigm is one of

110 Id. at 201-240.
111 Id.
112 See e.g., McCollom v. Board of Education, 333 U.S. 203, 237 (1948); Everson, supra note 93; Lemon,
supra note 95.
114 Id. at 237.
“separation” between church and state, the extent to which this paradigm may be properly extended is debatable. Its implementation over 200 years makes clear that, while there is a wall, it is, as Justice Jackson predicted, a winding one.

Having established the church/state paradigms applicable to both countries, and examined important qualifications, this paper now turns to the establishment, development, and ultimate downfall of clergy disqualification clauses in the United Kingdom and the United States.

III. DISQUALIFICATION CLAUSES IN THE UNITED KINGDOM

“I accept your Majesty as the sole source of ecclesiastical, spiritual and temporal power.”115

OATH OF LOYALTY SWORN BY CHURCH OF ENGLAND BISHOPS

A. Traditional Disqualification: 1553-1801

The tradition of prohibiting clergy from serving in the United Kingdom’s House of Commons is first recorded in the early 16th century, and existed between 1533-1801 as a matter of parliamentary tradition.116 The tradition’s earliest history is matter of some disagreement. There is, for example, a difference of opinion as to whether, in Parliament’s earliest days, Britain’s clergy assembled with the Lords and Commoners in their applicable parliamentary bodies.117 While some have argued that is precisely what happened, others, such as late 19th century British historian, and Bishop of Salisbury, Gilbert Burnet, have argued that whether clerics ever served in the commons “is a just doubt.”118

While it is unclear to what extent, if any, early British clergy served in the Commons, it is clear that, by the 13th century, they served primarily in a body known as the “Convocation.”119 The Convocation was a “miniature of parliament” in which clergy ruled on canon matters.120 Originally part of Parliament itself, canons passed by Convocation on ecclesiastical matters bound the entire kingdom.121 In consisting of two houses, of which the members of the “lower” house were elected, it directly mirrored Parliament itself.122 A significant difference, however, is the fact that there were two Convocations: one residing at York, and the larger residing at Canterbury.123 Eventually, however, clergy were prevented from simultaneous service in Convocation and the Commons out of fear that clergy, who after 1553 were subject to the Crown, would use membership in the Commons to diminish its independence in favor of the monarchy.124

The importance of a clergyman’s service in the Convocation is demonstrated in the earliest recorded case in English law addressing clergy disqualification. Occurring in October of 1553, Rev. Alexander Newell, Prebendary of Westminster and a clergyman in the Church of England, was returned to the House of Commons.125 The House thereupon appointed a six member committee to determine the whether Rev. Newell may sit.126 After deliberating, it concluded:

121 Id.
122 Helmholtz, supra note 119, at 159.
123 Id. at 158.
124 Select Committee in Parliamentary History Vol. 35, Cols. 1375-6 (as cited in MacManaway, supra note 116, at 164).
126 Id.
It is declared by the commissioners, that Alexander Newell, being prebendary in Westminster, and thereby having voice in the convocation house, cannot be a member of this House; and so agreed by the House; and the Queen’s writ to be directed for another burgess in that place.127

This practice of excluding clergy based on service in the Convocation was affirmed in 1621 with the exclusion of Reverend John Robson from service in the Commons for precisely the same reasons.128 The House of Commons journal for that date records:

Sir Geor. Moore proceedeth with this Report for the third Question, concerning the Return of…a Minister, returned for Morpeth in Northumberland.

Sir Edw. Coke: -- When he Speaker, one put out: And that he saw Alexander Nowell (though he had not curam animarum) put out, because of the Convocation-house.

Upon Question, Resolvd, His Return void; and a new Writ to issue, for a new Election.129

After referring back to Newell’s exclusion from the House, the Commons opposed Reverend Robson’s service because, like Newell, he had “a Voice [in] or attendeth…the Convocation.”130

By 1664, however, English clergy had abandoned the practice of voting their own subsidies to the King and were under the general taxation power of Parliament. This alteration, however, did not end the practice of clergy disqualification. In 1661, for example, Sir James Craddock, another Anglican clergyman, was excluded from the Commons, not because his service could benefit the monarchy at the expense of

127 Id.
128 See H.C. JOUR., Vol. I, p. 511 (as cited in The Case of the Borough of Newport, supra note 7, at 272); See also MacManaway, supra note 116, at 170).
129 H.C. JOUR., Vol. I, p. 513 (1620). Interestingly, case notes attached to The Case of the Borough of Newport point out that a Mr. Hatfell observed there must be some mistake with Sir Edward Coke’s assertion, as Coke was born in 1550 and Newell was excluded from the Commons in 1553. The Case of the Borough of Newport, supra note 7, at 273.
130 Le Clercq, supra note 120, at 558.
Parliament, but due to the broader consideration of the “sacred calling” of a clergyman.\textsuperscript{131} The clergyman’s “sacred calling,” according to reasoning of the House, must not be interfered with by “such mundane activities as were appropriate to a member of the House of Commons.”\textsuperscript{132} Applying this logic, the Commons determined Craddock was in holy orders and “so disabled to sit.”\textsuperscript{133} This marked a subtle yet definite shift in the rationale behind clergy disqualification clauses. From 1664 onward, a recurring rationale in their defense was that there was something inherent in the office of minister or clergyman rendering them unfit for civil office.\textsuperscript{134} This determination that service as a minister \textit{in and of itself} disqualified an individual for service in the secular institution of Parliament established an enduring rationale for clergy disqualification provisions, one whose substance reappears in 20\textsuperscript{th} century American litigation.\textsuperscript{135}

By the mid 18\textsuperscript{th} century, Sir William Blackstone summarized the existing legal prohibitions on individuals serving in Parliament:

> And from there it appears, That they must not be aliens born, or minors. That they must not be any of the twelve judges, because they sit in the Lords House; nor of the clergy, for they sit in the convocation; nor persons attained of treason or felony, for they are unfit to sit anywhere.\textsuperscript{136}

In providing support for statement that clergy were prevented from serving in Parliament as a consequence of sitting in Convocation, Blackstone cited the “law and custom of

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} MacManaway, \textit{supra} note 116, at 170.

\textsuperscript{133} \textit{Id.} at 171.

\textsuperscript{134} See \textit{Id.} An example is the sweeping manner in which the Tennessee Supreme Court addressed Rev. McDaniel’s case before the appeal to the U.S. Supreme Court: “It is not religious belief, but the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect, that disqualifies.” Paty v. McDaniel, 547 S.W. 2d 897, 903 (1977).

\textsuperscript{135} McDaniel \textit{supra} note 6.

\textsuperscript{136} BLACKSTONE, W., \textit{COMMENTARIES ON THE LAWS OF ENGLAND}, 174 (Sharswood ed. 1860) (Book 1 at 175 in original).
parliament.” He also cited three of the examples recounted above: the exclusion of Alexander Newell in 1553, John Robson in 1620, and Dr. James Craddock in 1661.

1. The Case of the Borough of Newport

The exclusions of Newell, Robson, and Craddock were carefully scrutinized in the 1785 controversy *The Case of the Borough of Newport* brought before a House of Commons select committee investigating a challenged election in Southampton. Reprinted in April of 1789, in Volume II of Alexander Luder’s *Reports of the Proceedings in Committees of the House of Commons Upon Controverted Elections*, this case provides a rare and thorough analysis of clergy disqualification, as a traditional matter, at the end of the 19th century. As a result, it is worth examining in some detail here.

*The Case of the Borough of Newport* was heard before a thirteen member House of Commons committee, selected on February 22, 1785, and squared the petitioner, John Barrington, against the sitting member for Newport, Edward Rushworth. Barrington’s case alleged Rushworth was incapable of being seated in the Commons on account of Rushworth’s service as a deacon in the parish church at Newport. This belief was so strongly held that, as the record reads, “When the electors were assembled for the last election, they were told by the petitioner’s counsel, that Mr. Rushworth was in deacon’s orders, and ineligible; and that any votes for him would be thrown away.” Despite this

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137 *Id.*
138 *Id.*
139 *The Case of the Borough of Newport*, supra note 7.
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.* at 270.
warning, the electors of Newport returned Mr. Rushworth, with the following recorded result:

The poll at the election for this borough stood thus:

For Edward Rushworth, Esq; 15
Hon. Hugh Seymour Conway 13
John Barrington, Esq; 3

Upon reviewing the election results, the Committee noted that the facts of the case were largely uncontested in that Rushworth had, indeed, been ordained deacon by the Bishop of Winchester, and had preached in the church of Newport in 1780. These facts being established, the Committee turned first to the allegations offered by the counsel for the petitioner, summarized by the Committee as being: “That Mr. Rushworth, being a clerk in orders, was not capable of being elected a member of parliament.”

The Committee then heard Barrington’s opening argument, a clearly delivered summary of the case against Rushworth:

According to the constitutional of parliament, a clerk in orders is incapable to sit in the House of Commons. The description of a clerk in orders includes the characters both of priest and deacon. This incapacity will appear by a consideration of the law of parliaments, and of the ecclesiastical law.

As demonstrated in this opening argument, Barrington’s case clearly turns on the assertion that Rushworth’s service as deacon was encompassed in the traditional bar to service among the clergy of the United Kingdom. Following this opening statement, Barrington’s counsel proceeded to lay out his argument, noting how rare such cases are in British history: “There are but few instances in the Journals of the House of Commons, in

\[144\] Id. This case naturally raises the curious role, or lack thereof, of the immediate runner-up, Mr. Conway. The record notes “There was no objection to the election of Mr. Conway,” but does not state what role, if any, Conway had in the case against Rushworth. Id.

\[145\] Id.

\[146\] Id. at 271.

\[147\] Id. at 271-2.
which this law of parliament is recognized; those few, however, expressly support the position contended for.”

Having established the relative rarity of the case before the Committee, Barrington’s counsel examined the history of the “few instances” discovered. These included Alexander Newell’s exclusion in 1553, John Robson’s exclusion in 1621, and Sir James Craddock’s exclusion in 1661, all of which were examined earlier in this section. Regarding John Robson’s case, Barrington’s counsel noted that the Committee judging the matter declared “All of opinion against…a clerk returned; because -- had or might have a voice in the convocation house; therefore not fit to be admitted here: And would have fined the town but for their poverty.” After noting the threat of fining a town for the peculiar offense of electing a clergyman, Barrington’s counsel declared that all the known exclusions shared the fact that the individuals in question served “in holy orders.” He continues:

Thus, as far as examples go, they appear to have been uniform in the exclusion of clerks in orders. They have been confirmed by a long experience in modern times. The road of preferment offered to ambitious men, through the House of Commons, is so sure, that it is not to be questioned but the clergy would have taken it, if it had been open to them.

Barrington’s counsel then turned to the thorny, but central, question of the Convocation. Declaring that clergy, including deacons, were “represented in convocation,” Barrington’s counsel cited both Blackstone and Coke as authorities for the

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148 Id. at 272; R.H. Helmholz may agree with this argument by Barrington’s counsel that deacons were represented in Convocation: “The monks and lower clergy attended by elected representatives and had a right to participate in the decisions that were made in Convocation…” HEMHLHOLZ, supra note 119, at 159.
149 The Case of the Borough of Newport, supra note 7, at 272-273; See supra notes 125-134.
150 The Case of the Borough of Newport, supra note 7, at 272-273.
151 Id. at 274.
152 Id. 274-275.
proposition that such service excluded clergy from serving in the Commons. This exclusion was for the simple fact that the United Kingdom’s clergy were taxed by acts of the Convocation, rather than Parliament. Having established this as the reason for exclusion, Barrington’s counsel preemptively addressed two arguments “which it is necessary to anticipate.” These two arguments were: 1) “deacons are not members of the convocation, or not represented there;” and 2) “the convocation has not, in modern times, exercised the right of taxation or legislation.” In response to these arguments, Barrington’s counsel declared that the Convocation represented all of the United Kingdom’s clergy, and that the Convocation, although it had not exercised its right of taxation since 1664, could still do so at any time it chose. After hearing further arguments based on ecclesiastical law, the Committee then turned to the argument for Mr. Rushworth.

Mr. Rushworth’s counsel opened his response by arguing that the clergy exclusion “never extended to deacons; and that even if it did, the reason of it had long ceased.” Rushworth’s counsel then proceeded to distinguish the cases of Newell, Robson, and Craddock to his client’s. These distinctions included that Craddock’s exclusion was based on an “extrajudicial” opinion of the election committee, and hinted

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153 Id. at 275. “Blackstone, in enumerating the classes of persons who cannot sit in the House of Commons, mentions the clergy, ‘because they sit in convocation.’ [citation deleted] Coke establishes the same doctrine: He says, ‘None of the clergy, though they be of the lowest order, are eligible, because they are of another body, viz. the convocation.’” Id.
154 Id.
155 Id. at 276.
156 Id. “As to the first, the convocation is the representation of the whole body of the clergy. It is assembled by the authority of the king’s writ to each of the archbishops, to call together ‘universos & singulos episcopos, nec non archidiaconos decanos & omnes alias personas ecclesiasticas cujuslibet, diocesesos, &c.’” Id.
157 Id. at 277. “Second, although since the year 1664, there has been a change, in fact, in this part of our constitution, the principle continues the same; and the convocation possesses still, whenever it may choose to exert it, the full and sole authority to impose taxes on the clergy.” Id.
158 Id. at 289.
that his exclusion was primarily political.\cite{159} Politics, according to Rushworth’s counsel, may have also played a role in Newell’s exclusion.\cite{160} After distinguishing the cases on the fact that Newell appeared to actually serve as a priest, as opposed to merely a deacon, the charge was made that Craddock was excluded “by the influence of the court, for being a zealous protestant; and, consequently, a determined opponent of [the court’s] measures.”\cite{161}

Having distinguished the above cases, Rushworth’s counsel proceeded to examine the issue of Convocation.\cite{162} In doing so, he declared that, when Britain’s clergy submitted themselves to the taxation power of Parliament in 1664, the exclusion of service in the Commons effectively ceased to have meaning.\cite{163} Indeed, although he acknowledged the technical power of the Convocation to again vote its own taxes, he declared it “a dead letter” and compared the language allowing such an action “as nugatory as the name of *King of France* in the royal title of England.”\cite{164} Rushworth’s counsel concluded his argument by examining and responding to the points of ecclesiastical law raised by Barrington’s counsel.\cite{165} At the conclusion of this argument, after allowing Barrington’s counsel to reiterate his earlier comments, the Committee concluded, without comment: “*That the sitting member was duly elected.* Of which the

\begin{footnotes}
\item[159] *Id.* at 290. “The most modern, and therefore the most pertinent, is clearly founded on an extrajudicial opinion of the election committee; for Craddock, the clergyman, said to be incapable, had not the majority of votes.” *Id.*
\item[160] *Id.* at 290-291.
\item[161] *Id.*
\item[162] *Id.* at 295.
\item[163] *Id.*
\item[164] *Id.*
\item[165] *See Id.* at 299-303. In the course of this examination, Rushworth’s counsel noted that, curiously enough, neither ecclesiastical nor secular law does “nothing to prevent a man actually excommunicated, from being eligible to parliament.” *Id.* at 300.
\end{footnotes}
Chairman informed the house, Feb. 24.” The legal arguments offered in this case indicate agreement that the matter of a clergyman’s service in Convocation, whether a deacon or priest, was the primary issue of concern. The fact the Committee allowed Rushworth to take the seat indicates that the Committee either believed the argument that the exclusion was not intended to apply to lower orders of clergy, such as deacons, or that the case simply did not possess the same political concerns which may have prevented Newell and Craddock from taking their seats. In any event, *The Case of the Borough of Newport* is an enlightening example of the traditional bar to service among clergy members in the House of Commons in the late 19th century.

*Statutory Disqualification: 1801-2001*

In the sixteen years following *The Case of the Borough of Newport*, the tradition of clergy disqualification continued unbroken, until codified into law by the Clergy Disqualification Act of 1801. Occasioned by the election to the House of Commons by Reverend J. Horne Tooke, an ordained priest of the Church of England, sitting as a member for Old Sarum, the House prepared a Commons Report on the subject. The committee preparing the Report made a search “into all the returns to writs issued for the election of members to serve in Parliament, from the earliest period in which they are extant.” In doing so, the Report listed sixty-two individuals returned to the Commons between the reigns of Edward I and George II who “could furnish any presumption of [being] individuals in Holy Orders.” Upon the Report’s conclusion, the Commons felt sufficiently strong on the subject (going so far as to label simultaneous service as a

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166 Id. at 307.
167 Clergy Disqualification Act, 41 Geo. 3, c. 63 (1801)(Eng.).
168 *MacManaway, supra* note 116, at 164.
169 14 H.C. REP. 150 (1801).
170 Id.
minister and member of the House “entirely incompatible”) as to forbid service by any
“person having been ordained to the office of priest or deacon, or being a minister of the
Church of Scotland” from serving in the Commons. This legislation, aimed at
members of the established church, was extended to Catholic clergy in the Roman
Catholic Relief Act of 1829. The Clergy Disqualification Act was consistently upheld
by English courts, most recently in 1951 with the exclusion of Reverend James Godfrey
MacManaway, a clergyman elected as the Ulster Unionist member for the division of
Belfast (West). Indeed, it remained in effect as the general election loomed for Tony
Blair’s government in the summer of 2001.

In 2001, David Cairns was nominated as the Labour candidate for the safe seat of
Greenock and Inverclyde. As a former priest, however, it was clear that Cairns would
be incapable of sitting in the Commons under the Clergy Disqualification Act of 1801,
and its Catholic-oriented relation, the Roman Catholic Relief Act of 1829. Hurriedly
moving to address the situation, so as to allow Mr. Cairns to take his seat following the
election, the Blair government introduced the Removal of Clergy Disqualification Act.
The politics on display, and the aroused passions, were evident in the Bill’s second
reading:

171 Id. (quoting Clergy Disqualification Act, 1801). Debate regarding the repeal of this act precisely 200
years later featured the following observation by a supportive MP: “The 1801 legislation was the product of
a specific electoral event to decide whether the Rev. J. Horne Tooke – a name to conjure with, if ever there
was – should take his place in the House.” (Quoting Mr. Stunnell) available at
http://www.publications.parliament.uk/pa/cm200001/cmhansrd/vo010206/debtext/10206-12.htm (last
visited April 6, 2006).
172 See Roman Catholic Relief Act, 10 Geo. 4, c. 7 (1829).
173 MacManaway, supra note 116, at 161.
(last visited April 10, 2006).
175 Supra notes 171, 172.
Mr. O’Brien [for the government]: Most hon. Members are aware of the case of Mr. David Cairns, a former Catholic priest, who intends to stand as the Labour candidate for Greenock and Inverclyde at the next general election. If elected, he could be prevented from taking his seat in the House.

Mr. Eric Forth (Bromley and Chislehurst): That is what this is all about.

Mr. O’Brien: The right hon. Gentleman is right. [Interruption.] The Bill will remove old, prejudiced provisions from the statute book--[Interruption.]

Mr. Speaker: Order. The right hon. Member for Bromley and Chislehurst (Mr. Forth) must give the Minister a hearing. 176

After a lengthy discussion regarding the Government’s perceived need for the bill, and some of the issue’s convoluted history, debate on the subject turned even sharper. Labour MP’s demanded to know if sporadic Conservative opposition was based on the fact “that although they used to pride themselves on being described as the Church of England at prayer, they have long since lost the support of all the Churches in the country?” 177 Conservative MPs rejoined that the Bill was for the sole benefit of Labour political fortunes: “We know why the measure is being whipped: because this constitutional business is not being undertaken on its own merits, but for a particular Labour candidate in a particular constituency.” 178

When not devoted to the politics of the Bill, debate centered around Labour’s decidedly egalitarian view of the issue. Declaring that the bill was needed to erase “essentially discriminatory and outdated qualifications,” speaker after speaker rose from

177 Id. (quoting Mr. Ben Bradshaw (Exeter)).
178 Id. (quoting Miss Widdecombe) available at http://www.publications.parliament.uk/pa/cm200001/cmhansrd/vo010206/debtext/10206-10.htm (last visited, April 7, 2006).
the Labour benches to argue the existing law was discriminatory.\textsuperscript{179} Ms. Ryan, representing Enfield North, offered a characteristically powerful Labour argument:

There are no grounds for continuing to distinguish between the clergy of different religions in this matter. Whether or not ministers of any religious groups should be able to be elected to the House is a matter of choice for the electorate and the parties and religious groups involved, not a matter for legislation.\textsuperscript{180}

Against such rhetorical blows, and the Conservative decision to treat the vote as a vote of conscience, the Bill passed overwhelmingly by a vote of 196-15.\textsuperscript{181} In doing so, it firmly brought about an end to 450 years of clergy disqualification in Britain, whether as a matter of tradition or statutory requirement.

\textit{C. Justifications for Disqualification}

Various justifications were offered in defense of the British tradition, and later statute, prohibiting clergy from serving in the House of Commons. The background paper prepared for the Commons in early 2001 addressed two overarching categories: “House-based” defenses and “Office-based” defenses.\textsuperscript{182} The paper defines a “House-based” defense as one designed to “ensure that Members are fit and proper to sit in the House, and are able to carry out their duties free from undue pressures…”\textsuperscript{183} Vice versa, an “Office-based” defense is described as one “designed to ensure that an office held by

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{179}] Id. (quoting Ms. Joan Ryan (Enfield North)) available at http://www.publications.parliament.uk/pa/cm200001/cmhansrd/vo010206/debtext/10206-11.htm (last visited, April 7, 2006).
\item[\textsuperscript{180}] Id. available at http://www.publications.parliament.uk/pa/cm200001/cmhansrd/vo010206/debtext/10206-12.htm (last visited, April 7, 2006).
\item[\textsuperscript{181}] Id. available at http://www.publicwhip.org.uk/division.php?date=2001-03-01&number=140 (last visited, April 7, 2006).
\item[\textsuperscript{182}] HOUSE OF COMMONS RESEARCH PAPER 01/11, The House of Commons (Removal of Clergy Disqualification) Bill, at 7, note 5; available at www.parliament.uk/commons/lib/research/rp2001/rp01-011.pdf (Last visited March 27, 2006).
\item[\textsuperscript{183}] Id.
\end{itemize}
\end{footnotesize}
an individual is not adversely affected by his membership of Parliament.” 184 These opposing categorizations are apt and will be used for the purposes of this paper.

During the approximately 450 years of disqualification, four general “House-based” and “Office-based” justifications emerge. These include 1) Prevention of dual office holding by clergy in the Commons and Convocation 185; 2) Preserving the independence of the House of Commons from the influence of the monarchy 186; 3) Preserving the sacred character of a clergyman’s calling 187; and 4) General constitutional concerns 188. Each of these justifications, and their merits, are examined below.

The first justification, that clergy are ineligible to serve in the Commons by virtue of their service in the Convocation, is a “House-based” defense relying on the presumption that a clergyman’s legal status independent of the taxing power of Parliament impairs the quality of representation. This argument might be that, as a result of the “undue influence” of not being subject to the ramifications of Parliamentary decisions pertaining to taxes, a member of the clergy sitting in the Commons would be under pressure unique to their clerical office. This justification was explored above in The Case of the Borough of Newport where Rushworth’s counsel cited both Blackstone and Coke as supporting the idea that membership in Convocation was the primary impediment to membership. 189 This justification, however, is based on the independent ability to tax, an impediment that no longer existed when Britain’s clergy came under the general taxation power of Parliament in 1664. 190 The decision in The Case of the

184 Id.
185 See e.g., The Case of the Borough of Newport, supra note 7.
186 See SELECT COMMITTEE OF PARLIAMENTARY HISTORY, supra note 124, at Cols. 1375-1376.
187 MacManaway, supra note 116, at 170-171.
188 See e.g. H.C. JOUR. Vol. 1, p. 512 (1620).
189 Note 153, supra.
190 See Id., at 295.
Borough of Newport suggests that, even by 1785, the Convocation-oriented justification was no longer strongly adhered to.  

Another important “House-based” defense is that the exclusion is necessary to prevent the monarch from unduly influencing clergy at the expense of the House’s independence.  This is powerfully reinforced by the commentary offered by Chancellor Addington on the Commons Report prepared in response to the election of Mr. Tooke in 1801.  Addington’s remarks to the House were to the effect that, as the greater part of the clergy’s benefices were within the power of the crown to grant, allowing clergy to serve in the Commons would only weaken the Commons in favor of the monarchy.  This fear was seemingly realized in Dr. Craddock’s exclusion in 1661.  While Addington feared manipulation of the clergy by the monarchy at the expense of the Commons, Craddock’s exclusion appears to have been orchestrated by the monarchy, precisely because of Dr. Craddock’s independent views on religious matters.  It is possible that the successful exclusion of Dr. Craddock provided ample evidence of the crown’s determination to control clergy serving in the House, an action which may have strengthened parliamentary resolve in the matter.

An “Office-based” justification to contend with is the idea that service in the Commons constitutes an earthly distraction from the spiritual pursuits of a clergyman, and thus harms the clergyman’s quality of clerical service.  This is most noticeable in the court’s language in MacManaway, where the court observed that the clauses were

\begin{footnotes}
\footnote{191} Id.
\footnote{192} See MacManaway, supra note 116, at 164, 170-171.
\footnote{193} Note 186, supra.
\footnote{194} See note 124, supra.
\footnote{195} See note 133, supra.
\footnote{196} See note 161, supra.
\footnote{197} See, e.g. note 133, supra.
\end{footnotes}
designed to insure that the priest or deacon devoted himself to his “sacred calling,” rather than to “such mundane activities as were appropriate to a member of the House of Commons.”

Finally, the last “House-based” defense is the argument that clergy may be prevented from serving in the Commons out of general constitutional concerns. Sir Edward Coke, writing in the early 17th century, viewed this concern in light of the “per pares” requirement that trial of nobility be carried out before the nation’s peers. Coke noted that one must be “[e]ither of the Upper or Lower House, except some few cases.” With British clergy already serving in the House of Lords, this raised constitutional concerns regarding the propriety of clergy serving in the Commons. Coke remarked further: “[n]one of the judges of the kings bench, or common pleas, or barons of the exchequer that have judicial places can be chosen knight, citizen or burgess of parliament…because they be affiants in the lord’s house.” This view that Parliament served as the highest court in the kingdom is consistent with prevailing English constitutional theory in the 16th century, and constitutes an effective “House-based” defense.

Interestingly, none of the above four justifications for disqualification played a major role in debate on repealing the provision. Instead, opposition to repealing the Clergy Disqualification Act was of a political and traditional orientation. The few Conservatives who opposed the bill regularly cited the unseemliness of passing the repeal

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198 Note 116, supra.
199 See Note 188, supra.
200 1. H.C. JOUR. 512 (1620) (as cited in Brief for the Respondent at 13, McDaniel v. Paty supra note 6).
201 Id.
202 35 PARL. HIST. ENG. 1367 (1801) (Microfilm) (as cited in Brief for the Respondent at 22, McDaniel v. Paty supra note 6).
for the sole perceived benefit of Labour political fortunes. Some also cited the
importance of the provision to the traditional concept of British church/state relations.

What is striking, and important for the purposes of this paper, is that not a single MP in
opposition to the repeal cited the “House-based” concerns which appear to bear the
greatest responsibility for the disqualification’s origin: fear of “undue pressure” through
service in the Convocation, or diminished independence of the House to the benefit of the
monarchy.

III. Disqualification Clauses in the United States

“[T]he church itself is a thing absolutely separate and distinct from the commonwealth.”
JOHN LOCKE

A. Colonial Disenfranchisement: 1607-1776

The parliamentary tradition of disqualifying clergy from legislative service was
transported to the New World by English colonists. It is unknown, however, how
many colonies actually enforced such measures. One colonial legislature that did is the
Virginia House of Burgesses, which is known to have adopted the tradition of
disqualifying clergy, and was apparently rigorous in its enforcement. In 1653, the
Journal for the House of Burgesses records that that Reverend Robert Bracewell was
elected and subsequently denied his seat: “It is ordered by this present grand assembly,

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204 See e.g., Notes 176, 178, supra.
205 See e.g., Hansard parliamentary debates for 6 Feb., 2001, available at
http://www.publications.parliament.uk/pa/cm200001/cmhansrd/vo010206/debtext/10206-09.htm (last
visited April 7, 2006). Quoting Miss Widdecombe: “My right hon. Friend will be glad to hear that I do not
believe that we should dismiss too lightly the Bill's constitutional implications. For hundreds of years--and
not merely since the reformation--the politics of England, Wales, Scotland and Ireland were dominated by
questions of religion....There is an on-going debate today about whether the Church of England should be
disestablished. In many ways, to many communities in the United Kingdom, questions of religion are no
less relevant today than they were decades, or hundreds of years, ago.”
206 McDaniel, supra note 6, at 624 (quoting 5 WORKS OF JOHN LOCKE 21 (C. Baldwin ed. 1824).
207 See Id. at 623.
208 See Earl Gregg Swem, The Disqualification of Ministers from State Constitutions, 26 WM. AND MARY
HIST. Q. MAG. 69 (1917).
that Mr. Robert Bracewell, clarke, be suspended, and is not in a capacitie of serving as a burgess, as it is unpresidentiall, and may produce bad consequences.”

Half a century later, Reverend John Waugh of Stafford was elected member of the assembly of 1699. The Journal for the House of Burgesses on May 4th, 1699 briefly addresses the issue:

Then according to order Yesterday the house took into their Consideration the report of the Committee for Elections and Privileges touching upon Mr John Waugh (he being withdrawne) and after a full debate on the matter.

Resolved That It is the Opinion of the House that Mr. John Waugh elected and returned a Burgess for Stafford County being a Clergyman is disabled for Serving as a Burgess.

Ordered. That Mr. John Waugh be acquainted with the Resolve of the house touching his being a Burgess who being called in Mr. Speaker acquainted him therewith and then the said Mr. Waugh was ordd to withdraw.

Ordered. That Mr. Corbin Mr. Mason and Mr. Lloyd do waite upon his Excellcy and in the name of the house pray his Excellcy to Issue out a new writt for the Election of a Burgess to serve in this Assembly for Stafford County in the room of Mr. John Waugh disabled being a Clergy man.

Despite these exclusions of Bracewell and Waugh, multiple members of the clergy served in colonial Virginia’s appointed upper house, the Council.

B. Disqualification and Disestablishment: 1776-1833

During and after the American Revolution, political philosophers and statesmen alike urged the struggling colonies to disqualify clergy from legislative service. John Locke, an exceptionally important influence on revolutionary American political philosophy, argued for restricting clergy “within the bounds of the church, nor can it in
any manner be extended into civil affairs; because the church itself is a thing absolutely separate and distinct from the commonwealth.” Virginia took its first Revolutionary-era steps of formally excluding clergy from serving in the legislature with its Constitution of May, 1776. This Constitution prohibited ministers of the gospel from every denomination, or anyone holding lucrative office, from serving in either house of the legislature, or in the privy council. One year later saw Virginia’s first application of this constitutional disqualification. The Journal for the House of Delegates on November 1, 1777 records that Mr. John Corbley was elected to represent Monongalia County.

Although only briefly discussed, it is worthwhile to examine the Journal for the account:

The House being informed that Mr. John Corbley, one of the members returned to serve in this present General Assembly for the county of Monongalia, is a minister of the gospel; Mr. Corbley was heard in his place upon the subject matter of the said information, and confessed himself to be a preacher of the gospel, but alleged that he received no stipend or gratuity for performing the function; and then he withdrew.

And the question being put, that Mr. John Corbley is capable of being elected a member of this House, It passed in the negative.

Resolved, That Mr. John Corbley is not duly elected to serve in this present General Assembly, as a delegate for the county of Monongalia.

Ordered, That the Speaker be desired to issue a new writ, for the election of a delegate, to serve in this present General Assembly for the county of Monongalia, in the room of Mr. John Corbley, who being a minister of the gospel, is incapable of being elected a member of this House.

Thomas Jefferson, who served in the House of Delegates at the time of Corbley’s exclusion, advocated continuing this clergy disqualification clause in his 1783 draft of a

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213 McDaniel, supra note 6, at 624 (quoting 5 WORKS OF JOHN LOCKE 21 (C. Baldwin ed. 1824).
214 9 Hening 117, Article XIII (as cited in Swem, supra note 208, at 73).
216 Id.
Vigorous opposition to Jefferson’s effort came from his political ally and fellow Virginian James Madison. Madison’s response to Jefferson’s effort was laid out in his “Remarks on Mr. Jefferson’s Draught of a Constitution”:

Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? Does it [not] violate another article of the plan itself which exempts religion from the cognizance of Civil power? Does it not violate justice by at once taking away a right and prohibiting compensation for it? Does it not in fine violate impartiality by shutting the door [against] the Ministers of one Religion and leaving it open for those of every other?

Madison was joined in his opposition to clergy disqualification clauses by Reverend John Witherspoon, a Presbyterian minister, President of Princeton University, and the only clergyman to sign the Declaration of Independence. In response to a proposal by Georgia legislators to prohibit clergyman from certain public offices, Witherspoon offered a tongue in cheek amendment:

No clergyman, of any denomination, shall be capable of being elected a member of the Senate or House of Representatives, because (here insert the grounds of offensive disqualification, which I have not been able to discover) Provided always, and it is the true intent and meaning of this part of the constitution, that if at any time he shall be completely deprived of the clerical character by those by whom he was invested with it, as by deposition for cursing and swearing, drunkenness or uncleanness, he shall then be fully restored to all the privileges of a free citizen; his offense [of being a clergyman] shall no more be remembered against him…

Despite these eloquent opponents of clergy disestablishment clauses, seven of the original thirteen states, and six later states, formally adopted clergy disqualification clauses by

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217 McDaniel supra note 6, at 623.
218 Id. at 624 (citing 5 WRITINGS OF JAMES MADISON 288 (G. Hunt ed. 1904)).
219 Id.
220 Id. at 624-625. Rev. Witherspoon’s opposition is made more powerful considering his lifetime of work in favor of religious liberty. Before coming to America, Witherspoon agitated in Scotland in favor of allowing the people to choose their own ministers and against the theory of a state church. STOKES & PFEFFER, supra note 51, at 41.
provisions prohibiting clergy from some or all political offices.\textsuperscript{221} With the exception of New York, all were southern or border states. Perhaps not coincidentally, these states are those in which the Anglican church, with well-known Tory sympathies, was strongest.\textsuperscript{222} New York’s constitution of 1777 made clergymen of any denomination ineligible for any public office.\textsuperscript{223} South Carolina’s constitution of 1778, Mississippi’s constitution of 1817, and Texas’s constitution of 1866 had virtually the same provisions with only minor changes.\textsuperscript{224} Virginia, Georgia, and Maryland had similar restrictions in their Revolution-era constitutions as did Kentucky.\textsuperscript{225} The Louisiana constitution provides an interesting glimpse into the politics of constitution-making in the early 19th century: “No person while he continues to exercise the functions of a clergyman, priest or teacher of any religious persuasion, society, or sect, shall be eligible to the general assembly or to any office or trust under this State.” (emphasis added).\textsuperscript{226} It is believed this provision is attributable to the influence of a former Jesuit priest, Eligius Fromentin, a jurist, who represented Louisiana in the U.S. Senate from 1813 to 1819.\textsuperscript{227}

The earliest Revolutionary-era clergy disqualification effort, and most pertinent to their final downfall in the U.S., took place in 1776 in North Carolina with its strong Scotch-Irish Presbyterian background: “XXI. That no clergyman or preacher of the gospel shall be capable of being a member of either the Senate, House of Commons, or

\textsuperscript{221} Stokes & Pfeffer, supra note 51, at 158-161.
\textsuperscript{222} See Id. at 22.
\textsuperscript{223} Id. at 159.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id. at 160.
\textsuperscript{227} Id. Fromentin is not the only member of the clergy to serve in Congress. Perhaps the most interesting case is that of Rev. Gabriel Richard, a French priest, who played a large role in the early religious, educational, and philanthropic life of Michigan. In 1823, Richard was elected a delegate to Congress representing the Michigan territory. His service gained him wide-spread support, regardless of religious affiliation. Richard donated his congressional salary to the Church and was so respected in Congress that Henry Clay frequently repeated his friend’s arguments to the House when Richard’s English was defective. Id. at 161.
Council of State, while he continues in the exercise of his pastoral function.” In 1796, North Carolina’s constitution, including Article XXI, was adopted almost entirely by the new state of Tennessee constructed out of North Carolina’s western territories. This provision was readopted in the Tennessee constitutional conventions of 1835 and 1870. Indeed, it stood virtually untouched for over 180 years.

C. Modern Disqualification: 1833-1978

As examined in Section II, the state disestablishment battles were concluded by 1833. As a result, constitutional provisions prohibiting clergy from serving in the legislature, a favored tool by disestablishmentarians, came under increasing scrutiny throughout the 19th and 20th centuries. As the 19th century progressed, eleven of the thirteen states disqualifying clergy from service in the legislature gradually abandoned the limitation. New York, in an 1846 constitutional convention, determined that the exclusion of clergymen from the legislature was an “odious distinction.” North and South Carolina dropped the clergy disqualification provision in their reconstruction constitutions of 1868. Kentucky’s clergy disqualification clause, originally adopted in 1799, continued in 1850, and applying only to the governor, was eventually discarded in 1890.

The increasing skepticism of clergy disqualification clauses was a result of many elements. Among them is the fact that by the mid-19th century, the disestablishment

228 Id. at 159.
229 Id.
231 See McDaniel, supra note 6.
232 See note 68, supra.
233 McDaniel supra note 6, at 625.
234 Id.
235 STOKES & PFEFFER, supra at note 51, at 159.
236 Id.
battles at the state level were complete. This rendered one of the traditional defenses of disqualification clauses, that clergy serving in political office would serve an established faith at the expense of the state, less of a reasonable fear. In addition, the role of clergy in abolition efforts became a moot political point following the Civil War. Prior to the Civil War, despite southern legislative decrees otherwise, the Anglican Church upheld the English legal ruling that a slave who had been baptized became free. Other sects, such as Quakers, Methodists, and Congregationalists were actively involved in abolition efforts. These emancipation activities led to Kentucky’s establishment of clergy disqualification in its 1792 constitution and its continuation in the 1850 constitutional convention. According to a delegate of the Kentucky Convention of 1890, the provision was readopted in the 1850 convention because “[I]t was well known that the most prominent ministers of the state of Kentucky were for emancipation and hence that led to the Convention of ’49 to exclude ministers from holding offices.” Kentucky is only one recorded example where pronounced positions on slavery by clergymen in slave states contributed to a political reaction in favor of maintaining clergy disqualification clauses.

1. McDaniel v. Paty

Through legislative action and Reconstruction-era constitutions following the Civil War, clergy disqualification clauses systematically disappeared from state constitutions throughout the 19th and 20th centuries. By the late 1970’s, only Tennessee’s

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237 See Id. at 531.
238 Id. at 283.
239 Id. at 282.
240 Le Clercq, supra note 120, at 580.
241 Id. at 581.
242 STOKES & PFEEFFER, supra note 51, at 159.
clergy disqualification provision found in Article VIII of its 1796 constitution remained, an unnoticed historical curiosity from disestablishment battles nearly two centuries previous. Just as examining The Case of the Borough of Newport in Section III provided a unique analysis of the British tradition of excluding clergy at the close of the 19th century, a close examination of McDaniel v. Paty, the seminal Supreme Court case on the subject of clergy disqualification, is instructive in examining the distinctly American view on the role of clergy in government.  

On March 19, 1976, the final day of the legislative session, the Tennessee legislature approved a call for a limited constitutional convention. In response to the legislature’s convention call, Reverend Paul A. McDaniel, a full-time minister at Missionary Baptist Church in Chattanooga, filed for office and was elected as Delegate from the 29th House District comprising most of Hamilton County. The qualifications for Delegate were the same as those required for serving in the state legislature. Among other things, this meant candidates could not have fought a duel or be a minister. The latter provision was a result of Tennessee’s 180 year old clergy disqualification clause to their state constitution, the final clergy disqualification clause still in effect in the United States. Tennessee’s disqualification clause read as follows:

\[
\text{Whereas ministers of the gospel are, by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no minister of the gospel or priest of any denomination whatever, shall be eligible to a seat in either House of the legislature.}
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243 Supra, notes 139-166.
244 McDaniel, supra note 6.
246 Id at. 498.
247 Id. at 490.
248 Id.
249 Id. at 497.
250 TENN. CONST., ART. VIII, SECT. 1 (1796).
When McDaniel filed for election, an opposing candidate named Selma Cash Paty, filed suit in the Chancery Court for a declaratory judgment. This suit demanded that, as a result of McDaniel’s serving as a minister, he be disqualified from serving as Delegate and his name be stricken from the ballot.\(^2^5^1\) The Chancery Court held that Tennessee’s clergy disqualification clause violated the First and Fourteenth Amendments to the Federal Constitution and declared McDaniel eligible for the office of delegate.\(^2^5^2\) As a result, McDaniel’s name remained on the ballot where he received a vote count almost equal to the combined total of all three opposing candidates.\(^2^5^3\)

Paty and the state of Tennessee appealed the Chancery Court’s ruling.\(^2^5^4\) In arguments before the Tennessee Supreme Court, Paty and the state argued the clergy disqualification clause reinforces church and state separation and is directed solely against the profession of religion as opposed to its exercise.\(^2^5^5\) McDaniel argued that the inability to simultaneously exercise his fundamental rights, inherent in serving as both preacher and political candidate, violated his First Amendment-guaranteed free exercise rights.\(^2^5^6\) In its decision, the court reviewed the history of Tennessee’s clergy disqualification clause, tracing its origin back to the 1776 North Carolina Constitution, and reviewing the provisions survival through the 1835 and 1870 constitutional conventions.\(^2^5^7\) It also examined the downfall of clergy disqualification provisions in other states.\(^2^5^8\) Thus educated, the court proceeded to address the question of whether the

\(^2^5^1\) *McDaniel*, supra note 6, at 621.
\(^2^5^2\) Id.
\(^2^5^3\) Id.
\(^2^5^4\) *Paty*, supra note 229, at 901.
\(^2^5^5\) Id.
\(^2^5^6\) See Id.
\(^2^5^7\) Id. at 902.
\(^2^5^8\) Id. at 902-903. The last clergy disqualification clause to exist, save Tennessee’s, was found in Maryland. Similar to Tennessee’s clause, the Maryland Constitution prohibited “ministers of the gospel, or
clergy disqualification clause actually impeded free exercise of religion. The court determined that the provision did not address religious belief, but is rather addressed at religious status. It explained that “It is not religious belief, but the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect, that disqualifies.”

The court went further, explaining that ineligibility for legislative service by ministers in no way impacts the free exercise of religion except in the lawmaking process of government “where religious action is absolutely prohibited by the establishment clause…”

Having examined legal justification for upholding the clergy disqualification clause, the Tennessee Supreme Court then explored policy concerns, citing two in particular. Examining the first, the court observed that Baptists, Methodists, and Catholics far outnumbered other religious sects in Tennessee. Opening the door to service in the legislature by leaders of such sects, the court opined:

[w]ould grant a distinct advantage to ministers and priests of the three mentioned religions, over those of all other sects, because of the far more extensive voter base from which to launch a campaign for office.

Having called attention to political ramifications, the court turned to its second policy objection. The court declared, without significant explanation, that allowing political campaigns by ministers would naturally tend to “pit religion against nonreligion” and

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259 Paty, supra note 229, at 903.
260 Id.
261 Id. at 904.
262 Id.
would be considered a First Amendment prohibited “divisive force.”\textsuperscript{263} The court concluded its policy analysis by citing examples of situations in which religious leaders have acquired government positions:

The present day religious wars in Ireland and Lebanon, that shock the conscience of all men of good will, everywhere, religious and non-religious, remind us that the human race has not advanced to a degree of civilization that will permit us to conclude that the fervor of religion will never again disturb and disrupt secular affairs and government. Out of its proper realm, it is a force of awesome power and influence upon human conduct.\textsuperscript{264}

In light of these policy concerns, the court noted that Tennessee had a compelling interest in preserving the separation between church and state through its clergy disqualification clause.\textsuperscript{265} Consequently, the Tennessee Supreme Court proceeded to overrule the Chancery Court’s decision by a 4-1 vote and ordered that Reverend McDaniel be declared ineligible for service and that a vacancy exist in the 29\textsuperscript{th} House District. McDaniel, now joined by religious freedom advocates from throughout the country, appealed the ruling to the United States Supreme Court.\textsuperscript{266}

The U.S. Supreme Court, upon receipt of McDaniel’s appeal, immediately accepted the case and granted a stay allowing McDaniel to take his seat when the Tennessee constitutional convention convened on August 1, 1977.\textsuperscript{267} During arguments heard on December 5th, 1977, both parties repeated and elaborated on the arguments delivered before the Tennessee Supreme Court earlier that year. McDaniel reiterated his argument that disabling ministers from service in the legislature violated the free exercise guarantee of the First Amendment by making his ability to take part in a civic right, that

\begin{footnotesize}
\textsuperscript{263} Id.
\textsuperscript{264} Id. at 906.
\textsuperscript{265} Id. at 905.
\textsuperscript{266} McDaniel, supra note 6.
\textsuperscript{267} Laska, supra note 245, at 498.
\end{footnotesize}
of legislative service, contingent on surrendering his exercise of religion. Paty and the Tennessee Attorney General argued, in contrast, that the clergy disqualification clause was necessary for the state to ensure a continuing “wall of separation” between church and state.

The U.S. Supreme Court handed down its decision in McDaniel v. Paty on April 19th, 1978. Writing for a plurality of four justices, Chief Justice Burger found for McDaniel and declared that Tennessee’s clergy disqualification provision violated McDaniel’s free exercise of religion guaranteed by the First Amendment. Burger explained that the First Amendment guaranteed the right to preach, proselyte, and perform other religious functions. He further explained that Tennessee also acknowledges the right of its adult citizens “generally” to seek office as legislators. However, under the clergy disqualification clause of the Tennessee constitution, McDaniel cannot simultaneously exercise both rights because “the State has conditioned the exercise of one on the surrender of the other.” Burger quoted with approval Madison’s declaration of the inability of the state to engage in “punishing a religious profession with the privation of a civil right.”

Later in the opinion, Burger turned his attention to Tennessee’s argument that the clergy disqualification clause was “of the highest order” as it was designed to prevent the establishment of a state religion. In response to this argument, Burger dismissed

\[268\] McDaniel supra note 6.  
\[269\] Respondent’s Brief at 17, McDaniel, supra note 6.  
\[270\] McDaniel supra note 6.  
\[271\] Id. at 626.  
\[272\] Id.  
\[273\] Id.  
\[274\] Id.  
\[275\] Id.; WRITINGS OF JAMES MADISON at 288(G. Hunt ed. 1904).  
\[276\] McDaniel supra note 6, at 628.
Tennessee’s fears of religious strife and concerns that ministers serving in the legislature will use their position to benefit their denomination rather than their constituents, by simply stating, “the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.”

Having established that, Burger declared that Tennessee had failed to demonstrate the interest in retaining the clergy disqualification clause was of the highest order. Accordingly, Burger, joined by Justices Powell, Rehnquist and Stevens, struck down Tennessee’s clergy disqualification clause as a violation of the First Amendment’s free exercise guarantee.

This case saw an additional three concurring opinions. Of those, the most interesting for our purposes is Justice Brennan’s concurrence, written for himself and Justice Marshall. Brennan found Tennessee’s disqualification provision violated, not only the Free Exercise Clause of the First Amendment, but also the Establishment Clause. Brennan condemned the clause as exhibiting “patent hostility” toward religious activity, rather than neutrality. He further explained that simply because Tennessee’s purpose in supporting the disqualification was to support the separation of church and state, that did not give license for Tennessee to deprive ministers of their rights under the Constitution: “The Establishment Clause does not license government to

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277 Id. at 629.
278 Id.
279 Id. at 629-642.
280 See Id. at 642.
281 Id. at 636.
treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.\textsuperscript{282}

Justices Stewart and White each followed Brennan’s example, and wrote concurring opinions. Justice Stewart based his decision squarely on the Court precedent established in \textit{Torcaso v. Watkins}, a 1961 case where the Supreme Court struck down Maryland’s refusal to commission a notary public because of the plaintiff’s refusal to profess belief in God.\textsuperscript{283} Justice White, meanwhile, struck down the disqualification clause based on the Equal Protection Clause of the 14\textsuperscript{th} Amendment.\textsuperscript{284}

\textit{D. Justifications for Disqualification}

Earlier in this paper, I explored the “House-based” and “Office-based” defenses offered of clergy disqualification clauses in the United Kingdom.\textsuperscript{285} These distinctions transfer nicely across the Atlantic, and may be used to analyze the various defenses offered of the clauses in the United States.

In the significant time span between the disqualification clause’s transportation across the Atlantic, to their eventual demise in \textit{McDaniel}, roughly three general “House-based” or “Office-based” justifications emerge: 1) Tradition\textsuperscript{286}; 2) The argument that clergy may be expected to serve their faith at the expense of the electorate\textsuperscript{287}; and 3) Preserving the sacred character of a clergyman’s calling.\textsuperscript{288} Just as each justification for the United Kingdom’s disqualification was explored in Section III, we examine each of these in turn.

\footnotesize
\begin{itemize}
  \item \textsuperscript{282} \textit{Id.} at 641.
  \item \textsuperscript{283} \textit{Id.} at 642-3; \textit{Torcaso v. Watkins}, 367 US 488 (1961).
  \item \textsuperscript{284} \textit{McDaniel}, supra note 6, at 643.
  \item \textsuperscript{285} See supra note 182.
  \item \textsuperscript{286} See e.g. \textit{Swem}, supra note 208.
  \item \textsuperscript{287} See e.g. supra note 263.
  \item \textsuperscript{288} See e.g. supra note 250 (citing text of Tennessee’s clergy disqualification clause).
\end{itemize}
It is clear that clergy disqualification was originally justified in the colonies as a matter of tradition. As such, it is difficult to categorize early justification for the disqualifications as either “House-based” or “Office-based,” as either may be appropriate or inappropriate based on the clouded justification of disqualification in the United Kingdom. Indeed, early colonial experiences with clergy disqualification reveal little to the reasoning behind exclusion, beyond that observed in the exclusions of Reverends Bracewell and Waugh. Examining those cases reveals that Bracewell was excluded on the grounds of it being “unpresidential” to do otherwise, and fearing it “may produce bad consequences.” Assuming, perhaps erroneously, that “unpresidential” may be translated to “unprecedented,” Bracewell’s exclusion may be characterized as largely a matter of corresponding to prior English precedent. Waugh, meanwhile, was simply “disabled being a clergy man.” Both these exclusions provide little guidance in the way of whether traditional colonial exclusion was primarily a “House-based” or “Office-based” concern.

As the United States moved from an “establishment” paradigm to a “separation” paradigm, however, we perceive the “House-based” defense which is perhaps the strongest over time: that allowing clergy to serve in the legislature places them in the position of serving their faith at the expense of the electorate. This sentiment is reflected most recently in McDaniel where the Court declared that the essence of Tennessee’s insistence upon maintaining the clause stems from the idea that:

289 See STOKES AND PFEFFER, supra note 51, at 158-161.
290 Supra notes 208-212.
291 Supra note 209.
292 Supra note 211.
If elected to public office, ministers will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. (citations omitted). 293

This fear that clergy will serve their faith at the expense of the electorate appears to be a uniquely American concern, one not apparently shared in the United Kingdom, and could potentially be a result of the revolutionary experience with politicized Anglican clergy.

Lastly, we observe the final justification for clergy disqualification in the United States, namely, the “Office-based” justification that a clergyman’s clerical duties would be negatively impacted by service in the legislature. The primary evidence for such a justification, interestingly enough, comes the language of Tennessee’s disqualification clause itself, which states, in part: “Whereas ministers of the gospel are, by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions…” (emphasis added). 294 Interestingly, New York, South Carolina, Mississippi, and Texas had virtually identical language in the clergy disqualification clauses to the their state constitutions. 295 The circumstances surrounding the adoption of these constitutions, however, and the disestablishment battles raging at the time, indicate that their implementation may have been designed more to serve politics, rather than solicitude for the “great duties” of a clergyman.

Politics, indeed, serves as a primary source of opposition to repealing the clergy disqualification clauses. Just as in the United Kingdom, opposition to repealing the clauses should not necessarily be confused with their original justifications. That said,

293 McDaniel supra note 6, at 628-9.
295 Stokes and Pfeffer, supra note 51, at 159. The disqualification clause in New York’s Constitution of 1777 is a prime example: “And where as the ministers of the gospel are, by their profession, dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their functions…” Id.
however, it is clear that practical politics played a major role for those who fought to maintain the clauses through the decades. Examples in the United States include the Tory sympathies of the Anglican Church during the Revolution,\textsuperscript{296} antipathy toward anti-slavery efforts by clergy in the era preceding the Civil War,\textsuperscript{297} and modern concerns about the power of clergy possessing inherent political advantages.\textsuperscript{298} This final concern is exemplified in the concern demonstrated by the Tennessee Supreme Court that clergy, especially Baptist clergy in heavily-Baptist Tennessee, may have an inherent political advantage due to the sheer number of adherents to their particular faith.\textsuperscript{299}

Although politics plays a major historical role in advocating against repealing the disqualification clauses, it is also clear that, in the United States, significant constitutional issues played a role as well. Strong fears that allowing clergy to serve in the legislature may undermine the proper separation between church and state form a significant aspect of Tennessee’s argument before the Court in \textit{McDaniel}.\textsuperscript{300} Consequently, it would be misleading to characterize opposition to repeal of the clauses as purely political.

Having examined the rise, development, and fall of clergy disqualification clauses in both the United Kingdom and the United States, we turn now to the relationship between these clauses and the underlying church/state paradigms examined in Section II.

\textsuperscript{296} \textit{Supra} note 61.
\textsuperscript{297} See e.g. \textit{Supra} note 241.
\textsuperscript{298} \textit{Supra} note 262.
\textsuperscript{299} Id.
\textsuperscript{300} See e.g., \textit{McDaniel supra} note 6, at 628-629.
V. CHURCH/STATE PARADIGMS AND THE RELATIONSHIP TO DISQUALIFICATION CLAUSES

“A NATION WITH THE SOUL OF A CHURCH.”  
AUTHOR G.K. CHESTERON, SPEAKING OF THE UNITED STATES

A. Relevance of Church/State Paradigms to Disqualification

Section II of this paper strives to demonstrate that the United States and the United Kingdom employ two diametrically opposite church/state paradigms. Although imperfect descriptions, it may be argued that the United States employs Thomas Jefferson’s “separation” paradigm, while the United Kingdom utilizes Henry VIII’s “establishment” paradigm. These analyses are important because they lay the groundwork for this paper’s thesis: That the clergy disqualification tradition, and later legislation, arose in the United Kingdom and the United States precisely because of their distinctly different church/state paradigms. The fact that the United Kingdom and the United States employed the same method (disqualification of clergy from legislative service) to accomplish varying goals rooted in their uniquely different church/state paradigms, provides a rare instance of addressing a common issue from two substantially different viewpoints, and utilizing the same approach. This section intends to demonstrate the relationship between the national church/state paradigms employed in both countries and the resulting establishment of clergy disqualification clauses.

In the United Kingdom, as examined earlier, clergy disqualification was defended on four primary grounds: 1) Prevention of dual office holding by clergy in the Commons and Convocation; 2) Preserving the independence of the Commons from the influence of the monarchy; 3) Preserving the sacred character of a clergyman’s calling; and 4) General

302 See supra notes 12-97.
constititional concerns. Interestingly, three of these concerns are directly traceable to the existence of an established state church, while the fourth (preserving the character of a clergyman’s calling) is common to both church/state paradigms.

The Convocation-based justification, for example, is clearly derived from the Church of England’s status as an established faith and its relationship to the monarch at the time the disqualification tradition emerged in the 16th century. Rising in the 13th century as a body responsible to both the monarch and pope, Convocation is an example of the cooperative union between “regnum and sacredotium.” Responsibility to the pope, however, was removed during Henry VIII’s titanic battle over the divorce with Catherine of Aragon. Henry accomplished this by threatening the entire Convocation with high treason, and declaring unacceptable the making of laws in Convocation without approval of the king or laity. Cyril Garbett, author of *Church and State in England*, describes how the Convocation responded to this direct assault: “The Convocations, after much debate, made their submission to the king in a document in which they promised they would never make or promulgate any canons or even meet in Convocation without his previous license and writ.” Garbett, who also served as Archbishop of York, criticizes this action, stating that “[i]t is difficult not to censure the bishops and clergy for their weak submission,” and compared their actions unfavorably with the resolution of Bishop Fisher and Sir Thomas More. Consequently, the Convocation became a body largely under the control of the monarch as head of the Church of England. This control

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303 See supra notes 199-203.
304 HELMHOLZ, supra note 119, at 158.
305 Supra note 18.
306 CYRIL GARBETT, CHURCH AND STATE IN ENGLAND 58 (Hodder & Stoughton) (1950).
307 Id.
308 Id.
entailed the ability of the Convocation to determine its own taxes, subject to the crown and free from control of the Commons until 1664, and leads directly to the “House-based” concern that a clergyman’s service in the Convocation subjects them to “undue influence” unique to their status as a clergyman.

The second justification for disqualification, that service in the Commons will weaken it in favor of the monarch, is also directly traceable to the “establishment” paradigm. Concern of political manipulation by the monarch is a constant thread through many of the debates on clergy disqualification in the United Kingdom.

Chancellor Addington’s comments immediately prior to the Clergy Disqualification Act of 1801 is a prime example, both because it cites fears of political manipulation by the monarchy, but also because it demonstrates an important concern in the minds of the MPs immediately prior to adopting a statutory prohibition on clergy serving in the Commons.

This fear of political manipulation by the monarch, as we have seen, was not unfounded. Dr. Craddock’s exclusion, allegedly on political grounds and after machinations by the crown, provides a strong example. A series of additional examples is found in the 2001 Commons Report prepared for the Removal of Clergy Disqualification Act, which provided a history of clergy activity in government for interested MPs. Due to clergy being excluded from the Commons, the Report relied as a matter of course on activities among the Lords Spiritual. Validating earlier concerns

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309 See supra note 157.
310 See supra note 124.
311 Id.
312 See supra note 161.
314 Id.
that the monarch would use the clergy positions as a source of patronage, the Report states that, among earlier Parliaments, “the spiritual bench had tended to be a source of support for the political ministry of the day, and felt able to be independent only in ecclesiastical matters.” Interestingly, the Report cites British historian P.A. Bromhead as stating that this tendency had virtually ceased by the mid-twentieth century. In fact, the report recounted numerous comparatively recent examples of the Lords Spiritual actually serving as thorns in the side of majority governments, particularly on social and moral issues including abortion, immigration, capital punishment, and family law. Perhaps the best known examples occurred during Margaret Thatcher’s premiership over high-profile issues of local government, particularly the abolition of the Greater London Council. In sum, while fear of political manipulation by the monarch, or serving government, disappeared during the 20th century, it is clear that it was a potent fear in the minds of the Commons when the tradition of clergy disqualification emerged in the 16th century.

The third “House-based” justification for clergy disqualification in the United Kingdom is that it violates general constitutional provisions. As with the previous justifications, this is traceable to the “establishment” paradigm. By the 14th century, all bishops were invited to attend sessions of the House of Lords. Whether they were

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315 Id. The Report provides a delightful illustration that such patronage was not always welcome by incumbent Prime Ministers, illustrated in Melbourne’s famous cry, “Damn it, another bishop dead! They do it to vex me.” Id. at note 48.
316 Id. “[b]ishops have long since ceased to feel any sort of obligation to come down to the House of Lords to support with their votes the Party under which they have been appointed, and they no longer regard a record of faithful voting as a means of obtaining translation.” (Citing P. BROMHEAD, THE HOUSE OF LORDS AND CONTEMPORARY POLITICS, 1958 at 55).
317 Id. at 17.
318 Id.
319 Supra notes 199-203.
320 Supra note 119.
invited as barons or as separate spiritual peers is a matter of dispute, however, it is clear that by the reign of Henry VIII, Britain’s clergy were firmly represented in the Lords. 321 This representation was a consequence of the privileged status enjoyed by bishops in the Church of England under the “establishment” paradigm. It was this privileged status that created Sir Edward Coke’s concern about the impact of clergy serving in the Commons upon the “per pares” requirement that trial of nobility be by their peers. 322 This is especially important as the House of Lords possessed original jurisdiction in cases of impeachment and criminal cases involving peers. 323 Coke’s observations, however, were rendered necessary only as a result of the governing “establishment” paradigm.

The final justification for clergy disqualification in the United Kingdom is the “Office-based” argument that allowing service in the Commons is detrimental to the “sacred character” of a clergyman’s clerical services. This argument, however, was commonly utilized in both the United Kingdom and United States 324 and, consequently, is likely a result of the shared general Christian tradition of both countries, rather than different national church/state paradigms.

As we can see, the primary grounds for defending disqualification in the United Kingdom are largely traceable to the patronage powers enjoyed by the monarch as head of the Church of England within the “establishment” church/state paradigm. This is clearly opposite to the grounds underlying clergy disqualification clauses in the United States.

321 See KNAPPEN, supra note 15, at 276.
322 Supra note 201.
323 KNAPPEN, supra note 15, at 283.
324 See, e.g., supra notes 187, 288.
In the United States, as examined earlier, clergy disqualification clauses were primarily defended on three grounds: 1) Tradition; 2) The argument that clergy may be expected to serve their faith at the expense of the electorate; and 3) Preserving the sacred character of a clergyman’s calling. Of these three justifications, the second is most clearly related to the “separation” paradigm, and appears most frequently during debates on clergy disqualification in the U.S. The first, a product of colonization, is directly traceable to the “establishment” paradigm, but took on new meaning during the Revolution and disestablishment battles. The third, as was the case in the United Kingdom, is common to both paradigms and is likely a product of a broader religious tradition than specific church/state paradigms. Consequently, the second justification is the most relevant for the purposes of this paper.

The argument the American clergy may be expected to serve their faith at the expense of the electorate grows directly out of the “separation” paradigm and Jefferson’s “wall” between church and state. Just as American leadership rejected establishment after the Revolution, ironically, some states adopted clergy disqualification (a tradition from the mother country) to pursue the goal of church/state separation. E.G. Swem, author of The Disqualification of Ministers in State Constitutions, specifically cites the separation of church and state as the purpose for clergy disqualification in Virginia’s early Revolutionary environment:

As a step toward the separation of church and state in Virginia, the convention which met in Richmond, on July 17, 1775, adopted, in the ‘Ordinance for regulating the election of delegates,’ a clause prohibiting all clergymen of the Church of England, and all dissenting ministers or teachers from election as delegates, or voting in convention. (emphasis added).

325 Supra notes 286-288.
326 See supra note 221.
327 Swem, supra note 208, at 73.
As was demonstrated in Section IV, Thomas Jefferson advocated continuing the clergy disqualification clause referenced by Swem in Virginia’s constitution of 1783.328

The fear that clergy would necessarily serve their faith at the expense of the electorate, as exemplified in the comments of the Tennessee Supreme Court recounted earlier, has largely proven illusory. Justice Burger labeled them so in his McDaniel opinion: “[T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.”329 The fact it has proven illusory, however, leaves unimpaired the observation that the original concern was born out of the “separation” paradigm and an effort to restrict clergy to the spiritual domain.

The second justification, that of tradition, grows out of the “establishment” paradigm, but was fundamentally altered by the American experiences in the Revolutionary War and the disestablishment battles. These conflicts transformed American’s view regarding the proper role of clergy, and changed the justification for disqualification from that of an “establishment”-based tradition, to a “separation”-based

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328 See supra note 70. Interestingly, Jefferson came to alter his position on the subject of clergy serving in the state legislature. In an 1800 letter to Jeremiah Moore, Jefferson writes “In the scheme of constitution for Virginia which I prepared in 1783, I observe an abridgement of the right of being elected, which after 17 years more of experience and reflection, I do not approve. It is the incapacitation of clergymen from being elected. The clergy, by getting themselves established by law, and ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man. They are still so in many countries, and even in some of the U.S. Even in 1783, we doubted the stability of our recent measure for reducing them to the footing of other useful callings. It now appears that our means were effectual. The clergy here seem to have relinquished all pretensions to privilege, and to stand on a footing with lawyers, physicians, etc. They ought, therefore, to possess the same right.” 7 FORD’S JEFFERSON 454 (as cited in Swem, supra note 208, at 74).

329 McDaniel supra note 6, at 629.
effort at restricting clerical involvement in politics.\textsuperscript{330} Urged on by prominent political philosophers, such as John Locke, America’s new leadership adopted disestablishment as a hallmark of the young American political system.\textsuperscript{331} Despite this broad agreement on disestablishment, it should be reiterated that not all American leadership embraced the proposed disqualifications. Prominently, both James Madison and Rev. Witherspoon both opposed disqualifying clergy from legislative service.\textsuperscript{332}

Finally, the third justification, that disqualification is necessary to preserve the sacred character of a clergyman’s vocation, need not be addressed here as it is an argument common to both countries, and is therefore likely independent of a particular church/state paradigm.

Whether or not unanimously supported, it is clear that the “separation” paradigm powerfully influenced the course of clergy disqualification clauses in the United States. Even 150 years following the end of the disestablishment battles, the need for separation was cited by the Tennessee Supreme Court in \textit{McDaniel} as a “compelling interest.”\textsuperscript{333} What is unique about the American “wall of separation”-backed disqualification, is that the primary concern appears to be that clergy will serve their faith at the expense of the electorate.\textsuperscript{334} This is a “House-based” concern that is slightly different than the primary “House-based” concern in the United Kingdom, namely, that clergy would serve the monarchy, or, later, the governing ministry, at the expense of the electorate. Laying aside

\textsuperscript{330} Compare notes 207-212 (detailing clergy disqualification in U.S. as a matter of tradition) and note 265 (detailing the Tennessee Supreme Court’s determination that Tennessee had a “compelling interest” in the separation of church and state, an interest served by the disqualification clause).
\textsuperscript{331} See \textit{supra} notes 213, 217, 221.
\textsuperscript{332} See \textit{supra} notes 218-220.
\textsuperscript{333} See \textit{supra} note 265.
\textsuperscript{334} See e.g. \textit{supra} note 262.
the justification, it is clear is that disqualifications on the state level came about precisely because of the new American church/state paradigm of “separation.”

B. Application to Current Debates

Relations between church and state are vitally important, whether in the 16th century or the 21st. The rise and fall of clergy disqualification clauses in the United States and United Kingdom, and the uniquely different church/state paradigms underlying them, provide valuable observation points for current debates.

In the United Kingdom, the downfall of clergy disqualification clauses represent a weakened monarchy, an emaciated Church of England, and a marked increase in acceptance of politically active clergy. If I have successfully demonstrated that the tradition, and later statutory prohibition, of clergy disqualification in the United Kingdom grows out of the “establishment” paradigm and control the monarch exerted over the Church, Parliament’s permission for clergy to serve in it clearly evinces a lack of fear that the monarch continues to exert significant authority. As today’s monarchy is largely a ceremonial office, the demise of Britain’s clergy disqualification is a biproduct of the significantly altered, and largely emasculated, power of the crown.

While the downfall of clergy disqualifications in Britain is a product of a weakened monarchy, it also signifies a weakened Church of England. With some estimates placing regular church service attendance in Britain at a mere 7% of British Christians, it is clear that there is little perceived danger from Anglican clerics serving in the Commons. In the United States, in contrast, the Tennessee Supreme Court cited the vibrancy of the Baptist faith in Tennessee as a reason to exclude Reverend McDaniel

from service.\textsuperscript{336} This fear, as applied to the vibrancy of the Church of England, was clearly not shared in the 2001 Commons debate. A potential element of this weakened state, and a further explanation for the removal of the disqualification in 2001, may lay in the fact that Anglican clergy have adopted increasingly independent views.\textsuperscript{337} Thus, while the Church of England is weakening, Anglican clergy are becoming increasingly headstrong.\textsuperscript{338}

Finally, elimination of the clauses in Britain clearly suggests an increased acceptance of politically active clergy. This is especially true given that, in contrast to a U.S. Supreme Court decision delivered nearly 30 years ago, the United Kingdom recently abolished the prohibition in a democratic fashion.\textsuperscript{339} With a weakened monarchy, and headstrong clergy, the fear that clergy will be bullied by political patrons has largely evaporated.\textsuperscript{340} Consequently, the British people, acting through the Commons, appear increasingly inclined to accept politically active clergy because today’s clergy are perceived as acting on their own political beliefs, rather than the dictates of their faith.

In the United States, meanwhile, elimination of the disqualifications also suggests some important observations. Among these is that the United States, like the United Kingdom, has developed an increased acceptance of politically active clergy. This is demonstrated in the rise of evangelical Christian clergy such as Dr. James Dobson, and

\textsuperscript{336} See supra note 262.  
\textsuperscript{337} See, e.g., Craig Timberg, Nigerian Warns of Split From British Church, THE WASHINGTON POST, Sept. 30, 2005, at A14 (available at \url{http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092902084.html}) (last visited April 29, 2006). In particular, the issue of ordination of openly homosexual priests has led to a threatened split within the Church of England. Nigerian Archbishop Peter J. Akinola, viewed as a leader of Anglican traditionalists, has been particularly vocal. As the nominal leader of 40 million Anglicans, out of only 77 million worldwide, Akinola’s threat carries particular weight. \textit{Id.}  
\textsuperscript{338} \textit{Id.}  
\textsuperscript{339} Supra note 181.  
\textsuperscript{340} Supra note 316.
the strong support they provide the Republican Party.\footnote{341 See, e.g., Brian MacQuarrie, *Dobson Spiritual Empire Wields Clout*, *The Boston Globe*, Oct. 9, 2005; (available at http://www.boston.com/news/nation/articles/2005/10/09/dobson_spiritual_empire_wields_political_clout/) (last visited April 29, 2006).} This remarkable accumulation of political power by evangelical leaders, widely researched and commented upon elsewhere,\footnote{342 See, e.g., *James Rudin*, *The Baptizing of America: The Religious Right’s Plans for the Rest of Us* (Avalon Publishing Group) (2006); Cece Cox, *To Have and To Hold – Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the U.S.*, *14 Law & Sexuality Review* 1 (2005).} portends significant impacts on issues such as stem-cell research, cloning, abortion, adoption, gay marriage, and any other number of important social issues facing the United States.\footnote{343 Id.}

Finally, a further observation may be pertinent, one that raises our eyes from the comfortable comparative analysis between two Christian-oriented states. Debates are continuing over the meaning of church/state relations in Afghanistan and Iraq. Particularly important to these debates are the levels of acceptable political activity by religious leaders under the developing church/state paradigms. In Afghanistan, these debates were highlighted in the recent trial of a Christian for converting from Islam.\footnote{344 See, e.g., Ian Fisher & Elisabetta Pavoledo, *Italy Grants Asylum to Afghan Christian Convert*, *The New York Times*, March 30, 2006, at A14.} In Iraq, religious clerics have emerged as among the strongest political forces in the country.\footnote{345 See e.g. Robin Wright, *Religious Leaders Ahead in Iraq Poll*, *The Washington Post*, Oct. 22, 2004, at A01; (available at http://www.washingtonpost.com/wp-dyn/articles/A52674-2004Oct21.html) (last visited April 29, 2006).} As both Afghanistan and Iraq appear to be embracing an “establishment” paradigm of church/state relations, it will be instructive to observe whether the same power politics evident in the United Kingdom’s use of clergy disqualification clauses emerges in either of those countries.
VI. CONCLUSION

In the United States today, we have grown accustomed to politically active clergy. Yet both the United States and United Kingdom experienced significant periods of history where, either by tradition or statute, members of the clergy were prohibited from serving in the Commons or state legislatures. This article examined the lengthy history of clergy disqualification clauses in Britain, a subject brimming with political intrigue and dating back to power struggles between the monarchy and Parliament in the 16th and 17th centuries.\textsuperscript{346} It also recounted their traveling across the Atlantic to the New World, where they were enthusiastically adopted in the disestablishment battles following the American Revolution.\textsuperscript{347} It followed their evolution, growth, and constriction until they were eventually eliminated in both countries by the early 21st century. In doing so, it provides important background on the subject as we examined the broader topic of the church/state paradigms employed in both countries. By analyzing the relevant church/state paradigms, a paradigm of “separation” in the United States and “establishment” in the United Kingdom, we discovered that the clergy disqualification clauses in both countries actually developed because of the distinctly different paradigms. This is a counterintuitive result, one demonstrating an interesting overlap between two opposite paradigms. Finally, this paper concluded by positing potential applications of this research to current church/state debates.

\textsuperscript{346} MacManaway, supra note 116.
\textsuperscript{347} STOKES & PFEFFER supra note 51, at 158-159.
In *The Servant of Two Masters*, Truffaldino is ultimately unable to walk the narrow tightrope of two masters, both ignorant of each other’s existence.\(^{348}\) Consequently, he is eventually discovered, and surrenders the idea.\(^{349}\) Although Truffaldino was unable to successfully balance two masters, the downfall of clergy disqualification clauses in both the United Kingdom and United States indicate that the British and American people have drawn a different conclusion: politically active clergy can, indeed, simultaneously serve God and Caesar.

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\(^{348}\) Goldoni, *supra* note 2, at Act Three.

\(^{349}\) Id.