

2005

Some Kind of Religious Freedom: National Prohibition and the Volstead Act's exemption for the Religious Use of Wine

Michael deHaven Newsom

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Michael d. Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's exemption for the Religious Use of Wine*, 70 Brook. L. Rev. (2005).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol70/iss3/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine.

Michael deHaven Newsom[†]

I. INTRODUCTION

*Employment Division v. Smith*¹ represents, in the view of many, a low-water mark in American constitutional free exercise jurisprudence,² at least at the doctrinal level.³ The United States Supreme Court held that Oregon was within its rights to apply an Oregon statutory prohibition against the possession of peyote to members of the Native American Church, effectively subordinating religious freedom to Oregon's war against drugs.⁴ That many other states and the federal government had found a way to accommodate the religious use of peyote by expressly exempting the sacramental use of peyote from the reach of their anti-drug laws,⁵ was of no avail in the

* Copyright Michael deHaven Newsom 2005. All Rights Reserved.

[†] Professor, Howard University School of Law, B.A. Amherst College 1964, LL.B. Harvard Law School 1967.

¹ 494 U.S. 872 (1990).

² See, e.g., Steven H. Aden and Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception"*, 108 PENN. ST. L. REV. 573, 581-87 (2003) (stating that "*Smith* has the rather unusual distinction of being one case that is almost universally despised . . . by both liberals and conservatives").

³ Regardless of doctrine, religious minorities, especially non-Christians, have fared poorly in seeking judicially-mandated accommodations. See *Lyng v. Northwestern Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441-42 (1988) (denying exemption for lands sacred to Native Americans from a government road-building program); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987) (denying accommodation for prison inmates attending Islamic Friday afternoon religious services); *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (denying an exemption to the military dress code for a yarmulke).

⁴ *Smith*, at 890, 906 (O'Connor, J., concurring in judgment).

⁵ *Id.* at 890.

face of the Court's obsequious deference to majoritarianism, a deference arising out of an unsubstantiated and undocumented fear of anarchy and judicial activism. As Justice Scalia warned:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.⁶

Justice Blackmun, writing for himself, and Justices Brennan and Marshall dissented. They would have required the state of Oregon to meet a tougher standard in order to justify the refusal to exempt the religious use of peyote: that the statute was the least restrictive means to achieve a compelling state interest.⁷ Justice Blackmun noted that

⁶ *Id.* Justice Scalia, writing for the majority, made no attempt to connect his fears with real-world facts. Whether there is an empirical basis for these fears, particularly an imagined, make-believe world in which everyone could reasonably become a "law unto herself" by reason of religious choice is, of course, a highly contestable matter, and Scalia offers no evidence to support his parade of horrors. Scalia uses parades of horrors merely as a rhetorical device. See Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 KY. L.J. 167, 174 (stating that "[s]ome judges, Justice Scalia among them, use their dissents to publicly rebuke their colleagues or to provide a parade of horrors that will inevitably flow from the ruling"). And use them he does. See *Lawrence v. Texas*, 539 U.S. 558, 586-06 (2003) (Scalia, J., dissenting); *PGA Tour v. Martin*, 532 U.S. 661, 702-03 (2001) (Scalia, J., dissenting); *Monge v. California*, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting); *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 161-62 (1994) (Scalia, J., dissenting); *Mistretta v. United States*, 488 U.S. 361, 414-15 (1989) (Scalia, J., dissenting); *Morrison v. Olson*, 487 U.S. 660, 727-34 (1988) (Scalia, J., dissenting). Scalia's dire predictions in *Morrison v. Olson* indeed came to pass. See Michael deHaven Newsom, *Independent Counsel? No. Ombudsman? Yes: A Parable of American Ideology and Myth*, 5 WIDENER L. SYMP. J. 141 (2000). But all that one can fairly say is that Scalia got lucky in that case. *Lawrence v. Texas* still has yet to play itself out. It is most unlikely that same-sex marriages will become part of the American social and legal terrain anytime soon, if ever. The fact that Scalia authored the majority opinion in *Smith* does nothing to make Scalia's cheap and tawdry rhetorical technique any more defensible there than when he employs it in his bombastic dissents. However, one would hope that in writing opinions, the Justices would not indulge in rhetorical flights of contestable fancy. See Michael deHaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219, 328 (2002) [hereinafter *Common School Religion*] (arguing that "[t]here is virtue in requiring the law to offer the best explanation possible for its decisions").

⁷ *Smith*, 494 U.S. at 907-09 (Blackmun, J., dissenting). Justice O'Connor also would have required Oregon to satisfy a tougher standard, but the Justice managed to misapply the standard largely by failing to adequately assess that many jurisdictions granted exemptions for the religious use of peyote. *Id.* at 893-905 (O'Connor, J., concurring in judgment). These jurisdictions necessarily challenged any claim that Oregon had a compelling state interest in not exempting the religious use of peyote from the reach of its anti-drug laws. The hard factual question is why Oregon found it impossible to do what other states had managed to do; why Oregon was

“[d]uring Prohibition, the Federal Government exempted [the sacramental use of wine by the Roman Catholic Church] from its general ban on possession and use of alcohol.”⁸ The clear intendment of Blackmun’s remark is that Congress was far more attentive to the religious freedom or liberty interests of Roman Catholics when it passed the National Prohibition Act (the Volstead Act)⁹ than the state of Oregon was to the free exercise rights of members of the Native American Church when it enacted the anti-drug law at issue in *Smith*.¹⁰

The Volstead Act consisted of three titles, but only Title II, which concerned the “Prohibition of Intoxicating Beverages,” is of relevance here.¹¹ Its exemption for the religious use of wine actually consisted of several provisions. The first, the one to which Justice Blackmun referred, found in § 3, established the general rule of prohibition:

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.¹²

Section 3 then provided that “wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided”¹³ This is a clear and succinct statement of an exemption for the use of wine—for

somehow different from these other jurisdictions. In other words, what is it about Oregon that compelled it not to accommodate the religious use of peyote? Justice O'Connor had no answer.

⁸ *Id.* at 913, n.6. The exemption appears in a different form and guise elsewhere in the National Prohibition Act. See *infra* notes 16-23 and accompanying text.

⁹ The National Prohibition Act is frequently referred to as the Volstead Act, see HERBERT ASBURY, *THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION* 112 (1968); NORMAN H. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION* 130-31 (1976) [hereinafter *DELIVER*]; THOMAS M. COFFEY, *THE LONG THIRST—PROHIBITION IN AMERICA: 1920-1933*, at 8 (1976); MARTIN E. MARTY, *PILGRIMS IN THEIR OWN LAND* 376-78 (1984) [hereinafter *PILGRIMS*], named for the Congressman who introduced the Act, see JAMES H. TIMBERLAKE, *PROHIBITION AND THE PROGRESSIVE MOVEMENT: 1900-1920*, at 181 (1970), and will be so referred to in this article.

¹⁰ OR. REV. STAT. § 475.992 (1987).

¹¹ The Volstead Act, ch. 85, 41 Stat. 307 (1919).

¹² *Id.* at 308.

¹³ *Id.* at 307-08.

at least *Christian* religious purposes¹⁴—from prohibition, although not from regulation.

Title II went further. An amendment to § 6 of Title II of the Volstead Act added by the Senate as part of its consideration of H.R. 6810, the Act as passed by the House of Representatives,¹⁵ stated the exemption in strikingly different terms:

¹⁴ The crux of the problem involves the use of the word “sacramental” in title II, § 3 of the Volstead Act, as it relates to the use of wine or other forms of alcoholic beverages. The term “sacramental” usually connotes Christian religious usage of wine. See *Sweeney v. Webb*, 76 S.W. 766, 770 (Tex. Civ. App. 1903) (stating that “[t]he Jewish mode of worship knows no sacraments, but the same requires the use of wine on a number of occasions during each week and each year” and that “[s]uch use of wine has no symbolical or mystical meaning, and is in no sense for sacramental purposes, but is used on such occasions as a beverage”). See also WEBSTER DICTIONARY (1913 ed.) available at <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=sacramental> (defining “sacramental” as “[o]f or pertaining to a sacrament or the sacraments; of the nature of a sacrament; sacredly or solemnly [sic] binding; as, sacramental rites or elements”) (April 30, 2004); *id.* at <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=sacrament> (April 30, 2004) (defining “sacrament” as “[o]ne of the solemn religious ordinances enjoined by Christ, the head of the Christian church, to be observed by his followers . . .”). But see *Weiss v. State Board of Equalization*, 256 P.2d 1, 4 (Cal. 1953) (stating that, while irrelevant to the outcome of the case, the plaintiffs intended “to sell wine to customers of the Jewish faith for sacramental purposes”); *Williams v. Bright*, 632 N.Y.S. 2d 760, 767 (N. Y. Sup. Ct. 1995) (noting that “a law prohibiting all consumption of alcohol may impose a special burden on the use of sacramental wine in Catholic or Jewish rites, and without an exemption, the law of general application may in fact fail the test of religious neutrality”).

Justice Souter wrote:

A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religious neutrality.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 561 (1992) (Souter, J., concurring in part and concurring in the judgment). Souter clearly meant to say that Catholic and Jewish religious use of wine was “sacramental.” This passage influenced the court in *Williams v. Bright*. (In a footnote to this passage, Souter noted that “[t]he prohibition law in place earlier this century did in fact exempt ‘wine for sacramental purposes.’ National Prohibition Act, Title II, § 3, 41. Stat. 308.” *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 561 n.2 (Souter, J., concurring in part and concurring in the judgment). He, like Justice Blackmun, missed the form of the exemption found in Title II, § 6 of the Volstead Act.) Justice O’Connor put it this way: “A state law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews.” *Bd. of Educ. of Kiryas Joel Vill. School Dist. v. Grumet*, 512 U.S. 687, 715-16 (1994) (O’Connor, J., concurring in part and concurring in the judgment).

Sweeney may be bad law today, as the foregoing discussion suggests, but it is altogether possible that *Sweeney* would have been followed by many courts in the years leading up to National Prohibition, as the dictionary definitions quoted above would suggest. For further consideration of *Sweeney* and its implications, see *infra* notes 289-93 and accompanying text.

¹⁵ See S. REP. NO. 151, at 5 (1919).

Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites, except section 6 (save as the same require a permit to purchase) and section 10 hereof, and the provisions of this Act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a *rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose of any church or congregation*, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller. *The head of any conference or diocese or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest* to supervise the manufacture of wine to be used for the purposes and rites in this section mentioned, and the person so designated may, in the discretion of the commissioner [of Internal Revenue], be granted a permit to supervise such manufacture.¹⁶

Leaving to one side the regulatory regime to which the religious use of wine was made subject by National Prohibition,¹⁷ the text of the § 6 form of the exemption makes it abundantly clear that the Senate understood that specific religions—Judaism, liturgical and evangelical Protestantism (including Lutheranism), Roman Catholicism, Eastern Orthodoxy, and Episcopalianism—would benefit from the grant of the exemption. The phrase “rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose of any church or congregation” encompasses, certainly in 1919 or thereabouts, the congregational, parish, or local clergy of these religions.¹⁸ The exemption, as it appeared in § 3 of the Volstead

¹⁶ The Volstead Act, ch. 85, 41 Stat. 311 (1919) (emphasis added).

¹⁷ The regulation of the religious use of wine may well have been problematic. However, the workings of that regime lie beyond the scope of this Article. It suffices for present purposes to note that religious officials evidently registered few complaints regarding the practical workings of the regulatory system prescribed by the Volstead Act. On the other hand, it may well be that far too much wine found its way into non-religious hands, regulations notwithstanding. See FLETCHER DOBYNS, *THE AMAZING STORY OF REPEAL: AN EXPOSÉ OF THE POWER OF PROPAGANDA* 297-98 (1940).

¹⁸ With regard to “rabbis,” see *In re Silverstein’s Estate*, 75 N.Y.S.2d 144,145 (N.Y. Sur. 1947) (referring to a New York statute which defined “minister” as a “rabbi or other person having authority from . . . the church, to preside over and direct the spiritual affairs of the church”). See also *ENCYCLOPEDIA BRITANNICA* (1911 ed.) available at <http://44.1911encyclopedia.org/R/RA/RABBI.htm> (Mar. 25, 2004) (stating that the term “Rabbis” referred to “modern Jewish clergy”).

With regard to “ministers,” see *Pfeiffer v. Board of Education*, 77 N.W. 250, 251 (Mich. 1898) (defining “minister” as a “religious teacher”); *In re Silverstein’s Estate*, *supra*. See also *WEBSTER DICTIONARY* (1913 ed.) available at <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=minister> (last visited Mar. 25, 2004) (defining the term “minister” as “[o]ne who serves at the altar; one who performs sacerdotal duties;

Act, arguably limited the scope of the exemption to the religious use of wine by *Christians*. The § 3 form of the exemption appeared in the whole array of National Prohibition bills introduced in the House and the Senate.¹⁹ The Senate Judiciary Committee broadened the exemption in its § 6 form to cover the religious use of wine by *Christians and Jews*.²⁰ Of course the Senate, the Conference,²¹ and the House concurred in this second form of the exemption because it became a part of the law enacted by Congress. The text of the § 6 form shows that Congress intended to designate as explicitly as possible which religions would benefit from the exemption. Section 6 may or may not alter the scope of the accommodation as it appears in § 3 of the Volstead Act, but it surely communicated the intentions of Congress to benefit Jews, evangelical Protestants still using wine,²² liturgical Protestants, Catholics, and Eastern Orthodox Christians.

Justice Blackmun was correct then in his comparative assessment of the Volstead Act and the Oregon statute, although his reference to Roman Catholics was underinclusive. The § 3 form applied at least to the use of wine by Christians, and the § 6 form applied to the religious use of wine by Christians and Jews. Oregon, however, had no interest in

the pastor of a church duly authorized or licensed to preach the gospel and administer the sacraments").

With regard to "priests," see *Nikulnikoff v. Archbishop and Consistory of Russian Orthodox Greek Catholic Church*, 255 N.Y.S. 653, 661-62 (N. Y. Sup. Ct. 1932) (defining "priest" as, *inter alia*, "[o]ne whose office is to perform public religious functions; an official minister of religious worship" who "[i]n hierarchical Christian churches [is] a clergyman in the second of the holy orders (above a deacon and below a bishop), having authority to administer the sacraments and pronounce absolution") (citing THE OXFORD DICTIONARY (1909 ed.)). See also Webster Dictionary (1913 ed.) available at <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=priest> (last visited Mar. 25, 2004). The term "priest" is defined as:

A presbyter elder; a minister; specifically: (a) ([Roman Catholic Church] & [Greek Church]) One who is authorized to consecrate the host and to say Mass; but especially, one of the lowest order possessing this power. . . . (b) ([Church of England] & [Protestant Episcopal Church]) a presbyter; one who belongs to the intermediate order between bishop and deacon. He is authorized to perform all ministerial services except those of ordination and confirmation.

Id.

¹⁹ See, e.g., S. 555, 66th Cong. (1919), S. 611, 66th Cong. (1920), H.R. 3458, 66th Cong. (1919) (introduced by Congressman Volstead), H.R. 5549, 66th Cong. (1920).

²⁰ The writer is unaware of any use of wine by religions other than Christianity and Judaism. The writer is also unaware of the religious use of alcohol, other than wine, by any religion. It suffices to note, however, that should such uses exist, they were probably not covered by the exemption contained in the Volstead Act.

²¹ See H.R. Con. Res. 118, 66th Cong. (1st Sess. 1919)

²² See *infra* notes 139-43 and accompanying text.

accommodating the religious usages, practices, and needs of the members of the Native American Church. But it does not follow that the *reason* for the Volstead Act exemption, in either its § 3 form or its § 6 form, necessarily reflected any particular theory of religious freedom, nor does the Justice make any claim as to the reason for the exemption.

This Article will explore the meaning of the Volstead Act exemption for the religious use of wine by Christians and Jews. The Act itself has to be seen in its larger context before the exemption can be understood as an expression of a particular theory of religious freedom or liberty. I have earlier argued that the United States was, and still is, a Protestant Empire,²³ a religious polity “fueled by the Anglo-American Reformation and shaped by [a series of] Religious Settlements” beginning in 1534 and continuing through the founding of the United States and the incorporation of the Religion Clauses into the Fourteenth Amendment.²⁴ This religious polity:

[E]xhibits five major ‘procedural’ characteristics. The first is an opposition to Roman Catholicism. The second consists of a dedication to convert the people of the United States to Protestantism. The third is a fluctuating commitment to the idea that the various Protestant denominations constitute an affinity group participating in a complex tapestry of competition and cooperation. The fourth amounts to a belief that the perfect society, the “purified” Protestant Empire, is only one or more social reforms away. The fifth is a pragmatic commitment to attrition and restraint to achieve the goals of the Protestant Empire, rather than the use of the most violent forms of coercion in furtherance of those goals, though these forms remain in the background.²⁵

National Prohibition was a social reform that enjoyed the support of virtually all American evangelical Protestants.²⁶

²³ See Michael deHaven Newsom, *The American Protestant Empire: A Historical Perspective*, 11 WASHBURN L.J. 187 *passim* (2001) [hereinafter *Protestant Empire*].

²⁴ See *Common School Religion*, *supra* note 6, at 222.

²⁵ *Id.* at 222-23.

²⁶ See *Protestant Empire*, *supra* note 23, at 253 n.546. See also SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 901 (1972) (stating that evangelical and liberal Protestants led the drive for National Prohibition); JERALD C. BRAUER, *PROTESTANTISM IN AMERICA: A NARRATIVE HISTORY* 252 (1965) (stating that American Protestants, excepting Lutherans and Episcopalians, “favored either a drastic reduction of or prohibition of all alcoholic beverages”); ROBERT T. HANDY, *A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES* 90 (1971) (declaring that “[t]here was a high degree of evangelical consensus on temperance”); PILGRIMS, *supra* note 9, at 374-77 (arguing that the Volstead Act was the work of “the old-stock English Protestants”); MARK A. NOLL, *A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA* 299 (1992) (stating that “Prohibition . . . illustrated the power of the nation’s public Protestants—generally evangelical, almost all white,

It can be seen, therefore, as a paradigmatic work of the Protestant Empire, a pan-Protestant social reform. And since the Protestant Empire is not only a grand historical idea, but also an organizing or structural principle, it may make sense to view the complex intersection of theology, politics, culture, sociology and economics that constitutes the ultimate reality of National Prohibition through the lens or prism of the five characteristic traits of the Protestant Empire.

All five of these traits present themselves in the grand drama that constitutes National Prohibition. Demonstrated commitment to pan-Protestantism and belief in Prohibition as a “purifying” social reform stand as virtual givens.²⁷ As to the

largely of British background—in translating their moral vision into the law of the land”); TIMBERLAKE, *supra* note 9, at 21 (noting that except for Episcopalians and German Lutherans, “most of the Protestant churches aligned themselves solidly behind the prohibition movement”).

²⁷ Drys found ostensible secular reasons for drying up America. See DELIVER, *supra* note 9, at 12-13 (noting that “[e]xcept as we can see the Temperance-Prohibition Movement as an expression of [a] bourgeois interior, the movement will always appear either irrational or repressive. The purpose of Prohibition was to protect the values sheltered by the American nuclear family”); JOHN ALLEN KROUT, THE ORIGINS OF PROHIBITION 298 (1925) (describing Prohibition as “a movement against disease and poverty, against filth and misery, against drunken husbands who beat their wives and sent their children into the street to beg, against liquor dealers who grew rich while their customers filled the alms-houses and debtors’ prisons”); JOHN J. RUMBARGER, PROFITS POWER, AND PROHIBITION: ALCOHOL REFORM AND THE INDUSTRIALIZING OF AMERICA, 1800-1930, at xxiv (1989) (stating that “prohibition triumphed because enough urban capitalists believed such a ban was, in existing circumstances, a necessary precondition of the social reform required to ensure successful and permanent transformation of American society into an industrial order characterized by political stability and labor’s social quiescence”); Larry Daniel Engelmann, O, Whisky: The History of Prohibition in Michigan 169 (1971) (unpublished Ph.D. dissertation, University of Michigan) (on file with author) (arguing that the Anti-Saloon League won over moderate voters with the argument that “once the saloon was gone, the drinker would spend his money on other consumption goods . . . furniture, a car, a house, clothes, or groceries”).

Economic arguments would seem to be purely secular. However, they may have a religious predicate. See MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Stephen Kalberg, ed. and trans., 2002) (connecting certain Calvinist doctrines to modern capitalism). A full exploration of Weber’s thought lies beyond the scope of this paper. But the fact that there is a link between evangelical Protestant religion and capitalist economics in America would seem to be beyond serious question. See *infra* note 509 and accompanying text; ROBERT A. WAUZZINSKI, BETWEEN GOD AND GOLD: PROTESTANT EVANGELICALISM AND THE INDUSTRIAL REVOLUTION, 1820-1914 (1993). The argument of family protection similarly has a religious predicate as the agenda of the Women’s Christian Temperance Union plainly establishes. William Elliott West, Dry Crusade: The Prohibition Movement in Colorado, 1858-1933, 143-45 (1971) (unpublished thesis, University of Colorado) (on file with author). Finally, two arguments often advanced in support of Prohibition, taming the cities, see JOSIAH STRONG, OUR COUNTRY 171-86 (Jurgen Herbst ed., 1963) (1891), and destroying the saloon, see *infra* notes 223-36 and accompanying text, were nothing but proxies or covers for attacks on non-evangelical Protestants. One may fairly conclude, therefore, that the secular case for Prohibition was, in fact, largely, if not entirely, a religious case for Prohibition.

other three characteristic traits of the Anglo-American Protestant Empire, Part II of this Article will examine the phenomenon and the reality of anti-Catholicism, Protestantization, and the dynamic relation between suasion and coercion, as they all relate to National Prohibition.

Part III will next take up the exemptions contained in various state and federal laws enacted in the nineteenth and early twentieth centuries. Exemptions for the religious use of wine by Christians were fairly common. But exemptions sufficiently broad to cover the religious use of wine by Jews were rare.

In the twentieth century, the question of exemptions took on a new meaning. Evangelical Protestants had largely abandoned the use of wine in their communion services, so any exemption would basically accommodate the practices of religious minorities. The question whether to have an exemption at all, and, if so, what its scope should be, therefore, became a matter of some debate and controversy in the two decades leading up to National Prohibition.

The very existence of the exemption for the religious use of wine by Christians and Jews compels at least two readings or understandings of the exemption in the Volstead Act: the authors of the statute did *not* intend to use National Prohibition as a means of destroying the Catholic Mass—or any other Jewish or Christian rite that was dependent upon the use of wine; and the authors of the statute did *not* intend to use National Prohibition as a means of forcing those who make religious use of wine—Catholics, Episcopalians, Jews, Eastern Orthodox Christians, Lutherans, and any evangelical Protestants still using wine²⁸—to routinely beg judges and prosecutors (most of whom presumably would be evangelical Protestants²⁹) for permission to use wine for religious purposes, and thus for mercy, although they might have to beg Congress, from time to time, to keep the exemption in place. Part IV will discuss these two *textual* readings and how they necessarily implicate “some kind of religious freedom,” but they offer little insight into the reason or reasons why the exemption existed.

Part IV will thus discuss four possible *contextual* reasons for the exemption of the religious use of wine contained in the Volstead Act. The first holds that the exemption may

²⁸ See *infra* Part II.A.4.

²⁹ See 2 KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIANITY 1258 (rev. ed. 1975) (1953) (noting that in 1914 America was overwhelmingly Protestant).

simply have amounted to propitiation to Episcopalians, American Anglicans,³⁰ notwithstanding the language of § 6 of Title II, with others benefiting solely by reason of interest-convergence.³¹ The second supposes that the exemption may simply have reflected a series of pragmatic or strategic judgments by Drys as to how to make National Prohibition work given the social and demographic realities of 1919 America. The third propounds the theory that the exemption for the religious use of wine may have reflected a desire to wait out Roman Catholics, and for that matter, Jews, Eastern Orthodox Christians, and even Episcopalians and Lutherans, relying on other social dynamics to convert them in the fullness of time into evangelical Protestants. And the fourth argues that the exemption may have been a principled statement of a broad, generous, liberal conception of religious freedom, a theory that celebrates religious diversity as a social good.

It is the conclusion of this Article, the third in my Protestant Empire series,³² that a reading of the exemption based on some broad and liberal principle of religious freedom and liberty that exalts diversity and pluralism is implausible. Rather, the setting and the context of the exemption make the propitiation reading very probable, and make the two strategic restraint readings likely. Thus, as Justice Blackmun correctly noted, Catholics fared better under National Prohibition than the members of the Native American Church do under Oregon's anti-drug laws. But this is only to say that Catholics did not have to confront the destruction of their religious practices, and beg prosecutors and judges for mercy, whereas, given the result in *Smith*, members of the Native American Church did.

II. ANTI-CATHOLICISM, PROTESTANTIZATION, AND THE DYNAMIC RELATION OF SUASION AND COERCION

This Part explores the relationship between the Protestant Empire's anti-Catholicism, its desire to

³⁰ The Episcopal Church is the American branch of the now-worldwide Anglican communion. See 2 WILLIAM STEVENS PERRY, *THE HISTORY OF THE AMERICAN EPISCOPAL CHURCH 1587-1883*, at 101-118 (Boston, James R. Osgood & Co. 1885). The Church of England, established by Henry VIII, is the "mother church" of that communion. *Id.*

³¹ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

³² See *Common School Religion*, *supra* note 6; *Protestant Empire*, *supra* note

Protestantize America, and the dynamic relation of suasion and coercion, as they all relate to the undoubtedly Protestant endorsed temperance movement. Indeed, the origins of Protestant Empire anti-Catholicism are complex and varied.³³ To begin, though, subpart A will discuss the anti-Catholicism inherent in the evangelical Protestant doctrine of the Eucharist, the central act of Christian worship. In particular, it will address how the Protestant doctrine of the Eucharist, in contrast to the Catholic doctrine of the Eucharist, allowed for a Protestant attack on alcohol.

Subpart B then will discuss the development of a political basis or predicate for the anti-Catholicism of the English and then the Americans. Subpart C will explore the general outlines of Anglo-American Protestant Empire anti-Catholicism as it relates to the temperance-prohibition movement and its full flowering in National Prohibition.

Subpart D will look at Protestantization, also a characteristic trait of a Protestant Empire, and the resistance of Catholics and other non-Protestants thereto. Inasmuch as National Prohibition was, in many ways, seen as a way to convert non-Protestants, to Protestantize them, that resistance, in and of itself, could also—and did—contribute to the anti-Catholicism of the Drys.³⁴ Catholics, together with other religious groups, resisted the siren call of National Prohibition, but the Drys were bound and determined to prevail, and the resistance of Catholics and others made them, at the least, impatient. A liberal theory of religious freedom might not fare well in such rocky soil. Lastly, subpart E will explore the complex relation between attrition and restraint and moral suasion on the one hand and coercion and the sanction of state violence on the other, the fifth characteristic trait of a Protestant Empire, again a circumstance that puts a liberal conception of religious freedom to the test.

³³ See *Protestant Empire*, *supra* note 24, at 189-92.

³⁴ See *Common School Religion*, *supra* note 6, at 238-44 (discussing the dynamic relation between evangelical Protestant persistence and Roman Catholic resistance to prayer and Bible reading in the public schools).

A. *The Theology of Anti-Catholicism*

1. The Setting or Context: The Catholic Doctrine of the Eucharist

Christian theology at its core is about the Eucharist. This holds equally true for those Christians for whom the Eucharist sits at the center of religious life and for those Christians who ascribe little or no importance, value, or meaning to the Eucharist.³⁵ This is a very large claim indeed. It subordinates the Christian ethic³⁶ to a cultic ritual, or at the very least supposes that the cultic informs and shapes the ethical. But this claim also rests on the fact that the Eucharistic liturgy has been the central act of Christian worship from the very beginning of Christianity itself,³⁷ and that a cultic ritual of this sort indeed must inform and shape the ethical life of the religious community.

The second claim made here is that there is a fundamental dynamic in Western Christianity which is driven by personal, political, cultural and social responses to the Roman Catholic Church as that Church has manifested itself in history. If anything counts for truth in Western Christianity, it is that Western Christians are not neutral about the Roman Catholic Church.³⁸ Because the Roman Catholic Church developed a definitive and authoritative doctrine of the Eucharist, Protestant Eucharistic theology can be understood as a doctrine or set of doctrines that sit in apposition, if not outright opposition, to Catholic teaching.

³⁵ Martin Marty notes that Protestants took over the Eucharistic liturgy "in some revised form," although they "tended to reduce the numbers of occasions when it was celebrated from daily to weekly, from weekly to monthly or quarterly and even annually." MARTIN E. MARTY, *PROTESTANTISM* 167 (1972) [hereinafter *PROTESTANTISM*]. He concluded:

Given such neglect, it is also surprising to the student of history to see how much ink was spilled in polemics over the Catholic version and how much controversy and infighting ensued between Protestant parties over its meaning. Even twentieth century discussions of intercommunion in the ecumenical movement occur with an intensity not always shared by the faithful in their congregations. *It might almost be said that the Lord's Supper (or Mass, or Eucharist, or Holy Communion, or Lord's Table) was more fought over than enjoyed in Protestantism.*

Id. (emphasis supplied).

³⁶ Perhaps the quintessential expression of the Christian ethic is found in the Beatitudes. *See Matthew* 5:3-12.

³⁷ GREGORY DIX, *THE SHAPE OF THE LITURGY* 1-11 (2d ed. 1945).

³⁸ Nothing else can explain the sharp cleavage between Protestants and Catholics. In the context of Protestant Empires, this cleavage manifests itself in a characteristic anti-Catholicism. *See supra* note 26 and accompanying text.

For present purposes, the doctrine of transubstantiation sums up Catholic Eucharistic theology. The Roman Catholic Church's understanding of the doctrine was reaffirmed in the middle of the sixteenth century. Partially in response to the Protestant Reformation, the Roman Catholic Church convened the Council of Trent. It consisted of twenty five sessions held between 1545 and 1563. At the Thirteenth Session held in 1551, the Council issued a decree on the subject of transubstantiation.

First of all, the holy council teaches and openly and plainly professes that after the consecration³⁹ of bread and wine, our Lord Jesus Christ, true God and true man, is truly, really and substantially contained in the august sacrament of the Holy Eucharist under the appearance of those sensible things [bread and wine]. For there is no repugnance in this that our Savior sits always at the right hand of the Father in heaven according to the natural mode of existing, and yet is in many other places sacramentally present to us in His own substance by a manner of existence which, though we can scarcely express in words, yet with our understanding illumined by faith, we can conceive and ought most firmly to believe is possible to God. . . . Since [the Institution Narratives]⁴⁰ embody that proper and clearest meaning in which they were understood by the Fathers, it is a most contemptible action on the part of some contentious and wicked men

³⁹ There is a discrete moment in the Mass called the moment of consecration. It occurs during the Eucharistic Prayer. In Roman Catholicism, that moment transpired when the celebrant recited the Institution Narrative. DIX, *supra* note 37, at 299-302.

⁴⁰ There are four Institution Narratives in the New Testament, all of them quite liturgical in their structure. See *Matthew* 26:26-30; *Mark* 14:22-25; *Luke* 22:19-20; *I Corinthians* 11:23-26. They all account for what Jesus said and did at the Last Supper and the meaning He gave to it. In Paul's first letter to the Church at Corinth, by way of example, the Institution Narrative proceeds as follows:

The Lord Jesus on the night when he was betrayed took a loaf of bread, and when he had given thanks, he broke it and said, "This is my body that is for you. Do this in remembrance of me." In the same way he took the cup also, after supper, saying, "his cup is the new covenant in my blood. Do this, as often as you drink it in remembrance of me."

1 *Corinthians* 11:23-25.

In the prayers uttered by the priest in the liturgy similar words are used in the recounting of what happened at the Last Supper. For example, in Eucharistic Prayer II in the Roman Catholic Mass, the following words are said:

Before he was given up to death, a death he freely accepted, he took bread and gave you thanks. He broke the bread, gave it to his disciples, and said: *Take this, all of you, and eat it: this is my body which will be given up for you.* When supper was ended he took the cup. Again he gave you thanks and praise, gave the cup to his disciples, and said: *Take this, all of you, and drink from it: this is the cup of my blood, the blood of the new and everlasting covenant. It will be shed for you and for all so that sins may be forgiven. Do this in memory of me.*

to twist them into fictitious and imaginary tropes by which the truth of the flesh and blood of Christ is denied. . . .⁴¹

The Council continued:

[B]y the consecration of the bread and wine a change is brought about of the whole substance of the bread into the substance of the body of Christ our Lord, and of the whole substance of the wine into the substance of His blood. This change the holy Catholic Church properly and appropriately calls transubstantiation.⁴²

One of the clear consequences of this teaching is that the bread and wine become something holy and divine at the moment of consecration. The Eucharist consists of at least two parts: the bread and the wine (the first part) are the signs of the Body and Blood of Christ (the second part), that which the bread and wine signify.⁴³ An important part of Catholic teaching is that the sacraments are "*instrumental* causes of God's grace."⁴⁴ The Council reaffirmed this doctrine.⁴⁵ The Eucharist, therefore, has three parts: the sign (the bread and wine), the reality signified by the sign (the Body and Blood of Christ), and the grace or the virtue of that reality.⁴⁶

Writ somewhat larger, the Catholic understanding of the Eucharist presupposes that the divine (the Body and Blood of Christ) can enter into union with the created material order (the bread and wine) for the purpose of dispensing grace. The divine does not sit or act apart from the material world but rather joins with it in order to aid in the salvation of the faithful Christian. Catholic sacramental theology ultimately rests on a broad view of reconciliation. Catholic teaching necessarily ascribes an importance to the material world in the salvation economy, and therefore ascribes a soteriological meaning or value to the created order. There is, in a literal as well as a theological sense, a kind of "earthiness" or "earthy" or "earthly" realism in Catholic Eucharistic theology. It is as if God gets His hands "dirty" in the stuff of His created order, it is

⁴¹ CANONS AND DECREES OF THE COUNCIL OF TRENT 73 (H. J. Schroeder, trans., TAN Books & Publishers, Inc. 1978) (1941) (footnotes omitted) [hereinafter CANONS AND DECREES].

⁴² *Id.* at 75 (footnotes omitted).

⁴³ See ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, § IIIa q.73-74, at 3-25 (William Barden trans.) (McGraw Hill Co. 1965) (1273).

⁴⁴ *Id.* at § IIIa, q.62, at 51.

⁴⁵ See CANONS AND DECREES, *supra* note 41, at 52.

⁴⁶ See, e.g., CHARLES E. SHEEDY, THE EUCHARISTIC CONTROVERSY OF THE ELEVENTH CENTURY 109-24 (1980) (using the terminology *sacramentum*, *sacramentum-et-res*, and *res sacramenti*).

as if God somehow joins with us, here, not in Heaven, not in some rarified way-station between Heaven and Earth suffused only with power, energy or virtue, and not in some "purified" soul, heart or mind. Reconciliation and realism, which are captured in the Catholic Eucharistic doctrine of Real Presence, are the touchstones of the Catholic sacramental *Weltanschauung*.⁴⁷

This, then, is the doctrine that the Protestant Reformers of the sixteenth century decided to refute and overthrow. Once transubstantiation falls, the rest is easy: all that remains is a mopping up. The papacy, the ordered ministry, the sacramental system, the meaning of "Church" only require a slight push or shove to cause them to topple over once transubstantiation has been done in.

Protestants have tended to react somewhat differently to this "mopping up." The more conservative Reformers contented themselves with trashing transubstantiation. Anglicanism, for example, retained at least the outward forms—if not the inner or hidden reality—of the ordered ministry, the sacramental system and the sense of "Church" as something more than a mere voluntary association of like-minded believers.⁴⁸ In contrast, the more radical Reformers, the progenitors of evangelical Protestantism, overthrew the ordered ministry and the sacramental system as well as the traditional doctrines of the "Church," of ecclesiology.⁴⁹ They took "mopping up" very seriously indeed.

⁴⁷ For a discussion of the differences, if such they be, on the matter of Eucharistic theology as between Tridentine Catholicism and Vatican II Catholicism, see G.C. BERKOUWER, *THE SECOND VATICAN COUNCIL AND THE NEW CATHOLICISM* (Lewis B. Smedes, trans., 1965); CHRISTOPHER BUTLER, *THE THEOLOGY OF VATICAN II* (1967); AVERY DULLES, *THE RESHAPING OF CATHOLICISM: CURRENT CHALLENGES IN THE THEOLOGY OF THE CHURCH* (1988); *MODERN CATHOLICISM: VATICAN II AND AFTER* (Adrian Hastings, ed., 1991); GEORGE A. LINDBECK, *THE FUTURE OF ROMAN CATHOLIC THEOLOGY: VATICAN II—CATALYST FOR CHANGE* (1970); JOHN O'MALLEY, *TRADITION AND TRANSITION: HISTORICAL PERSPECTIVES ON VATICAN II* (1989); and KARL RAHNER, *THE CHURCH AFTER THE COUNCIL* (D.C. Herron & R. Albrecht, trans., 1966).

⁴⁸ The Anglican forms, however, had different meanings for the various parties or groupings in the Anglican churches. See E. CLOWES CHORLEY, *MEN AND MOVEMENTS IN THE AMERICAN EPISCOPAL CHURCH* 181 (1946) (stating that "The Evangelicals thought of the Church as the blessed company of all faithful people [essentially the Protestant view of "church," but] [t]he High Churchmen looked on the other side of the shield [for t]o them the Church was the Body and Bride of Christ; the pillar and ground of truth; built on the foundation of the apostles and prophets, Jesus Christ Himself being the chief corner-stone").

⁴⁹ *Id.* at 181-83.

2. The Evangelical Protestant Doctrine of the Eucharist

a. The Doctrine Explained

The giants of the Protestant Reformation were Martin Luther and John Calvin. It fell to another reformer, however, to prescribe what would become the normative evangelical Protestant doctrine of the Eucharist,⁵⁰ the German Swiss Reformer, Ulrich (Huldrych) Zwingli. He built his Eucharistic theology on a series of rigid dualisms which were, for him, with one interesting exception, utterly incapable of reconciliation because of certain "rules" upon which he insisted.⁵¹

The first dualistic "rule" concerned the situs or location of the body of Christ. Zwingli declared flatly that "the body of Christ must be in *one* place, and that is at the right hand of God,"⁵² and "Christ's body must be in some particular place in heaven *in virtue of its character as a real body*."⁵³ Thus, the Body of Christ, according to its essence, could not be present in the Eucharist, and thus no close ontological relation between the bread and wine and the Body and Blood of Christ could exist.⁵⁴ Zwingli necessarily denied, therefore, that God could, in the Eucharist, in the liturgy, bridge the gulf between Heaven and earth. He was contemptuous of those who would "drag Christ down from heaven and the Father's throne,"⁵⁵ and he had "no use for that notion . . . of a real and true body that does not exist physically, definitely and distinctly in some place."⁵⁶

A second dualism central to Zwingli's theology separated matter and spirit, body and soul:⁵⁷ "for the first line

⁵⁰ See *infra* Part II.A.2.b.

⁵¹ The source of Zwingli's "rules" is far from clear.

⁵² Ulrich Zwingli, *An Account of the Faith*, reprinted in ON PROVIDENCE AND OTHER ESSAYS: ULRICH ZWINGLI 33, 55 (William John Hinke ed., 1983) [hereinafter *An Account*] (emphasis added).

⁵³ See Ulrich Zwingli, *Exposition of the Christian Faith*, reprinted in ON PROVIDENCE AND OTHER ESSAYS: ULRICH ZWINGLI, *supra* note 52, at 235, 249 [hereinafter *Exposition*].

⁵⁴ *Id.* at 249-50.

⁵⁵ *Id.* at 250.

⁵⁶ Ulrich Zwingli, *Letter to the Princes of Germany*, reprinted in ON PROVIDENCE AND OTHER ESSAYS: ULRICH ZWINGLI, *supra* note 53, at 105, 120 [hereinafter *Letter*].

⁵⁷ Zwingli's favorite "proof text," see G. R. POTTER, HULDRYCH ZWINGLI 91 (1977), for his rigid matter-spirit dualism was *John* 6:63: "It is the spirit that gives life; the flesh is useless." The difficulty with this text as proof of a system of rigid unreconcilable dualisms is that Zwingli utterly failed to place this verse in the context of the Sixth Book of John from which it comes. The Sixth Book is, in its grand structure, an outline of the Mass, as written by a gospeler who belonged to a faith community deeply committed to a sacramental-Incarnationist view of the world, a view

of division between all things and all substances is that they are either body or spirit. This division was so far reaching that it even included God, and the angels and all spirits.”⁵⁸ Zwingli continued:

As the body cannot be nourished by a spiritual substance, so the soul cannot be nourished by a corporeal substance. But if the natural body of Christ is eaten, I ask whether it feeds the body or the soul? Not the body, hence the soul. If the soul, then the soul eats flesh, and it would not be true that spirit is only born of spirit.⁵⁹

Again, “between material or physical and spiritual there is no middle term. Though you put together everything there is, both creator and created things, you will have either spirit or body.”⁶⁰ Zwingli plainly taught that there can be no reconciliation across this vast divide that he conjured up. He derided Catholic doctrine of transubstantiation: “They have invented some third thing between the real and material body of Christ and His sacramental body, not that spiritual body which we eat, but a kind of thing that does not exist, being neither material nor sacramental, that is symbolical and significative.”⁶¹ He declared that “it is wrong for us to be so dull as to attribute to a material thing what belongs to God alone, and to turn the Creator into the creature and the creature into Creator.”⁶² All of these statements evinced a fundamental rejection of reconciliation in the created order.

Zwingli found yet one more dualism, derived from the first two, to block any reconciliation of the divine and the human: “Christ’s humanity is not eternal; therefore it is not

rooted in a this-world reconciliation, and as such, utterly inconsistent with the rigid dualisms upon which Zwingli insisted. The best “simple” proof of the error of Zwingli’s reading of *John* 6:63 is *John* 1:14: “And the Word became flesh and lived among us.” The correct reading of *John* 6:63, of course, is that *ordinary* flesh is useless, but not so for the *Word made flesh*, for that Word made flesh is “true food,” *John* 6:55, in the very realist sense of reconciliation. Zwingli’s rejectionism is real enough, but it comes not from scripture.

⁵⁸ *Exposition*, *supra* note 53, at 278. John Calvin held the same view:

[B]ody must be body, spirit must be spirit, every thing must be subject to that law, and retain that condition which was fixed by God at its creation. And the condition of a body is such, that it must occupy one particular place, and have its proper form and dimensions.

JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION at IV, XVII, XXIV.

⁵⁹ *An Account*, *supra* note 52, at 53.

⁶⁰ *Letter*, *supra* note 56, at 120.

⁶¹ *Id.* at 119.

⁶² Ulrich Zwingli, *On the Providence of God*, in ON PROVIDENCE AND OTHER ESSAYS: ULRICH ZWINGLI, *supra* note 52, at 128, 192.

infinite. If it is not infinite, it must be finite. If it is finite, it is not everywhere."⁶³ And he continued:

[E]ven if the things that belong to Christ's divinity are attributed to His humanity, and, on the other hand, the things that belong to His humanity to His divinity, yet the natures are not confused, as if the divinity had degenerated and been weakened to humanity, or the humanity changed into divinity.⁶⁴

Zwingli concluded with a fourth dualism: "[Christ] is not to be looked for in the world according to His humanity in literal, substantial, bodily presence, but only in a spiritual and sacramental sense."⁶⁵ For Zwingli, spiritual eating meant merely trusting "in spirit and heart upon the mercy and goodness of God through Christ,"⁶⁶ and sacramental eating means merely spiritual eating "with the accompaniment of the sacrament," the bread and wine.⁶⁷ It was "'impossible,' Zwingli declared, for Christ to have both a mortal [eucharistic] body and at the same time immortal body [sitting at the right hand of the Father]."⁶⁸

Faith, for Zwingli, was the sum and substance of reconciliation. Catholic sacramental theology anchors reconciliation in the church-sacrament system, with the Church and the Eucharist serving as instrumental means of grace.⁶⁹ Zwingli's doctrine, however, thanks to his rigid dualisms, left the Christian to her own individual devices. God, for Zwingli, provided no help, aid or succor, other than faith, to enable her to experience reconciliation in the midst of life, of creation, of other people. Faith, for Zwingli, trumped his four dualistic "rules," and faith, so understood, provided the predicate for Zwingli's theology of the Eucharist. What he had to say about the sacrament stands in stark contrast with the Catholic conception of the Eucharist.

Zwingli defined the sacraments, including the Eucharist, as

[A] sign of a sacred thing, *i.e.*, of grace that has been given. I believe that it is a visible figure or form of the invisible grace, . . . a visible example which presents an analogy to something done by the Spirit . . . [T]he sacraments, which are sacred ceremonies . . . should be

⁶³ *Exposition, supra* note 53, at 250.

⁶⁴ *Id.*

⁶⁵ *Id.* at 251.

⁶⁶ *Id.* at 252.

⁶⁷ *Id.*

⁶⁸ *Exposition, supra* note 53, at 255-56.

⁶⁹ See *supra* notes 45-46 and accompanying text.

religiously cherished. . . . For though they are unable to bestow grace, they nevertheless associate visibly with the Church us who have previously been received into it invisibly; and this should be regarded with the highest veneration, since with their administration the words of the divine promise are declared and pronounced.⁷⁰

Zwingli effectively reduced the sacrament to the bare material elements alone, the bread and the wine, the sign. He made absolutely no provision here whatsoever for either the Body and Blood of Christ or the gift of grace because “sacred ceremonies” and the declaration of “words of the divine promise” are a far cry from the traditional understanding of the reality—the Body and Blood of Christ—and the benefit—the grace or virtue of the sacrament. Zwingli did recognize that the Body and Blood of Christ exist but only in Heaven, and that God bestows grace on his faithful believers. However, he did not connect either of them to the material elements of sacrament. Quite the contrary, he distanced them from the bread and wine.⁷¹

Thus, the most that the sacraments could do was, “acting as a sort of a stimulant, call into action the faith or promise which is already there and bear witness to the other members of the Church”⁷² because grace “belongs to God alone,”⁷³ and it was “frivolous . . . to teach that either the saints or the sacraments remove sins and bestow grace upon us. For who remitteth sins save God alone?”⁷⁴ The “virtues” of the Eucharist, such as they were for Zwingli, lay in the fact that they: (1) “are sacred and venerable rites”;⁷⁵ (2) “bear witness to an accomplished fact”;⁷⁶ (3) “take the place of the things they signify, whence also they get their names”;⁷⁷ (4) “signify sublime things”;⁷⁸ (5) are an “analogy between the symbols [the bread and wine] and the thing signified [the Body and Blood of

⁷⁰ *An Account*, *supra* note 52, at 48.

⁷¹ Zwingli was quite clear that the Eucharist was not an instrumental means of grace: “[I]t is apparent that the sacraments cannot justify nor give grace, for we know no other justification than that of faith. It follows also that grace is not bound up with the sacraments.” *Letter*, *supra* note 56, at 113.

⁷² *Id.* And again Zwingli wrote “I, however, say that the sacraments do not bestow grace, but call it into activity and testify to it when already bestowed.” *Id.* at 118.

⁷³ *Exposition*, *supra* note 53, at 241.

⁷⁴ *Id.*

⁷⁵ *Id.* at 256.

⁷⁶ *Id.* at 257.

⁷⁷ *Id.*

⁷⁸ *Exposition*, *supra* note 53, at 256.

Christ]";⁷⁹ (6) "bring increase and support to faith, and this the Eucharist does above all others";⁸⁰ and (7) "fill the office of an oath of allegiance."⁸¹

The centrality of faith as the sum and substance of the Eucharist for Zwingli became clear:

I believe that in the holy Eucharist, *i.e.*, the supper of thanksgiving, *the true body of Christ is present by the contemplation of faith*. This means that they who thank the Lord for the benefits bestowed on us in His Son acknowledge that He assumed true flesh, in it truly suffered, truly washed away our sins by His blood; and thus everything done by Christ becomes *as it were present* to them by the contemplation of faith.⁸²

There was no objective reality, no objective presence for Zwingli. The only reality in the Eucharist, apart from the bread and wine, consisted of the "contemplation of faith."⁸³ Zwingli's true meaning lies in the use of phrases like "as it were present," implying a mere figure. In other words, far from any Real Presence of the Body and Blood of Christ, far from a close ontological relation of the reality or the thing of the Eucharist with the bread and wine, there is only a figurative one.

Zwingli's thinking became even clearer in the following passage:

But that the body of Christ in essence and really, *i.e.*, the natural body itself, is either present in the supper or masticated with our mouth and teeth, as the Papists or some [the Lutherans] who look back to the fleshpots of Egypt assert, we not only deny, but constantly maintain to be an error, contrary to the Word of God.

....

Here the presence of the *body* alone is denied, for according to His divinity He is always present, because He is always everywhere, according to His other word: "Lo, I am with you always, even unto the end of the world," viz., according to divinity, power and goodness.⁸⁴

The dualistic "rules" had led Zwingli to teach that the natural body of Christ was in Heaven and could not be present in the Eucharist.⁸⁵ This in turn required Zwingli to tackle Scripture itself: "[W]e are compelled to confess that the words:

⁷⁹ *Id.*

⁸⁰ *Id.* at 258.

⁸¹ *Id.* at 259.

⁸² *An Account*, *supra* note 52, at 49 (second emphasis added).

⁸³ In a certain sense, the Body and Blood of Christ are present only in the mind. See *Letter*, *supra* note 56, at 107, 109, 113.

⁸⁴ *An Account*, *supra* note 52, at 49.

⁸⁵ See *supra* notes 53-57 and accompanying text.

“This is my body,” should not be understood naturally, but figuratively.”⁸⁶ Accordingly, Zwingli rewrote the Institution Narratives,⁸⁷ turning them merely into a large metaphor or trope.

“Do this in remembrance of me, giving thanks and offerings and pouring out prayer and praise because I, the spouse of your souls, have redeemed you.” . . . So in the Eucharist [Christ], when going away to a distant country, gave Himself to us in the bread and wine far more vividly and intimately when He said, “This is my body,” than if He had said, “This is a symbol of my body,” though He was going to take away His material body and place it in heaven. Yet by these words He gave Himself just as entirely, as far as faith and grace are concerned, as if He had said, “Now I am going to death for you, and a little later [at the Ascension] I shall go away from here again, but I do not want you to doubt of my love and care for you. I am wholly yours in all that I am. In witness of this I entrust to you a symbol of this my surrender and testament, to awaken in you the remembrance of me and of my goodness to you, that when you see this bread and this cup, held forth in this memorial Supper, you may remember me as delivered up for you, just as if you saw me before you as you see me now, eating with you and presently to be taken away from you to suffer for you.”⁸⁸

All of Zwingli’s major themes, which combine to deny the Real Presence, found themselves here. The meaning that he ascribed to the Institution Narratives meant that there was no consecration. Nothing happens for Zwingli in the liturgy except memory and contemplation. Christ says, in Zwingli’s “restatement” of the Last Supper, that He entrusts to us a symbol to “awaken” in us the memory of *past* events. But memory and contemplation are entirely mental, subjective, and highly individualistic acts. There really is no need for “church” in this view. Nothing was *present*, in any meaningful sense of the word, apart from the individual, private act of memory, because what was recalled was entirely past, and the past did not participate in the present.

What had to be remembered, for Zwingli, was Jesus and his “goodness” towards his followers. This meant, therefore, that there could be no sacramental relation between the bread and wine, on the one hand, and the Body and Blood of Christ and the grace or virtue of the sacrament on the other hand. The only sacramental relation, if such it be, involved the bread and wine and the individual, private act of memory.

⁸⁶ *An Account*, *supra* note 52, at 52.

⁸⁷ *See supra* note 41 and accompanying text.

⁸⁸ *Letter*, *supra* note 56, at 122-23.

Zwingli's teaching took private individual meditation, of the sort contemplated merely as an accompaniment of the medieval Catholic liturgy,⁸⁹ and made it the essence of the meaning of the liturgy itself. In so doing, the liturgy could not survive, at least not in any form remotely resembling the traditional Catholic Mass.⁹⁰ The private individual meditation became the basis for evangelical Protestant Sunday morning church services.⁹¹

Having rejected Real Presence, Zwingli arguably taught a "Real Past," to be honored and venerated.⁹² Veneration, therefore, becomes the true meaning of "liturgy" for Zwingli. The bread and wine, while not in an ontological sacramental relation with the Body and Blood of Christ, while not Really Present, nonetheless serve as mind-enhancers,⁹³ again, providing content for the meaning of the "liturgy" for Zwingli.

[T]hese signs [the bread and wine] were so instituted by Christ Himself, that by their very analogy they might be especially effective for bringing one to the consciousness of the actual thing through faith and contemplation. Hence, since the sacraments were instituted to give teaching, suggestion, delight through the senses just as much as the external word, it happens that, when given the names of the things of which they are the signs and which are themselves the real refreshment of the mind, they kindle the mind more effectively than any one can do by contemplating the divine goodness, however faithfully it may be, without the signs. And since this is so, the most learned and holy men have rightly made frequent use of the sacraments for the things of which they are the

⁸⁹ See DIX, *supra* note 37, at 605-12.

⁹⁰ The earliest understanding of the Eucharist was as a corporate rite, in which every member of the faith community had an active role to play. See *id.* at 1-2, 12-35, 607. Thus liturgy was first understood literally as the work of the people. This conception of the liturgy changed, and it came to be seen as the work of the priest, and the mass became something "said" rather than "done." *Id.* at 13. And it was this latter conception against which the Protestant Reformers, including Zwingli, reacted. However, the connection between the liturgy and Real Presence was no less great in the second context than in the first. The doctrine of the Council of Trent makes that abundantly clear. See *supra* notes 40-43 and accompanying text.

⁹¹ Truth be told, Zwingli tried to hold on to a Eucharistic liturgy of some sort or another, but he failed. Dix explains why:

If this tradition of subjective individual devotion to the passion and atonement were to be maintained, and *the catholic doctrines of the priesthood and the conversion of the elements were to be removed*, what need would there be for maintaining the performance of the eucharist as the centre of christian worship? It would surely be inevitable that some form of worship more closely directed to the stimulation of devout affections on the passion would be found more suitable. So it was—after the Reformation.

Id. at 608 (emphasis added).

⁹² *Exposition, supra* note 54, at 240.

⁹³ While Zwingli denied that the sacraments bestowed grace, he nonetheless found some value for the bread and wine. *An Account, supra* note 53, at 48.

sacraments and signs, being well aware how much must be attributed to each.⁹⁴

One could hardly imagine two Eucharistic theologies more diametrically opposed than those of Catholics and of Zwinglians.⁹⁵ The differences lie mainly in the meaning or role of Zwingli's dualistic "rules." Roman Catholics, of course, have no use for Zwingli's "rules" because in the Catholic sacramental worldview, reconciliation, effected through the church-sacrament system, forms the normative proposition or underpinning of that worldview. For Zwingli, on the other hand, the "rules" drive his theology.

b. The Triumph of Zwinglian Eucharistic Theology in the Evangelical Protestant Nomos

The Protestant Reformation gave rise to several doctrines of the Eucharist.⁹⁶ Zwinglianism had the virtue, if such it be, of radical simplicity, and utter opposition to Catholic sacramental teaching, thereby representing a radical form of theological anti-Catholicism.

Zwinglian thought emerged fairly early on in England, much to the supposed displeasure of Henry VIII.⁹⁷ In fact, Zwinglian ideas may have profoundly influenced the 1552 Book of Common Prayer,⁹⁸ thus certainly making its way into English Protestantism.

Anglicans and Puritans have disagreed about the subsequent course of Zwinglianism in non-Anglican English Protestantism. E.C.E. Bourne, an Anglican priest, insisted that by the early seventeenth century, Puritans had become thoroughly Zwinglian in their theological outlook.⁹⁹ Stephen Mayor, a non-Anglican English Protestant Pastor, took a different view of the matter. At the dawn of the seventeenth century, non-Anglicans had an "ambiguous" theology of the Lord's Supper because they had had little to say about what the Eucharistic rite accomplished.¹⁰⁰ However, Mayor strongly

⁹⁴ *Letter, supra* note 56, at 111.

⁹⁵ Unless one were to abandon any pretense of the sacraments altogether, as, for example, the Quakers have done. See J. WILLIAM FROST, *THE QUAKERS* 4, 30, 64, 83 (1988); RUFUS M. JONES, *THE FAITH AND PRACTICE OF THE QUAKERS* 71 (2d ed. 1965).

⁹⁶ See Newsom, *Protestant Empire, supra* note 23, at 196 n.65.

⁹⁷ *Id.* at 202.

⁹⁸ *Id.* at 215.

⁹⁹ See E.C.E. BOURNE, *THE ANGLICANISM OF WILLIAM LAUD* 59, 66-68 (1947).

¹⁰⁰ STEPHEN MAYOR, *THE LORD'S SUPPER IN EARLY ENGLISH DISSENT* 45-46 (1972).

suggested that Separatism had begun to drift towards a Zwinglian position largely because of its aversion to liturgy of the Calvinist, much less Catholic, sort.¹⁰¹ Separatists also taught that the sacraments "were of less than central importance, even while preserving them."¹⁰² Examining the theology of two important Seventeenth Century Separatist or Nonconformist divines, Mayor concluded that they and their contemporary dissenters generally leaned towards Zwinglianism.¹⁰³ Mayor and Bourne disagree merely about the timing of the drift to a Zwinglian understanding of the Eucharist. But it is, of course, clear that the English Puritans, Separatists and Nonconformists of whom Bourne and Mayor wrote, were the progenitors of American evangelical Protestants.

It fell to John W. Nevin, a Nineteenth Century Calvinist theologian, to document the triumph of Zwinglianism in American evangelical Protestantism.¹⁰⁴ Nevin had set out to accomplish three objectives: "(i) to show that American Protestantism had fallen away from Calvin and was quite content with Zwingli's eucharistic theology; (ii) to re-establish and re-interpret Calvin's doctrine; (iii) and to correct Calvin's 'psychology,' or his 'sursum-corda' mechanics."¹⁰⁵ His first goal concerns us here.

Nevin launched a thunderous attack on contemporary American evangelical Protestant Eucharistic theology, finding it utterly different from the teachings of John Calvin, and utterly wanting.¹⁰⁶ His theory for the American evangelical Protestant embrace of Zwinglian Eucharistic doctrine was that (1) rationalism and (2) the tendency to splinter into innumerable sects, to which Protestants had fallen prey, had undermined the objectivity of orthodox Calvinism.¹⁰⁷ This was so because for Nevin, both rationalism and sectarianism were expressions of subjectivism.¹⁰⁸ The powerful link between the subjectivism that Nevin bemoaned and a Eucharistic theology

¹⁰¹ *Id.* at 48.

¹⁰² *Id.* at 97.

¹⁰³ *Id.* at 114.

¹⁰⁴ JOHN W. NEVIN, *THE MYSTICAL PRESENCE: A VINDICATION OF THE REFORMED OR CALVINISTIC DOCTRINE OF THE HOLY EUCHARIST* (Bard Thompson & George H. Bricker eds., 1966) (1846).

¹⁰⁵ JACK MARTIN MAXWELL, *WORSHIP AND REFORMED THEOLOGY: THE LITURGICAL LESSONS OF MERCERSBURG* 31 (1976).

¹⁰⁶ *Id.* at 104-30.

¹⁰⁷ *Id.* at 130-49.

¹⁰⁸ *Id.*

that stressed subjective, internal, mental recollection of what Christ did for us—the essence of Zwinglianism—is manifestly patent. And analysis of the doctrines of American evangelical Protestants confirms Nevin's diagnosis.¹⁰⁹

c. Revivalism and Millenarianism as Reinforcements of Zwinglian Eucharistic Theology

The attempt by evangelical Protestants to find deeper meaning, if not sustenance, in Zwinglianism failed. The Eucharist, understood as corporate liturgy, simply could not survive the limitations of Zwingli's rejectionist, alienation-based theology, theology based not on reconciliation, but on unbridgeable—and thus distancing or alienating¹¹⁰—constituent parts of the dualisms, like matter and spirit, one from the

¹⁰⁹ The Baptists firmly hold to a Zwinglian understanding of the Lord's Supper. They call it neither the Eucharist nor a sacrament, but instead an "ordinance," a word that evokes the sense of the Lord's Supper as a duty-driven bare memorial of the sort that Zwingli had in mind. See J. LANSING. BURROWS, WHAT BAPTISTS BELIEVE, AND OTHER DISCOURSES 96-111 (H. M. Wharton & Co. 1887); C. BROWNLOW HASTINGS, INTRODUCING SOUTHERN BAPTISTS: THEIR FAITH & THEIR LIFE 63-71 (1981).

The Congregationalists are now a part of the United Church of Christ, which lays claim, in unspecified ways, to Luther, Zwingli, and, most of all, Calvin. DOUGLAS HORTON, THE UNITED CHURCH OF CHRIST: ITS ORIGINS, ORGANIZATION, AND ROLE IN THE WORLD TODAY 92 (1962). However, before the time of National Prohibition, Congregationalism was essentially Zwinglian. HOWARD G. HAGEMAN, PULPIT AND TABLE: SOME CHAPTERS IN THE HISTORY OF WORSHIP IN THE REFORMED CHURCHES 85 (1962) (quoting S.J. ANDREWS, WILLIAM WATSON ANDREWS 14-15 (1900)).

The Methodists have held to a Zwinglian point of view for a long time. See ROBERT MILTON WINTER, AMERICAN CHURCHES AND THE HOLY COMMUNION: A COMPARATIVE STUDY IN SACRAMENTAL THEOLOGY, PRACTICE AND PIETY IN THE EPISCOPAL, PRESBYTERIAN, METHODIST AND GERMAN REFORMED TRADITIONS 1607-1875, at 636 (1988). A Methodist writing in 1926 declared that the Zwinglian position "has perhaps come to be the prevailing one in Methodist as well as in the usual Protestant theology." NOLAN B. HARMON, THE RITES AND RITUAL OF EPISCOPAL METHODISM 160 (1926).

Zwinglianism also prevailed in most quarters of the Presbyterian Church. It was only in 1906 that the Presbyterians came to have a "comprehensive" sacramental rite. WINTER, *supra*, at 485-87, 538-40. Contemporary Presbyterian writers exercise care to distinguish Calvin's teachings from those of Zwingli, pointing out that Calvin attempted to find a middle ground between Zwingli on the one hand, and the Lutherans and Catholics on the other. See FELIX B. GEAR, OUR PRESBYTERIAN BELIEF 67-70 (1980); JACK ROGERS, PRESBYTERIAN CREEDS 110-112 (1985); LOUIS B. WEEKS, TO BE A PRESBYTERIAN 59-60 (1983). The modern view has come a long way from the unabashed Zwinglianism of the Presbyterian Charles Hodge who in the mid-nineteenth century challenged the Virtualism of Nevin. See NEVIN, *supra* note 104, at 12-13. For a discussion of Virtualism, see *Protestant Empire*, *supra* note 24, at 196 n.65. It remains to be seen, however, whether Presbyterian liturgical practice in fact has adopted anything like Nevin's Virtualism and has abandoned Zwinglianism.

¹¹⁰ For a discussion of alienation, see Michael deHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes — A Study in Social and Racial Alienation from African-Americans*, 46 ST. LOUIS U. L.J. 327, 328-30 (2004).

other. Thus, Scotch-Irish Protestants, who were to have a profound influence on American evangelical Protestantism, could not maintain the powerful and necessary connection between the Eucharist and the traditional Sunday liturgy. Instead, they tied the celebration of the Eucharist to a quarterly or annual weekend-long meeting.¹¹¹ Having severed the link to liturgy, the substitute celebration generated its own dynamic in which the conversion of souls, the encoded message of Zwinglian Eucharistic theology, rather than the conversion of the bread and wine as a source of heavenly food for the reconciled body and soul, became the center of attraction. Hence the revival emerged.¹¹² Revivalism, and its twin,

¹¹¹ See generally PAUL K. CONKIN, *CANE RIDGE: AMERICA'S PENTECOST* (1990).

¹¹² *Id.* Maxwell painted a vivid portrait of the development of revivalistic evangelical Protestantism:

Revivalistic evangelicalism, the very death of historical sacramental and liturgical worship, made its entry into the Reformed tradition through the sacramental door, ironically enough. Whereas some of the Puritans—Wesley, for example—increased the frequency of celebrating the Eucharist, the overall effect of Puritanism was a reduction in the number of celebrations. In spite of these annual or perhaps semi-annual occasions, the Puritans did retain a “high” doctrine of the spiritual real presence in the sacramental action. They surrounded the celebrations with lengthy “sacramental seasons” of four-day duration, during which times hundreds, even thousands, would prepare themselves to receive Communion. Since a number of the “unconverted” would attend these meetings, which doubtless had all the attractions of a major social gathering, the preaching gradually shifted its emphasis from the sacramental to a concern to save the “lost”, and thus the revivalistic camp meeting.

Revivalism understood the Church to be “an assemblage of religiously inclined neighbors”, rather than the People of the Word, as Calvin had argued. With this fundamental change came the erosion of much that was characteristic of the classical Reformation [i.e. Calvinist] tradition: the “focus on Word and Sacraments in the historic church as the loci and media of salvation”, for example. The “means of grace” became the conversion experience itself with its attendant public confession of sin and profession of faith. Objectivity in worship yielded to the maudlin sentimentality of revivalistic hymns, and the “liturgy” lost its historic sense of a corporate oblation in response to God’s gift in Jesus Christ. The purpose of worship was conversion and the “liturgy” became an instrument used by clergy and choir to precipitate the sort of emotional crisis which would guarantee conversion.

MAXWELL, *supra* note 106, at 56-57. See generally AHLSTROM, *supra* note 26, at 429-54; ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776-1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY* 87-108 (1992). Maxwell characterized the theology of the “proto-revivalists” as a “‘high’ doctrine of the spiritual real presence in the sacramental action.” Not only do some commentators disagree, see BOURNE, *supra* note 100, at 66-68, but Maxwell misses the central point that “high” theologies are rooted in church, and in liturgy. High churchmen would not have sacramental “seasons” but would have regular Sunday liturgies at which they would celebrate the Eucharist. Even Mayor concedes that English non-Anglican evangelical Protestants tended to undervalue liturgy, MAYOR, *supra* note 101, at 48, thus betraying a Eucharistic theology that cannot be characterized as “high.” Finally, a “high” theology would not so easily give way to the maudlin sentimentality of revivalism. But in other

millenarianism, became the hallmarks of American evangelical Protestantism.¹¹³ Revivalism and millenarianism,¹¹⁴ however, produce a world-view that sees everything in stark either-or terms.¹¹⁵ This dualism, this rejectionism, reinforces and is in

respects, Maxwell's description of the origins of evangelical Protestant revivalism rings true.

¹¹³ See Jerald C. Brauer, *Revivalism and Millenarianism in America*, in *IN THE GREAT TRADITION, IN HONOR OF WINTHROP S. HUDSON: ESSAYS ON PLURALISM, VOLUNTARISM, AND REVIVALISM* 147 (Joseph D. Ban & Paul R. Dekar eds., 1982) [hereinafter *IN THE GREAT TRADITION*].

Having abandoned the church-sacrament system, evangelical Protestants were still left to contend with the question of conversion. Revivalism is "a particular way of becoming, being, and remaining Christian. . . . The absolute necessity of a personal, highly self-conscious, individual conversion experience is the bedrock on which revivalism is built. Without such an experience, without being born again, one cannot be a Christian and certainly one cannot minister to others.

Id. at 147-48.

¹¹⁴ Millenarianism has precisely the same "anti-sacramental" structure as revivalism. Brauer writes:

At the center of millennialism is the belief in the rebirth of the cosmos, carried out purely through divine agency just as is the salvation of the individual in revivalism. The first stage is identical. There is a prolonged conflict in which the forces of good fight the forces of evil. . . .

Just as the individual soul is reborn in revivalism, so in millennialism old history is ended and there is a totally new beginning—a new heaven and a new earth. . . . [T]he new heaven and the new earth do not appear until after the fulfillment of the millennium and the utter triumph of Jesus as the Christ. So it is that the converted . . . await their death or their rapture so that they will finally and ultimately be fully translated or reborn as totally new creatures in Christ.

In both cases, the initiative is from God, and in both cases judgment is brought to bear through the process of struggle, which culminates in divine victory and the reconstitution of life, both personal and cosmic. In revivalism and in millennialism there can be no salvation without personally experienced conversion; and however long the process, it ends in a cataclysm which destroys the past and recreates all that is for a new future.

Id. at 152-53.

By contrast, Catholics tend not to think in revivalist-millennialist terms because the Catholic Eucharist is, in and of itself, a foretaste of the Second Coming, the Kingdom of God. *CATECHISM OF THE CATHOLIC CHURCH* §§ 2816, 2821 (2d ed. 1994). Thus for Catholics there is no need for cataclysmic conversion after a struggle with the forces of good and evil. The church-sacrament system, itself the epitome of reconciliation, provides a safe haven in which conversion by growth, development, self-examination and scrutiny can take place. Furthermore, the objective truth of the Eucharist, and the Real Presence means that Christ in fact returns to the Altar, by means of the substance of His Body and Blood and by means of His saving power and grace every time the Mass is said and done. Thus, "[m]an's vocation to eternal life does not suppress, but actually reinforces, his duty to put into action in this world the energies and means received from the Creator to serve justice and peace." *Id.* at § 2820. It does not follow that a Catholic cannot experience something like a revivalistic conversion, or be born again. Rather, that experience is not necessary to salvation. The Eucharist, for Catholics, has both substance and soteriological meaning.

¹¹⁵ Brauer writes:

turn reinforced by the dualism inherent in Zwinglian Eucharistic theology.

3. Beverage Alcohol as *Malum in se*

The discussion has shown that Zwinglian dualism unleashed powerful forces that would produce radically different outlooks on life than those that flowed from Catholic sacramental realism. As far as beverage alcohol is concerned, however, it took time for the implications of Zwinglian Eucharistic theology to work themselves out. John Calvin enjoyed food and drink, and the Puritans "would have stared at the idea of prohibiting alcoholic drink," and even as late as the eighteenth century, John Wesley apparently had no objections to beer and wine, even as he opposed distilled spirits.¹¹⁶ Wesley's contemporary, Benjamin Rush, author of the first temperance tract, approved of moderate amounts of wine for health, although he, like Wesley, objected to distilled spirits.¹¹⁷ It appears that generally in the eighteenth century, no one argued for total abstinence.¹¹⁸ But in the nineteenth century, something happened.

Zwinglian theology, as noted above, reduced the action of the liturgy to an interior, subjective mental act.¹¹⁹ Without the church-sacrament system to intercede, the worshipper is left solely to her own devices to remember what Jesus did for

Another emphasis shared by revivalism and millenarianism is a radical distinction between nature and grace. . . . Grace is not the culmination of nature but is purely from divine love and activity. Revivalism and millenarianism always press for the radical distinction between God and humanity, between evil and righteousness, and between salvation and damnation.

Nowhere is this seen more clearly than in the ethics, both public and private, which develop in revivalism. For the converted believer, there is only right or wrong and there is nothing in between.

Brauer, *supra* note 113, at 155-156.

Catholics, by contrast, do not see not radical distinctions but reconciliation of nature and grace instead. This is the central ethical and moral meaning of the claim that at the consecration the Body and Blood of Christ become Really Present. *See supra* notes 40-43 and accompanying text. Sacramental Realism means that grace and nature work, now reconciled, together in the salvation economy, that nature, the created order, once reconciled, has soteriological meaning and value.

¹¹⁶ THOMAS PINNEY, *A HISTORY OF WINE IN AMERICA: FROM THE BEGINNINGS TO PROHIBITION* 426 (1989).

¹¹⁷ JOHN KOBLER, *ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION* 42-43 (1973).

¹¹⁸ JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* 36 (1963).

¹¹⁹ *See supra* notes 83-90 and accompanying text.

mankind, for this is all that Zwinglianism can offer. If anything should interfere with her ability to remember, then she could not communicate with God, at least not in any Eucharistic sense. One preacher therefore declared: "Everything that . . . makes me forget God and eternity is dangerous and in the last damnable."¹²⁰ A commentator noted that for Nineteenth Century revivalist Protestants, "the befuddled, rum-soaked mind of the habitual drunkard patently lay beyond the reach of God's saving grace."¹²¹ But since revivalism derives from Zwinglianism, the observation reaches back to the complex cultural and nationalistic—not to mention anti-Catholic—impulses that spawned the Reformation.

Whatever broader social and cultural forces might have been in play in the nineteenth century regarding beverage alcohol, many evangelical Protestants had come to see beverage alcohol as a substance that blocked or inhibited the ability to perform the one Eucharistic act that survived Zwingli's assault on the church-sacrament system: the individual, internal, subjective, mental recollection of the Passion of Christ. Beverage alcohol, therefore, became something evil in and of itself.

Catholics and liturgical Protestants, at least those liturgical Protestants with a relatively "high" Eucharistic theology,¹²² resisted the idea that beverage alcohol could be inherently evil.¹²³ According to them, evil lay in the abuse of alcohol, not in the substance itself.¹²⁴ Theological considerations explain this difference in outlook. Catholic sacramental teaching rests on the fundamental principle that there is a role for the material world in the salvation economy, more specifically, the material world can become sanctified or holy.¹²⁵ The Eucharist, the central sacrament, puts the proposition in its strongest form: bread and wine become the

¹²⁰ GUSFIELD, *supra* note 118, at 30-32 (quoting from a sermon preached by the Rev. Theodore Cuyler on October 24, 1858).

¹²¹ ROBERT SMITH BADER, PROHIBITION IN KANSAS: A HISTORY 11 (1986).

¹²² See *Protestant Empire*, *supra* note 23, at 196-97 n.65.

¹²³ See, e.g., PATRICK W. CAREY, THE ROMAN CATHOLICS 19 (1993) (stating that according to Catholic moral theology "there was nothing inherently evil in the consumption of alcoholic beverages"); JIMMIE LEWIS FRANKLIN, BORN SOBER: PROHIBITION IN OKLAHOMA, 1907-1959, at 69 n.57 (1971) (stating that "[t]he Episcopal and Roman Catholic Churches . . . maintained that alcoholic beverages were not of themselves an evil").

¹²⁴ See FRANKLIN, *supra* note 123, at 69 n.57 (stating that "[t]he 'right use' of intoxicants was the key").

¹²⁵ See *supra* Part II.A.1.

Body and Blood of Christ.¹²⁶ It necessarily follows, therefore, that wine cannot possibly be inherently evil, at least for Catholics and some non-evangelical Protestants.

And this proposition holds quite true without regard to the weaknesses and failings of those who drink wine. Catholic sacramental theology rests on the premise of essentialist objectivity, as well as a well-thought out conception of reconciliation. The change of the bread and wine into the Body and Blood of Christ takes place without regard to the moral intentions of either the celebrant or the communicant.¹²⁷ Divine law and divine will have ordained that wine shall play an important role in the salvation, and the only condition is that the Church intend that wine shall be used as matter in the unfolding mystery of the church-sacrament system. Again, wine cannot be inherently evil for Catholics and some non-evangelical Protestants.

On the other hand, however, sobriety (which includes moderate consumption of beverage alcohol) is a virtue and drunkenness a vice.¹²⁸ Indeed, a drunken communicant may well receive the objectively real and present Body and Blood of Christ, as St. Paul taught,¹²⁹ to his detriment, not to his benefit.¹³⁰ But, because wine plays a role in the salvation economy, Catholics distinguish between the material substance, alcohol, and the physical, psychological and rational state of those who drink alcohol in excess. The critical transformative action of the Eucharistic liturgy—the transubstantiation of the bread and wine—does not depend on the sobriety of the communicants, only the consequences so depend.

Notwithstanding the formal doctrines and teachings of the Church, Catholics tend to tolerate excessive drinking more than evangelical Protestants.¹³¹ This may happen because Catholics do not limit the action of the Eucharist to the Zwinglian subjective, mental, interior, memorial exercise. Transubstantiation means that the action of the liturgy has other, objective dimensions. Drunkenness, therefore, however

¹²⁶ See *supra* Part II.A.1.

¹²⁷ See CANONS AND DECREES, *supra* note 41, at 52-53 (footnotes omitted).

¹²⁸ AQUINAS, *supra* note 43, §§ IIa-IIae, q.149-50, at 135-45.

¹²⁹ 1 *Corinthians* 11:29.

¹³⁰ AQUINAS, *supra* note 43, § IIIa, q.80, at 65.

¹³¹ See TIMBERLAKE, *supra* note 9, at 5 (noting that Roman Catholics, Episcopalians and Lutherans "were far more lenient and forgiving in matters of private morality, such as drinking. But even these churches had evangelical wings.").

bad it might be, does not strip the Eucharist of any sensible meaning or value, because of the objective reality of the sacrament for the worshipping community. Ultimately, the objective reality of the sacrament means that there is hope, even for the drunkard, that he will, some day, through the actions of the Church, the workings of the church-sacrament system, be a worthy recipient of the Eucharist, and therefore benefit from the grace or virtue of the sacrament. But however one understands Catholic teaching on sobriety, wine cannot be inherently evil, even if abused by drunkards.

4. The Evangelical Protestant Switch from Wine to Grape Juice

Given the concern, at the level of theology, of early Nineteenth Century American evangelical Protestants for the consumption of beverage alcohol, a pronounced tension between religious practice—use of wine in the celebration of the evangelical Protestant Lord's Supper—and religious belief—that alcoholic beverages, including wine, were inherently evil—emerged. An article appeared in 1848 calling for the use of unfermented wine in religious services.¹³² While many evangelicals resisted the call then, the theology behind it was unassailable, and straightforward, given evangelical Protestant suppositions. As one commentator put it, “[t]o change from wine to grape juice was a simple matter for the evangelical churches, since they looked upon the sacrament of the Lord's Supper as a memorial and regarded the elements of bread and wine as purely symbolic.”¹³³ To the extent that the change to unfermented grape juice might present textual or scriptural problems, evangelical Protestants justified the switch, claiming that the Bible in fact refers to two wines, one fermented, the other unfermented, and that the wine that Jesus used at the Last Super was unfermented.¹³⁴

Even in evangelical Protestant circles, some rejected the two-wine theory, at least at the beginning.¹³⁵ Practical difficulties, however, thwarted the use of either fermented or

¹³² JAMES BENSON SELLERS, *The Prohibition Movement in Alabama, 1702 to 1943*, at 62 in 26 JAMES SPRUNT STUDIES IN HISTORY AND POLITICAL SCIENCE 1 (1943).

¹³³ TIMBERLAKE, *supra* note 9, at 12.

¹³⁴ See TIMBERLAKE, *supra* note 9, at 10-12; Betty A. O'Brien, *The Lord's Supper: Fruit of the Vine or Coup of Devils?*, 31 METHODIST HISTORY 203, 206-07 (1993).

¹³⁵ O'Brien, *supra* note 134, at 207.

unfermented wine. During much of the nineteenth century, good wine, at a reasonable price, was hard to come by.¹³⁶ But much worse, a decent unfermented juice of the grape simply did not exist. It was not until 1869 that a Methodist communion steward named Thomas Bramwell Welch produced a pasteurized grape juice.¹³⁷

Perhaps not altogether coincidentally, starting in 1874, the newly formed Women's Christian Temperance Union (WCTU) began to agitate for the use of unfermented wine in evangelical Protestant communion services.¹³⁸ The efforts of the WCTU were met with a great deal of success. By the end of the nineteenth century, "the use of grape juice in [evangelical Protestant] churches had become quite general."¹³⁹

O'Brien captures the fundamental theological meaning of the switch: "[w]ithin the space of a century, Methodist churches joined many American churches in the move from a sacrament using grape wine preserved by a natural, God-given, life-changing fermentation process to a sacrament using grape juice preserved by an artificial, human-made, life-destroying pasteurization process."¹⁴⁰ Wine, of course, symbolizes reconciliation—God and man working together to make something good, something holy, something natural, a Catholic understanding of the sacraments. Man plants and harvests the grapes; God takes care of the natural processes, sun, water, soil, and fermentation.¹⁴¹ Pasteurized grape juice tends to push God into the background, and elevates, instead, the role of man and man's inventions, most notably, in this instance, pasteurization. Zwingli's dualisms similarly pushed God into the background, leaving only man's inventions—the subjective, interior, mental, recollection of what Christ did for mankind. The switch to grape juice, then, fits comfortably in the Zwinglian *nomos*. But this switch cannot operate in the *nomos* of Catholics and most liturgical Protestants as they, of course, continued to use wine in their Eucharistic liturgies.¹⁴²

¹³⁶ *Id.* at 208.

¹³⁷ *Id.* at 218-19.

¹³⁸ SELLERS, *supra* note 132, at 62; O'Brien, *supra* note 134, at 211.

¹³⁹ TIMBERLAKE, *supra* note 9, at 17.

¹⁴⁰ O'Brien, *supra* note 134, at 217.

¹⁴¹ At the beginning of the Liturgy of the Eucharist, the Preparation of the Gifts, the celebrant says the following regarding the wine that will be consecrated: "Blessed are you, Lord, God of all creation. Through your goodness we have this wine to offer, fruit of the vine and work of human hands. It will become our spiritual drink." See NEW SAINT JOSEPH SUNDAY MISSAL, *supra* note 41, at 21.

¹⁴² ANDREW SINCLAIR, PROHIBITION: THE ERA OF EXCESS 71 (1962);

Deep and profound theological differences, and the resulting divergent world views, set the stage for a serious test of the principle of religious liberty and freedom. The path to National Prohibition had now been irrevocably set, rooted in the dualist, rejectionist Eucharistic theology of Ulrich Zwingli, a theology that is quintessentially anti-Catholic and functions solely as a way of encoding anti-Catholicism, of enabling a distinctive evangelical Protestant world view to take hold among those who, for whatever reason, separated themselves—or were separated—from Rome.¹⁴³

B. *The Politics of Anglo-American Anti-Catholicism*

In 1570 Pope Pius V excommunicated Elizabeth I.¹⁴⁴ However, he did not leave matters there. He also “declared her ‘deprived of her . . . crown,’ absolved English people from sworn oaths to her and ordered them not to obey her laws.”¹⁴⁵ This maladroit move, this blunder, “provided fodder for the ideologically driven claim that [English Catholics] were traitors with conflicting dual loyalties.”¹⁴⁶ A *political* basis or predicate for the anti-Catholicism of the English, at least, had now been

TIMBERLAKE, *supra* note 9, at 12; O'Brien, *supra* note 134, at 221-22. One might argue that God gave man the ability to invent pasteurization, and that it could be applied to religious uses and purposes, all as part of God's plan for His Creation. The problem with this sort of reductionist argument is that it too easily assumes that the Eternal Mystery, that is God, too easily yields up to mere human invention without carefully considering the proper relation between the here and now and the Eternal Now, and what, in the course of human history, warrants or justifies human beings reworking or redefining that relation. As I have elsewhere suggested, the Protestant justification for such a reworking, for abandoning the sacraments as Catholics understood them, lies in “a new German ideology.” See *Protestant Empire*, *supra* note 23, at 191. This is too slender a reed to support the radical reordering of the understanding of the relation between the here and now and the Eternal Now. In an effort to justify this reordering, it fell to evangelical Protestants to develop, among other things, the notion of Manifest Destiny. See *infra* notes 193-203 and accompanying text. The limitations of this notion are all too clear.

¹⁴³ *But see* PROTESTANTISM, *supra* note 35, at 168 (attempting to rationalize the basic premises of evangelical Protestantism).

The Reformers found it necessary to break the Catholic link at its strongest point. So long as the door of heaven was locked or unlocked in the acts of confession and the mass, it would continue to have profound psychological and political powers. It was the instrument that kept the hierarchy and priestly castes in control. At the same time, popular piety—often with ecclesiastical encouragement—associated many magical powers with the changing of the bread to the body and the wine to blood, and this piety seemed to keep people in superstition.

Id.

¹⁴⁴ Pope Pius V, *Regnans in Excelsis* (1570), reprinted in THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY 423-28 (G.R. Elton ed., 2d ed. 1982).

¹⁴⁵ *Protestant Empire*, *supra* note 24, at 222 (footnotes omitted).

¹⁴⁶ *Id.*

established: one could not be a good Englishman—or an American, for that matter—if one were also a Roman Catholic, or so the argument went.

Political anti-Catholicism was embedded in American anti-Catholicism, its lineage directly traceable to the troubles of the sixteenth century. Lyman Beecher stirred up a hornet's nest of anti-Catholicism in Boston in 1834,¹⁴⁷ and penned one of the first, dramatic anti-Catholic diatribes with the publication in 1835 of a book claiming that a vast Hapsburg-led Catholic conspiracy was plotting to take over the then American West by flooding the United States with large numbers of Catholic immigrants.¹⁴⁸ Proving that silly ideas never seem to go away, some Protestants erroneously believed, shades of Guy Fawkes,¹⁴⁹ that Catholics in America "kept guns hidden in their churches and were awaiting the day when they could strike to capture America for the pope."¹⁵⁰

For Lyman Beecher, nothing less than the "political claims and character of the Catholic religion" were at stake.¹⁵¹ The challenge was to undo Catholic belief—as he understood it¹⁵²—that Catholicism was something more than merely one of many Christian denominations, that Catholicism might have been entitled to special or unequal rights and privileges, that Catholicism was the only church of Christ and the only way to salvation, that Bible reading was to be controlled by the priesthood, that no one could worship God according to the dictates of his own conscience, that heresy was a civil crime, that the pope and the councils of the Church were infallible,

¹⁴⁷ See STUART C. HENRY, *UNVANQUISHED PURITAN: A PORTRAIT OF LYMAN BEECHER* 156-57 (1973); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 667 (1998).

¹⁴⁸ LYMAN BEECHER, *PLEA FOR THE WEST* 58-60, 69, 74-75, 116 (Cincinnati, Truman & Smith 1835).

¹⁴⁹ See Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1061 (1966) (stating that "[i]n 1605 five Catholics dug a tunnel and placed thirty tons of gunpowder under the Houses of Parliament, planning to blow it up on opening day, when the King and all his ministers would be in attendance [and t]he plot was revealed and the plotters were executed, [t]he plotter actually found in the chamber with the gunpowder [being] Guy Fawkes . . .").

¹⁵⁰ BRAUER, *supra* note 26, at 128.

¹⁵¹ BEECHER, *supra* note 148, at 69.

¹⁵² It is beyond the scope of this paper to adjudge the soundness of Beecher's understanding of the character of the Catholic religion. For an analysis of the teachings of the Catholic Church in Beecher's time, see GERALD A. MCCOOL, *CATHOLIC THEOLOGY IN THE NINETEENTH CENTURY: THE QUEST FOR A UNITARY METHOD* (1977); MICHAEL J. SCHUCK, *THAT THEY BE ONE: THE SOCIAL TEACHING OF THE PAPAL ENCYCLICALS, 1740-1780* 1-43 (1991).

that ecclesiastical jurisdiction was enforceable by the civil power,¹⁵³ that the pope had the right to interfere in the political concerns of nations by means of his authority over the consciences of Catholics,¹⁵⁴ and that the pope had the power to sway Catholics by means of the power of life and death eternal.¹⁵⁵ The abiding problem, Beecher insisted, was that Catholicism had “always been, and still is, a political religion, a religion of state,”¹⁵⁶ committed to maintaining a despotic government.¹⁵⁷

For Josiah Strong, a Congregationalist minister schooled by Beecher’s Lane Theological Seminary,¹⁵⁸ and, like Beecher, the author of an important popular work and window into the meaning and ideological workings of the Protestant Empire,¹⁵⁹ Catholicism suffered from precisely the same ills. Strong saw Catholicism as a peril to the Protestant Empire,¹⁶⁰ a religion implacably opposed to republican notions of popular sovereignty.¹⁶¹ He called into question the loyalty of American Catholics,¹⁶² arguing that they would, if called upon to do so, follow the pope rather than the laws of the land.¹⁶³ Strong insisted that Catholic dependency on papal absolutism made it impossible for Catholics to be sovereign: “Representative government is the natural government of Protestant populations. Despotic government is the congenial government of Catholic populations.”¹⁶⁴ Thus, he concluded, with a melodramatic flair, Catholics “blow no trumpets, are sparing of statistics, but are at work night and day to break down the institutions of the country, beginning with the public schools. As surely as we live, so surely will the conflict come, and it will be a hard one.”¹⁶⁵ And, “[i]f the liberties of the American people are ever destroyed, they will fall by the hands of the Romish clergy.”¹⁶⁶

¹⁵³ BEECHER, *supra* note 148, at 70.

¹⁵⁴ *Id.* at 70-71.

¹⁵⁵ *Id.* at 71.

¹⁵⁶ *Id.* at 151.

¹⁵⁷ *Id.* at 160.

¹⁵⁸ RALPH E. LUKER, *THE SOCIAL GOSPEL IN BLACK AND WHITE: AMERICAN RACIAL REFORM, 1885-1912*, at 269 (1991).

¹⁵⁹ STRONG, *supra* note 27.

¹⁶⁰ *Id.* at 59-88.

¹⁶¹ *Id.* at 60-75.

¹⁶² *Id.* at 61.

¹⁶³ *Id.* at 64-65.

¹⁶⁴ STRONG, *supra* note 27, at 75 (internal quotation marks and citations omitted).

¹⁶⁵ *Id.* at 87.

¹⁶⁶ *Id.*

This drumroll continued unabated, as a review of some of the religious journals published during the second decade of the twentieth century reveals. An article in the Lutheran press put it plainly: Catholicism was an enemy. "It is the old subtle, well-organized foe and has done not a little to discredit the Lutheran Church in the eyes of the American public during the present war."¹⁶⁷ The writer continued: "The Lutheran Church knows this ancient foe better than the Reformed churches¹⁶⁸ and it should be a leader and not a follower in offsetting its *politico-religious* propaganda in America."¹⁶⁹

The Baptists, one of the anchor denominations in American evangelical Protestantism, pulled few punches. They condemned Catholics for their efforts to win over the "negroes of the South,"¹⁷⁰ and fulminated against a franked pamphlet which objected to a bill that would exclude "illiterates" from prospective citizenship. They called the pope "an infallible autocrat," asking "[h]ow is it possible for the [American] cardinals to imbibe the sweet water of liberty from the bitter fountain in the Vatican or gather the grapes and figs of freedom from the briar bush on the Tiber?"¹⁷¹

Methodism, the other great anchor of American evangelical Protestantism, also weighed in.¹⁷² An article set up "Americanism" and "Catholicism" in apposition to each other, finding Catholicism to be on the wrong side of such issues as church and state, freedom of the press and speech, establishment of religion, democracy, freedom of worship and conscience.¹⁷³ A week later, the same journal published an

¹⁶⁷ G. W. Sandt, *The Need of Lutheran Co-operation and What the Church Papers Can Do to Bring it About*, 2 LUTHERAN CHURCH HERALD 452 (July 19, 1918).

¹⁶⁸ One of the predominant American "Reformed" churches was the Presbyterian Church. See Fred J. Hood, *Evolution of the Denomination Among the Reformed of the Middle and Southern States, 1780-1840*, in DENOMINATIONALISM 140-41 (Russell E. Richey ed., 1977) (stating that Presbyterianism "maintain[ed]" about 70 percent of the Reformed churches in the middle and southern states in 1820). More generally, "Reformed Christianity" refers to churches in the Calvinist orbit. See ALF HÄRDELIN, *THE TRACTARIAN UNDERSTANDING OF THE EUCHARIST* 124 (1965). This particular branch of Protestantism would, of course, exclude the Lutheran churches.

¹⁶⁹ Sandt, *supra* note 167, at 452 (emphasis added).

¹⁷⁰ Note, *Roman Catholicism and the Negroes*, 3 THE WATCHMAN-EXAMINER 9 (Jan. 7, 1915).

¹⁷¹ Note, *Men and Things*, 6 THE WATCHMAN-EXAMINER 1039 (Aug. 15, 1918).

¹⁷² The nineteenth century saw the spectacular growth of the Methodist and the Baptist Churches. See FINKE & STARK, *supra* note 112, at 55 (displaying in graphic form that Baptists and Methodists accounted for half of all religious adherents in 1850). See also LATOURETTE, *supra* note 29, at 1258 (noting that in 1914 America was overwhelmingly Protestant and "Baptists far outnumbered any other type of Protestants," followed by the Methodists).

¹⁷³ Note, *Americanism and Catholicism*, 84 THE METHODIST PROTESTANT 5

essay pursuing the same major themes. It referred to Catholics as:

[T]he crowd that gathers in big conventions, is coddled and complimented by sycophantic politicians, whose actions and speeches are reported on the first pages of the press, and flaunted in big headlines, and who denounce as bigots and narrow-minded sectarians the American spirit which stands for protection and perpetuation of our institutions. We may well pray for deliverance from this awful menace. This "fair flock," made up in part of saloon keepers and the off-scouring of foreign nations, is the flock that will destroy this fair land whenever they have the power to do so.¹⁷⁴

The essayist had contrasted, favorably, the United States, made "fair" by Protestants, with the "ignorance, squalor and crime [in Mexico, Spain, Italy, and Austria] so common that even the priests themselves are not safe,"¹⁷⁵ and had referred to Catholicism as "the organization that has three hundred thousand armed knights who are kept ready to enforce Catholic demands when the time to strike has come."¹⁷⁶

Political or ideological anti-Catholicism certainly obstructed Catholics in securing religious freedom.¹⁷⁷ The possibility of establishing religious freedom would drift even further away if a deep and abiding *theological* objection to Roman Catholicism in the form of a rejectionist and reactionary Eucharistic theology continued to function as the normative doctrine of American evangelical Protestants—the very ones bent on drying up America, the ones who believed that wine was intrinsically evil and that Catholicism, if not Catholics themselves, were intrinsically evil and anti-American.

C. *The Broad Contours of the Anti-Catholicism of the Drys*

Given the culturally embedded anti-Catholicism of the Anglo-American Protestant Empire, it followed almost automatically that from the very beginning of the temperance-

(1914).

¹⁷⁴ Editorial, *Another Catholic Splurge*, 84 THE METHODIST PROTESTANT 1

(1914).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Anti-Catholicism, of course, also had social and economic dimensions. See, e.g., THOMAS A. ASKEW & PETER W. SPELLMAN, *THE CHURCHES AND THE AMERICAN EXPERIENCE: IDEALS AND INSTITUTIONS* 113 (1984) ("Anti-Catholicism in America was never purely religious, for social and economic factors aggravated suspicion of the stranger. Some of the recent arrivals could be less than orderly neighbors and also crowded the labor market.").

prohibition movement, a movement that took on coherent form and shape in the 1830s or 1840s,¹⁷⁸ the specter of anti-Catholicism would rear its ugly head. The middle third of the nineteenth century saw "[t]he rapid increase of Catholic immigrants, the geographical spread of Catholicism, the manifestations of institutional strength and stability, . . . and traditional Protestant-Catholic theological antagonisms brought about a virulent hostility toward American Catholics, particularly after 1830."¹⁷⁹ Anti-Catholicism continued to grow and develop, "culminating in the Know Nothing political movement of the 1850s."¹⁸⁰ Catholicism had refused to go away, however, and indeed, the Church had flourished.¹⁸¹

It did not take long for the link between temperance-prohibition and anti-Roman Catholicism to show itself. Neal Dow, the mayor of Portland, Maine, was one of the primary backers of the first state-wide temperance-prohibition law in the nation,¹⁸² and developed something of a reputation and a following as a result.¹⁸³ Dow was virulently anti-Catholic, and particularly scornful of the Irish Catholics who had immigrated to his state.¹⁸⁴ Indeed, "[h]is association with suspected Know-Nothings grew so close as to suggest that he himself belonged to one of the secret orders."¹⁸⁵ Dow, however, could not trump or evade the fundamental laws of politics. Those who opposed him, including "the foreign-born and Catholic victims of his bigotry . . . managed to prevent Dow's reelection" in 1852.¹⁸⁶

The dramatic events of the mid-nineteenth century caused the nation, perhaps, to put its religious squabbles aside, for the nonce, in order to address the matter of slavery. However, the link between the temperance-prohibition ideal and anti-Catholicism remained intact, if dormant. By the end of that century, the animosity of the Drys towards Catholics had once again come to the forefront,¹⁸⁷ reaching a crescendo in

¹⁷⁸ See DELIVER, *supra* note 9, at 32-33; KROUT, *supra* note 27, at 262; PINNEY, *supra* note 116, at 430-31.

¹⁷⁹ CAREY, *supra* note 124, at 32.

¹⁸⁰ *Id.*

¹⁸¹ ASKEW & SPELLMAN, *supra* note 177, at 111.

¹⁸² An Act for the Suppression of Drinking Houses and Tippling Shops, ch. 211, § 1, 1851 Me. Laws 210 (repealed 1934).

¹⁸³ KOBLER, *supra* note 117, at 83.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 86.

¹⁸⁷ One commentator writes: "Nativism, anti-Catholicism, and anti-Semitism prepared the ground for both the Immigration Restriction League and the Anti-Saloon League. They were prominent and functional features of the Protestant Establishment

1928, the year of the doomed candidacy of the Catholic wet, Al Smith, and nine years after the adoption of National Prohibition.¹⁸⁸ During the 1920s, therefore, anti-Catholic animus continued to play a prominent role in shaping the evangelical Protestant nomos.¹⁸⁹ The open and visible link between the Drys and anti-Catholicism persevered at least until the 1940s.¹⁹⁰

D. *Protestantization: A Narrative of Persistence and Resistance*

The foregoing discussion clearly establishes that conflict between Catholics and Protestants was a central feature of our national life, culture, history, and experience. That conflict becomes all the greater when one takes into account the second characteristic trait of a Protestant Empire—"a dedication to convert the people of the United States to Protestantism."¹⁹¹

The goals and objectives of the American Protestant Empire perhaps started small, but took on enormous proportions in the nineteenth century as the idea of Manifest Destiny took hold of the American imagination. In order to accomplish these objectives, the minions of the Protestant Empire established both preconditions and techniques for doing this work. However, Catholics and others resisted mightily the persistent attempt of evangelical Protestants to convert them to the evangelical faith.¹⁹²

in America during the last troubled decades of its hegemony." AHLSTROM, *supra* note 26, at 856.

¹⁸⁸ JEANNE BOZZELL MCCARTY, *THE STRUGGLE FOR SOBRIETY, PROTESTANTS AND PROHIBITION IN TEXAS: 1919-1935*, at 14 (1980).

¹⁸⁹ See GUSFIELD, *supra* note 118, at 124-25; PETER H. ODEGARD, *PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE 24-25 (1928)*; David F. Wells & John D. Woodbridge, *Introduction* to *THE EVANGELICALS: WHAT THEY BELIEVE, WHO THEY ARE, AND WHERE THEY ARE CHANGING 12* (David F. Wells & John D. Woodbridge eds., 1975).

¹⁹⁰ BADER, *supra* note 121, at 249.

¹⁹¹ See *Common School Religion*, *supra* note 6, at 222.

¹⁹² The story of common school religion is largely a recounting of the struggle between the persistence of evangelical Protestants and the resistance of Catholics, Jews, Free-thinkers and others regarding the outsized claim of evangelical Protestants that the public schools were an appropriate forum for the evangelization of non-evangelical Protestant schoolchildren. See *id. passim*.

1. Persistence: The Goals and Objectives of Protestantization

Protestantization came to have two aspects: one internal to the Protestant Empire and one external. The internal dimension of Protestantization was assimilation, the Americanization of non-Protestant whites.¹⁹³ Lyman Beecher put it this way:

Let the Catholics mingle with us as Americans and come with their children under the full action of our common schools and republican institutions, and the various powers of assimilation, and we are prepared cheerfully to abide the consequences. If in these circumstances the Protestant religion cannot stand before the Catholic, let it go down, and we will sound no alarm, and ask no aid, and make no complaint. It is no ecclesiastical quarrel to which we would call the attention of the American nation.¹⁹⁴

Lest anyone think that Beecher had somehow abandoned the cause of the Protestant Empire or had lost his faith in its anointed historical role, Beecher entertained no doubt but that if American Protestant political and religious leadership maintained a watchful eye by checking and regulating immigration, by instructing American Protestants as to the truth of Catholicism, by ensuring that the education of Protestant children never fell into the hands of Catholics, and by kindness and perseverance, that leadership would extend the light of evangelical Protestantism to Catholics,¹⁹⁵ Protestantism would not "go down," but Catholicism would.

But the American Protestant Empire never had defined territorial or geographical limitations, and the original thirteen states never marked its boundaries. America was to grow and expand by the work of Providence: "The expansion in power, prosperity, and territory of America was 'the manifest destiny' of God for God's people [i.e. Americans]."¹⁹⁶ Over the course of

¹⁹³ The treatment of Native Americans, African Americans and other non-white racial groups presents its own set of questions. But it is fair to say that the goal of assimilation was limited to whites. See STRONG, *supra* note 27, at 211-12 (stating that the race summoned by God to do the work of the Protestant Empire was a white race, albeit an amalgamated one, comprised of Saxon, Norman, Dane, Celt, Gaul, Welshman, Irishman, Frisian, Flamand, French Huguenot and German Palatine). The character and nature of the racism embedded in Protestantization is more clearly seen in the discussion of Manifest Destiny. See *infra* notes 196-203 and accompanying text.

¹⁹⁴ BEECHER, *supra* note 148, at 63-64.

¹⁹⁵ *Id.* at 175-90.

¹⁹⁶ William G. McLoughlin, *Religious Freedom and Popular Sovereignty: A Change in the Flow of God's Power, 1730-1830*, in *IN THE GREAT TRADITION*, *supra* note 113, at 190.

the nineteenth century, the goal took on an ultraist dimension, for the manifest destiny of America was to “Americanize and Protestantize the world.”¹⁹⁷

In the hands of Josiah Strong, this grandiose idea of manifest destiny took on a dark and sinister character. Strong had laid out a grand religio-historiographical thesis of the westward movement of human civilization,¹⁹⁸ noting that the end of that westward expansion had been reached—“our Pacific coast.”¹⁹⁹ His “westward ho” principle, therefore, had to yield to a new one: “the final competition of races for which the [amalgamated] Anglo-Saxon is being schooled.”²⁰⁰ He continued:

[When the population pressures begin to pinch] this [amalgamated Anglo-Saxon] race of unequalled energy. . . . — the representative, let us hope, of the largest liberty, the purest Christianity, the highest civilization — having developed peculiarly aggressive traits calculated to impress its institutions upon mankind, will spread itself over the earth. . . . And can any one doubt that the result of this competition of races will be the “survival of the fittest.” . . . Nothing can save the inferior race but a ready and pliant assimilation. Whether the feebler and more abject races are going to be regenerated and raised up, is already very much of a question. What if it should be God’s plan to people the world with better and finer material?

...

To this result no war of extermination is needful; the contest is not one of arms, but of vitality and civilization. . . . Whether the extinction of inferior races before the advancing Anglo-Saxon seems to the reader sad or otherwise, it certainly appears probable. I know of no-thing except climatic conditions to prevent this race from populating Africa as it has peopled North America.²⁰¹

Strong backed off a bit from his prediction of an Armageddon or apocalypse for the non-Anglo-Saxon races on this planet, races that included non-Protestant white ethnic groups. Maybe there was some hope for them after all, however limited in reach, scope or even human dignity.²⁰² Thus a milder

¹⁹⁷ JAMES HENNESEY, *AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES* 173 (1981). See also MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* 53 (1970) [hereinafter *RIGHTEOUS EMPIRE*] (“To evangelize the world—that was the great goal of empire.”).

¹⁹⁸ STRONG, *supra* note 27, at 39-40.

¹⁹⁹ *Id.* at 213.

²⁰⁰ *Id.* at 214. See *supra* note 193 for a discussion of the composition of this amalgamated Anglo-Saxon race.

²⁰¹ STRONG, *supra* note 28, at 214-15.

²⁰² *Id.* at 216. Someone, after all, has to do the laundry, sweep the floors, take

form of Strong's vile vision took hold, finding expression as imperialism.²⁰³

One cannot avoid, however, the conclusion that the idea of Protestantization, suffused and radicalized by the grandiose notion of manifest destiny, came to mean that white people, at least, had to conform to the goals and objectives of this manifest destiny, this American imperialism. To resist them would only heighten the tension that already existed, from the times of the Tudors and on, between evangelical Protestants and Catholics. In short, the ideology of manifest destiny only made matters worse as between evangelical Protestants and Roman Catholics. The intensification of anti-Catholic animus at the turn of the last century merely confirms this fact.

2. Persistence: Preconditions and Techniques for Protestantization

The minions of the Protestant Empire, evangelical Protestants, understood that Protestantization would not happen just by itself. Early on, Robert Baird, like Lyman Beecher before him and Josiah Strong after him, an important figure in the literary canon of the Protestant Empire, wrote that he was convinced that evangelical Protestantism would win out because of Sunday-schools, Bible-classes, religious societies, Home Missionary Societies and Boards, Maternal Associations, and most importantly, the preaching of the word.²⁰⁴ Subsequent events would suggest that Baird's prescription was naïve, romantic, or even silly. But Strong, writing two generations later, argued that the answer to the peril of Romanism, as reflected in the commitment of the American Catholic hierarchy to a vast program of parochial schools,²⁰⁵ was to make the public schools and their Bible-based

out the trash, pick the cotton and prance about, shuffling and half-stepping on far too many TV sitcoms that are nothing but the modern version of minstrel shows.

²⁰³ See H. Richard Niebuhr, *Institutionalization and Secularization of the Kingdom*, in DENOMINATIONALISM, *supra* note 168, at 243 (finding fault with the vision, noting that "[i]t is in particular the kingdom of the Anglo-Saxon race which is destined to bring light to the gentiles by means of lamps manufactured in America. Thus, institutionalism and imperialism, ecclesiastical and political, go hand in hand.").

²⁰⁴ ROBERT BAIRD, *RELIGION IN AMERICA: OR, AN ACCOUNT OF THE ORIGIN, PROGRESS, RELATION TO THE STATE, AND PRESENT CONDITION OF THE EVANGELICAL CHURCHES IN THE UNITED STATES* 320-21 (New York, Harper & Brothers 1844).

²⁰⁵ The handiwork of the Third Plenary Council of the American Catholic Church, held in Baltimore, Maryland in 1884, represented the culmination of a line of thought that had been developing in American Catholicism throughout the nineteenth century. See generally BERNARD JULIUS MEIRING, *EDUCATIONAL ASPECTS OF THE*

religious instruction so attractive that Catholic parents would abandon schools wherein religious instruction was based on Catholic Tradition, and embrace those schools wherein religious instruction was premised on evangelical Protestant Biblicism.²⁰⁶ Again, Strong's solution strikes one as strange, quaint, and old-fashioned, and certainly idealistic. In the decades after Strong offered up his suggestion, harsh reality would make its presence felt.²⁰⁷

Both conservative and liberal Protestants appreciated the problems that Protestantization confronted. They realized that "cooperation for moral reform [must take] precedence over theological disputes."²⁰⁸ An appeal to the third characteristic trait of Protestant Empires, a commitment of varying intensity over time to pan-Protestantism, to cooperation rather than conflict between evangelical Protestant denominations, certainly made a great deal of sense.

Evangelical Protestants, however, connected the temperance-prohibition impulse with the goal or objective of Protestantism. Weaving that impulse into the fundamental fabric of the Protestant Empire strongly suggests that anti-Catholicism would loom large in the meaning and purpose of that impulse if only because anti-Catholicism was also a part of the warp and woof of the American Protestant Empire. Evangelical Protestants, therefore, came to understand prohibition as a precondition for those who were to do the work of Protestantization,²⁰⁹ as well as a precondition for its objects.²¹⁰

LEGISLATION OF THE COUNCILS OF BALTIMORE: 1829-1884 (1978). The Council decreed that Catholic parents should "send their children to parochial or other truly Catholic schools." *Plenary Council Decrees*, tit. VI, ch. I, § 196, reprinted in MEIRING, *supra*, at 296 (Bernard Julius Meiring trans.) [hereinafter *Decrees*]. In order to accomplish this objective, the Council decreed that "[n]ear each church, where it does not exist, a parochial school is to be erected within two years from the promulgation of this Council" *Decrees*, tit. VI, ch. I, § 199, at 301.

²⁰⁶ STRONG, *supra* note 27, at 94.

²⁰⁷ See *Common School Religion*, *supra* note 6, *passim*.

²⁰⁸ NOLL, *supra* note 27, at 298; FERENC MORTON SZASZ, *THE DIVIDED MIND OF PROTESTANT AMERICA, 1880-1930*, at 64-65 (1982) (arguing that the liquor business "served as the bête noire for liberals and alcohol served the same role for conservatives").

²⁰⁹ RIGHTEOUS EMPIRE, *supra* note 197, at 213.

²¹⁰ HANDY, *supra* note 27, at 92 (stating that "[t]emperance was an increasingly important part of the strategy of Christianization To [the evangelicals], of course, a purified, reformed, Christian America must be a dry America . . . if the country were to fulfill her destiny as a Christian nation."); TIMBERLAKE, *supra* note 9, at 17 (noting a "faith in temperance reform as the prerequisite to a successful revival"); David E. Ruth, *The Georgia Prohibition Act of 1907: Its Proponents and Their Arguments* 25, 38-40 (1984) (unpublished B.A. thesis, Emory

Reflecting the theological predicate for the Protestant Empire, in general, and the American Protestant Empire in particular, evangelical Protestants held to the view that the revival²¹¹ was the most effective way to Protestantize non-Protestants. Sydney Ahlstrom put the matter plainly: "revivalism constituted the single largest response of evangelical Protestantism to the challenge of the urban frontier."²¹² H. Richard Niebuhr, in his scathing critique of temperance, held that evangelical Protestants utilized the revival to combat the evil of liquor, to be sure, but also "to enforce the codes of capitalist industry, to overcome the rebellion of workers and to foster the bourgeois virtues on which the success of the industrial system depended."²¹³ The theological, the social, and the cultural have been thoroughly mixed together. Protestantization and the revival, therefore, establish that core or central values of the Protestant Empire were at stake in the drive towards National Prohibition.

3. Resistance: Catholics Push Back

The final piece of the puzzle of Protestantization, and its significance for the question whether the exemption for the religious use of wine contained in the Volstead Act can plausibly be read as a reflection of a commitment to a broad and liberal theory of religious liberty and freedom consists of the fact that Catholics—and others—fought back: they resisted becoming Protestants. Revivalism did not work,²¹⁴ and evangelical Protestants were out of ideas, except National Prohibition. Strong bemoaned the fact that even those Catholics who abandoned their faith by and large did not embrace Protestantism. Instead of "examining Protestantism,"²¹⁵ he explained, the apostate "[sank] into skepticism, which is even worse than superstition. Apostate Romanists are swelling our most dangerous classes. Unaccustomed to think for themselves, and having thrown off authority, they become the easy victims of the wildest and most

University) (on file with author).

²¹¹ See *supra* Part II.A.2.c.

²¹² AHLSTROM, *supra* note 26, at 743; TIMBERLAKE, *supra* note 10, at 17 (arguing that evangelical Protestants believed that revivalism was "the solution").

²¹³ Niebuhr, *supra* note 203, at 244.

²¹⁴ See, e.g., FINKE & STARK, *supra* note 112, at 138-39; PILGRIMS, *supra* note 9, at 311; RIGHTEOUS EMPIRE, *supra* note 197, at 138; TIMBERLAKE, *supra* note 9, at 19, 115-16.

²¹⁵ STRONG, *supra* note 27, at 83.

dangerous propagandists.”²¹⁶ Gloomy pessimism pervades Strong’s bigoted rhetoric, acknowledging the fact that the hated Catholics rejected the blandishments and importuning of the evangelicals. Indeed, some Catholics had the temerity to suppose that America should become Catholicized!²¹⁷

The structural dimensions of Catholic resistance largely took the form of separate or parallel institutions, creating, in many instances, a separate society in which “an immense system of schools and colleges” occupied a central position.²¹⁸ The American Catholic hierarchy declared in 1884 that Catholic parents should send their children to Catholic schools, and that Catholic parishes should build such schools.²¹⁹ The purpose of these actions was to remove Catholic children from the sway and reach of evangelical Protestants, all too eager to bring these children into the Protestant fold through the means or instrumentality of the common schools.²²⁰

At the same time, evangelical Protestants feared Catholic schools, a fear that reached back into the early nineteenth century, beginning with Lyman Beecher’s concern that Protestant parents might be gullible enough to entrust the education of young impressionable minds to the wiles and machinations of a priesthood bent on remaking America in a Catholic image.²²¹ Beecher wrote: “You may as well suspend the attraction of gravity, or intercept the connection between cause and effect, as to prevent the adverse action of Catholic education on the minds of Protestant children.”²²² And that fear continued unabated, as state after state adopted provisions in their constitutions forbidding state aid to religious schools,²²³ and as Oregon went so far as to try to require children to attend public schools by abolishing non-public schools, a radical and foolish strategy that the Supreme Court had to lay to rest.²²⁴

²¹⁶ *Id.*

²¹⁷ See CAREY, *supra* note 124, at 78-81.

²¹⁸ FINKE & STARK, *supra* note 112, at 139. See also *Common School Religion*, *supra* note 6, at 239.

²¹⁹ See *supra* note 207 and accompanying text.

²²⁰ See generally *Common School Religion*, *supra* note 6.

²²¹ See BEECHER, *supra* note 148, at 102-04.

²²² *Id.* at 98.

²²³ *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 301-05 (2001)).

²²⁴ *Pierce v. Society of Sisters*, 268 U.S. 510, 530-32, 534-35 (1925).

Catholic resistance did not limit itself to the establishment of a comprehensive system of Catholic schools. Many Catholic parents sought to keep evangelical Protestant religion out of the common schools.²²⁵ As a result, the education of American children became a flashpoint in the dynamics flowing from the persistence of evangelical Protestants in seeking to protestantize Catholics and the resistance of Catholics to that effort.

However, it is somehow fitting that in the decades leading up to National Prohibition, another institution also came to symbolize—for evangelical Protestants, at least—Catholic and immigrant resistance to Protestantization. It was the saloon. As between schools and saloons, it is perhaps not surprising that the saloon proved to be more vulnerable to evangelical Protestant attack. Indeed the organization believed by many to have been primarily responsible for National Prohibition called itself the Anti-Saloon League.²²⁶ It is by no means clear, however, that Catholics—or other religious minorities—viewed the saloon as an institutional defense against temperance-prohibition. The saloon, therefore, cannot be analogized to the Catholic parochial school or, for that matter, the Catholic Church itself. Nonetheless, the saloon captured the imagination of the Drys, and became the wedge issue in their campaign for National Prohibition. Their anger was directed not only against the owners of saloons,²²⁷ but their patrons who arguably were disproportionately urban, immigrant, poor, and Catholic.

Drys tended to paint the saloon as an inherently evil institution, an unsurprising conclusion given the dualism of Zwinglianism and the normative Eucharistic theology of American evangelical Protestants.²²⁸ The saloon was, for the Drys, “a sleazy, beery, spittoon-filthy iniquitous gathering place,”²²⁹ and the locus of “crime, delinquency, poverty, prostitution, disease and corruption.”²³⁰ Some saloons were probably decent business establishments, but they constituted

²²⁵ *Id.*

²²⁶ See AHLSTROM, *supra* note 26, at 871; JACK S. BLOCKER, JR., *RETREAT FROM REFORM: THE PROHIBITION MOVEMENT IN THE UNITED STATES* 235-36 (1976); NORMAN H. CLARK, *THE DRY YEARS: PROHIBITION AND SOCIAL CHANGE IN WASHINGTON* 82-83 (rev. ed. 1988) [hereinafter *THE DRY YEARS*]; West, *supra* note 27, at 169.

²²⁷ See Engelmann, O, *Whisky*, *supra* note 27, at 87-89.

²²⁸ See *supra* Part II.A.2.b.

²²⁹ ELIOT ASINOF, *1919—AMERICA'S LOSS OF INNOCENCE* 236 (1990).

²³⁰ *THE DRY YEARS*, *supra* note 226, at 9.

a distinct minority in the eyes of the Drys.²³¹ One commentator wrote:

The American saloon was probably at its worst from the late 1880s to 1917. . . . As an institution the saloon was a blight and a public stench. It was dingy and dirty, a place of battered furniture, offensive smells, flyblown mirrors and glassware, and appalling sanitary facilities. It encouraged drunkenness; few bartenders hesitated to serve children, idiots, and known drunkards. It ignored the law. It corrupted the police, the courts, and the politicians. It was a breeding place of crime and violence, and the hangout of criminals and degenerates of every type. It was the backbone of prostitution²³²

Race also factored into the demonizing of the saloon because “[c]onservative whites found the racial liberality of the saloons especially troublesome. The racially mixed crowd of drinkers in many saloons challenged traditional white social disdain for the inferior race.”²³³

Another view of the saloon sat at the opposite extreme:

To the immigrant, the saloon was escape from squalor and provider of warmth and companionship. The occasional free lunch, billiards and backyard bocce, club rooms for card tables, letter-writing and reading matter. One could get hired out of a saloon or find help when in trouble. . . . To take away their saloon and their drinking on the grounds that it was for their own good was like drilling a hole in the bottom of a boat to bail out the excess water. . . .

Andrew Sinclair . . . compared [the saloon] with the Protestant church. There was human fellowship and equality in the saloon[,] . . . a center of tradition, the spirit of community, a place of recreation. It could be said that they were rivals in the same general business: consolation. The church and the saloon, battling for the soul of the city.²³⁴

For the unchurched immigrant, including the apostates of whom Strong was so contemptuous,²³⁵ the saloon might well have functioned as a “church.” But the Catholic Church worked tirelessly to aid immigrants make their way in their new country,²³⁶ and the Church did not need the aid of the saloon.

²³¹ See KOBLE, *supra* note 117, at 173.

²³² ASBURY, *supra* note 9, at 113-14.

²³³ Ruth, *supra* note 210, at 22.

²³⁴ ASINOF, *supra* note 229, at 243-44.

²³⁵ See STRONG, *supra* note 28, at 83.

²³⁶ An exemplar of Catholic social ministry to poor immigrants was Saint Frances Xavier Cabrini. See generally EDWARD V. DAILEY, *CITIZEN SAINT: THE LIFE AND MIRACLES OF SAINT FRANCES XAVIER CABRINI* (1947); SEGUNDO GALILEA, *IN WEAKNESS, STRENGTH: THE LIFE AND MISSIONARY ACTIVITY OF SAINT FRANCES XAVIER CABRINI* 63-69, 111-14, 142-47 (1996).

But none of this changes the hard fact that "the most important function of the saloon was that of dispensing legal opiates to the laborers and the impoverished inhabitants of the city slums and failing farms, in pouring oil upon the disturbed waters of the American melting pot."²³⁷ One certainly cannot gainsay the possibility that large numbers of Catholics, trapped in the poverty-stricken laboring classes of the late nineteenth and early twentieth centuries, sought succor both in the Church and in the saloon because the saloon "fulfilled important needs—physical and psychological—of many residents, [and thus] the dram shop became entrenched in community life."²³⁸ Therefore, the extremist views of the saloon miss the mark. Saloons were complex social institutions, with large dollops of both good and bad in and about them. They were pressed into service, warts and all, because of fundamental social and human need. Saloon succor carried a steep price, however—crime and debauchery come to mind. Indeed, saloon succor was very real, even as it provided cover for the excesses and the outrages of the Industrial Age.

The attack on the saloon was, therefore, emblematic of an attack on a culture, a way of life, and non-evangelical Protestant religions. Drys had met up with a resistance with which they found it difficult to cope, and they revised their approach and strategy accordingly. The very real and legitimate needs that the saloon fulfilled, however, apparently counted for naught.²³⁹ Sometimes drying up America seemed to be all that mattered to the evangelical Protestants, both liberal and fundamentalist.

E. The Nature of the Relation Between Suasion and Coercion and the Transformation of the Temperance-Prohibition Idea into National Prohibition

Lyman Beecher, writing in 1827, set out a strategy for temperance-prohibition that drew heavily upon legal coercion, but also had ample room for suasion.²⁴⁰ Beecher clearly

²³⁷ LARRY ENGELMANN, *INTEMPERANCE: THE LOST WAR AGAINST LIQUOR* 6 (1979).

²³⁸ West, *supra* note 27, at 20.

²³⁹ See Niebuhr, *supra* note 203, at 244 (arguing that the point of revivalism and Protestantization was not to save people from "the frustration, conflict, futility and poverty of life which they sought to escape in the saloons; they were saved from whiskey.").

²⁴⁰ LYMAN BEECHER, *SIX SERMONS ON THE NATURE, OCCASIONS, SIGNS, EVILS, AND REMEDY OF INTEMPERANCE* (New York, American Tract Society 10th ed. 1843)

believed that “[h]uman laws may not be able to prevent the wrong [of intemperance], but the cries of widows and orphans will be heard in heaven, and a retribution which human tribunals cannot award, will be reserved for the day of judgement.”²⁴¹ But he had much to say about solving the problem of temperance in this life, whatever justice may or may not be had in heaven. He began by asserting that self-government and voluntary abstinence on the one hand and “mere” civil coercion on the other were not adequate remedies.²⁴² He insisted that the remedy for intemperance was “[t]he banishment of ardent spirits from the list of lawful articles of commerce, by a correct and efficient public sentiment; such as has turned slavery out in half our land, and will yet expel it from the world.”²⁴³

Beecher’s prediction, if one may call it that, of the Webb-Kenyon law, enacted by Congress in 1913²⁴⁴ which “banished” beverage alcohol from the protection of the Interstate Commerce Clause,²⁴⁵ and which set the stage for the adoption of the Eighteenth Amendment, is nothing short of breathtaking. But his call for a specific legal strategy makes sense only in the context of moral suasion because the law that he wanted depended on “efficient public sentiment.” Here again, Beecher was remarkably prescient. The failure of National Prohibition may well have reflected a lack of an “efficient public sentiment” in favor of it.²⁴⁶

Beecher must have understood the powerful and close relation between public opinion and law in democratic politics.²⁴⁷ To those who insisted that nothing could be done to

[hereinafter SIX SERMONS].

²⁴¹ *Id.* at 78.

²⁴² *Id.* at 62-63.

²⁴³ *Id.* at 64.

²⁴⁴ Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1919) [hereinafter “the Act”]. The title of the Act reads as follows: “An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.” The Act was upheld in *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311 (1917).

²⁴⁵ U.S. CONST. art. I § 8, cl. 3.

²⁴⁶ See BLOCKER, *supra* note 223, at 239, 243-44 (arguing the Drys “w[on] the battle” but “lost the war” with the enactment of prohibition because of the lack of a “consensus of values” supporting the movement, coupled with the Anti-Saloon League’s refusal to undertake “a long campaign of persuasion”); PINNEY, *supra* note 117, at 435-36 (maintaining that “Prohibition . . . created a nation of lawbreakers. All the provisions of the act were defied systematically and persistently by large sections of the population.”). For further discussion of the repeal of National Prohibition, see ENGELMANN, *supra* note 237, at 188-227; see generally DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION (1979); KENNETH D. ROSE, AMERICAN WOMEN AND THE REPEAL OF PROHIBITION (1996).

²⁴⁷ For the definitive treatment of the relation, see V.O. KEY, JR., PUBLIC

remedy the problem of intemperance, Beecher responded that the answer lay in the creation of "a rectified public opinion"²⁴⁸ because, in strangely modern tones, if one built the right public opinion, then the right public law would follow.²⁴⁹ He produced a subtle and supple synthesis of moral suasion and legal coercion. He outlined a program of suasion: making information on the subject of intemperance universally known;²⁵⁰ forming an association responsible for publicizing this information, delivering addresses and the like;²⁵¹ and encouraging employers to exclude "ardent spirits as an auxiliary to labor,"²⁵² young men to voluntarily abstain from drinking and form associations to advance the same, and

OPINION AND AMERICAN DEMOCRACY 14 (1961) (defining public opinion as "those opinions held by private persons which governments find it prudent to heed"). Key wrote:

Although all regimes must pay heed to the opinion of their peoples, obviously in democratic orders opinion plays a different role than in dictatorial states. When the doctrine prevails that citizens have a right to be heard and governments have a duty to hear, private opinion may have an impact on most major public actions. For the maximum participation of the public (or the publics) a practice of disclosure or notice of prospective actions and of announcement of the considerations underlying actions must be followed. Freedom of association and freedom of expression of opinion on public matters need also to exist. . . . Communication of views to the government is not essential to transform opinion into public opinion, although communication may be the general rule.

Id. at 17. Key's ideas have undergone refinement, particularly with respect to the process by which public opinion becomes law. See IRVING CRESPI, PUBLIC OPINION, POLLS, AND DEMOCRACY 131 (1989) (arguing that public opinion was manipulable by powerful special interests, thus undermining the democratic principle enunciated by Key, and that "public opinion is a social process in constant flux, always changing in focus, direction, and definitiveness in reaction to both direct personal experiences and to the appeals of those who have control or access to mass communications"); DENNIS S. IPPOLITO ET AL., PUBLIC OPINION AND RESPONSIBLE DEMOCRACY 312 (1976) (arguing that "[p]ublic opinion is a process . . . which links the governed to their governors; and a process which provides a portion of the energy upon which democratic regimes are run"). Superimposed on what is now recognized as the socially contingent nature of public opinion is the older debate as to whether the political elites should even bother with public opinion, except in some vague, non-specific way, relying, instead, on their own judgment as to what policies best serve the public interest. See, e.g., RUSSELL J. DALTON, CITIZEN POLITICS: PUBLIC OPINION AND POLITICAL PARTIES IN ADVANCED INDUSTRIAL DEMOCRACIES 261-83 (2d ed. 1996). But even the "elitist" theory of representative democracy must concede that if the elite offend the sensibilities of the masses, notwithstanding the manipulation of the masses by those who control the media or access to the media, the masses can, at least in theory, vote the elite out of office.

²⁴⁸ SIX SERMONS, *supra* note 240, at 83.

²⁴⁹ *Id.* at 84-85.

²⁵⁰ *Id.* at 86.

²⁵¹ *Id.* at 87.

²⁵² Both moral suasion and legal coercion appear to be elements of an integrated personnel management strategy. See ROBERT C. SEDWICK, PEOPLE, MOTIVATION, AND WORK 1-3 (1975).

churches to form a national society to aid in the cause of excluding “the use and commerce in ardent spirits.”²⁵³ The ultimate act or expression of moral suasion would occur “when the use of ardent spirits will be proscribed by a vote of all the churches in our land, and when the commerce in that article shall, equally with the slave-trade, be regarded as inconsistent with a credible profession of Christianity.”²⁵⁴

Then, when moral suasion had attained its highest reach, and only then, Beecher argued:

[S]omething may be done by *legislation* to discourage the distillation and importation of ardent spirits, and to discountenance improper modes of vending them. Then, the suffrage of the community may be expected to put in requisition men of talents and integrity, who sustained by their constituents, will not hesitate to frame the requisite laws, and to give to them their salutary power.²⁵⁵

Beecher’s synthesis of suasion and coercion had a cautionary tone to it, insisting that any effort to use legislation “*before the public is prepared for an efficient cooperation, could terminate only in defeat. Republics must be prepared by moral sentiment for efficient legislation.*”²⁵⁶ Beecher stated this “rule” three more times²⁵⁷ making the point that “efficacious legislation” requires the “concurrent aid of an enlightened public sentiment.”²⁵⁸

Beecher’s cheery reliance on moral suasion and assimilation as the remedy for the “peril” of Catholicism²⁵⁹ in the 1830s must be considered in light of his call for more restrictive immigration laws. Perhaps he meant only that the Catholics *then* in America could be assimilated, but the number of Catholics had to be kept under control for assimilation to work.²⁶⁰ Beecher’s call for laws restricting immigration and naturalization must have rested on his belief that “rectified public opinion,” that is to say the views of white Anglo-Saxon evangelical Protestants, wanted to keep Catholics out.²⁶¹ He

²⁵³ SIX SERMONS, *supra* note 240, at 87-88. Beecher also called on those committed to temperance to boycott merchants who dealt in ardent spirits. *Id.* at 91-92.

²⁵⁴ *Id.* at 93.

²⁵⁵ *Id.* at 94 (emphasis added).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 96, 98, 101.

²⁵⁸ SIX SERMONS, *supra* note 240, at 101.

²⁵⁹ See *supra* notes 193-95 and accompanying text.

²⁶⁰ See BEECHER, *supra* note 148, at 175-76 (arguing for the use of legal coercion to stem the flow of immigration and to slow down and restrict the naturalization of those immigrants then in the United States).

²⁶¹ See RIGHTEOUS EMPIRE, *supra* note 197, at 211 (noting that the “[a]nti-

may have been right, up to a point. However, countervailing forces—mainly the need for white immigrants to help in the settlement of the vast North American continent²⁶²—kept restrictive immigration and naturalization laws off the books for a long time, until the perceived need had vanished, along with the frontier.²⁶³ Nonetheless, Beecher was no starry-eyed idealist. Moral suasion needed legal coercion in order to effectuate the social reform goals of the Protestant Empire. The demographics reveal much about the meaning of “assimilation,” of suasion as the dominant strategy to advance the interests of the Protestant Empire. Evangelical Protestants, as a collective group, far outnumbered other religious groups in the America of the 1840s.²⁶⁴ A hegemony, a dominance, then existed in fact, if not in law.²⁶⁵

Beecher was betting on something like critical mass, an idea that explains much of his thinking. He believed that a critical mass of evangelical Protestants was ready to close the door on immigration and restrict naturalization in the 1830s. On this point he was wrong. Evangelical Protestants were conflicted between their dislike of Catholics and the need for white colonizers. Protestant Europe simply did not produce enough workers for the Protestant Empire. But his larger theory held true: “rectified public opinion” on the immigration question came around to his position eighty or ninety years later, as did the law.²⁶⁶ With regard to temperance, Beecher rightly understood that many evangelical Protestants had not yet come to agree with him. The program of suasion that he called for was not aimed at Catholics, but was aimed at

Catholicism [of the early Twentieth century] was an emphasis left over from the days when Protestants had endeavored to build an empire which would keep the hated papists out.”).

²⁶² See *Protestant Empire*, *supra* note 23, at 243-45.

²⁶³ See Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts,”* 81 N.C. L. REV. 1927, 1994 (2003) (stating that Frederick Jackson Turner noted in 1893 that as of 1890, the frontier line had disappeared and noting that for Turner “the passing of the frontier meant that America was entering a new and potentially dangerous age”).

²⁶⁴ In 1850, evangelical Protestants totaled 73.8% of those Americans having religious affiliation. See FINKE & STARK, *supra* note 112, at 55.

²⁶⁵ The distinction between the situs or location of the Protestant Empire became a matter of some discussion early on. See *State v. Chandler*, 2 Del. (2 Harr.) 553, 562-63, 572 (1837) (holding that Delaware was a Christian nation in fact, although not in law, and that that fact could change, if the people changed their religion).

²⁶⁶ See Immigration Act of 1921, ch. 8, § 2(a), 42 Stat. 5 (repealed 1952) and Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153 (repealed 1952), which established national origins quotas that strongly preferred whites.

Protestants, the vast bulk of the white American population at the time.

Using Beecher's thought as a benchmark, it becomes clear that the stubborn and persistent resistance of an ever growing Catholic and immigrant American population to the temperance-prohibition idea threw a monkey wrench into Beecher's well-crafted strategy. Suasion could not produce the "rectified public opinion" that Beecher rightly understood was necessary for prohibition to work. And it is difficult to believe that broad liberal notions of religious freedom easily come into play under these circumstances for it was precisely that "religious freedom," claimed by Catholics and others, no matter what the Protestant Empire might have thought, wished for, or wanted,²⁶⁷ that gummed up the works.

The larger currents of evangelical Protestant thought and action also reflect the idea that suasion and coercion exist in a dynamic relation. The Anglo-American Protestant Empire has, for centuries, exhibited a characteristic penchant for suasion, for attrition and restraint, even though legal coercion remained in the background, available for use when circumstances warranted.²⁶⁸ The relation between suasion and coercion might take shape within the thinking and the work of one writer, as was the case with Beecher. It might also manifest itself in other contexts, such as the swirling currents of history, society, and culture, operating as an unstated premise in a welter of conflicting and dissonant ideas, policies and strategies.

Thus it happened that the first temperance group, established in New York in 1808, relied on self-help, surely a form of moral or cultural or social suasion, as the way to get its

²⁶⁷ See R. LAURENCE MOORE, *RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS* xi (1986). Moore argues:

[O]utsiderhood is a characteristic way of inventing one's Americanness. Despite what Frederick Jackson Turner wrote, most people who lived in this country did not gain a sense of what it meant to be an American by going to the frontier. Far more of them gained that sense by turning aspects of a carefully nurtured sense of separate identity against a vaguely defined concept of mainstream or dominant culture.

Id.; James H. Moorhead, "God's Right Arm"? *Minority Faiths and Protestant Visions of America*, in *MINORITY FAITHS AND THE AMERICAN PROTESTANT MAINSTREAM* 337 (Jonathan D. Sarna ed., 1998) (arguing that "the meaning of America remained subject to continuous renegotiation, as together minority faiths and the Protestant mainstream haggled over questions of national identity.").

²⁶⁸ See *Common School Religion*, *supra* note 6, at 222-23. For a detailed discussion of this dynamic over time, as mirrored in the post-Reformation Anglo-American religious settlements, see *Protestant Empire*, *supra* note 23, *passim*.

members to abstain,²⁶⁹ and this faith in suasion dominated the approach of many temperance groups and supporters in the years leading up to the Civil War.²⁷⁰ Perhaps these groups had read and mastered Beecher or some precursor to Beecher. In any event, the strategy of the early self-help temperance groups, at least until the critical mass of "rectified public opinion" had taken shape, was consistent with Beecher's. But even during that period, some temperance supporters favored the use of coercion to impose temperance,²⁷¹ and in the 1850s several states and territories enacted state-wide laws designed to prohibit the manufacture and sale of alcoholic liquor, although regulated sales for limited purposes were permitted or authorized.²⁷² These laws had limited impact, given the

²⁶⁹ See KOBLE, *supra* note 117, at 48-51.

²⁷⁰ See SIDNEY E. MEAD, *THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA* 98 (1963); ODEGARD, *supra* note 189, at 36 (arguing that "[a] frontier population, just emerg[ing] from a seven year struggle for political independence and educated by the propaganda of that period to regard with suspicion all governmental interference, would have looked askance at a prohibitory policy.").

²⁷¹ GUSFIELD, *supra* note 118, at 48 (noting that "Temperance adherents [in the West] were not content with moral suasion alone."); MEAD, *supra* note 270, at 99.

²⁷² See An Act for the Suppression of Intemperance, ch. 57, §§ 1-2, 5, 1854 Conn. Pub. Acts 54-55 (repealed 1882) (prohibiting the manufacture and sale of liquor, permitting the local manufacture and sale of cider and wine provided that they be sold in quantities of not less than five gallons, and authorizing regulated sales of liquors for "sacramental, medicinal, chemical, and mechanical uses only"); An Act for the Suppression of Intemperance, ch. 245, §§ 1, 3, 5, 19, 11 Del. Laws 273-74, 279 (1855) (repealed 1873) (prohibiting the sale of intoxicating liquors; prohibiting the possession of intoxicating liquors with intent to sell; authorizing regulated sales of intoxicating liquors for "Mechanical, Chemical and Medicinal purposes only, and pure wine for sacramental use"; and permitting the local manufacture and sale of cider and wine, provided that sales be in quantities of not less than one gallon); An Act to Prohibit the Retailing of Intoxicating Drinks, ch. 30, §§ 1, 4, 1851 Ill. Laws 389-90 (repealed 1853) (prohibiting the sale of spiritous liquors in quantities of less than one quart and allowing the sale of liquors by druggists or physicians for "purely medical, mechanical, or sacramental purposes"); IOWA CODE ANN. §§ 1523-1524, 1544 (1880) (repealed 1934) (prohibiting the manufacture or sale of intoxicating liquors, authorizing the regulated sale of liquors "to be used for mechanical, medicinal, culinary, or sacramental purposes[.]" and permitting the local manufacture and sale of beer, cider and wine); An Act concerning the Manufacture and sale of Spirituous or Intoxicating Liquors, ch. 322, §§ 1-2, 12, 1852 Mass. Acts 257-58, 262-64 (repealed) (prohibiting the manufacture or sale of intoxicating liquors, permitting the regulated sale of liquor for medicinal, chemical, and mechanical purposes, and exempting the sale and use of wine "for the commemoration of the Lord's supper"); Act for Suppression of Drinking Houses and Tippling Shops, ch. 211 §§ 1-2, 1851 Me. Laws 210-11 (repealed) (prohibiting the manufacture and sale of alcoholic liquor and authorizing regulated sales of alcohol "for medicinal and mechanical purposes and no other"); An Act to Prevent the Manufacture and Sale of Spiritous or Intoxicating Liquors as a Beverage, ch. 52, §§ 1, 14, MICH. COMP. LAWS §§ 1, 14 (1857) (repealed 1933) (prohibiting the manufacture or sale of intoxicating liquors, except "cider, beer, and wine of domestic manufacture; and permitting the regulated sale of liquor for medicinal, scientific, mechanical and manufacturing purposes, and wine for sacramental purposes); An Act for the Restriction of the Sale of Intoxicating Liquors within the Territory of Minnesota, ch. 8,

disorder of the Civil War, and were largely ignored, repealed, or both. But they clearly represented an effort—successful or otherwise—to advance the goals and agenda of the temperance-prohibition movement.

The years following the Civil War, a low point in the temperance-prohibition movement, saw the formation of the Prohibition Party, the Women's Christian Temperance Union, and the Anti-Saloon League.²⁷³ While their strategies and approaches might have differed,²⁷⁴ each of these organized

§§ 1-2, 1852 Minn. Laws 12 (repealed 1933) (prohibiting the manufacture and sale of intoxicating liquors and authorizing the regulated sale of liquor for "medicinal or mechanical purposes and no other"). See *infra* Part III.A for further discussion of the exemption in nineteenth century American law; An Act for the Suppression of Intemperance, ch. 1658, §§ 1, 7, 1855 N.H. Laws 1527-28 (repealed 1858) (prohibiting the manufacture and sale of intoxicating liquor and authorizing the regulated sale of liquor "for medicinal, mechanical and chemical purposes, and wine for the commemoration of the Lord's Supper"); An Act for the prevention of Intemperance, Pauperism, and Crime, ch. 231, § 1-2, 1855 N.Y. Laws 340-41 (prohibiting the sale or distribution of intoxicating liquor, except for medical or sacramental purposes and permitting the regulated sale of intoxicating liquor "for mechanical, chemical, or medicinal purposes, and wine for sacramental use"); The Revised Statutes of the State of Rhode Island and Providence Plantations §§ 1-2, 28 (1857) (repealed) (prohibiting the manufacture and sale of liquor, authorizing the regulated sale of liquor for "sacramental, medicinal, mechanical, chemical, and culinary purposes only[.]" and permitting the local manufacture and sale of cider, wine and beer); VT. STAT. tit. 30, §§ 1, 4 (1862) (repealed 1902) (prohibiting the manufacture and sale of intoxicating liquor, but totally exempting from the reach of the law the manufacture, sale and use of wine "for the commemoration of the Lord's supper" and authorizing the regulated sale of intoxicating liquors for "medicinal, chemical, and mechanical purposes only").

²⁷³ The Party was founded in 1869. See Randall C. Jimerson, *The Temperance and Prohibition Movement in America, 1830-1933*, in GUIDE TO THE MICROFILM EDITION OF TEMPERANCE AND PROHIBITION PAPERS 8 (Randall C. Jimerson et al. eds., 1977). The Union was founded in 1874, see *id.* at 10, and the League in 1893, see ASBURY, *supra* note 9, at 94; ASINOF, *supra* note 229, at 235-36; BADER, *supra* note 121, at 191.

²⁷⁴ The Prohibition Party was the least effective of the three major temperance-prohibition organizations. Its leaders "failed to understand the nature of the modern political party." See West, *supra* note 27, at 111. Its rigidity "gained the contempt of many political observers," *id.* at 112, and it "lost itself amid fuzzy dreams of state offices and immediate abolition of all liquor," failing to "realize that [it was] not a party but an interest group which would have to organize, cooperate and take one restrictive step at a time," *id.* at 136. See also PAUL E. ISAAC, PROHIBITION AND POLITICS: TURBULENT DECADES IN TENNESSEE, 1885-1920, at 61 (1965) (noting that the Prohibition Party "advocated the most radical kind of temperance reform," condemning as "inadequate and compromises with evil" more modest proposals). The Women's Christian Temperance Union was very much concerned with the family and home, and worried about the living condition of workers. West, *supra* note 27, at 143-45. The Union was also non-partisan. See Jimerson, *supra* note 273, at 14. Quite unlike the Prohibition Party's singular focus on prohibition, the Union involved itself in a range of social issues. The Anti-Saloon League adopted the non-partisanship of the Union and the narrower focus on prohibition of the Party, although it never was as rigid as the Party. The League was, first and foremost a pressure group, the most effective one in American political history. See DELIVER, *supra* note 9, at 93. See also BADER, *supra* note 121, at 191; Engelman, O, Whisky, *supra* note 27, at 151; West, *supra* note 27, at 266. The League "was formed as a political organization and was never anything else.

expressions of the temperance-prohibition idea was committed to the use of legal coercion to dry up America. Each had to know that Catholics and immigrant groups, more generally, opposed prohibition. At the same time, however, some Drys stubbornly held on to a suasion strategy, even as the nineteenth century drew to a close.²⁷⁵

But history clearly teaches that whatever the balance between suasion and coercion might have been at the beginning of the temperance-prohibition movement, the balance had shifted towards legal coercion in the years leading up to National Prohibition. "Circumstances" warranted bringing coercion from the background into the foreground of the effort to dry up America. The commentators on National Prohibition have offered a variety of reasons to explain the shift in emphasis.²⁷⁶ Surely, though, Catholic and immigrant resistance to temperance-prohibition had to play an important part in this shift.

Nonetheless, even during the regime of National Prohibition, the Drys had not abandoned all hope in suasion.²⁷⁷ It is important to remember, therefore, that suasion and coercion exist in a dynamic relationship, which is to say that both can be present at any moment in time, although with varying degrees of emphasis. Second, the American colonial experience had established the importance of cultural or social

But it was not partisan; it never tried to gain the support of any political party. . . . Two things were always emphasized by the Anti-Saloon League—its religious character and the omnipartisan nature of its political activities." ASBURY, *supra* note 9, at 100. See also GUSFIELD, *supra* note 118, at 108 (stating that the League "operated as a 'pressure group,' with no formal attachment to any political or social system of ideas other than evangelical Protestantism."). The League was by far and away the most effective of the major temperance-prohibition organizations.

²⁷⁵ See Ruth, *supra* note 210, at 4 (noting that "[s]ome temperance organizations in Georgia in the 1880s or thereabouts, apparently still taught individual moral suasion.").

²⁷⁶ See *Protestant Empire*, *supra* note 23, at 253-54 (describing the reasons as some or all of the following: impatience with the pace of suasion-dominated reform; a search for order; "a major change in philosophy;" majority support for change; or no apparent reason at all, although some believed that suasion and coercion could and did coexist because one did not necessarily follow from the other or because of a stubborn belief in cultural suasion).

²⁷⁷ Many Drys believed that the power or force of National Prohibition, once in place, would, without more, lead to conversion. See ENGELMANN, *supra* note 237, at 123 (noting that Drys expected to see within a matter of weeks or months, a "dramatic and massive urban conversion to the dry cause . . . once city dwellers no longer saw as through the bottom of a glass darkly" because "[t]he clear bright light of prohibition would reveal in detail magnificent changes and transformations"); MCCARTY, *supra* note 188, at 24 (quoting a Dry Journal to the effect that "given appropriate time, the prohibition amendment would 'show its power'").

suasion,²⁷⁸ thereby blurring any sharp distinction between public and private action. Thus, it is most probable that Drys responded in a pragmatic fashion to changes in demographic and other facts. They “simply viewed coercion and suasion, without any regard to institutional locus or situs, as options and alternatives, but they all ultimately coalesced under the banner of legal coercion”²⁷⁹ for whatever reason, even though the *legal* forms of National Prohibition might, for Joseph Gusfield,²⁸⁰ have marked a *moral* reform only.²⁸¹

This Part has established two important traits of Drys during the times leading up to National Prohibition, both of which must be considered in providing an explanation for the exemption in the Volstead Act for the religious use of wine. First, the Drys had inherited a multi-dimensional culturally and theologically embedded anti-Catholicism, fed and nourished in no small part by theology, a world view, and the stubborn resistance of Roman Catholics and other non-evangelical Protestants to the efforts of the evangelical Protestants to convert them to their evangelical religion. Second, Drys clearly demonstrated considerable frustration, anger, impatience, anxiety, and fear because their plans to Protestantize non-Protestant Americans had not fared well. Undoubtedly, the imperatives of anti-Catholicism and Protestantization, not to mention a shift from suasion to coercion, sorely test any conclusion that the exemption *necessarily* reflects a deep and abiding commitment to a theory of religious freedom and liberty that values religious pluralism and diversity. However, the foregoing does not *necessarily* justify the conclusion that the exemption does not reflect such a commitment.

III. THE HISTORY OF THE EXEMPTION IN AMERICAN LAW

In the spirit of exploring the meaning of the exemption in the Volstead Act, this Part will examine the history of exemptions for the religious use of wine, explicit or implied, in the temperance-prohibition laws of the states and the federal government enacted prior to the adoption of the Volstead Act. In the second decade of the twentieth century the question of

²⁷⁸ See *Protestant Empire*, *supra* note 23, at 244-45, 249-53.

²⁷⁹ *Id.* at 254.

²⁸⁰ See GUSFIELD, *supra* note 118 *passim*.

²⁸¹ See *Protestant Empire*, *supra* note 23, at 254.

the presence or the absence of an exemption, explicit or implied, took on an urgency, and became, in some sense, symbolic or emblematic of the larger religious struggle between evangelical Protestants and non-evangelical Protestants. The ultimate conclusion was that National Prohibition would *not* be the means for the destruction of the Catholic Mass, or for that matter, other Christian and Jewish religious rituals and ceremonies, and that National Prohibition would *not* be the occasion for reducing those who were not evangelical Protestants to mendicants forced to beg judges and prosecutors for the right to use wine for religious purposes.

A. *The Exemption in Nineteenth Century American Law*

As discussed above, the dawn of the nineteenth century revealed a universal use of wine for religious purposes by Protestants and Catholics alike.²⁸² While evangelical Protestants would shift to grape juice by the end of that century, temperance-prohibition laws began to appear long before the Civil War. Exemptions for the religious use of wine, therefore, benefited evangelical Protestants by ensuring that temperance-prohibition laws would not interfere with their communion services. Others might also benefit from such exemptions, but it might well suffice to say that they benefited solely by reason of interest-convergence.²⁸³

1. The Exemption Expressly Provided

A brief review of a sampling of the temperance-prohibition laws enacted in the nineteenth century shows a pattern or a tendency to provide an exemption for the *sacramental* use of wine.²⁸⁴ Some statutes made it quite clear

²⁸² See *supra* Part II.A.4.

²⁸³ See generally Bell, *supra* note 31.

²⁸⁴ See, e.g., Revised Statutes of the State of Illinois, ch. 24, art. V, pt. 62, § 1 (1885); An Act to prevent intemperance in Wayne township, the county of Henry, ch. 115, 1851 Ind. Acts 125 (repealed); An Act to prohibit the sale of intoxicating liquors in the town of Plainfield and vicinity, in Hendricks county, ch. 154, 1850 Ind. Acts 123; An Act to prohibit the sale of spirituous liquors in Jackson and Monroe townships, in Madison county by a less quantity than thirty gallons, ch. 158, 1850 Ind. Acts 126; Act of Feb. 19, 1908, ch. 113, § 4, 1908 Miss. Laws 112, 113 (repealed); An Act to prohibit the sale of vinous, spirituous or malt liquors within two miles of the Ethel school house and church in the county of Attala, ch. 107, 1890 Miss. Laws 123 (repealed); An Act [sic] to prohibit the sale of intoxicating liquors in the corporate limits of the town of Harrison, of the county of Tallahatchie, of the State of Mississippi, or within three miles of the corporate boundary of said town of Harrison, ch. 306, 1886 Miss. Laws 548 (repealed); An Act to prevent the sale of vinous and spirituous liquors in the town of

that only the Christian use of wine was protected. For example, several Mississippi statutes limited the exception to unmistakably Christian usages, if not evangelical Protestant usages. Thus, one law exempted liquors used “for the administration of the Lord’s supper.”²⁸⁵ Another permitted the sale of wine only “to church officers to be used for sacramental purposes.”²⁸⁶ And yet another created an exemption for the use of wine in “the administration of the Christian sacrament.”²⁸⁷

Mississippi was not alone in crafting a narrow exemption that explicitly benefited Christian usages only. During the wave of statewide prohibition laws enacted by several states and territories during the 1850s and 1860s, Vermont exempted the use of wine “for the commemoration of the Lord’s supper.”²⁸⁸ Likewise, New Hampshire carved out an exemption only for the use of wine “for the commemoration of the Lord’s Supper.”²⁸⁹ And, completing a New England trifecta, Massachusetts limited the exemption in identical terms, restricting it to the use of wine in “the commemoration of the Lord’s supper.”²⁹⁰ These three New England statutes may well have accommodated only evangelical Protestant usages of wine, considering that the Catholic Mass is not a “commemoration of the Lord’s supper,” but rather a propitiatory sacrifice and a commemoration of the bloody sacrifice of Christ.²⁹¹ Thus statutes exempting the use of wine in connection with “the commemoration of the Lord’s supper” might or might not have applied to the Mass.

Meadville, Franklin county, in this State, or within two miles of the Court-house, ch. 72, 1875 Miss. Laws 104 (repealed); An Act to allow Druggists in the Town of Hernando, DeSoto county, to sell vinous and spirituous liquors for sacramental or medicinal purposes, ch. 158, 1860 Miss. Laws 218 (repealed). *See also supra* note 272.

²⁸⁵ An Act to prevent the sale or giving away intoxicating liquors within one mile of Chapman Church, at Binnsville, Kemper county, Mississippi, ch. 193, 1886 Miss. Laws 311. *See also* An Act to incorporate Ebenezer High School, in the town of Ebenezer, Holmes county, Mississippi, ch. 386, 1890 Miss. Laws 560.

²⁸⁶ An Act to amend an Act entitled “An Act to prohibit the sale or giving away of spirituous, vinous or malt liquors, in the town of Ripley, and within two miles thereof, in the county of Tippah,” approved March 8, 1884, ch. 342, 1886 Miss. Laws 645).

²⁸⁷ An Act to incorporate Goodman High School, in the town of Goodman, Holmes county, Mississippi, ch. 385, 1890 Miss. Laws 558.

²⁸⁸ The General Statutes of the State of Vermont 1862, ch. 94, § 1.

²⁸⁹ An Act for the suppression of Intemperance, ch. 1658, § 7, 1855 N.H. Laws 1527, 1530.

²⁹⁰ An Act concerning the Manufacture and Sale of Spirituous or Intoxicating Liquors, ch. 322, § 12, 1852 Mass. Acts 257, 264.

²⁹¹ *See* CANONS AND DECREES, *supra* note 41, at 144-46 (footnote omitted).

As we have already seen,²⁹² the limitation of the exemption to Christian uses of wine found judicial acceptance. Texas had adopted a local option law with an exemption for the sacramental use of wine.²⁹³ The law was challenged on several grounds, one of which was that it discriminated against Jews in their mode of worship.²⁹⁴ The Texas Court of Civil Appeals rejected the argument, stating that in essence the Jewish use of wine was not "sacramental."²⁹⁵ Even though the court recognized that the exemption only spoke to the *sacramental* use of wine, it found no discrimination because the law did not prohibit the *use* of wine in Jewish worship, but merely prohibited the *sale* of wine for use in Jewish worship.²⁹⁶ The court was terribly insensitive to Jewish religious practices, paying no attention to the practical problems that Jews might have in acquiring wine for religious uses. Regardless of whether the Texas court sincerely felt bound by the conventional understanding of the term "sacramental," it clearly chose not to appeal to any theory of broad and liberal religious freedom as a basis for extending the exemption to include the Jewish uses of wine.

2. The Exemption Arising by Implication—or Explicit Text not Needed

Some nineteenth century laws made no accommodation for the religious use of wine and there appear to be no cases from that century challenging the absence of any exemption. However, the United States Attorney General did respond to an inquiry from the Secretary of the Treasury regarding "an application to ship to Alaska wines for sacramental use in the various Greco-Russian churches there."²⁹⁷ A federal prohibition law applicable to the territory of Alaska had no exemption for the religious use of wine. The Attorney General concluded, however, that:

[S]uch provision does not apply to exclude wines intended for sacramental uses. Such use of wines is a religious rite equally solemn and venerable. Its 'free exercise' is therefore protected by the first amendment to the Constitution. In the light of that guaranty, I

²⁹² See *supra* note 14 and accompanying text.

²⁹³ 1895 Texas Rev. Civ. Stat. tit. 69, art. 3385.

²⁹⁴ *Sweeney v. Webb*, 76 S.W. 766 (Tex. Civ. App. 1903).

²⁹⁵ *Id.* at 770. See *supra* note 14.

²⁹⁶ *Id.*

²⁹⁷ 18 Op. Att'y Gen. 139 (March 24, 1885).

am satisfied that . . . Congress had no more intention than it had power to interfere with the shipment of the wines in question.²⁹⁸

Professor Powell has observed that this opinion “gave a more vigorous interpretation to [the free exercise] clause than modern doctrine endorses.”²⁹⁹ Although this may well be true, it is unclear whether the Attorney General would have reached the same conclusion had the question pertained to the importation of wine into Alaska for Jewish religious purposes.

B. The Exemption in American Law during the First Two Decades of the Twentieth Century, the Years Leading up to National Prohibition

By 1900, circumstances had radically changed for evangelical Protestants. Most importantly, as a general rule, they no longer used wine for their communion services.³⁰⁰ Thus the exemptions in the various temperance-prohibition laws, even in their pinched form accommodating only the “sacramental” use of wine, no longer served their original majoritarian function of protecting the religious exercises of the majority. The law could now prohibit the use of wine for any purpose and not interfere with evangelical Protestant religious services. The exemptions, therefore, could only benefit non-evangelical Protestants, then and now, a minority of the American population.³⁰¹ Not surprisingly, exemptions for the religious use of wine had, at this point, become a matter of considerable controversy, particularly for Catholics.³⁰²

1. The Exemption Expressly Provided—Or Not

As more and more states fell victim to the onslaughts of the Drys, the question whether to exempt the religious use of wine kept surfacing. In several states, notwithstanding the objection of Catholics and others, Drys threatened to enact prohibition legislation that would lack exemptions for the “sacramental”—not to mention the religious—use of wine.³⁰³ The threat became a reality in Arizona and Oklahoma.

²⁹⁸ *Id.*

²⁹⁹ H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 222 (1999).

³⁰⁰ See *supra* notes 139-41 and accompanying text.

³⁰¹ See LATOURETTE, *supra* note 29, at 1258.

³⁰² See PILGRIMS, *supra* note 9, at 377; TIMBERLAKE, *supra* note 9, at 32.

³⁰³ See George E. Hoadley, *Some Tactics of Prohibitionists*, 19 AMERICA 353-54

a. Arizona and Oklahoma

Arizona became a state in 1912. Its “progressive”³⁰⁴ constitution permitted initiatives and referendums,³⁰⁵ but said nothing on the subject of prohibition. In November, 1914, soon after Arizona became a state, the Drys put the question of prohibition to the Arizona electorate. The proposed amendment to the Arizona constitution read in relevant part as follows:

Section 1. Ardent spirits, ale, beer, wine, or intoxicating liquor . . . shall not be manufactured in or introduced into the State of Arizona. . . . Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, . . . wine, or intoxicating liquor . . . to any person in the State of Arizona, or who manufactures, or introduces into, or attempts to introduce into the State of Arizona any ardent spirits . . . wine, or intoxicating liquor . . . shall be guilty of a misdemeanor . . . ; provided[] that nothing in this amendment contained shall apply to the manufacture or sale of denatured alcohol.

Section 2. The legislature shall by appropriate legislation provide for the carrying into effect of this amendment.³⁰⁶

It passed, narrowly.³⁰⁷

When Oklahoma entered the Union in 1907, its constitution contained a Prohibition provision that similarly stated, in relevant part:

The manufacture, sale, . . . or otherwise furnishing . . . of intoxicating liquors within this State . . . is prohibited Any person . . . who shall manufacture, sell . . . or otherwise furnish any intoxicating liquor . . . contrary to the provisions of this section, . . . or who shall ship . . . such liquors from one place within this State to another place therein, except the conveyance of a lawful purchase as herein authorized, shall be punished . . . provided [that there may be regulated sales of] such liquors for medicinal purposes; and . . . for

(1918) (discussing Florida); Henry Maurice, *Temperance against Prohibition*, 12 AMERICA 506 (1915) (discussing Pennsylvania); Bernard J. McNamara, *Danger in Prohibition*, 58 THE ECCLESIASTICAL REVIEW 495, 509-11 (1918) (discussing Iowa); Note, *The Minimum and a Menace*, 12 AMERICA 566 (1915) (discussing Utah); Note, *Sacramental Wine and Prohibition Laws*, 56 THE LIVING CHURCH 673 (1917) (discussing Georgia).

³⁰⁴ See *infra* note 517 and accompanying text for a discussion of Progressivism.

³⁰⁵ ARIZ. CONST. art. IV, pt. 1, § 1; art. XXI, § 1.

³⁰⁶ WILEY E. JONES, PROHIBITION LAWS, FEDERAL AND STATE, IN FORCE IN THE STATE OF ARIZONA 3 (1917).

³⁰⁷ DAVID R. BERMAN, REFORMERS, CORPORATIONS, AND THE ELECTORATE: AN ANALYSIS OF ARIZONA'S AGE OF REFORM 121 (1992); H.D. Ware, *Alcohol, Temperance and Prohibition in Arizona* 261 (1995) (unpublished Ph.D. dissertation, Arizona State University) (on file with author).

industrial purposes, of alcohol which shall have been denaturalized . . .
of alcohol for scientific purposes³⁰⁸

Pursuant to this provision, in 1917 the Oklahoma legislature enacted a prohibition law, a Bone-Dry law because it prohibited the possession of liquor, which contained no exemption for any religious use of wine.³⁰⁹ It provided:

It shall be unlawful for any person in this State to receive directly or indirectly any liquors, the sale of which are prohibited by the laws of this State, from a common or other carrier.

It shall also be unlawful for any person in this state to possess any [such] liquor[], received directly or indirectly from a common or other carrier in this State. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate as well as intrastate shipments or carriage. . . . Provided, however, that scientific institutions, universities and colleges, and bonded apothecaries, druggists, hospitals or pharmacists may receive and possess pure grain alcohol, as provided by the laws of this State, to be used only for such purposes as are prescribed by the laws of this State.³¹⁰

The question in both Arizona and Oklahoma became whether the law implied an exemption for the “sacramental,” or the “religious” use of wine, notwithstanding the silence of the Arizona constitution and the Oklahoma statute.³¹¹

b. The Other American States

In virtually every American state, however, whether contemplated or not, an exemption or accommodation for the religious use of wine, at least by Christians, found its way into the prohibition laws enacted during the first two decades of the twentieth century. The change in the circumstances of evangelical Protestants of course changed the meaning of the exemption. Nonetheless, the Nineteenth Century form still dominated the statutes that emerged during these two decades,

³⁰⁸ OKLA. CONST. PROHIBITION ORDINANCE (repealed 1959).

³⁰⁹ A Bone-Dry law can still provide for the religious use of wine. *See infra* notes 386-387 and accompanying text. In fact, the Volstead Act itself is a perfect example of such a law.

³¹⁰ Bone Dry Law, ch. 186, § 1, 1917 Okla. Sess. Laws 350, 350 (repealed).

³¹¹ A larger question presented is whether one could read the exemption in the Volstead Act merely as the product or result of custom, a custom that dates back to some of the earliest temperance-prohibition laws of exempting the religious use of wine when the laws otherwise would prohibit or impede access to religious wine. The experience of the first two decades of the twentieth century counsels against such a conclusion. The contestability of the question was simply too wide, broad, and deep as this Part will show.

and, arguably, the religious freedom of Jews remained precarious.³¹²

Whatever the influence of the Anti-Saloon League may or may not have been on the drafting of the state prohibition laws enacted in the run-up to National Prohibition,³¹³ and thus, whether there may have been “model” laws that the states adapted to meet their own individual purposes and circumstances, the state laws demonstrate a remarkable fidelity to the form limiting the exemption to the *sacramental* use of wine. Wayne Wheeler, the legislative superintendent of the Anti-Saloon League, prepared a comprehensive survey of federal and state prohibition laws.³¹⁴ That compilation provides the basis for the following discussion.

As noted earlier, the Nineteenth Century form provided for an exemption for the *sacramental* use of wine.³¹⁵ Some of the states, the “Group I States,” enacted laws in the first two decades of the twentieth century that essentially restated the Nineteenth Century form.³¹⁶ Some states, the “Group II States,” expanded on the Nineteenth Century form by introducing the term “religious” when defining the nature and the scope of the exemption.³¹⁷ The term “religion,” which of course gives content to the adjective, “religious,” had a meaning that clearly encompassed Judaism.³¹⁸ The use of the word

³¹² See *supra* notes 281-93 and accompanying text.

³¹³ It is clear, of course, that the Anti-Saloon League drafted what ultimately became the Volstead Act. See TIMBERLAKE, *supra* note 10, at 181.

³¹⁴ FEDERAL AND STATE LAWS RELATING TO INTOXICATING LIQUOR (Wayne B. Wheeler, compiler, 2nd ed., 1918) [hereinafter FEDERAL AND STATE LAWS].

³¹⁵ See *supra* notes 281-288 and accompanying text.

³¹⁶ FEDERAL AND STATE LAWS, *supra* note 314, at 131. The following states exempted the “sacramental” use of wine, without elaboration: Connecticut, *id.*; Idaho, *id.* at 184; Iowa, *id.* at 207; Kentucky, *id.* at 258; Louisiana, *id.* at 270; Minnesota, *id.* at 321; Montana, *id.*, at 392; New Mexico, *id.* at 450; New York, *id.* at 465; and North Dakota, *id.* at 482.

³¹⁷ See WEBSTER DICTIONARY (1913 ed.) (defining “religious” to mean “of or pertaining to religion; concerned with religion; teaching, or setting forth, religion; set apart to religion . . .”), at <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=religious> (last visited May 1, 2004).

³¹⁸ See *People ex rel. Ring v. Board of Education*, 92 N.E. 251, 252 (Ill. 1910) (stating that “[r]eligion has reference to man’s relation to divinity; to the moral obligation of reverence and worship, obedience and submission” and “the recognition of God as an object of worship, love, and obedience; right feeling toward God, as rightly apprehended.”); *McMasters v. State*, 207 P. 566, 568 (Okla. 1922) (stating that religion “has reference to man’s relation to Divinity; to reverence, worship, obedience, and submission to the mandates and precepts of supernatural or superior beings” and “[i]n its broadest sense it includes all forms of belief in the existence of superior beings, exercising power over human beings by volition, imposing rules of conduct with future rewards and punishments.”); *Nikulnikoff v. Archbishop and Consistory of Russian Orthodox Greek Catholic Church*, 255 N.Y.S. 653, 663 (N.Y. Sup. Ct. 1932) (stating that “[r]eligion as generally accepted may be defined as a bond uniting man to God and

“religious” would suggest, therefore, an intention to accommodate both Christian and Jewish religious uses of wine.³¹⁹ A few of the Group II States also introduced the term “church.”³²⁰ It is not clear that “church” sweeps as broadly as “religious” does. Indeed, the word merely sows confusion and doubt.³²¹ A small number of states, comprising the “Group III States,” expanded the Nineteenth Century form by utilizing the term “church” rather than “religious.”³²² As with the Group II

a virtue whose purpose is to render God the worship due to him as the source of all being and the principle of all government of things.”). See also WEBSTER DICTIONARY (1913 ed.), at <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=religion> (last visited May 1, 2004) (defining religion as “[t]he outward act or form by which men indicate their recognition of the existence of a god or of gods . . . as, ethical religions; monotheistic religions; natural religion; revealed religion; the religion of the Jews; the religion of idol worshippers.”). *Ring* got to the heart of the matter: “Christianity is a religion.” 92 N.E. at 254 (emphasis added). So is, for present purposes, Judaism.

³¹⁹ The Group II States adding the term “religious” to the basic Nineteenth Century form were Arkansas, FEDERAL AND STATE LAWS, *supra* note 314, at 105; California, *id.* at 110; Florida, *id.* at 140; Michigan, *id.* at 300; South Dakota, *id.* at 584; Texas, *id.* at 642, 658; Utah, *id.* at 678; Virginia, *id.* at 706-08; and West Virginia, *id.* at 806-07.

³²⁰ The Group II States adding the two terms “religion” and “church” to the basic Nineteenth Century form were Alabama, FEDERAL AND STATE LAWS, *supra* note 314, at 80-81; Colorado, *id.* at 121; Georgia, *id.* at 178; Indiana, *id.* at 196; Mississippi, *id.* at 339; Nebraska, *id.* at 393, 396; North Carolina, *id.* at 477; Oregon, *id.* at 540; and Tennessee, *id.* at 633, 637.

³²¹ Several cases decided at or around the time of National Prohibition, defined “church” as pertaining to Christians only. See *Portage Township v. Full Salvation Union*, 29 N.W.2d 297, 300 (Mich. 1947); *Church of the Holy Faith v. State Tax Comm.*, 48 P.2d 777, 778 (N. Mex. 1935); *McNeilly v. First Presbyterian Church*, 137 N.E. 691, 694 (Mass. 1923); *Scott County v. Roman Catholic Archbishop*, 163 P. 88, 91 (Or. 1917); *In re Zimzow*, 43 N.Y.S. 714, 719 (N.Y. Sup. Ct. 1896) (relying on a dictionary definition of “church” that equates the term to Christian religious bodies); *Wiggins v. Young*, 57 S.E.2d 486, 487 (Ga. 1950); *In re Douglass’ Est.*, 143 N.W. 299, 300 (Neb. 1913). But other cases defined church with reference to “religion” generally, and not to Christianity. See *McAllister v. Burgess*, 37 N.E. 173 (Mass. 1894); *In re Rupp*, 106 N.Y.S. 483, 484 (N.Y. Sup. Ct. 1907); *Riffe v. Proctor*, 74 S.W. 409, 410 (Mo. App. 1903); *Josey v. Union Loan*, 32 S.E. 628 (Ga. 1899). And at least one case specifically defined “church” with reference to an Orthodox Jewish religious group. *Katz v. Goldman*, 168 N.E. 763 (Ohio App. 1929). See also WEBSTER DICTIONARY (1913 ed.) (defining the word “church” primarily with reference to Christians and Christianity, but also to “[a]ny body of worshippers; as, the Jewish church;”), at <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=church> (last visited May 1, 2004). Modern cases continue to reflect the variable meanings of the term “church.” See *Summum v. City of Ogden*, 152 F. Supp. 2d 1286, 1295 n.11 (D. Utah 2001) (distinguishing between churches and “the Jewish communion”); *Jews For Jesus, Inc., v. Jewish Cmty. Relations Council of New York, Inc.*, 768 F.Supp. 467, 468 n.1 (S.D.N.Y. 1991) (describing “church” as Gentile, and thus not Jewish); *Grendel’s Den, Inc. v. Goodwin*, 662 F.2d 88, 99 n.2 (1st Cir. 1981) (distinguishing between church and synagogue). *But see Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 768 (1973) (arguably using the word “church” to include Jews); *Elbert v. Elbert*, 579 N.E.2d 102, 109 n.3 (Ind. App. 1991) (using the word “church” to encompass all religions); *In re Marriage of Goldman*, 554 N.E.2d 1016, 1024 (Ill. App. 1990) (Johnson, J., dissenting) (using “church” to describe an Orthodox Jewish religious community).

³²² The Group III States were Delaware, FEDERAL AND STATE LAWS, *supra*

States using the term "church," the Group III States merely sowed confusion. One could argue, nonetheless, that the Group II and the Group III States, or at least many of them, expanded the reach of the exemption to cover the Jewish use of wine. But several of the Group II and Group III States appear to have had no such purpose in mind. Only a small handful of states, the "Group IV States," directly and explicitly confronted the matter of the religious use of wine by Jews.³²³ Finally, some states appear to have had no statewide laws that implicated the religious use of wine by Christians and Jews.³²⁴

Of course, the simplest and most straightforward approach to accommodating both Christians and Jews would simply have entailed the explicit mention of the religious use of wine by Christians and Jews, or the expressed inclusion of rabbis when describing the clergy eligible to receive and purchase wine for religious purposes. That so few states did so should give one pause. It may simply be that the Nineteenth Century form continued to hold sway over the legislative imagination in the two decades leading up to National Prohibition. But because states employed language that arguably broadened the reach and scope of the exemptions that they crafted, it appears that many states meant to achieve something more and different. Nonetheless, the texts adopted by the Group II, the Group III, and the Group IV states warrant some brief examination and review, considering new language and new forms did not always mean a broader exemption for the religious use of wine.³²⁵

i. Group II States

The religious freedom of Jews and Catholics was certainly not secure in Group II States, where the exemption only pertained to the sacramental use of wine. Given the

note 314, at 135; Kansas, *id.* at 251; New Hampshire, *id.* at 417, 420; and New Jersey, *id.* at 448.

³²³ The Group IV States were South Carolina, FEDERAL AND STATE LAWS, *supra* note 314, at 570-71; and Washington, *id.* at 793.

³²⁴ Illinois, Maine, Maryland, Massachusetts, Missouri, Nevada, Ohio, Pennsylvania, Rhode Island, Vermont, Wisconsin, and Wyoming did not appear, as of the publication of FEDERAL AND STATE LAWS, to have *statewide* laws that implicated the religious use of wine. See FEDERAL AND STATE LAWS, *supra* note 314. Some or all of these states might have adopted such laws subsequent to the publication of FEDERAL AND STATE LAWS. *Id.*

³²⁵ This discussion limits itself to the religious needs of Christians and Jews in the face of National Prohibition. This is not to suggest that National Prohibition did not adversely affect the religious needs of others. See *supra* note 20.

holding in *Sweeney v. Webb* that “[t]he Jewish mode of worship knows no sacraments,”³²⁶ the position of Jews in such jurisdictions could be perilous, to the extent that the position in *Sweeney* might be adopted elsewhere. Additionally, given the language in some nineteenth century statutes limiting the reach of an exemption for the use of wine “for the commemoration of the Lord’s Supper,”³²⁷ the position of Catholics was also in jeopardy to the extent that legislatures would use language to protect “the Lord’s Supper” only.

The decision of the legislators in the Group II States to add the term “religious”³²⁸ or the two terms “religious” and “church”³²⁹ to the basic Nineteenth Century form of the exemption, did not necessarily settle the questions raised by *Sweeney* and by the variations on the Nineteenth Century form which limited the exemption to the Christian sacramental use of wine, or, even worse, the use of wine in commemoration of the Lord’s Supper. As noted above,³³⁰ the term “religious” should certainly include both Jews and Catholics, and the term “church” should include Catholics, at least, if not Jews as well.³³¹ But the drafting of the early twentieth century statutes too often left much to be desired when it came to matters of clarity and precision, not to mention the substantive protection of the use of wine by Catholics and Jews in rituals, services and ceremonies.

The nine Group II States adding the term “religious” to the textual mix left the question of the scope of the exemption unsettled. Thus Arkansas law accommodated the order, shipment, or delivery of wine for sacramental purposes by or to “any priest or minister of any religious denomination or sect.”³³²

³²⁶ 76 S.W. 766, 770 (Tex. Civ. App. 1903).

³²⁷ See *supra* note 272 and accompanying text.

³²⁸ See *supra* note 319.

³²⁹ See *supra* note 320.

³³⁰ See *supra* notes 317-318 and accompanying text.

³³¹ See *supra* note 322 and accompanying text.

³³² FEDERAL AND STATE LAWS, *supra* note 314, at 105. Similarly, California accommodated the sale by pharmacists of wine for sacramental purposes to “a regularly ordained minister of some religious denomination, or upon the written order of the local official board or governing body of a religious organization.” *Id.* at 110. Florida made it lawful for “any priest or minister of any religious denomination or sect to receive and possess wines for sacramental purposes.” *Id.* at 140. Michigan law provided for the sale of wine “for sacramental purposes for use by religious bodies.” *Id.* at 300. Utah created an exemption for the “sacramental” use of wine by “religious bodies.” *Id.* at 678. Virginia law also created an exemption for the “sacramental” use of wine “by religious bodies.” *Id.* at 706-08. West Virginia law used the same form as the Utah and Virginia statutes, exempting the sale of “wine for sacramental purposes by

Texas law followed the same pattern as the other Group II States adding the word "religious" to the formulation or expression of the exemption. The Texas statute provided that a "priest or minister of any religious denomination or sect" could lawfully take delivery of wine, but only for "sacramental purposes."³³³ But the Texas statute must be read with *Sweeney's* restrictive holding in mind. The continued use of the word "sacramental" in statutes enacted after *Sweeney* strongly suggests that the Texas legislature meant to embrace the holding of *Sweeney* and that the addition of the word "religious" did not broaden the scope or reach of the exemption. It would appear, therefore, that in Texas, Jews were still left unprotected.

The obvious question, then, is how one should read the statutes enacted in Arkansas, California, Florida, Michigan, South Dakota, Utah, Virginia, and West Virginia, the other Group II States that added the term "religious" to the text of the exemption. On the one hand, some or all of these states could or would have rejected the restrictive and bigoted holding in *Sweeney*. On the other hand, some or all of these states could or would have accepted and adopted that holding. Nothing in the statutory text of these laws, however, provides any clear answer to the question whether Jewish religious uses of wine were accommodated. Simply put, in light of *Sweeney*, the use of the word "sacramental" in framing the exemption was at best problematic.

For a variety of reasons, the answer of the nine Group II states that added both "religious" and "church" to the text of their statutory exemptions, fares no better than that of the nine jurisdictions reviewed above, and may even be worse. The exemption in Alabama, for example, fell victim to sloppy drafting. The Alabama statute allowed wine to be used for "sacramental or religious purposes only."³³⁴ It further provided that "it shall be unlawful to sell wine for sacramental purposes, except to a minister, pastor, priest or officer of a regularly organized religious congregation or church"³³⁵ The problem arises from the fact that the first clause uses the words "sacramental or religious" whereas the second uses the words "sacramental . . . religious. . . or church." This leaves one to

religious bodies." *Id.* at 806-07.

³³³ *Id.* at 642, 658.

³³⁴ FEDERAL AND STATE LAWS, *supra* note 314, at 80.

³³⁵ *Id.* at 81.

wonder, in the classic tradition of flyspecking, whether the words paired with “sacramental” had different meanings. It might be senseless to conclude that the meaning or scope of the exemption changes from one clause to the other, and thus one might suppose that “religious” and “religious or church” mean the same thing. But this conclusion is far from obvious.³³⁶ So it remains possible that the two clauses have different meanings! At that point, the statute becomes incoherent.

Georgia law presented a somewhat similar interpretive problem. It provided for the shipment of wine “used for sacramental purposes or used in the observance of the Lord’s Supper only.”³³⁷ One might reasonably conclude that “sacramental purposes” would exclude Jewish religious uses, and perhaps Catholic ones as well, because of the specific reference to “the Lord’s Supper only.” However, the Georgia statute also provided that “the ordained minister, priest, in actual charge of a church or religious order, or head of the official board of any church or religious order”³³⁸ were entitled to receive wine. Thus there was some room to argue that the broader term “religious” and the somewhat less broad term “church” trumped the specific reference to “the Lord’s Supper only,” particularly if a Georgia court were moved to invoke a broad and liberal theory of religious freedom. On the other hand, a court interpreting this statute could just as easily conclude that the specific reference to “the Lord’s Supper only” controlled the analysis and that the phrase “church or religious order” would have to be read narrowly in order to comport with that specific reference or limitation, and thus, would only apply to a “*Christian* church or religious order” if not an “*evangelical Protestant* church or religious order.”

Mississippi law exempted the sale of wine “for sacramental purposes . . . to a minister, pastor, priest or officer of a regularly organized church or religious congregation.”³³⁹ But true to its well-established traditions,³⁴⁰ a later Mississippi law provided that wine “shall remain in the possession of such minister or priest save when the wine is being administered in the sacramental service or in the the service in commemoration of the Lord’s supper.”³⁴¹ As may have been the case in Georgia,

³³⁶ See *supra* notes 317-318, 321 and accompanying text.

³³⁷ FEDERAL AND STATE LAWS, *supra* note 314 at 339.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ See *supra* notes 284-286 and accompanying text.

³⁴¹ FEDERAL AND STATE LAWS, *supra* note 314, at 371.

the term “minister . . . of a . . . church or religious congregation,” would have to be read narrowly to encompass only a “*Christian* minister . . . of a . . . church or religious congregation” if the more limiting reference to “sacramental service or . . . the service in commemoration of the Lord’s supper” were to be held to trump the broader reference to “a regularly organized church or religious congregation.” Catholics in Mississippi were spared from the draconian reach of prohibition, but it is far from clear that Jews were. The limiting language of the Mississippi statute—like the limiting language in the Georgia statute—performed precisely the same function as the narrow holding in *Sweeney* did in construing the Texas statutes. Jews were left out and ignored.³⁴²

Nebraska law accommodated the use of wine for sacramental purposes, and the shipment of such wine to “churches and religious societies,”³⁴³ but limited the “sacramental” use of wine to “sacramental services.”³⁴⁴ The term “sacramental” is difficult enough, given *Sweeney*, but the phrase “sacramental services”³⁴⁵ may trump the broader phrase “churches and religious societies” requiring the latter phrase to be read to apply only to “*Christian* churches and religious societies.”

Yet another Group II State created a problem for Jewish religious uses of wine. Colorado law permitted sales by licensed druggists of wine for sacramental purposes “to any person duly designated by any regularly organized or incorporated church or religious society, which according to the accepted doctrines of such church or religious society uses intoxicating liquors in any of their services. . . .”³⁴⁶ This provision may have had broader scope than the comparable Nebraska provision, but the question remained whether the exemption covered the Jewish use of wine at religious meals. Everything would have turned, of course, on the meaning of “service.”

³⁴² In Georgia, Catholics may also have been left out and ignored.

³⁴³ FEDERAL AND STATE LAWS, *supra* note 314, at 393, 396.

³⁴⁴ *Id.* at 401.

³⁴⁵ The term “services” is not necessarily limited to Christian religious services. See *Nikulnikoff v. Archbishop and Consistory of Russian Orthodox Greek Catholic Church*, 255 N.Y.S. 653, 662 (N.Y. Sup. Ct. 1932) (defining “service” as “public worship”). See also WEBSTER DICTIONARY (1913 ed.), at <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=service> (last visited May 1, 2004) (defining “service” as “office of devotion; official religious duty performed; religious rites appropriate to any event or ceremonial; as a burial service”). However, when linked to “sacramental,” “services” may be limited to *Christian* religious services, rites or ceremonies.

³⁴⁶ FEDERAL AND STATE LAWS, *supra* note 314, at 121.

Finally, four Group II States used the terms “religious” and “church” in a more or less straightforward way and eschewed the use of qualifying or limiting language such as “the Lord’s Supper only,” “sacramental service or . . . service in commemoration of the Lord’s supper,” “sacramental services,” or “services.” But, again, thanks to *Sweeney*, it is far from clear that the textual interplay of “sacramental,” “church,” and “religious,” standing by themselves accommodates Jewish uses of wine.³⁴⁷

The legislatures in at least some of the Group II States may have intended to accommodate Catholics and Jews. It is not clear, however, that they necessarily did so. That depends on whether the courts in the various states would have adopted the reasoning of *Sweeney*. The problem arises, of course, from the use of the word “sacramental” without additional language specifically rejecting that reasoning. The use of the term “religious” and the more problematic terms “religious and church” do not, without more, solve the problem posed by *Sweeney* when the statutes also use the term “sacramental” in crafting an accommodation for the use of wine. Thus, the reasoning of *Sweeney* could have reared its ugly head in the interpretation of all the Group II states.

ii. Group III States

In framing their exemptions for at least some religious uses of wine, the Group III states eschewed the use of the word “religious,” or the words “religious” and “church” together, preferring to use “church” instead. While both terms can comprehend or cover Judaism, the latter term is more troublesome if only because many probably understood “church” to refer to a Christian body even though the term does cover Jews as a body of worshipers.³⁴⁸ The exemptions enacted in the Group III States, therefore, should have been at least as

³⁴⁷ Indiana accommodated the sale of wine “for sacramental purposes to the authorized officer or clergyman of any regular church or religious organization.” *Id.* at 196. North Carolina law accommodated the sale of “wine to any minister of religion or other officer of a church when said wine is bought for religious or sacramental purposes.” *Id.* at 477. Oregon, in a fashion similar to the North Carolina approach, carved out an exemption for the receipt of wine by “any priest or minister of any church or religious congregation . . . for sacramental purposes only.” *Id.* at 540. Tennessee law permitted “any priest or minister of any religious denomination or sect to receive and possess wines for sacramental purposes,” and also provided that retail druggists could sell wine “to ordained ministers, or to elders of a church . . . for sacramental purposes.” *Id.* at 633, 637.

³⁴⁸ See *supra* note 322 and accompanying text.

problematic as the exemptions adopted in the Group II States, and they were.

For example, Delaware limited sales of wine "to churches or the proper officers thereof . . . for sacramental purposes."³⁴⁹ New Hampshire also limited the "sacramental" use of wine to "churches."³⁵⁰ New Jersey nominally fell into Group III, but, just as Georgia, Mississippi, Nebraska, and Texas used express language (or arguably relied on judicial precedent) to narrow the reach of the exemption to the religious use of wine by Christians, notwithstanding the use of a broader term, New Jersey did likewise. The New Jersey statute permitted sales of wine by pharmacists to "the proper officer of any duly organized church."³⁵¹ But the law limited the use of such wine "for communion purposes."³⁵² The Kansas statute produced a similar result. The law created an exemption for the "regularly ordained minister or regular priest of any church," permitting them to receive and possess "wine for communion purposes."³⁵³ The law also referred to the eligible clergy as "pastor[s] or priest[s]."³⁵⁴ Rabbis need not have bothered to apply for permission to receive and possess wine in Kansas, even though at one point the statute referred to "any duly organized church."

iii. Group IV States

Only two states specifically addressed the question of the religious use of wine by Jews. In so doing, they largely put *Sweeney* to rest. A South Carolina law provided that "a minister, pastor, priest, *rabbi*, or regularly constituted officer of a regularly organized religious congregation or church" could lawfully take delivery of not more than one gallon of wine upon the filing of the necessary affidavit and payment of a small fee.³⁵⁵ The statute also provided that "the head of a family of the Hebrew faith" could take delivery of not more than one gallon of wine "for use during Passover" upon the filing of the necessary affidavit and payment of the small fee.³⁵⁶ Clergymen could seek permits once a month. A Jewish head of household

³⁴⁹ FEDERAL AND STATE LAWS, *supra* note 314, at 135.

³⁵⁰ *Id.* at 417, 420.

³⁵¹ *Id.* at 448.

³⁵² *Id.*

³⁵³ *Id.* at 251.

³⁵⁴ FEDERAL AND STATE LAWS, *supra* note 314, at 251.

³⁵⁵ *Id.* at 570.

³⁵⁶ *Id.* at 570-71.

could apply only in March of every year, obviously looking towards the celebration of Passover. There is much that is wrong with this law, not least of which are the application fees and the gallonage restrictions. This law suffers from an excessively pinched view of the need of wine by liturgical Christians and Jews. But at least little to no doubt remains as to the religions benefited—to whatever degree—by the law.³⁵⁷

Washington State also improved upon the Group II States with a law that exempted sales of wine to “an ordained clergyman, priest or *rabbi* actually engaged in ministering to a religious congregation in this State . . . for sacramental purposes only.”³⁵⁸ The Washington State law had no gallonage restrictions.³⁵⁹ However, it did not address the problem of the religious needs of Jewish heads of household for wine.³⁶⁰

While the Group IV statutes clearly represent substantial improvements in the form of the exemption, they do not appear adequately to address the full range of Jewish religious practices requiring the use of wine. The early twentieth century statutes reflect, therefore, some kind of religious freedom. But one cannot describe it as broad and liberal. These statutes clearly presented problems for Catholics and Jews in some instances and arguably did so in others. As a consequence, it is difficult, if not impossible, to make a plausible argument that these statutes, as a group, reflect a broad and liberal theory of religious freedom. And yet, to the extent that these statutes influenced the drafting of the Volstead Act, it may prove difficult to demonstrate that the Volstead Act somehow rose above the pinched view of religious liberty contained in the generality of these statutes.

³⁵⁷ An earlier South Carolina statute clearly fell in the Group II classification. *Id.* at 563, 565.

³⁵⁸ *Id.* at 793. As with South Carolina, an earlier Washington State statute clearly fell in the Group II classification. *Id.* at 784-85.

³⁵⁹ FEDERAL AND STATE LAWS, *supra* note 314, at 796-97.

³⁶⁰ A 1933 Minnesota law probably addressed the question best, although the exemption is tied to the tenets, practices and clergymen of religious organizations. See 1933 Minn. Laws 306 § 11 (exempting the importation of wine by “any regularly appointed and ordained rabbi, priest, minister or pastor of any church or established religious organization,” and providing that such clergymen “may supply the wine so purchased to individual worshippers of religious organizations and congregations who practice religious rites and ceremonies in their homes in which wine is used by virtue of the established tenets of such organizations”).

c. Federal Laws

Congress enacted a raft of prohibition laws beginning in 1917. The Alaska Prohibition Law exempted "shipments of wine for sacramental purposes" to "a duly authorized and officiating priest or minister of [a] church."³⁶¹ The Porto [sic] Rico Prohibition Law empowered the Commonwealth legislature to "authorize and regulate importation, manufacture and sale of [intoxicating] liquors . . . for . . . sacramental . . . uses only."³⁶² The Reed "Bone-Dry" Amendment carved out an exemption for the use of intoxicating liquors for "sacramental . . . purposes."³⁶³ The District of Columbia Prohibition Law carved out an exemption for the use of wine for "sacramental" purposes.³⁶⁴ However, only a "minister, pastor, or priest of a religious congregation or church" may apply for a permit to take delivery of such wine.³⁶⁵ And the Hawaii Prohibition Law created an exemption for the use of wine for "sacramental" purposes.³⁶⁶

The Porto [sic] Rico law, the Reed Amendment, and the Hawaii law would fall in Group I. The District of Columbia law would fall in Group II. The Alaska law would fall in Group III. No clear pattern emerges in five statutes passed within a year of each other, except that none of these laws explicitly addresses the religious needs of Jews.

2. The Exemption Arising by Implication – or not

Neither the 1914 Amendment to the Arizona constitution nor the 1907 Oklahoma constitution provided an exemption for the religious use of wine. The stage was thus set for a series of dramatic confrontations in both states as to whether there was such an exemption arising by implication, or whether such an exemption needed to be expressly crafted. The Oklahoma Supreme Court found that there was such an exemption by implication. The people of the State of Arizona amended the amendment to provide expressly for an exemption for the religious use of wine. It remains to be seen whether one

³⁶¹ Alaska Prohibition Act, ch. 53, Pub. L. No. 64-308, 39 Stat. 905 (1917).

³⁶² Jones Act, ch. 145, Pub. L. No. 64-368, 39 Stat. 952 (1917).

³⁶³ Reed Amendment, ch. 162, Pub. L. No. 64-380, 39 Stat. 1069 (1917).

³⁶⁴ Sheppard Bone-Dry Law in District of Columbia, ch. 165, Pub. L. No. 64-383, 39 Stat. 1123 (1917).

³⁶⁵ *Id.* at 1125.

³⁶⁶ Hawaii Prohibition Act, ch. 84, Pub. L. No. 65-157, 40 Stat. 560 (1918).

approach was better than the other from the perspective of religious freedom.

The campaign to adopt the 1914 amendment to the Arizona constitution specifically gave rise to the question whether an exemption for the religious use of wine in Arizona could be implied notwithstanding the silence of the text. Wets argued that the proposed amendment "interfered with religious freedom."³⁶⁷ Nonetheless, the amendment was adopted. Shortly thereafter, four lawsuits challenging the law were filed in federal court. These cases were then consolidated for trial.

Father Thomas Connolly, a Roman Catholic priest in Arizona, filed one of them,³⁶⁸ seeking, *inter alia*, to have the amendment declared unconstitutional as violative of Article I, § 8 and the Fourteenth Amendment of the United States Constitution, and to have Arizona officials enjoined from enforcing the amendment "preventing the introduction of wines into Arizona for sacramental or sacrificial purposes" or from instituting any other action on the purported authority of the amendment.³⁶⁹ At a hearing held on December 21 and 22, 1914, the State "blandly asserted that since the state constitution forbade interference with religious freedom, use of wine in liturgy could not be denied."³⁷⁰ On December 24, 1914, in an unpublished opinion, the court ruled in favor of the State of Arizona.³⁷¹

The State of Arizona's concession regarding the non-prosecution of the religious use of wine did not ultimately settle the matter. In a case unrelated to the four suits brought to overturn the 1914 prohibition amendment to the Arizona constitution, one W. J. Sturgeon was convicted of bringing liquor into the state in violation of the 1914 prohibition amendment, one quart of California wine, to be precise.³⁷² The Supreme Court of Arizona reversed his conviction and ordered a new trial.³⁷³ At trial, Sturgeon had demurred to the

³⁶⁷ BERMAN, *supra* note 307, at 120.

³⁶⁸ The other three were filed by a hotel company, a wholesale liquor company, and a drug and candy company. See Ware, *supra* note 307, at 270.

³⁶⁹ Complaint of Father Thomas Connolly, *Connolly v. Jones*, (D. Ariz) (Dec. 7, 1914) (unpublished opinion) (copy on file with the author).

³⁷⁰ Ware, *supra* note 307, at 271. See also, Nancy K. Tisdale, *The Prohibition Crusade in Arizona 170* (1965) (unpublished M.A. thesis, University of Arizona) (on file with author). This "stipulation" or "concession" by the Drys would resurface in Oklahoma. See *infra* notes 401-04 and accompanying text.

³⁷¹ Ware, *supra* note 307, at 271. See also Tisdale, *supra* note 370, at 170.

³⁷² Ware, *supra* note 307, at 293-94.

³⁷³ *Sturgeon v. State*, 154 P. 1050, 1056 (Ariz. 1916).

information on the grounds that the liquor had been transported for his personal use. The demurrer was overruled, and his later offer of proof of personal use was denied.³⁷⁴ The Arizona high court declared that “[s]earch the prohibition amendment as you will, there is no suggestion or intimation in any form contained therein prohibiting the possession or individual consumption of intoxicating liquors in Arizona.”³⁷⁵ It continued: “[w]e think it is the concensus [sic] of opinion, not only of the legal profession, but of the general public, that it is not a crime to possess or drink intoxicating liquors in this state.”³⁷⁶ Thus the trial court “committed error in refusing appellant’s offer of evidence to show that he had brought the liquor into the state for his personal use,”³⁷⁷ although the demurrer to the information “was properly overruled” because the question of personal use was a question of fact for the jury to decide.³⁷⁸

The decision in *Sturgeon* left a gaping hole in the Arizona prohibition scheme, notwithstanding the court’s cautionary warning that:

[T]he privilege of possessing and using intoxicating liquors for [one’s] individual consumption . . . may not be used as a license to violate the law by invoking that privilege as a subterfuge for an illicit introduction or use, nor should [one] consider it an invitation to pass the danger line lest [one] find [oneself] wrecked, for the way of the transgressor is hard.³⁷⁹

The Drys had their work cut out for them. And so they offered up a new constitutional amendment in 1916 which would eliminate the personal use exception,³⁸⁰ thus proposing a Bone-Dry constitutional regime. The new proposed amendment also contained an exemption for the religious use of wine by Christians—and perhaps Jews as well: “provided, that it shall be lawful for any regularly ordained priest or clergyman of an

³⁷⁴ *Id.* at 1051.

³⁷⁵ *Id.* at 1053.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 1055.

³⁷⁸ *Sturgeon*, 154 P. at 1056.

³⁷⁹ *Id.*

³⁸⁰ The proposed amendment provided, in relevant part: “it shall be unlawful for any person in the State of Arizona to have in his possession, for any purpose, any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind, which he has introduced or caused to be introduced into the State of Arizona.” See JONES, *supra* note 306, at 4.

established church to receive, transport and possess wine to be used only for sacramental purposes.”³⁸¹

In their official argument for the 1916 proposed amendment, the Drys stated:

The Courts would make exceptions for sacramental wine, as it is a mode of religious worship, if it were not made here. A law without this exception would be inoperative in this particular. What the United States Constitution and Court decisions guarantee we cannot take away. This amendment must stand the test before the Courts.³⁸²

The 1914 litigation, of course, did not establish the legal proposition contended for in the official argument. Nor is it clear that any other litigation, anywhere, had done so, and there remains the possibility that the Arizona courts might have supported a narrow construction of the word “church” so as to prejudice the religious use of wine (or other types of intoxicating liquor) by non-Christians in general and by Jews in particular.³⁸³ While the predicate for the claim made by the Arizona Drys may be debatable to one degree or another, it was a legal claim, a claim about what the law required, not what the Drys believed in on the merits of the question.

In any event, this amendment passed handily.³⁸⁴ Now it no longer mattered what promises the State officials—judges and prosecutors—would or would not make to those *Christian* clergy who wanted to use wine for religious purposes in Arizona, and hopefully, to non-Christians as well.

The scene now shifted to Oklahoma. The 1917 law, as noted above, made no exception for the religious use of wine.³⁸⁵ But notwithstanding the Arizona experience, the Oklahoma Attorney General, S. Prince Freeling, made it clear that in his opinion the new 1917 Bone-Dry law did not imply an exemption for the sacramental use of wine.³⁸⁶ As in Arizona, a Roman Catholic priest challenged the law. Urban De Hasque,

³⁸¹ *Id.*

³⁸² STATE OF ARIZONA, INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 10 (1916).

³⁸³ See *supra* note 316 and accompanying text. Were the Arizona courts to follow the “reasoning” of *Sweeney*, it is altogether possible that the religious use of wine by Jews would fall within the ban of the prohibition because such use, while “religious,” was not “sacramental.”

³⁸⁴ See *Ware*, *supra* note 307, at 303.

³⁸⁵ See *supra* notes 306-07 and accompanying text.

³⁸⁶ See THOMAS ELTON BROWN, BIBLE BELT CATHOLICISM: A HISTORY OF THE ROMAN CATHOLIC CHURCH IN OKLAHOMA, 1905-1945, at 72 (1977); FRANKLIN, *supra* note 124, at 67-68.

chancellor to the Catholic diocese of Oklahoma, and secretary to the Catholic bishop of Oklahoma, tried to send a quantity of altar wine by rail to another Roman Catholic priest in Guthrie, Oklahoma. The railroad company, Atchison, Topeka & Santa Fe, refused to deliver the altar wine on the grounds that shipment and delivery would be in violation of the 1917 Bone-Dry law.³⁸⁷ DeHasque thereupon brought suit in state court for mandamus to compel the railroad to accept a shipment of wine to the priest in Guthrie, and to compel it in the future to accept like shipments and deliver them.³⁸⁸ The trial court ruled in favor of the railroad. On appeal, the Oklahoma Supreme Court reversed and remanded "with directions to grant the relief prayed for."³⁸⁹

The case squarely presented the question of the religious and sacramental use of wine by Christians. It did not present the larger question of the religious use of wine by Jews or the religious use of wine or other alcoholic beverages by members of other religions. Nevertheless, a commitment to and a concern for a broad and liberal theory of religious freedom might have persuaded a court to take on the larger question. Whether or not the Oklahoma court had such a commitment or concern, it did not take on the larger question.

Instead, the Oklahoma high court framed the question narrowly as "whether the laws of [Oklahoma] prohibiting the sale of intoxicating liquors include . . . altar wine."³⁹⁰ An interesting feature of this case is that while the immediate cause of the problem was the 1917 Oklahoma Bone-Dry law, the parties, the trial court and the state high court focused their attention on the Oklahoma constitution. The court's framing of the issue, therefore, was not altogether correct. The best argument for the shift in emphasis is that the Oklahoma legislature was bound to follow the strictures of the Oklahoma constitution. If the state constitution protected the religious use of wine, then the legislature had to do likewise, regardless of what it said or did not say in the 1917 Bone-Dry law. The proper question was, therefore, whether the Oklahoma

³⁸⁷ The relevant portion of the 1917 Bone-Dry law provides that "It shall [] be unlawful for any person . . . to possess any [unlawful] liquor . . . received directly or indirectly from a common or other carrier in this State." 1917 Okla. Sess. Laws 186, §1.

³⁸⁸ De Hasque v. Atchison, T. & S.F. Ry. Co., 173 P. 73, 74 (Okla. 1918).

³⁸⁹ *Id.* at 78.

³⁹⁰ *Id.* at 74.

constitution's prohibition against intoxicating liquors included altar wine.³⁹¹

The railroad made the rather straightforward argument that the general terms of the Oklahoma constitution³⁹² clearly covered altar wine, and since exemptions for medicinal, industrial and scientific purposes were provided for, the absence of an exemption for the sacramental use of wine meant that such wine should be comprehended or covered by the general prohibitory rule of the Oklahoma constitution.³⁹³

The court, however, insisted that the question concerned not the language of the text, but "the intention of the legislative body."³⁹⁴ The court conceded, as the railroad had argued, "that any fermented and intoxicating wines fall within the general terms of the [Oklahoma] constitution."³⁹⁵ However, "it has been held a thing may be within the letter of the law and yet not within the law, because not within its spirit, nor within the intention of its makers."³⁹⁶ The evil that the constitution was meant to remedy was, in part at least, the casually racist conclusion that "the use of intoxicating liquors among the Indians was the fruitful source of much crime."³⁹⁷ Put in somewhat broader terms, the purpose of the prohibition amendment in the Oklahoma constitution was "to conserve the morals and guarantee the safety of the public by suppressing the use and traffic in intoxicating liquors and prevention of kindred and resulting evils."³⁹⁸ The court stated that it did not believe that "the members of . . . the [Oklahoma] Constitutional Convention, in framing [the prohibition] section, had in mind the sacred use of wine in the sacramental service in connection with the suppression of this evil."³⁹⁹ Thus, the court concluded, an exemption for the sacramental use of wine had to be implied: "the term 'intoxicating liquors,' as commonly used in prohibition statutes, [does not] include such wine when used in divine worship."⁴⁰⁰

³⁹¹ We shall see that there were also pragmatic reasons for this shift in focus from "laws" to the Oklahoma constitution itself. See *infra* Part IV.B.

³⁹² See *supra* note 305 and accompanying text.

³⁹³ *De Hasque*, 173 P. at 75.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *De Hasque*, 173 P. at 75.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

The court also referred to another section of the Oklahoma constitution which provided for toleration of religious sentiment,⁴⁰¹ and noted that religion and the public worship of God served useful social purposes. It further stated that it "should not impute to the framers of our Constitution . . . the intention to prevent or interfere with public worship under the general terms to suppress the liquor traffic."⁴⁰² The court then put the matter in exceedingly sharp focus:

Suppose in our Constitutional Convention some member had offered a section which in express terms declared against the use of wine in sacramental services by any church within this state, and that the transportation and use of such wine, solely for such purpose, would subject the members of that church to prosecution and punishment; can it be believed it would have received a minute of approving thought or a single vote?⁴⁰³

It did not matter, therefore, what might have or might not have motivated the Oklahoma legislature when it passed the Bone-Dry law. What mattered was what the framers of the Oklahoma constitution would or would not have done, and the court was satisfied that it knew the answer to the constitutional question.⁴⁰⁴

But the court had not finished. It pointed out that various prohibition laws enacted after statehood and before the enactment of the 1917 Bone-Dry law *expressly* provided for the sacramental use of wine.⁴⁰⁵ To the extent that the one-section Bone-Dry law built upon these other Oklahoma prohibition laws, it might make sense to suppose that it should be read as doing likewise, and the court so held.⁴⁰⁶ Finally, the court considered the fact that those charged with enforcing the various prohibition laws enacted by Congress applicable to the Indian Territory, now the eastern part of the state of Oklahoma, and which, like the 1917 Bone-Dry law, contained no express exemption for the religious use of wine, had not sought to apply or enforce the applicable federal laws.⁴⁰⁷

⁴⁰¹ OKLA. CONST. art. I, § 2.

⁴⁰² *De Hasque*, 173 P. at 77.

⁴⁰³ *Id.*

⁴⁰⁴ The court surely exaggerated, perhaps to good effect, but exaggerated nonetheless. See *infra* notes 410-12 and accompanying text.

⁴⁰⁵ *De Hasque*, 173 P. at 78.

⁴⁰⁶ *Id.* This argument, of course, does not depend on what the 1907 Oklahoma Constitution does or does not mean.

⁴⁰⁷ *Id.* This argument, likewise, does not depend on what the 1907 Oklahoma Constitution does or does not mean.

In essence, the court (1) embedded an exemption for the sacramental use of wine in the Oklahoma constitution, and made the laws enacted pursuant thereto subject to that exemption, regardless of the text of those laws, (2) embedded the Bone-Dry law in the fabric of the other Oklahoma prohibition laws many of which did make provision for the sacramental use of wine, (3) embedded the Bone-Dry law in the larger texture of federal law and law enforcement relative to the Indian Territory, now a part of Oklahoma, or (4) some or all of the above. The 1917 law had little to no independent legal or constitutional significance in the view of the Oklahoma court.

Arizona ended up aligned with the Group III States. The text of the 1916 prohibition amendment conjoined the terms "sacramental" and "church," producing an uncertain result as to the scope or coverage of the exemption. The means by which Arizona did so were dramatic, however, because of a clear reversal of course by the Drys utilizing the initiative and referendum process. The legislature itself played little to no role in the events. The courts might have functioned as an impetus for the change in direction, but they certainly did not compel it. Father Connolly lost his lawsuit, after all.

In Oklahoma, the final outcome, if such it were, aligned that state with the Group I States. Left to its own devices, the Oklahoma legislature would have provided no exemption for any religious use of wine or other intoxicating liquor. The courts forced a change of direction. But working within the logic and structure of case-by-case adjudication, the court decided only the question before it which concerned the religious use of wine by the Roman Catholic plaintiff. Reference by the Oklahoma high court to the Oklahoma Constitution's declaration of religious tolerance⁴⁰⁸ invites the supposition that the court would have extended the scope of the judicially crafted exemption to any religious use of wine or other intoxicating liquor. But the holding in *DeHasque*⁴⁰⁹ extends protection only to Roman Catholics, and probably any other Christians needing "altar wine," even as the "spirit" of the case might extend the accommodation even further.

⁴⁰⁸ See *supra* notes 401-02 and accompanying text.

⁴⁰⁹ *De Hasque*, 173 P. at 78.

C. *The Social, Religious and Cultural Context*

Perhaps, given the results in Arizona and Oklahoma, the conflict and the dispute amounted to sound and fury signifying nothing,⁴¹⁰ at least as far as the sacramental use of wine was concerned. Perhaps not. There was real conflict, and it is clear that an anti-Catholic bias, revived and enlivened for the reasons discussed earlier, fueled the conflict.⁴¹¹ A review of the social, religious and cultural context of the troubles in Arizona and Oklahoma, and also of the commentary of the period demonstrates the intensity and ferocity that the Arizona and Oklahoma situations and their "reasonable" resolutions belie. Feelings about the question of an exemption for the religious use of wine remained strong and testy as late as 1940.⁴¹²

Nor should one forget the precarious position in which Jews found themselves. While anti-Catholicism lies at the heart of the meaning and purpose of the Protestant Empire, anti-Semitism also reared its ugly head, making Jews the targets of oppression, abuse, indifference and neglect.⁴¹³ The drama, the conflict, and the tension, however, seemed largely to revolve around problems between Christians. A broad and liberal idea of religious freedom and liberty, however, would not leave non-Christians to the tender mercies of neglect, benign or otherwise. In other words, the very nature of the predominant drama or discourse may have shaped the predominant ideologies of religious freedom and liberty. But the predominant drama and discourse also provided the context for assessing the meanings of religious freedom that one might fairly ascribe to the Volstead Act's exemption for the religious use of wine.

⁴¹⁰ See WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 5 (Barbara A. Mowat & Paul Werstine eds. 1992) ("It is a tale Told by an idiot, full of sound and fury, Signifying nothing.").

⁴¹¹ See *supra* notes 187-90 and accompanying text.

⁴¹² See generally DOBYNS, *supra* note 17.

⁴¹³ See JOHN HIGHAM, *SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA* 164 (1984) (stating that "[i]n the early twentieth century the generalized prejudice that had fascinated modern social psychologists chrystallized" and that "Jews now found themselves part of a motley array of outsiders, confronting an ever more fearful [white Protestant] majority"); NATHAN C. BELTH, *A PROMISE TO KEEP: A NARRATIVE OF THE AMERICAN ENCOUNTER WITH ANTI-SEMITISM* 58 (1979) (noting that the 1915-1925 decade was the most violent decade experienced by American Jews); ARTHUR GILBERT, *A JEW IN CHRISTIAN AMERICA* 41-47 (1966) (discussing anti-semitism during the period of 1840-1924); LEONARD DINNERSTEIN, *UNEASY AT HOME: ANTISEMITISM AND THE AMERICAN JEWISH EXPERIENCE* 103-32 (1987) (discussing the lynching of Leo Frank in Atlanta, Georgia in 1913).

1. The Evangelical Protestants

Early twentieth century evangelical Protestants displayed a welter of emotions and feelings about the question whether to exempt the religious use of wine from the reach of prohibition laws ranging from arrogance to indifference to denial. A sampling of Protestant religious journals from the period illustrates the complexity of the evangelical stance on the question. It is fair to say that evangelical Protestants pressed the point.

The culturally embedded anti-Catholicism of Anglo-American evangelical Protestants often took the form of sheer arrogance. Having themselves abandoned wine for grape juice,⁴¹⁴ they found it difficult to understand why Catholics in particular, but also Episcopalians and Lutherans, would continue to insist on the use of wine in their Eucharistic liturgies.⁴¹⁵ Thus when asked whether prohibition laws ought to protect the religious use of wine, they responded that priests were better off with grape juice,⁴¹⁶ that "intelligent people in all churches had long ago given up the superstition that intoxicating wine is necessary to the proper observance of the sacramental duty,"⁴¹⁷ that there was no reason to "make an exception to much needed prohibition for the sake of . . . a church custom,"⁴¹⁸ and that grape juice "serves every purpose in the celebration of the Lord's Supper."⁴¹⁹ The use of wine by Catholics and others, therefore, amounted to nothing more than an unintelligent, superstitious custom that did nothing to further the purposes of the sacrament and harmed the clergy to

⁴¹⁴ See *supra* notes 139-43 and accompanying text.

⁴¹⁵ Of course any reasonable assessment of the Eucharistic theologies of Catholics and some liturgical Protestants would have shown they did not switch to grape juice. See *supra* notes 46-48 and accompanying text.

⁴¹⁶ Note, *Roman Catholics and Prohibition*, 5 THE WATCHMAN-EXAMINER 166-67 (1917). Since communion in one kind only was available to the Catholic laity, only priests drank from the cup. See CANONS AND DECREES, *supra* note 41, at 159 (noting that "the holy Catholic Church [had decided] that lay people . . . are to communicate under the one species of bread" but declaring that the Pope "in accordance with his singular prudence" had authority to act on petitions "for the use of the chalice" by the laity).

⁴¹⁷ See Bernard J. McNamara, *Prohibition and the Mass*, 59 THE ECCLESIASTICAL REV. 184, 190 (1918) (quoting, in a letter to the editor, a document issued on June 8, 1918, by the Board of Temperance, Prohibition, and Public Morals of the Methodist Episcopal Church, Washington, D.C. office).

⁴¹⁸ Lydia Vose Johnson, Letter, *Fermented Wine Should Go*, 102 THE CONGREGATIONALIST 130 (1917).

⁴¹⁹ Note, *Temperance at the General Assembly*, 23 THE ASSEMBLY HERALD 342 (July, 1917).

boot! Evangelical Protestants—or at least some of them—had clearly set themselves up as the ultimate authority on the religious practices of others.

In Oklahoma, this perspective found ample expression in the difficult and tense times that followed the enactment in 1917 of a tough Bone-Dry prohibition law that did not exempt the religious use of wine. A small newspaper opined that it did not think that “the good Lord would seriously object to the substitution of grape juice for wine.”⁴²⁰ Members of an Oklahoma City Baptist Church “thought [that the prohibition law] should apply impartially to all citizens; and they went further to assert that the use of altar wine by Protestant churches in particular ‘is wholly unnecessary and . . . is deemed detrimental to the best interests of such churches,’”⁴²¹ leaving unstated what the benefits or detriments of altar wine might be for non-Protestants.

The superintendent of the Oklahoma Anti-Saloon League, H.T. Laughbaum, provided the best look into the conceit of evangelical Protestants towards other religious groups, at least in cases where they had the political power to do whatever they wanted to. Laughbaum was reported to have said:

In every fight we fellows had for Prohibition, Anglicans and Catholics refused to lend their aid. We would gladly have incorporated into the law the permission to import wine into the state for sacramental purposes, but at the time they sent no delegates and ignored us completely, and therefore we let the law go on record as it stood.⁴²²

Evangelical Protestant views on the religious use of wine had both theological and political dimensions, a perfectly foreseeable development in a Protestant Empire. The court in *DeHasque* had good reason, quite apart from the law, to shift the focus away from the 1917 Bone-Dry law, and the highly charged rhetoric of Laughbaum and other ultraist Drys in Oklahoma, to a presumably more peaceful or civil point in time

⁴²⁰ FRANKLIN, *supra* note 124, at 67-68 (quoting an editorial in the Waukomis, Oklahoma, *Hornet*).

⁴²¹ *Id.*

⁴²² McNamara, *Danger*, *supra* note 303, at 505 (quoting Laughbaum’s remarks on the Oklahoma prohibition law). *But see* BROWN, *supra* note 386, at 69 (arguing that Catholic “inactivity” rather than Protestant “bigotry” explains the failure of the 1917 Oklahoma Bone-Dry law to make provision for the religious use of wine). Brown’s argument, however, makes no sense unless one expects Roman Catholics continually to ask evangelical Protestant politicians—legislators, prosecutors and judges—to take pity on Catholics and protect their use of wine in the Mass.

ten years earlier, or at least a time where anti-Catholicism had not so thoroughly deformed Oklahoma politics.⁴²³

Sometimes the evangelical Protestant response was muddled, or perhaps reflective of a greater sensitivity by some evangelical Protestants to the rights of minority religions. A Baptist journal took the "standard" position, as it had done before,⁴²⁴ postulating that it would have been better if the Arkansas legislature had not exempted the sacramental use of wine and admonished "[l]et not the churches lend their influence to the liquor traffic by demanding wine for use in the Lord's supper."⁴²⁵ Nevertheless, just a year later the same journal was indifferent on the question,⁴²⁶ and more to the point, denied that the Baptists and other evangelical Protestants wanted to abolish the use of wine for the Mass, claiming that the argument of a Roman Catholic priest to that effect was "false, utterly false, absurdly false."⁴²⁷ Protestants in Arizona reflected this varied approach to the religious use of wine, or at least they did in 1916.⁴²⁸

It is certainly the case that some evangelical Protestants were utterly indifferent to the question of an exemption for the religious use of wine and, on other occasions,⁴²⁹ denied any intention to interfere with the religious use of wine. In particular the Anti-Saloon League took great pains to make such a denial.⁴³⁰ But the religious press betrayed

⁴²³ Nonetheless anti-Catholicism was present in Oklahoma in 1907 and persisted at least up to World War I. See BROWN, *supra* note 386, at 45-46.

⁴²⁴ See *supra* note 416 and accompanying text.

⁴²⁵ *Men and Things*, 5 THE WATCHMAN-EXAMINER 228 (1917).

⁴²⁶ See *Men and Things*, 6 THE WATCHMAN-EXAMINER 454 (1918).

⁴²⁷ See *id.* at 1134.

⁴²⁸ See *supra* notes 303-04, 380-82 and accompanying text.

⁴²⁹ See, e.g., Editorial, *Prohibition Victories*, 102 THE CONGREGATIONALIST 206 (1917) (reporting without opinion or comment on a prohibition law that [supposedly] did not exempt the religious use of wine and a prohibition law that did); Note, *A Comprehensive Bill*, 22 THE ASSEMBLY HERALD 292 (1916) (expressing support for a bill pending in Congress that might have had the effect, were it to become law, of not exempting the religious use of wine from its reach); BADER, *supra* note 121, at 186 (noting that the Women's Christian Temperance Union "took no stand on the controversial proposal that communion wine be exempted" from a pending Kansas prohibition law).

⁴³⁰ Purley A. Baker, *The Sacramental Use of Wine*, 22 THE AMERICAN ISSUE 8 (1915) (claiming that the Anti-Saloon League "will not advocate the passage of any federal or state law that interferes with the . . . religious use of alcohol"); Note, *Oklahoma Prohibition*, 58 THE LIVING CHURCH 861 (1918) (referring to remarks from the Anti-Saloon League on the Oklahoma situation to the effect that the league "has avoided, in drafting laws . . . , any infringement whatever upon the polity and practice of any denomination in the use of fermented wines at the sacramental altar," and "has advised against such infringement"); Wayne Wheeler, *The Great Prohibition Victory*, 80 THE METHODIST RECORDER 19 (1919) (insisting that the Prohibition Amendment "does

a school of evangelical thought bent on destroying the Mass by denying or discouraging the use of wine in the Mass,⁴³¹ as did the reaction of many evangelical Protestants in Oklahoma.⁴³² That those holding this view did not succeed⁴³³ does not tell us what position (or positions) did. Identifying that position (or those positions) is, of course, the central concern of this paper. Nothing captures better the fundamental interpretive or hermeneutical dilemma than the essentially political response of an evangelical Protestant journal to the decision in *DeHasque*:⁴³⁴ "This ruling will dissipate much opposition to prohibition."⁴³⁵

Perhaps Fletcher Dobyns, a Dry frustrated by the repeal of National Prohibition, writing in 1940, put the matter into proper perspective.⁴³⁶ Dobyns opposed the Volstead Act exemption for the religious use of wine, viewing it as an "absurdity,"⁴³⁷ because the exemption "furnished an opening through which large amounts of intoxicating liquor [i.e. wine] poured into illegal channels."⁴³⁸ Dobyns' solution is of considerable interest here:

If [the Volstead Act] had simply prohibited the manufacture and use of alcoholic liquors for beverage purposes, it would have been complete and adequate and free from invitations to evasion. *If any church desired in good faith to make or have made, purchase, and use intoxicating beverages for strictly sacramental purposes, there would not have been a district attorney who would have suggested, or*

not interfere with the manufacture and distribution of [intoxicating] liquors for . . . sacramental purposes, which will doubtless be provided for in careful rules and regulations which Congress will authorize"). Apparently Oklahoma's doughty H.T. Laughbaum was a loose cannon on a rolling deck. Presumably he was "advised" by the national office not to push for a law not containing an exemption for the religious use of wine, if one believes Purley A. Baker, a high ranking official in the Anti-Saloon League.

⁴³¹ See Note, *Roman Catholics and Prohibition*, 5 THE WATCHMAN-EXAMINER 166-67 (1917) (declaring that Roman Catholic priests would be better off not using wine in the Mass).

⁴³² See JIMMIE LEWIS FRANKLIN, BORN SOBER: PROHIBITION IN OKLAHOMA, 1907-1959 at 67-69 (1971) (noting that one newspaper editorialist and many church members and leaders in Oklahoma saw no reason to exempt the religious use of wine from the reach of prohibition).

⁴³³ Some Roman Catholics entertained little doubt that evangelical Protestants meant to destroy the Mass, plain and simple. See, e.g., Lucian Johnson, *An Aspect of Prohibition*, 53 THE ECCLESIASTICAL REVIEW 373, 380 (1915) (stating that "I make this prediction, namely, that at no very distant date Protestant bigotry will recognize in Prohibition just such a means of prohibiting the Mass").

⁴³⁴ *De Hasque*, 173 P. 73 (Okla. 1918).

⁴³⁵ See McNamara, *Prohibition*, *supra* note 417, at 190 (quoting remarks made by the Methodist Episcopal Church).

⁴³⁶ See generally DOBYNS, *supra* note 17.

⁴³⁷ *Id.* at 295.

⁴³⁸ *Id.* at 297.

*a judge who would have held, that such action constituted a violation of the law. The churches could have used fermented or unfermented wine in connection with their religious rites without interference by governmental officials, and there would have been no loopholes through which bootleggers might escape.*⁴³⁹

Dobyn's approach suffers from two serious defects. The first is that as a matter of fact the Oklahoma Attorney General took the position that the sacramental use of wine was a violation of the Oklahoma prohibition law. It took a court decision to overturn that view. One cannot say that other attorneys general or other state and local prosecutors might not have reached the same conclusion.⁴⁴⁰ Second, as suggested earlier,⁴⁴¹ Dobyn's solution would have turned those who were not evangelical Protestants into perpetual mendicants regularly having to beg judges and prosecutors for relief from the draconian sweep of National Prohibition. As bigoted as he was, the Oklahoma Anti-Saloon League superintendent, Laughbaum, would have required them only to beg once.

⁴³⁹ *Id.* at 298 (emphasis added).

⁴⁴⁰ In 1959, Oklahoma voters adopted an amendment to the state constitution directing the legislature to "enact laws providing for the strict regulation, control, licensing, and taxation of the manufacture, sale, distribution, possession, and transportation of alcoholic beverage." OKLA. CONST. art. 27, § 3. This provision gave rise to a lawsuit, *Salatka v. Oklahoma Alcoholic Beverage Control Bd.*, 607 P.2d 1355 (Okla. 1980). In a remarkable display of obtuseness, the then Oklahoma Attorney General opined that the "import, sale and purchase by churches" "of sacramental wine" were subject to the regulatory régime adopted in 1959. *Id.* at 1355. As a consequence, the Oklahoma Alcoholic Beverage Control Board sought to require the Roman Catholic Church "to purchase their sacramental wine from licensed Oklahoma retail liquor stores rather than from their own approved sources of supply." *Id.* The Catholic Bishops of the Archdiocese of Oklahoma City and the Diocese of Tulsa brought the suit in the Oklahoma Supreme Court for a Writ of Prohibition to restrain the Board and the Oklahoma Tax Commission from acting pursuant to the opinions issued by the Attorney General. The court granted the writ.

The Attorney General sought to distinguish *DeHasque* on the grounds that sacramental wine "is within the purview of the constitutional use of the term 'alcoholic beverage' for the purpose of regulation and taxation but was outside its purview when shipping of wine was sought to be prohibited in *DeHasque*." *Id.* at 1357. The court was having none of it. As in *DeHasque*, the court stated that it was "extremely doubtful that the people of Oklahoma who adopted Section 3, Art. 27 by popular vote . . . intended that the regulation and taxation of traffic in 'alcoholic beverages' was meant to curtail or interfere with public worship in the slightest degree." *Id.* Also, as in *DeHasque*, the court noted that "there is nothing in the record to show but that for the first time in 20 years, officers in charge of enforcement of Section 3 and the Oklahoma Alcoholic Beverage Control Act have undertaken to apply it to the use of wine for sacramental purposes." *Id.* *DeHasque* obviously settled the matter for the court.

Dobyn's casual assurance that prosecutors would have done "the right thing" is belied by the facts in *Salatka*. Anti-Catholicism continued to have a real bite. The bishops had to bring their action in the Oklahoma high court because their supplies of altar wine were running low and they needed immediate relief from the silly opinion of the Attorney General. *Id.* at 1355-56.

⁴⁴¹ See *supra* notes 29-30 and accompanying text.

2. The Catholics

As we have already seen, Catholics resisted evangelical Protestant attempts to protestantize Catholics.⁴⁴² Not surprisingly, Catholics demonstrated a different set of emotional responses when the question whether to exempt the religious use of wine arose. Reported Catholic opinion essentially consisted of an admixture of fear, bravado, desperation, and contempt. It was, by and large, far more focused and uniform than evangelical Protestant opinion was, although one can find gradations and variations in Catholic thought about the question of an exemption for the religious use of wine.

In Arizona, Catholics led the fight against the 1914 proposed prohibition amendment to the state constitution, and the Roman Catholic Church "was the most vocal in opposition to the amendment."⁴⁴³ Drys had responded by arguing, in the opinion of a former judge, "that although the amendment did by inference prohibit wine for sacramental purposes, this provision could not be enforced because such was not the intention of the framers of the amendment."⁴⁴⁴ This argument did not satisfy the Catholics. "In October of 1914 the Church issued a formal statement denouncing the prohibition amendment. Father Thomas Connolly . . . declared that though many lawyers contended that the amendment would in no way restrict free exercise of religious liberties, the church still felt that it must stand in opposition to the prohibition amendment."⁴⁴⁵ Arizona Episcopalians, however, supported the amendment,⁴⁴⁶ even though they, like Catholics, used wine in their celebration of the Eucharist.

The predominant Catholic response to the unwillingness of the Drys to include exemptions for the religious use of wine in the prohibition laws enacted in the decades leading up to National Prohibition was fear, perhaps with a touch of distrust. Over and over again the Catholic religious journals of that era insisted that the Drys aimed to destroy the Mass by prohibiting the religious use of wine.⁴⁴⁷ Catholic opinion also revealed a

⁴⁴² See *supra* Part II.D.3.

⁴⁴³ Tisdale, *supra* note 370, at 159.

⁴⁴⁴ *Id.* at 160.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 161-62.

⁴⁴⁷ Johnston, *supra* note 433, at 380 (arguing that the exemptions for the religious use of wine are a matter of courtesy, even political trickery, but are not a

related contempt that responded to the conceit of the evangelical Protestants: Protestantism had decayed and its back was to the wall, and was "emotionalism unregulated by reason" incapable of harmonizing "all the elements of human nature;"⁴⁴⁸ Drys had a "fanatical and blasphemous attitude toward the Mass;"⁴⁴⁹ and Bernard J. McNamara distinguished between "the Christ-given apostolically-carried tradition" of Roman Catholicism and "the new-fangled, unscriptural, untheological, unphilosophical, characterless, sentimental, unchristian, unchristlike, unity-destroying, unpatriotic, and trouble-making doctrine of modern American Protestantism."⁴⁵⁰

We have seen that Catholics took the lead in challenging the 1914 Arizona constitutional amendment both as a matter of politics and of law, and that they also challenged the Oklahoma Bone-Dry law, at least in the bringing of a lawsuit,⁴⁵¹ thereby revealing some bravado, if not outright courage. When commenting on the Arizona and Oklahoma situations, fear and anger were joined by bravado and desperation as well. One correspondent noted that "in one Western State [presumably Arizona] priests even now must evade the law to get wine for Mass."⁴⁵² The Bishop of Arizona said, among other things:

I took care to warn the promoters of Prohibition of the stand of the Church . . . and of our determination to fight all and every form of Prohibition that failed to provide an exemption The Prohibitionists were intent on framing a drastic law that would leave no loophole of any sort or shape for infringement and they simply waived aside our representations by alleging that priests could use grape juice.⁴⁵³

recognition of any right, as a matter of principle, to use wine in the Mass); Maurice, *supra* note 303, at 507 (claiming that the Drys are extremists, pursuing "an impossible program which would prevent [Catholics] from saying Mass"); Note, *Prohibition and the Mass*, 16 AMERICA 355 (1916) (urging Catholics "not to take part in public campaigns for legal prohibition, unless an unequivocal clause, authorizing the use of wine for sacramental purposes, is inserted in the prohibition law."); Hoadley, *supra* note 303, at 353-54 (stating that prohibitionists meant to destroy the Mass by prohibiting the religious use of wine); Michael Kenny, *Prohibition and Alcoholism*, 19 AMERICA 301 (1918) (declaring that prohibitionists meant to destroy the Mass); McNamara, *Prohibition*, *supra* note 417, at 190 (stating that Drys meant to do in the Mass).

⁴⁴⁸ Johnston, *supra* note 433, at 376.

⁴⁴⁹ Note, *Bone Dry Prohibition, Patriotism or Blasphemy?*, 19 AMERICA 314 (1918).

⁴⁵⁰ McNamara, *Prohibition*, *supra* note 417, at 189.

⁴⁵¹ See *supra* Part III.B.2.

⁴⁵² Johnston, *supra* note 433, at 380.

⁴⁵³ McNamara, *Danger*, *supra* note 303, at 498 (reporting Bishop Granjon's

Another commentator observed that dealers and railroad companies which formerly supplied wine to Catholic priests in Arizona were now refusing to do so, citing the 1914 amendment to the Arizona Constitution. The writer concluded that "[t]he manufacture or introduction of wine for purely sacramental purposes has become a penal offence."⁴⁵⁴

Another correspondent labeled the Catholic Church as "the chief victim" of the Oklahoma prohibition statute.⁴⁵⁵ He concluded with a declaration that all of those using wine for religious purposes in Oklahoma:

[O]ught to be in prison because they are openly violating the law of the State and committing a crime every day in the week, even though it is done in the performance of the sacred functions of their office The Catholic Church and the others must give up the practice of their religion because the Legislature of Oklahoma says that the use of wine is a crime.⁴⁵⁶

Yet another correspondent, Michael Kenny, put it best, albeit sarcastically, in his response to the question of what Catholics should do in those states that did not exempt the religious use of wine: "Nothing but incur felony and helotry, take to the woods or jails, or dig catacombs; or else, become Baptists, Methodists, or other pure species of prohibitionist."⁴⁵⁷ Kenny did believe—mistakenly—that the courts would grant relief on constitutional principles.⁴⁵⁸ But in his sarcasm, Kenny

remarks).

⁴⁵⁴ Note, *Prohibition at Work*, 12 AMERICA 368, 369 (1915). See also Note, *Arizona*, 13 AMERICA 544 (1915) (noting that "railroads will not transport wine destined for religious purposes, until the courts pronounce on the meaning of the [1914 Arizona] prohibition law. . .").

⁴⁵⁵ McNamara, *Danger*, *supra* note 303, at 504. Whether the Catholic Church was the chief victim remains to be seen. See *infra* Part III.C.3 for a discussion of Episcopalian concern regarding the accommodation of the religious use of wine.

⁴⁵⁶ McNamara, *Danger*, *supra* note 303, at 506.

⁴⁵⁷ Michael Kenny, *Prohibition, the Constitution and the Mass*, 19 AMERICA 5, 5 (1918). Occasionally a Catholic correspondent would suggest that the Catholic Church make do with grape juice. See John R. Hagan, *Reply to Dr. McNamara's Article on Prohibition*, 59 THE ECCLESIASTICAL REVIEW 48, 52-53 (1918) (arguing that if "matters were to come to a real crisis, unfermented juice of the grape could be used until such time as Catholics could appeal to the sense of justice of their fellow citizens."). But see McNamara, *Prohibition*, *supra* note 417, at 192-93 (rejecting Hagan's suggestion outright).

⁴⁵⁸ Kenny, *Prohibition, the Constitution and the Mass*, *supra* note 457, at 5-7. Incorporation of the religion clauses was still a generation or more away. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1, 7, 15-17 (1947) (incorporating the Establishment Clause). *DeHasque* was decided, after all, on textual (i.e. constitutional) construction grounds. See *supra* notes 385-407 and accompanying text.

managed to capture the fear, bravado, desperation and contempt that characterized Catholic opinion of the time.

3. The Episcopalians

Many Episcopalians, the quintessential liturgical Protestants, found themselves on the horns of a dilemma when it came to temperance-prohibition. One important journal, *The Living Church*, joined with evangelical Protestants in supporting Prohibition, but at the same time joined with Catholics and other non-evangelical Protestants in insisting on express exemptions for the religious use of wine.⁴⁵⁹

One commentator laid out the basic position: some Episcopalian priests were having difficulty in obtaining proper wine for use in the Holy Communion.⁴⁶⁰ He noted that Episcopalians, like Catholics, cannot hold that the use of wine is sinful or necessarily evil, and Episcopalians were not prepared to take a position that calls into question "the legitimacy of a use that has been made an integral necessity in the sacrament of the Holy Communion."⁴⁶¹ Nonetheless, he continued, Churchmen could stand for prohibition as a measure justified by the widespread abuse of liquor, and by the behavior of the liquor industry.

The liquor traffic is beyond reclaiming now, and those who have promoted it must assume the blame. But notwithstanding all this, the Church cannot take the ground that the production or the proper use of liquor is necessarily sinful, and she is bound to see that pure wine is made available for sacramental use in every county, town, and village in the country, no matter how ironclad may be the regulations against its sale or use as a beverage. Certainly our bishops, our clergy, and our people must take it upon themselves to see that the prohibition laws now being enacted or proposed so generally do not infringe upon this requirement.⁴⁶²

The Oklahoma statute forced *The Living Church* to take another look at its position on prohibition. Another commentator noted that enforcement of the Oklahoma law

⁴⁵⁹ Lutherans expressed a similar, but somewhat more accommodating, position. See Note, *The Prohibition of Sacramental Wines*, 2 LUTHERAN HERALD 242 (1918) (arguing that either an exemption in the Oklahoma prohibition law for the religious use of wine should be implied by the courts, or, if such an interpretation were not possible, then the Oklahoma constitution should be amended so as to permit such an exemption).

⁴⁶⁰ Note, *Sacramental Wine and Prohibition Law*, 56 THE LIVING CHURCH 673 (1917).

⁴⁶¹ *Id.*

⁴⁶² *Id.*

created difficulty for churches using wine for religious purposes.⁴⁶³ He restated the basic position that the first commentator had taken earlier. However, he concluded that "[i]f we must choose between the absolute Prohibition of the Oklahoma law and no Prohibition at all, our religion compels us to choose the latter."⁴⁶⁴ Religion, then, trumped the depredations of the liquor traffic. Indeed, some Episcopalians—however many or few—seriously considered the possibility of civil disobedience. An editorial writer declared that if clergy are caught using wine for religious purposes,

[L]et them suffer the penalty of the law and go to jail. A couple of bishops and a goodly number of priests suffering prison terms for the crime of preparing to administer Holy Communion to their people would impress the virility of modern [Episcopal] Churchmanship and of the clergy upon the men of Oklahoma as, perhaps, nothing else can do.⁴⁶⁵

The argument that Episcopalians should use grape juice and not engage in civil disobedience⁴⁶⁶ fell on deaf ears. *The Living Church*, and those Episcopalians who agreed with that journal, took the matter seriously, and saw themselves as having to resist the Drys. Their style and their tactics, and indeed even their basic approach to National Prohibition may have differed from that of the Roman Catholics.⁴⁶⁷ However, the two religious groups did, at some level, resist the Drys and their depredations. It is not clear, unfortunately, that either group has adequately credited the other for its role in protecting the religious use of wine, a rather uncharitable, not to say unchristian, position for both Catholics and Episcopalians.

IV. RELIGIOUS FREEDOM AND LIBERTY

The § 6 form of the exemption in the Volstead Act most nearly resembles the form employed in the two Group IV States.⁴⁶⁸ It explicitly settles the question as to the protection or accommodation of Jewish religious practices, and it leaves

⁴⁶³ Note, *Prohibition and Sacramental Wine*, 58 THE LIVING CHURCH 524 (1918).

⁴⁶⁴ *Id.*

⁴⁶⁵ Editorial, *The Oklahoma Inhibition of Sacramental Wine*, 58 THE LIVING CHURCH 759 (1918).

⁴⁶⁶ See J. Louis Gibbs, Letter, *Sacramental Wine and the Oklahoma Law*, 58 THE LIVING CHURCH 839, 839-40 (1918).

⁴⁶⁷ See *infra* Part IV.A.2. discussing Anglican medianism.

⁴⁶⁸ See *supra* notes 355-60 and accompanying text.

no doubt that it covers the use of wine by all Christians. As such, the Volstead Act indisputably marks an important advance or progression in the quest for religious freedom and liberty.

It remains a fair question, however, as to what kind of religious freedom and liberty might underlie the § 6 form. Two approaches to the question present themselves. The first involves an attempt to reason from the text of the § 6 form itself. Textualism, like formalism more generally, tends to bracket factors that may aid in understanding the text itself. Accordingly, a contextualist approach also commends itself, and it is to that approach that this Part IV is largely dedicated.

Nonetheless, textualism provides a useful starting point in understanding the exemption for the religious use of wine by Christians and Jews. As a matter of textual analysis, the Drys decided two important questions when they exempted the religious use of wine from the reach of the Volstead Act. First, they decided that the Volstead Act would not become the occasion for destroying the Catholic Mass, or the Eucharistic liturgies of non-evangelical Christians, nor the religious practices of Judaism that required the use of wine. Second, by expressly exempting the religious use of wine, they clearly demonstrated that there was no need for those who were not evangelical Protestants to have to routinely beg judges and prosecutors for administrative grace. For whatever the reason, any begging, if any at all was required, was limited to the legislative process that produced the Volstead Act. The Act could, in theory, be amended at some future date, striking out, modifying, or narrowing the scope of the exemption. Those who were not evangelical Protestants would have to beg then too. But it is hard to imagine that repeal of the exemption—or the threat thereof—would become part of the legislative routine of Congress.

The text-driven meanings of the exemption found in the Volstead Act reveal a theory of religious freedom and liberty that ultimately rests on the idea or concept of non-interference, a legally protected zone of autonomy.⁴⁶⁹ Thus, the Volstead Act exemption placed the religious use of wine by Christians and Jews in such a zone, and also offered some assurance that the zone would remain intact because it would take, literally, an act of Congress for it to be eliminated, modified, or narrowed.

⁴⁶⁹ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746 (1917).

But the question remains why Congress was moved to create such a zone of autonomy and non-interference for Catholics, liturgical Protestants, Jews, and Eastern Orthodox Christians. It is at this point that one must turn to context.

The most plausible explanation for the creation of this particular zone of autonomy, for the religious freedom and liberty implicit in the exemption found in the Volstead Act, was the need for the Drys to propitiate Episcopalians. A second possible reading of the exemption, closely related to the first, is that pragmatic considerations of demography, political stability and "appearances" led even the most ultraist Drys to accede to the exemption, notwithstanding their belief that wine was unnecessary for religious purposes. A third plausible explanation is that some Drys believed that the fact of National Prohibition, in and of itself, would aid greatly in the program of evangelical Protestant moral reform. Those who were not evangelical Protestants would give up the use of wine in their religious services and ceremonies and, perhaps, even convert to evangelical Protestantism out of gratitude for the great gifts that National Prohibition would, in the estimation of the Drys, undoubtedly bestow on the American people. A fourth reading, that the exemption reflected a genuine belief in a broad and liberal theory of religious freedom, that is, that religious diversity and pluralism are *pro bono publico*, simply cannot withstand scrutiny.

A. *Propitiation of Episcopalians*

1. Setting the Context: The Act of Toleration

My first Protestant Empire article⁴⁷⁰ set the stage for a reading of the Volstead Act exemption as an expression of propitiation of Episcopalians. A brief review of portions of that article is in order.

Anglo-American Protestantism essentially consists of two rather distinct groupings. Henry VIII presided over two religious parties that traced their origins back over 500 years, Anglo-Protestants and Anglo-Catholics.⁴⁷¹ But Henry's church "was at war with itself. From 1534 until the decisive lurch leftward in 1549, Henrician religion embraced two distinct factions, the avowed goal of which was the elimination of the

⁴⁷⁰ See Newsom, *Protestant Empire*, *supra* note 23.

⁴⁷¹ *Id.* at 200.

other.”⁴⁷² They continued to battle each other even as each changed, moving to the theological left. By the time of the reign of Elizabeth I, many Anglo-Catholics, Protestants nonetheless because they “protested” the claims of the papacy, had become Anglicans⁴⁷³ and many Anglo-Protestants had become Puritans.⁴⁷⁴ In turn, many Puritans developed Separatist tendencies or inclinations.⁴⁷⁵ As a result, England ended up with its established church, the Church of England, and with some number of separatist evangelical Protestants. The two parties, transformed in the crucible of the sixteenth century, had not yet found a *modus vivendi*.⁴⁷⁶

The great travails of the seventeenth century did nothing to improve the situation. Anglicanism was restored after the Civil War, but the Restoration Stuart kings muddied the waters with their allegiance to Roman Catholicism.⁴⁷⁷ Finally, Anglicans, feeling threatened by the religion of Charles II and James II, decided to forge a pan-Protestant unity, something which had theretofore largely eluded the grasp of the post-Reformation English State. The shape of the 1688 Settlement, the Act of Toleration,⁴⁷⁸ concerns us here. During the preceding century and a half, the English government had adopted a number of laws that burdened non-Anglican evangelical Protestants in various ways. The 1688 settlement left those laws on the books, but declared that they would not “extend” to evangelical Protestants who made certain oaths and declarations regarding religion, theology, and anti-Catholicism.⁴⁷⁹

⁴⁷² *Id.* (quotation marks and footnote omitted).

⁴⁷³ Radical swings between the extreme Protestantism of Edward VI and the Roman Catholicism of Mary convinced Anglo-Catholics that their future lay with the Roman Church. They thus refused to work with the Protestant Queen, Elizabeth I, *id.* at 219-20, thereby robbing the Anglo-Catholic party of much of its base and support. “What was left of the Anglo-Catholic leadership essentially became the junior partners of moderate Anglo-Protestants in an alliance against the more militant Anglo-Protestants.” *Id.* at 221.

⁴⁷⁴ More radical Anglo-Protestants objected to the relative conservatism of the Church of England, wishing to “purify” it. *Id.* at 221-22.

⁴⁷⁵ *Id.*

⁴⁷⁶ Indeed, British North America owed much to the penchant of evangelical Protestants who left England to settle in the New World, especially New England, free from king and bishops as they pursued their goal of “purity.”

⁴⁷⁷ Newsom, *Protestant Empire*, *supra* note 23, at 227-35.

⁴⁷⁸ An Act for Exempting their Majestyes Protestant Subjects, Dissenting from the Church of England, from the Penalties of Certain Lawes. Act of Toleration, 1688, 1 W. & M. ch. 18 (Eng.) [hereinafter *Act of Toleration*].

⁴⁷⁹ Newsom, *Protestant Empire*, *supra* note 23, at 235-36.

Pan-Protestantism in 1688 took the form of Anglican toleration (with the threat of the penal law lurking in the background) of evangelical Protestants. As such, it constituted just one more example of the dynamic relation between suasion and coercion that had come to typify the Protestant Empire, this time leaning decisively in favor of suasion over coercion, of attrition over open combat. But in the American context, the 1688 Settlement took on an entirely different form. Episcopalians found themselves outnumbered by evangelical Protestants. In a democratic polity, Episcopalians were in no position to hold *legal* hegemonic sway over evangelical Protestants. But, in a remarkable tribute to embedded cultural patterns and norms, Episcopalians nevertheless came to hold *cultural* hegemonic sway over evangelical Protestants. The Act of Toleration had become, in short, a *cultural* artifact.⁴⁸⁰

2. Anglican Eucharistic Theology and Cultural Hegemony

Anglican—or Episcopalian—Eucharistic theology runs the gamut from Zwinglianism to Transubstantiation (or something very much like it) and Consubstantiation (or something very much like it).⁴⁸¹ This wide range of Anglican views about the Eucharist largely stems from the medianist impulse that typifies and even defines Anglicanism.⁴⁸² While

⁴⁸⁰ The founding of the American nation witnessed the social power of cultural institutions, particularly at the level of suasion. *Id.* at 249-56

⁴⁸¹ See *id.* at 196-97 n.65 for a discussion of various Eucharistic theologies. More specifically, the theologies and examples of their Anglican "authority" are as follows: Zwinglianism—BENJAMIN HOADLY, *A PLAIN ACCOUNT OF THE NATURE AND END OF THE SACRAMENT OF THE LORD'S SUPPER* (1735); Dynamic Receptionism—THOMAS CRANMER, *A DEFENCE OF THE TRUE AND CATHOLIC DOCTRINE OF THE SACRAMENT OF THE BODY AND BLOOD OF OUR SAVIOUR CHRIST* (Focus Christian Ministries Trust & Harrison Trust ed. 1987) (1550); Receptionism—DANIEL WATERLAND, *A REVIEW OF THE DOCTRINE OF THE EUCHARIST* (Clarendon Press 1880) (1737); Virtualism—JOHN JOHNSON, *THE UNBLOODY SACRIFICE AND ALTAR, UNVEILED AND SUPPORTED* (John Henry Parker 1847) (1713); Transubstantiation (or something very much like it)—ROBERT ISAAC WILBERFORCE, *THE DOCTRINE OF THE HOLY EUCHARIST* (John Mozley et al. eds., Oxford & London 1853); Consubstantiation (or something very much like it)—JOHN KEBLE, *ON EUCHARISTIC ADORATION* (James Parker & Co., Oxford & London, 1857).

⁴⁸² One of the most striking features of the Protestant Reformation is the disarray among Protestants over the meaning of the Eucharist. See Newsom, *Protestant Empire*, *supra* note 23, at 196-97 n.65. It is simply impossible to harmonize the teachings of Luther, a sacramental realist, and Zwingli, a Bare Memorialist. Calvin tried, see John Calvin, *Short Treatise on the Supper of Our Lord*, in 2 TRACTS AND TREATISES ON THE DOCTRINE AND WORSHIP OF THE CHURCH 195-98 (Henry Beveridge, trans., Wm. B. Publ'g Co. 1958) (1849), but failed for a number of reasons, not least of which is that his "medianist" theologies of the Eucharist failed to take hold with his followers, as the vast majority of them became Zwinglians. See NEVIN, *supra* note 104,

various Anglican parties or groups might find themselves at odds over critical theological doctrines, like the theology of the

passim. The medianist impulse, however, reflected an attempt to challenge Roman Catholic teaching, not on the basis of a series of propositions about what the "correct" Eucharistic theology was, but rather on a series of propositions as to what the "correct" Eucharistic theology was not. Medianism and triangulation have much in common. By adopting Zwinglianism as its normative Eucharistic theology, Evangelical Protestantism has, of course, abandoned any medianist position in favor of a clear cut theology that challenges the very heart and soul of Catholic sacramental realism.

Anglicanism, however, adopted and has maintained a medianist posture for several reasons. Given the practical realities of a messy, long drawn-out English Reformation, see Newsom, *Protestant Empire*, *supra* note 23 *passim*, it became impossible for Anglicans to embrace one normative Eucharistic theology. Their perhaps remote origins as Henrician Anglo-Catholics meant that they had to maintain some sort of openness to Catholic ideas, even though few if any Anglicans could be described as holding a Catholic understanding of the Eucharist during the period between the end of the reign of Elizabeth I at the beginning of the seventeenth century and the full flowering of the Oxford movement in the mid-nineteenth century.

Unlike Calvin, therefore, Anglican medianism covered a wider terrain—Transubstantiation (or at least something functionally similar, if not identical to it) to Zwinglianism—than Calvin's did, and Anglicans did not all fall into Zwinglian subjectivism largely because the Book of Common Prayer, in all of its post-1552 forms, and the Anglican commitment to the historic episcopate kept open the possibility that the Eucharist meant more than Zwingli thought that it did. See *infra* notes 488-500 and accompanying text.

In a very real sense, much of what constitutes Anglican medianism can be summed up in the words of the Eucharist's administration as they appear in the post-1552 Books of Common Prayer. On the one hand those words include the words of the 1549 Book of Common Prayer—"The body of our Lorde Jesus Christe which was geuen for thee, preserue thy bodye and soule unto euerlasting lyfe" and "The bloud of our Lorde Jesus Christe which was shed for thee, preserue thy bodye and soule unto euerlasting lyfe," see EDWARD P. ECHLIN, *THE ANGLICAN EUCHARIST IN ECUMENICAL PERSPECTIVE: DOCTRINE AND RITE FROM CRANMER TO SEABURY* 39 (1968)—words that easily admit of a realist or Catholic interpretation, and the words of the 1552 Book of Common Prayer—"Take and eate this, in remembrauce that Christ dyed for thee, and feede on him in thy hearte by faythe, with thankes geuinge" and "Drinke this in rembraunce that Christes bloude was shed for thee, and be thankfull," *id.* at 80-81—words that cannot support a Catholic understanding of the Eucharist. The Anglican communicant is largely left to her own devices to choose whichever Eucharistic theology she might like since the words that she hears every time that she receives the sacrament point in quite different theological directions.

Virtually alone among Protestants, Anglicans have insisted on maintaining the historic episcopate. To the extent that the Catholic understanding of the Eucharist requires *sacramental* bishops, bishops in the Apostolic Succession, then Anglican *sacramental* bishops make it possible for Anglicans to understand the Eucharist in Catholic ways, should they wish to do so. Anglicans pressed hard on the matter of Apostolic Succession in the 1880s. In 1886, the House of Bishops of the Episcopal Church adopted a statement addressed to other Christian bodies, setting out the terms or the basis for "the restoration of unity among the divided branches of Christendom." *The Chicago Quadilateral*, in *THE BOOK OF COMMON PRAYER* 877 (1979). One such term was: "[t]he Historic Episcopate, locally adapted in the methods of its administration to the varying needs of the nations and peoples called of God into the unity of His Church." *Id.* at 876-77. Two years later, at the 1888 Lambeth Conference, the worldwide Anglican Communion adopted and reaffirmed the Chicago Quadrilateral. *Id.* at 877-88. Roman Catholics pressed back hard, denying that Anglicans had bishops in the line of Apostolic Succession. See *infra* notes 600-01 and accompanying text.

Eucharist,⁴⁸³ Anglicans nonetheless by and large stayed put in a Church that allowed them some room to work out their own understandings of the faith. Medianism's avoidance of rigid doctrinal propositions, at least affirmative ones, made such cohesion possible.⁴⁸⁴ Some have described the consequence of medianism as Anglican "comprehensivism."⁴⁸⁵ At least one party in the Church of England, the Latitudinarians, saw themselves as a medianist party, encompassing within their views of doctrine and mission, the substantive content of medianism.⁴⁸⁶ Others, however, closer to the High and Low Church positions also appealed to the *via media*, although from quite different premises or presuppositions.⁴⁸⁷

This general pattern or hanging together, notwithstanding serious disagreement on theological or other related matters, played itself out in the nineteenth century American branch of the Anglican Communion. The year 1811 saw the emergence of two rather distinct parties in the

⁴⁸³ See DIX, *supra* note 37, at 613-14 (remarking on the intensity of intra-Anglican disagreement over the theology of the Eucharist).

⁴⁸⁴ Some Anglicans did secede, both to evangelical Protestantism, see GRAYSON CARTER, *ANGLICAN EVANGELICALS: PROTESTANT SECESSIONS FROM THE VIA MEDIA, C.1800-1850 passim* (2001), and to Rome, see GERTRUDE DONALD, *MEN WHO LEFT THE MOVEMENT*, at vi (1933) (noting that "it is reckoned that several hundreds [of lay people] accompanied the one hundred and thirty Tractarian clergy who left the [Oxford] Movement for Rome" in the period of 1845-1855). The number of secessions was relatively small. The experience in the United States was similar, see CHORLEY, *supra* note 48, *passim*. "Going to Rome" has caused a great deal of disquiet in Anglican and other circles. See PATRICK ALLITT, *CATHOLIC CONVERTS: BRITISH AND AMERICAN INTELLECTUALS TURN TO ROME 5-6* (1997); Dwight Longenecker, *Introduction to THE PATH TO ROME: MODERN JOURNEYS TO THE CATHOLIC CHURCH 1, 1-3* (Dwight Longenecker ed., 1999); ARNOLD LUNN, *ROMAN CONVERTS* (1924); D. G. PAZ, *THE PRIESTHOODS AND APOSTASIES OF PIERCE CONNELLY: A STUDY OF VICTORIAN CONVERSION AND ANTICATHOLICISM*, at xiv (1986). Whatever the numbers or the consequences might be of "going to Rome," I did so, becoming a Roman Catholic on Pentecost, 1992.

⁴⁸⁵ PROTESTANTISM, *supra* note 35, at 172.

⁴⁸⁶ Latitudinarianism was a late seventeenth century expression of moderate Anglican churchmanship, born of the strife and discord of that century. It placed relatively little importance on doctrine as it sought to advance pan-Protestant unity in the face of "the threat of [Roman] Catholic insurgency." W.M. SPELLMAN, *THE LATITUDINARIANS AND THE CHURCH OF ENGLAND, 1660-1700*, at 9 (1993).

⁴⁸⁷ See GEORGE FREDERICK POLLARD, *ECCLESIA ANGLICANA 274-75* (1930) (arguing from a High Church stance that the Anglican Church, like the Church of the East, takes the *Via Media*, unlike "the Church of Rome [which] has added to the Faith once for all delivered, while the Protestant bodies have taken away from that Faith"); ALFRED FAWKES, *THE GENIUS OF THE ENGLISH CHURCH 24, 105, 110* (1917) (arguing from a non-High Church position that the Church of England reflected the English national instinct to "distrust extreme solutions, and to avoid decisive action," and instead to "temporize, and take a middle course," finding fault with both the Evangelical and the Tractarian movements, and stating that the English Church's "characteristic 'Via Media' is not, and is not likely to become, a middle term between Rome and Protestantism.").

Episcopalian Church,⁴⁸⁸ and serious conflicts and disagreements ensued.⁴⁸⁹ Nonetheless the warring factions, good Anglicans all, largely succeeded in keeping their struggles in house. By the time of National Prohibition, a peace of sorts had settled on the Episcopal Church, a peace that legitimized a “catholic” understanding of the Christian faith and liturgical practice.⁴⁹⁰

Throughout the history of the Episcopal Church, the vast majority of Episcopalians, medianist or not, could rightly claim to be Protestants when it came to the doctrine of the Eucharist. Some of them even shared the Zwinglianism of the evangelical Protestants. Those Episcopalians who held Dynamic Receptionist, Receptionist, or Virtualist doctrines of the Eucharist could at least trace their beliefs back to John Calvin and Thomas Cranmer, Protestants in good standing. Perhaps even the Consubstantiationists could argue that at least they rejected the Roman Catholic doctrine of Transubstantiation. Only those Episcopalians who believed in Transubstantiation (or something very much akin to it) could—and often did—have their Anglican credentials challenged.⁴⁹¹

In varying degrees, from less so to more so, Dynamic Receptionism, Receptionism, Virtualism, Consubstantiation and Transubstantiation are all “higher” Eucharistic theologies than Zwinglianism. Anglican Low Churchmen tended to Zwinglianism, Dynamic Receptionism, and Receptionism,⁴⁹²

⁴⁸⁸ See CHORLEY, *supra* note 48, at 133 (stating that “[t]wo movements sprang from the revival of the American Church in 1811—the Evangelical and the high Church Movement.”).

⁴⁸⁹ *Id.* at *passim*.

⁴⁹⁰ *Id.* at 390-91 (noting that the fight between High and Low Church factions had largely reduced itself to a question of proper ritualistic practices, resulting in a “pro-Low Church” canon in 1874 outlawing certain “catholic” practices, but also noting that in 1904 “this canon was dropped”). Notwithstanding the canon, the growing insinuation of Anglo-Catholicism in the nineteenth century American church led several Low Churchmen to depart and establish a splinter church, The Reformed Episcopal Church, which specifically rejects and denies “high church” or “Anglo-Catholic” Eucharistic doctrine. See JAMES THAYER ADDISON, *THE EPISCOPAL CHURCH IN THE UNITED STATES, 1789-1931*, at 212-13 (1951).

⁴⁹¹ ADDISON, *supra* note 490, at 158-63 (discussing, *inter alia*, objections in 1843 to the ordination of a seminarian who did not “deny” the teachings of the Council of Trent); WILLIAM WILSON MANROSS, *A HISTORY OF THE AMERICAN EPISCOPAL CHURCH* 301-02 (1950) (remarking on the refusal in the mid-1870s to confirm the election of two Anglo-Catholics nominated as Episcopal Bishop of Illinois).

⁴⁹² See GEORGE HODGES, *THREE HUNDRED YEARS OF THE EPISCOPAL CHURCH IN AMERICA* 139 (1906) (stating that “[a]s regards the Holy Communion, . . . [t]he high Churchman held a doctrine . . . akin to that which was held in the Middle Ages . . . [whereas t]he low Churchman held a doctrine of the Lord’s Supper akin to that which was held by the Swiss reformers.”).

Anglican High Churchman typically held to a Virtualist understanding of the Eucharist,⁴⁹³ and Anglo-Catholics, heirs of the Tractarians of the nineteenth century and of the Henrician Anglo-Catholics, held views that were functionally quite similar to consubstantiationist and transubstantiationist doctrine although formalistically different because of a need to attempt some reconciliation with the rejection of Transubstantiation in the Thirty-Nine Articles of the Church of England.⁴⁹⁴ Not surprisingly, Low Churchmen tended to enjoy better relations with evangelical Protestants than High Churchmen and Anglo-Catholics did.⁴⁹⁵ Low Churchmen, therefore, served as a valuable theological and cultural bridge between Episcopalians and evangelical Protestants.

The "higher" Eucharistic theologies of virtually all the Episcopalian parties mapped or followed the contours of the fundamental structural logic of the Act of Toleration. The Act accorded Anglicans a higher *legal* status. The Eucharistic theologies of Anglicans—and Episcopalians—also conferred a higher *theological* status.⁴⁹⁶ In some sense, even if resented by evangelical Protestants, Episcopalians enjoyed a privileged *cultural* position due to their higher Eucharistic theologies.

It is possible that the higher status of Episcopalians came, in whole or in part, from the refined and elegant beauty of the Book of Common Prayer and its liturgies,⁴⁹⁷ quite without regard to the Eucharistic theology of either the Book or those who worshipped in accordance with it. Evangelical

⁴⁹³ See ECHLIN, *supra* note 482, at 213-16 (showing that the Eucharistic theology of the High Churchman, Samuel Seabury, the first American Episcopal Bishop, was Virtualist).

⁴⁹⁴ See HARDELIN, *supra* note 168, at 123-219 (engaging in a careful and meticulous examination and analysis of the thought, as it changed over time, of various important figures in the Tractarian or Oxford Movement, as they came ever and ever closer to a Catholic Eucharistic Realism); MANROSS, *supra* note 491, at 273 (noting that the Anglo-Catholics, heirs of the Tractarians "tended to express a strong belief in the Real Presence, sometimes even approaching the Roman Catholic theory of Transubstantiation.").

⁴⁹⁵ See CHORLEY, *supra* note 48, at 273-81; Charles Newton Brickley, *The Episcopal Church in Protestant America, 1800-1860*, at 156-57 (1946) (unpublished Ph.D. dissertation in History and International Relations, Clark University) (on file with author).

⁴⁹⁶ However much some evangelical Protestants might despise "high church," one cannot gainsay the reality of "high church" theologies that go back to the beginning of Christianity. See ADOLF VON HARNACK, *HISTORY OF DOGMA* (Neil Buchanan trans., 1976) (1893) (making a liberal Protestant critique of "high church" or Catholic tradition and dogma). For a discussion of von Harnack's liberal evangelical Protestantism, see WILHELM PAUCK, *HARNACK AND TROELTSCH: TWO HISTORICAL THEOLOGIAN* 5, 22-23 (1968).

⁴⁹⁷ See CHORLEY, *supra* note 48, at 103-04, 192, 270.

Protestants, with their aversion to liturgy,⁴⁹⁸ might disparage the Book of Common Prayer at least as much as they disliked non-Zwinglian Eucharistic doctrine. Furthermore, the Book of Common Prayer is not theologically neutral.⁴⁹⁹ There are, undoubtedly, functional, liturgiological links and connections between its “high” prose and “high”—or at least “higher”—Eucharistic theologies. The Book has to accommodate the theologies of those who use it. At a minimum, throughout most of its history, it has had to accommodate Zwinglianism, Dynamic Receptionism, Receptionism and Virtualism, and from the mid-nineteenth century on, Consubstantiation and Transubstantiation as well. It may take some doing to get the Book of Common Prayer to do all of this.⁵⁰⁰ However, the evident devotion of Anglicans of all theological persuasions to the Book of Common Prayer would suggest that the Book “works” for Anglicans. Finally, “high” prose, like “high” art, has cultural relevance. The Book may function, for present purposes, therefore, as a cultural proxy.⁵⁰¹

It may be no accident, therefore, that a religion that came to be seen as the special preserve of the wealthy, the “high and mighty,” as is shown below,⁵⁰² would in strictly theological or liturgical terms also be or become “high and mighty.” If the Gilded Age did anything for America, it established that it was possible to have extraordinary gulfs between the rich and the rest—whether or not the gulf did the country any good. Being “high and mighty,” therefore, took on a more extreme and palpable form as an expression, a status, a cultural norm that stood at a considerable distance from the values of the non-rich. As noted above, the resolution of the strife between High and Low Churchmen had, by the time of National Prohibition, largely come out on the High side, not the

⁴⁹⁸ See *supra* notes 100-04 and accompanying text.

⁴⁹⁹ See ECHLIN, *supra* note 482, *passim* (arguing that the Book of Common Prayer has increasingly, over time, come to express a theology that is essentially Virtualist); BYRON D. STUHLMAN, EUCHARISTIC CELEBRATION 1789-1979, at 162-63 (1988) (stating that the 1979 Book of Common Prayer reflects a “virtualist” theology of the Eucharist).

⁵⁰⁰ See DIX, *supra* note 37, at 716 (stating that the Book of Common Prayer “is patient, however awkwardly, of a different interpretation from its author’s [i.e. Thomas Cranmer].”).

⁵⁰¹ See WILLIAM ADAMS BROWN, THE CHURCH IN AMERICA: A STUDY OF THE PRESENT CONDITION AND FUTURE PROSPECTS FOR AMERICAN PROTESTANTISM 83 (1922) (remarking that “[m]ore than any other American church the Episcopal lays stress upon beauty and dignity of worship, and side by side with its parish churches it is building stately cathedrals in the great centres of population which accommodate large numbers of worshippers and minister to the community as a whole.”).

⁵⁰² See *infra* note 508-13 and accompanying text.

Low side, the Low Churchmen being, at least for the moment, in retreat.⁵⁰³

3. Social Dynamics and Cultural Hegemony: The Case for Propitiation in the Face of Evangelical Protestant Envy and Resentment

The social status of Episcopalians matched their theological and liturgical status. Admittedly, at the beginning of our national history, the future of Anglicanism in America was far from bright. Many Episcopalian clergy and laity, especially in New England, had been Tories, favoring England in the Revolutionary War.⁵⁰⁴ Thus the post-Revolutionary church was "small and feeble, and still suspect by reason of its English origin."⁵⁰⁵ But shortly thereafter, the Episcopalian Church had become a bastion for the urban privileged,⁵⁰⁶ a church for the refined.⁵⁰⁷ The power and social clout of Episcopalians emerged in full force in the decades following the Civil War,⁵⁰⁸ which is to say, during the push for National Prohibition. Nevertheless, the Episcopal Church "could not effectively reach the rank and file."⁵⁰⁹

Episcopalians enjoyed high status and prestige, not to mention power and social clout, even if they constituted only a minority of the American population. As such, their situation paralleled that of the Anglicans responsible for the Act of Toleration, sufficient to cause the shift from *legal* hegemony to *cultural* hegemony and to retain that dominance over time.

⁵⁰³ See CHORLEY, *supra* note 48, at 424 (stating that "the remnant of the Evangelicals remained to tread softly and speak low for more than half a century [after 1873], when they were born again").

⁵⁰⁴ ROBERT W. PRICHARD, A HISTORY OF THE EPISCOPAL CHURCH 118-19 (1991).

⁵⁰⁵ CHORLEY, *supra* note 48, at 27.

⁵⁰⁶ *Id.* at 28-29.

⁵⁰⁷ ADDISON, *supra* note 490, at 272, 379.

⁵⁰⁸ See KIT KONOLIGE & FREDERICA KONOLIGE, THE POWER OF THEIR GLORY, AMERICA'S RULING CLASS: THE EPISCOPALIANS 29, 65-66 (1978). The high position of Episcopalians continues to the present day. See, e.g., THE GALLUP ORGANIZATION, THE SPIRITUAL HEALTH OF THE EPISCOPAL CHURCH (1989) (noting that the household income of Episcopalians appears to be considerably above the national average).

⁵⁰⁹ See LATOURETTE, *supra* note 29, at 1234.

a. Evangelical Protestant Crisis: Josiah Strong's Critique of Socialism, Wealth, and the City

The unprecedented growth and development of industrial capitalism in the years following the American Civil War left many evangelical Protestants at a loss as they sought to accommodate new economic realities to the Protestant Empire. American Protestantism divided on the question. The Gospel of Wealth taught that the growing concentration of great wealth in the hands of the capitalist classes and the growing gulf between the rich and the laboring poor represented a natural and rational development which should be allowed to take its course because it was, perhaps, even divinely inspired.⁵¹⁰ But other Protestants believed that some aspects of these developments warranted not only pause but also corrective action in order to attenuate the economic extremes generated by American post-Civil War economic growth and development. These social reformers, not altogether comfortable with all of the implications of a theology rooted in alienation and rejectionism, tended to group themselves under the banner of the Social Gospel.⁵¹¹

⁵¹⁰ See PAUL H. BOASE, *THE RHETORIC OF CHRISTIAN SOCIALISM* 12-13 (1969) (quoting Russell Herman Conwell who "assured his listeners that 'there is not a poor person in the United States who was not made poor by his own shortcomings, or the shortcomings of someone else'" and who "exhorted his audiences 'to get rich . . . because to make money honestly is to preach the gospel . . . Ninety-eight out of one hundred of the rich men of America are honest [and t]hat is why they are rich.'). Henry Ward Beecher, one of Lyman Beecher's children, put it even more directly: "God has intended the great to be great and the little to be little." *Id.* at 17. Sydney Mead describes a Gilded Age preacher who suggested that begging "is prompted by a low, indolent spirit which seeks to gratify its selfish lusts, at the expense of the virtuous and good . . . [and] four-fifths, if not nine-tenths, of all our street beggars and paupers are of one nationality and of one form of religion." MEAD, *supra* note 270, at 159. Mead described the tendency of the age to view poverty as the result of sin. *Id.* at 160-61.

⁵¹¹ The Social Gospel was a "Protestant crusade for the kingdom of God and against social evil." *THE SOCIAL GOSPEL IN AMERICA, 1870-1920*, at 3 (Robert T. Handy ed., 1966) [hereinafter *SOCIAL GOSPEL*]. Its origins lie in "the patterns of thought and action that had long been characteristic of American Protestantism." *Id.* at 4. It was thus an expression of the Protestant Empire.

The Social Gospel had, however, no coherent *political* point of view, embracing within its fold Protestant ministers with a wide range of attitudes "from right wing to radical." See BOASE, *supra* note 510, at 21-24. Yet, there may be a certain overarching coherence in the Social Gospel movement, as a matter of *theology*, due largely to the fact that it was based on "a conviction that the social principles of the historical Jesus could serve as reliable guides for both individual and social life in any age." See *SOCIAL GOSPEL, supra*, at 10. *But see* MEAD, *supra* note 270, at 178 (stating that 'the social gospel movement cannot be defined theologically or institutionally. It was never incorporated in any independent new organizations, it did not result in any new denominations . . . It was in reality a movement in the denominations looking for

The division between the two ideologies⁵¹² was real but also lopsided. In the waning years of the nineteenth century, the predominant opinion held by the loyalists of the Protestant Empire favored the Gospel of Wealth.⁵¹³ Herbert Spencer became an icon for the rich, the comfortable, the smug, and the complacent of the Gilded Age.⁵¹⁴ And Andrew Carnegie, the industrialist—or robber baron,⁵¹⁵ if one prefers—produced the “bible” of the Gospel of Wealth.⁵¹⁶ Perhaps the Progressive Movement⁵¹⁷ of the first two decades of the twentieth century

theological roots.”).

⁵¹² The struggle between the Social Gospel and the Gospel of Wealth largely concerned the locus of salvation—the individual or society. The Gospel of Wealth can be described as “Private” Protestantism, whereas the Social Gospel can be described as “Public” Protestantism. See *RIGHTEOUS EMPIRE*, *supra* note 197, at 178-79.

⁵¹³ See *HENNESEY*, *supra* note 197, at 173. See also *BOASE*, *supra* note 510, at 11.

⁵¹⁴ Spencer’s doctrine of Social Darwinism provided ample grist for the Gospel of Wealth’s mill. *BOASE*, *supra* note 510, at 13-18. See also *RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT* 31-50 (perm. ed., rev. vol. 1959) (1944) (discussing Spencer’s views). Spencer’s sociology generated a “language [that] has become a standard feature of the folklore of individualism.” *Id.* at 50. Spencer’s great sociological disciple in America was William Graham Sumner.

He provided his age with a synthesis which, though not so grand as Spencer’s was broader in its stark and candid pessimism. Sumner’s synthesis brought together three great traditions in western capitalist culture: the Protestant ethic, the doctrines of classical economics, and Darwinian natural selection. Correspondingly, in the development of American thought Sumner played three roles; he was a great Puritan preacher, an exponent of the classical pessimism of Ricardo and Malthus, and an assimilator and popularizer of evolution. His sociology bridged the gap between the economic ethic set in motion by the Reformation and the thought of the nineteenth century, for it assumed that the industrious, temperate, and frugal man of the Protestant ideal was the equivalent of the “strong” or the “fittest” in the struggle for existence; and it supported the Ricardian principles of inevitability and *laissez faire* with a hard-bitten determinism that seemed to be at once Calvinistic and scientific.

Id. at 51. See also *AHLSTROM*, *supra* note 26, at 789 (describing “the American’s basic contempt for poverty, the ‘hard shell of sanctified realism’ fostered by the Puritan ethic in both its pious and secularized forms The Puritan doctrine of vocation avoided a static interpretation of the dominical words, ‘You have the poor always with you’ (*Matt.* 26:10). Because God called nobody unto mendicancy and inactivity, [and thus] those who begged and did not work either were being or ought to be punished for their sins.”).

⁵¹⁵ See *SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT* 30-31 (3d ed. 1993) (defining the term robber baron to include rogue financiers, businessmen who “aimed for monopoly control . . . but not simply to control prices . . . [who] determined to replace fierce industrial competition with sound commercial order,” and “rapacious men capable of criminal acts for commercial gain, but who nevertheless worked within the letter (if not the spirit) of the law”).

⁵¹⁶ See *ANDREW CARNEGIE, THE GOSPEL OF WEALTH, AND OTHER TIMELY ESSAYS* (Edward C. Kirkland ed., 1962).

⁵¹⁷ Herbert Croly wrote the definitive work on progressivism. His major thesis was: “[i]f the responsible managers of large industries of the country and their political allies lost public confidence, it was because of their own flagrant misdeeds The ill-

will of public opinion could be stirred up against them, because they had unscrupulously violated the laws, and abused their opportunities." HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 5 (1914). Croly, of course, laid the blame at the feet of robber barons. See CASHMAN, *supra* note 515. The loss of public confidence opened the door to a more searching, if not radical, inquiry into our political institutions. CROLY, *supra*, at 28. It has been suggested that there is no agreement on the meaning of "Progressivism." JOHN D. BUENKER, *URBAN LIBERALISM AND PROGRESSIVE REFORM*, at vii (1978). But see DAVID M. KENNEDY, *INTRODUCTION TO PROGRESSIVISM: THE CRITICAL ISSUES*, at vii (David M. Kennedy ed., 1971) (arguing that the heart of Progressivism was, quoting William Allen White, the use of "the government as an agency of human welfare," having "reject[ed] the laissez-faire determinism that had rendered government so unable to control the economic expansion that followed the Civil War").

One can find parallels between Progressivism and the Social Gospel. Both represent impulses having their origins in the Protestant Empire. "Catholics were not prominent in Progressive Era reform movements." HENNESEY, *supra* note 197, at 210. Indeed, it was only in 1919, when the Progressive movement had largely spent its force, that the American Catholic Church spoke in a meaningful way to Progressive reform, showing that it could be reconciled with Leonine Social Catholicism, see Leo XIII, *Rerum Novarum*, in *CATHOLIC SOCIAL THOUGHT* 14-39 (David J. O'Brien et al. eds., 1992). See also JOSEPH M. MCSHANE, "SUFFICIENTLY RADICAL": CATHOLICISM, PROGRESSIVISM AND THE BISHOPS' PROGRAM OF 1919 (1986). One writer has sought carefully to distinguish between the Progressive movement, a Protestant phenomenon, and "urban liberalism," a political expression dominated by Catholics and Jews. BUENKER, *supra*, viii. ("urban liberalism' is a reasonably precise description of the complex of social, economic, and political positions taken by urban new stock lawmakers in [New York, New Jersey, Connecticut, Rhode Island, Massachusetts, Ohio, and Illinois] . . .").

And both the Social Gospel and Progressivism were silent—or worse—on matters of race and religion. Croly in his masterful piece of political science, only referred to slavery and the Civil War in passing, and said nothing at all about the problem of racism during his time, or at any other time in American history, as if the various political conceptions of democracy that he so carefully treats have absolutely nothing to do with race. A more perceptive commentator has observed:

The many terrorized and disgruntled southern Negroes who sought refuge in northern cities during the Progressive era found no relief from violence and omnipresent discrimination. They also found that northern progressives offered no plan of social redemption for their oppressed numbers. An aspiring white middle class condemned the malefactors of great wealth, but they failed to condemn the great malefactors of race who sought eternal degradation of the Negro. The trenchant fact was that the overwhelming majority of northern progressives had acquired a racial philosophy akin to that of the Negro-baiting politicians of the South. The only difference was that the racism of the northern progressives was often more circumspect, more subtle. It was no subtlety, however, that the end of the Progressive era saw the Negro at the very nadir of his harried existence.

DAVID W. SOUTHERN, *THE MALIGNANT HERITAGE: YANKEE PROGRESSIVES AND THE NEGRO QUESTION: 1901-1914*, at 2 (1968).

The blind spot, the malignancy, extended even beyond the minions and the reaches of the Protestant Empire. The 1919 Catholic program of industrial democracy referred to above was completely silent on the matter of racial and religious justice, contenting itself to deal with matters of industrial democracy. See MCSHANE, *supra*. And Southern relates that even socialists were, by and large, racists. SOUTHERN, *supra*, at 72-73. This blind spot, this obtuseness on the race question, continues to play itself out in otherwise "respectable" scholarship. See, e.g., TIMBERLAKE, *supra* note 9, at 120 (writing that liquor interests could corrupt the black vote, yet failing to display the curiosity or the interest in determining whether this was in fact the case. For a more honest treatment of Progressivism, southern style, see Ruth, *supra* note 210. But

was a victory of sorts for the apostles of the Social Gospel.⁵¹⁸ But during the nineteenth century, the Social Gospel was distinctly a minority voice.

Nonetheless, in the waning years of the nineteenth century, Josiah Strong, a Social Gospeler, rather than a disciple of the Gospel of Wealth,⁵¹⁹ seemed to capture the spirit and feeling of evangelical Protestant America. He “had gauged correctly the mind and mood of Protestant America and, in the Quaker phrase, spoke ‘to his readers’ condition.”⁵²⁰ Strong did so by the publication of *Our Country*, “a historical document of major importance.”⁵²¹

Strong identified several “perils” confronting the America of the Gilded Age: (1) immigration,⁵²² (2) Romanism,⁵²³ (3) religion and the public schools,⁵²⁴ (4) Mormonism,⁵²⁵ (5) intemperance,⁵²⁶ (6) Socialism,⁵²⁷ (7) wealth,⁵²⁸ and (8) the

Timberlake nevertheless provides critical insights into both Progressivism and Prohibition. Racism was so deeply ingrained in both social movements that bracketing, if not condoning, racism may in and of itself yield insight.

And yet, as with the Social Gospel, see CALVIN S. MORRIS, REVERDY C. RANSOM: BLACK ADVOCATE OF THE SOCIAL GOSPEL (1990), people who were neither white, nor male, nor both, did address issues of segregation, family relations, labor, lynchings, and suffrage, seeking to have—and perhaps succeeding in having—a positive impact on this large and broad reformist impulse in the Protestant Empire and having it address the concerns of the excluded and the marginalized “others.” See generally GENDER, CLASS, RACE AND REFORM IN THE PROGRESSIVE ERA (Noralee Frankel et al. eds., 1991). The contribution of these “outsiders,” of course, has been largely ignored.

⁵¹⁸ The Social Gospel achieved its greatest measure of success during the Progressive era. See, e.g., MEAD, *supra* note 270, at 182; SOCIAL GOSPEL, *supra* note 511, at 3; RONALD C. WHITE, JR. & C. HOWARD HOPKINS, THE SOCIAL GOSPEL: RELIGION AND REFORM IN CHANGING AMERICA, at xi (1976). See also TIMBERLAKE, *supra* note 9. This makes perfect sense because of the profound similarities between these two broad impulses of the Protestant Empire, see *supra* notes 312, 317, although some tension existed between the two. WHITE & HOPKINS, *supra*, at xix. But the Social Gospel never attained the backing of a majority of Protestants. See, e.g., RIGHTEOUS EMPIRE, *supra* note 197, at 183. Fundamentalism, as we use that term today, can be explained as a reaction to the Social Gospel. MEAD, *supra* note 270, at 183. Its political equivalent would be an Americanist conservatism.

⁵¹⁹ See generally LUKER, *supra* note 158. Strong may not have been a major figure in the Social Gospel movement, for that distinction appears to belong to Walter Rauschenbusch and Washington Gladden, see SOCIAL GOSPEL, *supra* note 511, but he was nonetheless a man of no little consequence in the Protestant America of his time. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 303 (2001); T. Jeremy Gunn, *Religious Freedom and Laïcité*, 2004 BYU L. REV. 419, 449 (2004).

⁵²⁰ Jurgen Herbst, *Introduction* to STRONG, *supra* note 27, at ix.

⁵²¹ *Id.*

⁵²² STRONG, *supra* note 27, at 41-58.

⁵²³ *Id.* at 59-88.

⁵²⁴ *Id.* at 89-106.

⁵²⁵ *Id.* at 107-16.

⁵²⁶ *Id.* at 117-32.

⁵²⁷ STRONG, *supra* note 27, at 133-55.

city.⁵²⁹ As discussed above, Strong was strongly anti-Catholic.⁵³⁰ But, of interest here are Strong's views on Socialism, wealth and the city. In his analysis and treatment of these three "perils" something of the nature of the relations between predominantly middle class evangelical Protestants and disproportionately upper class Episcopalians on the question of temperance-prohibition becomes clear.

Strong's criticism of Socialism focused on various strands of European or German Socialism because of their anarchistic and nihilistic tendencies.⁵³¹ However, Strong did not content himself merely to flagellate "German" Socialism. He conceded that "the great German [i.e. Protestant] Reformation of the sixteenth century" was a part of "an irresistible drift toward individualism"⁵³² which, if left unchecked, would become "favorable to the spread of socialism, as advocated by the [anarchists]."⁵³³ Thus, Protestantism was itself part of the problem.

Second, Strong tarred the radical socialism that he disliked with the brush of materialism.⁵³⁴ But it is difficult to see how one could avoid tarring the plutocrats of his age with the same brush. Strong was obliged, therefore, to lay much of the blame at the feet of the very tribunes of the Empire who made the rules. It is a fair assumption, of course, that a good number of these tribunes were or were becoming Episcopalians.⁵³⁵

Strong saw that "mechanical invention" tended to widen the gulf between the social classes, even making them hereditary, thereby enhancing the appeal of socialism's dream of equality.⁵³⁶ But the problem of "mechanical invention" and the widening gulf between the social classes was not the fault of immigrants and their alleged alien and strange ways, beliefs and practices. Rather this problem derived from the heart and soul of the Protestant Empire.⁵³⁷

⁵²⁸ *Id.* at 156-70.

⁵²⁹ *Id.* at 171-86.

⁵³⁰ See *supra* notes 161-69 and accompanying text.

⁵³¹ See STRONG, *supra* note 27, at 134-39.

⁵³² *Id.* at 139.

⁵³³ *Id.* at 139-40.

⁵³⁴ *Id.* at 140.

⁵³⁵ See *supra* notes 501-06 and accompanying text.

⁵³⁶ STRONG, *supra* note 27, at 140-41.

⁵³⁷ Strong also pressed the point that the wages paid to the average working man were not enough to support him and his family. *Id.* at 142-43. Consequently, wives and children were forced to work. Strong insisted that "[t]hese children ought to be in the school instead of in the mill or the mine." *Id.* at 143.

Strong similarly understood that the monotony of the assembly line would give rise to discontent,⁵³⁸ and that technological change and development would lead to the unemployment of middle-aged men too old to be retrained and who would, "unless anchored by a family, probably turn[] tramp."⁵³⁹ Strong also feared "a strong tendency toward combination and monopoly, which is one of the darkest clouds on our industrial and social horizon."⁵⁴⁰

This is modern and republican feudalism. These American barons and lords of labor have probably more power and less responsibility than many an olden feudal lord. They close the factory or the mine, and thousands of workmen are forced into unwilling idleness. The capitalist can arbitrarily raise the price of necessities, can prevent men's working, but has no responsibility, meanwhile, as to their starving. Here is "taxation without representation" with a vengeance. We have developed a despotism vastly more oppressive and more exasperating than that against which the thirteen colonies rebelled.⁵⁴¹

In analyzing the "peril" of wealth, Strong elaborated on the themes and the analysis that he had developed in connection with his critique of Socialism. He granted that the germ of the evil lay in "the very blood of Anglo-Saxons."⁵⁴² This time the seminal danger was *mammonism*, the love and worship of money.⁵⁴³ And there were peculiar features of his beloved Protestant Empire that made matters even worse, especially its aristocracy of wealth.⁵⁴⁴ The love of money had led to the corruption of popular morals⁵⁴⁵ as well as the ballot-box.⁵⁴⁶ Mammonism threatened Americans with a "gross materialism,"⁵⁴⁷ and the perils of "luxuriousness."⁵⁴⁸ Even worse, it had led to a "congestion of wealth."⁵⁴⁹

⁵³⁸ *Id.* at 144-46

⁵³⁹ *Id.* at 146.

⁵⁴⁰ STRONG, *supra* note 27, at 149.

⁵⁴¹ *Id.* at 150.

⁵⁴² *Id.* at 160.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.* Strong failed to note that to the extent that the American class structure was becoming hereditary, see STRONG, *supra* note 27, at 140-41, the American aristocracy might conceivably come to rest on birth as much as on wealth and that such a development could have a considerable impact on the strength, character, and shape of American mammonism.

⁵⁴⁵ *Id.* at 162.

⁵⁴⁶ *Id.* at 163.

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.* at 165.

⁵⁴⁹ STRONG, *supra* note 27, at 167.

Strong declared that “[t]he classes from which we have most to fear are the two extremes of society—the dangerously rich and the dangerously poor; and the former are much more to be feared than the latter.”⁵⁵⁰ His objection to the “dangerously poor” rested to a significant degree on religious grounds: these people, particularly in large cities, tended to be Catholics.⁵⁵¹ Strong has reinforced his bias against Catholics by associating Catholics with the “worst” of the urban poor. It is no small wonder, therefore, that his views found widespread support among the white evangelical Protestants of his day. But his objection to the “dangerously rich” had a religious component to it as well. Strong thundered that this latter class needed to “discover that they are not proprietors, apportioning their own, but simply trustees or managers of God’s property.”⁵⁵² There was a Protestant duty to treat great wealth as a divine trust. To the extent that the “dangerously rich” did not, then they had violated a religious duty in much the same way that the “dangerously poor” had violated their duty to become card-carrying evangelical Protestants.

Nonetheless, the tone of the criticism of the two classes was different. Fear of the poor may be aggravated by the sense of differentness or alienation. Envy, or aspiration, or optimism, or hopefulness may, ironically, temper fear of the rich,⁵⁵³ particularly if the rich were the soteriological elite.⁵⁵⁴ The fact that Strong appealed to the rich to fund his missionary efforts to turn the immigrant poor into Protestants⁵⁵⁵ certainly helped to temper the criticism, no doubt, and indeed, may simply be an acknowledgement that the rich are that elite.

The normative Eucharistic theology of the Protestant Empire rests in alienation and the doctrine of unbridgeable distances.⁵⁵⁶ Gulfs between social classes should not offend that

⁵⁵⁰ *Id.* at 167–68.

⁵⁵¹ Strong’s argument focused on “dangerous elements” in cities. *See id.* at 171–86. He concluded that “the dangerous elements of our civilization are each multiplied and all concentrated in the city.” *Id.* at 177. He declared that Romanism found its chief strength in cities, *id.* at 173, and that the Catholic urban vote was subject to the control of the pope. STRONG, *supra* note 27, at 185. Strong also stated that the poor in large cities were worse off than the poor in smaller communities, *id.* at 174. The city was the situs, therefore, of the “dangerously poor” who were, in large numbers, Catholics.

⁵⁵² *Id.* at 221.

⁵⁵³ Strong himself appealed to the rich to fund his missionary work, surely an expression of optimism and hopefulness, whether or not also an expression of envy. *See infra* notes 546–551 and accompanying text.

⁵⁵⁴ *See supra* notes 509–10 and accompanying text.

⁵⁵⁵ *See STRONG, supra* note 27, at 226.

⁵⁵⁶ *See supra* Part II.A.2.a.

theology, although some, like Strong, were surely troubled by these social chasms. Perhaps, however, the problem was not the social gulfs, but rather that if the gulfs grew too wide, the have-nots would rise up against the rich thereby causing the divinely ordained gulfs to disappear. The incoherence of the Social Gospel⁵⁵⁷ and of Progressivism⁵⁵⁸ may now be explained. The task at hand was the maintenance of the soteriological elite, even if the excesses of that elite needed to be controlled for its own good.

But the elite, the rich and powerful, needed more than criticism of their ways by the likes of Josiah Strong. In a way that is so typically American, Strong, the Congregationalist missionary, declared money to be the solvent in which the moral and the providential would dissolve the dross and the impurities and the perils would be overcome. He called for the rich and the powerful, perhaps to atone for their sins of greed, mammonism, and appalling lack of social responsibility for their economic decisions, to donate large sums of money to fund the voluntary efforts of men like, well, Josiah Strong. He declared "[f]or Christians to apprehend their true relations to money, and the relations of money to the kingdom of Christ and its progress in the world, is to find the key to many of the great problems now pressing for solution."⁵⁵⁹

In other words, "money power" had to be "Christianized."⁵⁶⁰ Strong bemoaned the fact that far too many Christians "give only a trifle or nothing at all for the work of missions,"⁵⁶¹ claiming that "the world would have been evangelized⁵⁶² long ago, if Christians had perceived the relations of money to the Kingdom, and had accepted their stewardship."⁵⁶³ Strong wanted to use the money that stewardship would produce so as to increase urban and western missions, work which, given Strong's notion of "peril," was of the utmost importance and necessity.⁵⁶⁴ For Strong,

⁵⁵⁷ See *supra* notes 509-18 and accompanying text.

⁵⁵⁸ See *supra* note 516 and accompanying text.

⁵⁵⁹ STRONG, *supra* note 27, at 219.

⁵⁶⁰ *Id.* at 220.

⁵⁶¹ *Id.* at 238.

⁵⁶² Strong appears to have moved a considerable distance from his earlier insistence that the Anglo-Saxon race would dominate the other races of the world, instead using the much milder language of "evangelization." See *supra* notes 198-203 and accompanying text. One does not have to be a cynic to understand that "evangelization," for Strong, is merely racial domination by another name.

⁵⁶³ STRONG, *supra* note 27, at 242.

⁵⁶⁴ *Id.* at 251-56.

propitiation of the wealthy was an indispensable element of the work of the Protestant Empire.

Strong fully appreciated the importance of the city. For him it was "the nerve center of our civilization. It is also the storm center."⁵⁶⁵ For "[t]he city has become a serious menace to our civilization, because in it, excepting Mormonism, each of the dangers we have discussed is enhanced, and all are focalized. It has a peculiar attraction for the immigrant."⁵⁶⁶ For this reason, Romanism and the saloon find their home in the city.⁵⁶⁷ And yet, wealth also found its home in America's metropolitan centers: "[h]ere the sway of Mammon is wildest, and his worship the most constant and eager Here, also, is the *congestion* of wealth in the severest The rich are richer, and the poor are poorer, in the city."⁵⁶⁸

The mission goal of Protestantization simply ran up against a brick wall in American cities. Strong lamented the relatively small number of Protestant churches in large urban centers like Boston, St. Louis, Cincinnati, Buffalo, and Chicago:⁵⁶⁹ too few evangelical Protestant churches to do the "manifestly destined" work of Protestantization. He declared that "we may say that the city, where the forces of evil are massed, and where the need of Christian⁵⁷⁰ influence is peculiarly great, is from one-half to one-quarter as well supplied with churches as the nation at large. And [evangelical Protestant] church accommodations in the city are growing more inadequate every year."⁵⁷¹

After lambasting cities and their inhabitants for not being evangelical Protestants and evangelical Protestants for not building enough evangelical Protestant churches in American cities, Strong then took up the cudgels against the government of large cities, calling it "a failure,"⁵⁷² and "degenerating into government by a 'boss.'"⁵⁷³ Under Strong's theory, cities would soon be controlled by immigrant non-evangelical Protestants, people "who themselves most need to

⁵⁶⁵ *Id.* at 171.

⁵⁶⁶ *Id.* at 172.

⁵⁶⁷ *Id.* at 173.

⁵⁶⁸ STRONG, *supra* note 27, at 174.

⁵⁶⁹ STRONG, *supra* note 27, at 177-78.

⁵⁷⁰ Here Strong displays the annoying tendency to equate evangelical Protestantism with Christianity, as if Catholics, Eastern Orthodox and Oriental Orthodox are somehow beyond the pale.

⁵⁷¹ *Id.* at 178.

⁵⁷² *Id.* at 180.

⁵⁷³ *Id.* at 181.

be controlled.”⁵⁷⁴ In his peroration, Strong tied the upper and lower classes together, both being the source of threat and danger. Strong feared “centralized [political] power,” the power of the “boss,” the capitalist and the corporation, the liquor interests, the Mormon Church, and most severely, the pope.⁵⁷⁵ Strong lumped together the upper-class capitalist with all of the socialists, liquor traffickers and non-Protestant religious leaders who, in one way or another, served or represented the lower classes. He wrote: “These several dangerous elements are singularly netted together, and serve to strengthen each other. It is not necessary to prove that any *one* of them is likely to destroy our national life, in order to show that it is imperiled.”⁵⁷⁶ The disaster to befall America would be “an open struggle between the destructive (i.e. upper and largely Protestant and lower largely non-evangelical Protestant classes) and the conservative (i.e. evangelical Protestant middle class) elements of society.”⁵⁷⁷

Josiah Strong’s critique of socialism, wealth and the city would suggest that the middle class, imbued with rural or small town values, if not rural or small town mailing addresses, embodied the heart and soul of the Protestant Empire.⁵⁷⁸ But the upper class, overwhelmingly Protestant, to be sure, but troublesome for the Protestant middle class largely precisely because of its wealth and urban orientation, nevertheless had a Christian duty to fund the works of the Protestant Empire, works largely aimed at the working class, a class dominated by immigrant, non-evangelical Protestants. On this view, then, temperance-prohibition, an idea and an ethos springing forth from the evangelical Protestant middle class, would be imposed on the non-Protestant working class thanks to the financial support of the Protestant upper class. In reality, something like this actually happened.

⁵⁷⁴ *Id.*

⁵⁷⁵ STRONG, *supra* note 27, at 184-85.

⁵⁷⁶ *Id.* at 185.

⁵⁷⁷ *Id.* at 186.

⁵⁷⁸ See TIMBERLAKE, *supra* note 9, at 2, 152-54 (defining the “middle class” essentially as “old-stock,” which is to say, evangelical Protestant); HANDY, *supra* note 26, at 77 (stating that “evangelicals usually thought of themselves as falling into that vague but vast grouping styled ‘the middle class’”); JIMERSON, *supra* note 273, at 19 (referring to “middle-class Protestant values”); CHERYL CRASNICK WARSH, DRINK IN CANADA: HISTORICAL ESSAYS 13-14 (1993) (noting a similar pattern in Canada where “temperance ideology has invariably been associated with the emerging middle classes and evangelical religion.”).

In Josiah Strong's perfervid *nomos*, propitiation of disproportionately Episcopalian, wealthy, Protestant urbanites, became a theological imperative, even though Strong found much about these urbanites to dislike, as his critique of socialism, wealth and the city plainly demonstrates.

b. Social Class and National Prohibition

Many commentators have argued that National Prohibition emerged from an evangelical Protestant middle class that felt squeezed both by the upper and the working classes,⁵⁷⁹ a position that was presaged by Josiah Strong.⁵⁸⁰ Somewhat more problematically, others have claimed that Prohibition was part of the broad Progressive Movement of the first two decades of the twentieth century.⁵⁸¹ We have already seen that some progressives (sometimes referred to as "urban liberals") were neither white nor Protestant and opposed

⁵⁷⁹ See ASINOF, *supra* note 229, at 240 (stating that the "middle class, squeezed by its struggle for identity between its envy of the wealthy owners and its distrust of hardworking labors found [temperance] an agreeable cause around which to rally"); BLOCKER, *supra* note 223, at 241 (stating that the "middle class supported prohibition primarily because of a social outlook which stemmed not from slipping status but rather from the inescapable growth of the corporation and the resulting militancy of labor. This outlook rested on the well-founded belief, dating from the Gilded Age, that the middle class was in imminent danger of being crushed between two millstones: capital above and labor below."); CAREY, *supra* note 123, at 65 (stating that the "progressive movement represented in part a middle-class mentality that feared the concentration of power in Gilded Age trusts on the one hand and radical labor and populist agitations on the other" whereas Catholics exhibited a variety of responses, Protestant moralism, resistance to that moralism, and noninvolvement in the question, "being primarily concerned with the religious needs of immigrant parish communities"); GUSFIELD, *supra* note 118, at 106 (arguing that the Dry middle class opposed the Wet upper and lower classes); HANDY, *supra* note 26, at 77 (stating that "[m]iddle-class and Protestant complacency was threatened by both the unrest of the laboring and poor, by the vast increase of wealth, especially when displayed conspicuously, . . . pos[ing] disturbing challenges to the reigning philosophy of individualism [for] the road to a Christian America was seemingly becoming more difficult because of developments such as these"); RUTH, *supra* note 210, at 28-29 (stating that "Protestant institutions seemed threatened from above and from below"); TIMBERLAKE, *supra* note 9, at 1 (describing the Progressive Movement as "endeavor[ing] to come to grips with the two great problems threatening American democracy: the growing power of big business on the one hand, and, on the other, the mounting discontent of the lower classes, especially among urban-industrial workers").

⁵⁸⁰ See *supra* notes 538-39 and accompanying text.

⁵⁸¹ See TIMBERLAKE, *supra* note 9, at 2 (stating that "prohibition was actually written into the Constitution as a progressive reform," that it was "an integral part of the Progressive Movement" and "drew on the same moral idealism and sought to deal with the same basic problems"); THE DRY YEARS, *supra* note 226, at 122 (stating that the "dimension of class tension in the prohibition movement in Washington helps one see it as part of that widespread agitation for reform in American society after 1900 called the progressive movement . . . [t]his is to say, almost, that the progressive movement and the prohibition movement were, in fact, the same").

Prohibition.⁵⁸² Thus, a more accurate statement would be that Prohibition was part of the *evangelical Protestant Progressive Movement* and not part of the *liberal-urban-immigrant and African-American Progressive Movements*. Even granting this point, more careful observers have noted that the relation between Prohibition and Progressivism was yet more complex—and more contingent, characterized by separateness and distance.⁵⁸³ Prohibition, unlike other items on the Progressive agenda, had *direct* ties, links and connections to the normative Eucharistic theology of American evangelical Protestants.⁵⁸⁴ This accounts for its distinctive character, and thus, its distinctive political and strategic coloration. The Anti-Saloon League referred to itself as “the church in action against the saloon.”⁵⁸⁵ No other group or organization associated in any manner or fashion with the Progressive Movement could earn, warrant, or deserve such a characterization. Furthermore, there were other exogenous factors, most importantly World War I, which played a role in advancing the temperance-prohibition cause.⁵⁸⁶ However, Progressivism and

⁵⁸² See *supra* note 517 and accompanying text. Timberlake concedes the point. See TIMBERLAKE, *supra* note 9, at 2 (granting that non-Protestant progressives “especially those identified with the urban-labor-immigrant elements, disliked [prohibition] and fought it” but their opposition was overcome by the “old-stock middle class [which] constituted the backbone of the Progressive Movement”).

⁵⁸³ See, e.g., FRANKLIN, *supra* note 123, at xii-xiii (arguing that Oklahoma Drys did not “flirt with other reform issues which would dissipate their strength, tax their finance, or divide their ranks”); LEWIS L. GOULD, PROGRESSIVES AND PROHIBITIONISTS 42-43 (1973) (essentially arguing that progressives and prohibitionists worked together in Texas because of the state’s “basic rural orientation” meaning that there were few to no liberal-urban-immigrant progressives in Texas); GUSFIELD, *supra* note 118, at 100 (noting that after 1906, “the rural nature of Temperance was enhanced and it became a dominant political issue, separated from the wider net of movements current at the same time”); HANDY, *supra* note 26, at 189 (stating that “[t]hough . . . the [prohibition] amendment . . . was part of the general program of the progressive movement, the evangelical churches felt it was a victory for them especially”); ISAAC, *supra* note 274, at 264-65 (stating that “Prohibition was stimulated by and flourished in conjunction with other waves of reformism, but it always retained its identity as a distinct movement” even though “there was a close relationship between the anti-saloon crusade and progressivism in Tennessee”); West, *supra* note 27, at 332 (pointing out that Colorado Drys rejected a Dry Progressive candidate for governor in favor of a law-and-order Republican in the 1914 elections).

⁵⁸⁴ See *supra* Part II.A.3.

⁵⁸⁵ See ASBURY, *supra* note 9, at 98. See also ISAAC, *supra* note 274, at 19; Engelmann, *O. Whisky*, *supra* note 27, at 149.

⁵⁸⁶ See, e.g., KOBLE, *supra* note 117, at 206-08 (arguing that but for World War I, prohibition might have eluded the Anti-Saloon League, but the war provided the League the opportunity to attack “the beer industry as pro-German and treasonable,” and “to forge ahead with the Eighteenth Amendment, advocating it primarily as a war-time measure”); MCCARTY, *supra* note 188, at 8. McCarty notes:

[T]he movement toward prohibition gained strength during World War I from a mobilization which stressed home-front austerity . . . and [n]or was it a

Prohibitionism shared marked affinities, as many Drys were also Progressives as a consequence of their status as middle class American evangelical Protestants.

Some challenged this canon, insisting that American capitalists, not the "old-stock" middle class, put National Prohibition on the map because the rich and powerful had come to the conclusion that National Prohibition served their economic interests vis-à-vis the working classes.⁵⁸⁷ John Rumbarger declared:

For while it is probably true that industrialization exacerbated the evils of excessive drinking and that genuinely human efforts were made to alleviate them, it is equally true that the liquor question itself was the ideological creation of America's dominant social class seeking to expand its hegemony over the lives of the country's propertyless masses. Without capital's need for profit there would have been no liquor question or temperance movement as they came to be in America.⁵⁸⁸

Rumbarger argued that wealthy capitalists bankrolled the Anti-Saloon League⁵⁸⁹ and largely set its agenda.⁵⁹⁰ He insisted that the rich used the League, not the other way around.⁵⁹¹ Jack Blocker, challenging Rumbarger, suggested that the question was a narrowly focused one: whether the League or wealthy businessmen persuaded Congress to approve the Eighteenth Amendment. Blocker concluded that the evidence to date did not support the conclusion that the rich, and not the League, persuaded Congress to propose National Prohibition. Instead, Blocker insisted that the data suggested that it was the League that in fact persuaded

happy circumstance for imbibers that many of the largest distilleries in America were controlled by persons of German descent; in the minds of many patriots, shackling the liquor interests was but another way of striking the "enemy."

Id.; ODEGARD, *supra* note 189, at 67 (noting that "[t]he war gave the League a rare opportunity to deal the liquor traffic a mortal blow"). *But see* ASBURY, *supra* note 9, at 136-37 (insisting that the 1916 elections guaranteed the success of the fight for National Prohibition, and that "[a]t most the war may have hastened ratification by a few years; it is extremely doubtful if anything could have stopped it").

⁵⁸⁷ See RUMBARGER, *supra* note 27, at xxiv; Harry Gene Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, CONTEMP. DRUG PROBS., Spring 1985, at 63.

⁵⁸⁸ RUMBARGER, *supra* note 27, at 187-88.

⁵⁸⁹ *Id.* at 183.

⁵⁹⁰ *Id.* at 156 ("the [Anti-Saloon] League is better understood as the political voice of business than as that of nativist and reactionary American Protestants—middle class, progressive, or otherwise").

⁵⁹¹ *Id.* at 182-83.

Congress.⁵⁹² Blocker's argument failed to consider the possibility, implicit in Rumbarger's challenge to the Prohibition canon, that wealthy capitalists controlled the League and left it to the League to get Congress to adopt the Eighteenth Amendment. One might think, however, that it would have been easy for wealthy capitalists to settle the matter with congressmen and senators directly, with no need for intermediaries, or a "front" or "puppet" organization, to do their work for them.

But there is another possibility, steeped in the historical and cultural norms and artifacts of the Protestant Empire: the interests of middle class evangelical Protestant Drys and wealthy capitalists converged and they used each other to advance their perceived self-interest.⁵⁹³ Of course, there is every reason to believe that the League received crucial support from the upper class, and that it deferred to the views of representatives of that class, even while furthering its own agenda. This view accords entirely with Josiah Strong's critique of the peril of wealth,⁵⁹⁴ and is very much in the tradition of the Act of Toleration: evangelical Protestant acceptance—albeit resentful and full of envy—of the dominant position of Anglicans in exchange for Anglican "toleration" of evangelical Protestantism. At the very least, propitiation of the wealthy appears to have been a central feature of the relationship between the Anti-Saloon League—and evangelical Protestant middle class Drys generally—and the rich. Taking care of the religious needs of a social class disproportionately Episcopalian, therefore, makes perfect sense. Put in the simplest of terms, most Drys, including those associated with the Anti-Saloon League, surely caviled at the thought of biting the hand that fed them.

c. Episcopalians as Evangelical Protestants and Roman Catholics Saw Them

Evangelical Protestants and Roman Catholics alike found much to dislike about Episcopalians. Anglican medianism⁵⁹⁵ presented a tempting target.⁵⁹⁶ They also found

⁵⁹² BLOCKER, *supra* note 223, at 235-36.

⁵⁹³ See generally Bell, *supra* note 31.

⁵⁹⁴ See *supra* notes 530-42 and accompanying text.

⁵⁹⁵ See *supra* Part IV.A.2.

⁵⁹⁶ For Catholic criticism of Anglican medianism, see, for example, Samuel F. Darwin Fox, *The Episcopal Church and Catholic Claims*, 102 THE CATHOLIC WORLD

American Anglicans to be haughty, arrogant, and somewhat silly and pretentious, probably the inevitable consequences of a medianist church with a disproportionately upper class membership and with the resulting cultural hegemony.⁵⁹⁷ The inter-religious discourse would seem to offer, therefore, scant reason to suppose that the evangelical Protestant Drys would have any particular interest in propitiating Episcopalians by accommodating their religious need for wine. But hints, large and small, surface in the popular religious literature of the time revealing an acceptance, willing or not, of the cultural hegemony of Episcopalians, and thus the need to propitiate, whether or not such need was understood in terms of Josiah Strong's Christian duty.

Evangelical Protestants routinely sniped at Episcopalians. The Baptists found fault with the Anglican insistence that Protestant church union required recognition of the historic episcopate, something that evangelicals would never easily accept, and with the failure of Episcopalians to cooperate with an umbrella evangelical Protestant organization and with the Dry agenda.⁵⁹⁸ They criticized the High Church party, noting that they "make no charges against the Episcopal Church, but . . . predict that the time will come when that Church will have to rid itself of the High Church party, or

609 (1916); Note, *What is an Episcopalian?*, 15 AMERICA 451 (1916). For evangelical Protestant criticism of Anglican medianism, see, for example, Note, *Episcopalians and Church Union*, 3 THE WATCHMAN-EXAMINER 1631 (1915).

⁵⁹⁷ For Catholic criticism, see, for example, Note, 12 AMERICA 452 (1915) (taking indignant exception to a characterization of English Roman Catholics as English "Dissent"); Henry Woods, *More Anglican Misrepresentations*, 13 AMERICA 172 (1915) (ridiculing a claim made by an Anglican journal that Rome had followed Anglican precedents regarding fasting before receiving communion). For evangelical Protestant criticism, see, for example, Note, *Men and Things*, 4 THE WATCHMAN-EXAMINER 130 (1916) (mocking a claim made by an Episcopalian bishop that the Episcopal Church was "the authoritative teacher of religious faith"); Note, *Men and Things*, 4 THE WATCHMAN-EXAMINER 1186 (1916) (noting, with envy perhaps, the fact that the Episcopalian Church had raised "the magnificent sum of \$3,000,000" for its pension fund for priests); Note, *Church Union?*, 84 THE METHODIST PROTESTANT 6 (1914) (referring to the "impudence" of Anglican claims regarding the "historic episcopate").

⁵⁹⁸ *Editorial Comments on Current Events*, 3 THE WATCHMAN-EXAMINER 719 (1915). See also Note, *Men and Things*, 3 THE WATCHMAN-EXAMINER 1058 (1915) (commenting favorably on an article in an Episcopalian journal that sharply criticized the lack of significant Episcopalian participation in the prohibition movement, finding his fellow Episcopalians guilty of "inactivity and . . . persistent disinclination to face the issue fairly and squarely"); Robert Stuart MacArthur, *This and That*, 3 THE WATCHMAN-EXAMINER 1481 (1915) (rejecting the claim of apostolic succession [and thus the claim for an episcopate] as "essentially absurd and self-contradictory," and ridiculing the Anglican position stating that "[t]he Anglican prelatist smiles at Protestants outside the Anglican Church, and the Romanist regards with contempt the Anglican mimicry of the Roman Church").

awake to the fact that the High Church party is leading the whole Church to Rome.”⁵⁹⁹ They mocked an Episcopal bishop’s claim that the Episcopal Church was “the authoritative teacher of religious faith” and found it “equally laughable to note how well ‘Billy’ [Sunday] gets on without the Episcopalians.”⁶⁰⁰ One editorial, proving that old wounds can fester for a very long time, reached back into the sixteenth century and pointed out that Anglo-Protestant reformers, Cranmer, Ridley, and Latimer were willing to burn Baptists at the stake.⁶⁰¹ “Does it not look like poetical justice for these three persecutors to have been bound to the stake themselves?”⁶⁰²

The Methodists made many of the same points that the Baptists had. On the question of church unity, the Methodists objected to the demand of the Episcopal Church that evangelical Protestants “surrender . . . everything to the soap bubble of an ‘historic episcopate.’”⁶⁰³ One commentator continued with the categorical claim that:

[I]t is impossible to show that an apostolic episcopate succession was in existence the first three hundred years, or that the Roman Catholic hierarchy with its importation of heathen rites and church officials represents Bible Christianity at all. The impudence of the Anglican proposition is on a parallel with the oft-repeated but utterly untenable assertion that there is a historic episcopate.⁶⁰⁴

The Methodists, like the Baptists, objected to the refusal of the Episcopal Church to take “a strong stand against the liquor traffic” and found particularly objectionable the attacks leveled against Drys by some Episcopalian priests.⁶⁰⁵ They

⁵⁹⁹ Note, *Episcopalians and Church Union*, 3 THE WATCHMAN-EXAMINER 1631 (1915). See also Note, *Baptist or Roman Catholic*, 4 THE WATCHMAN-EXAMINER 326-27 (1916) (*inter alia* accusing Anglicans of aping Catholics on the question of baptismal regeneration, that is whether baptism has objective sacramental force or power, which Catholics and Anglicans believe, or is only the occasion for the one baptized to confess Jesus before men, which Baptists believe); Note, 5 THE WATCHMAN-EXAMINER 388 (1917) (claiming that “the Catholic party in the Church of England is . . . busy sowing seeds of discord by striving to Romanize the Established Church,” and “[w]hy is it that the Catholic parties in the Church of England and the American Episcopal Church do not go over, bag and baggage, to the Roman Catholic Church?”).

⁶⁰⁰ Note, *Men and Things*, 4 THE WATCHMAN-EXAMINER 130 (1916).

⁶⁰¹ Mayor has suggested that English dissent was influenced by the Anabaptists. See MAYOR, *supra* note 100, at ix, xvi-xvii. Perhaps the “Baptists” referred to may have been Anabaptists. But see Joseph D. Ban, *Were the Earliest English Baptists Anabaptists?*, in IN THE GREAT TRADITION, *supra* note 113, at 91-104 (arguing that Baptists “are rooted in the Reformed Tradition”).

⁶⁰² Editorial Notes and Comments, *The Injustice of History*, 5 THE WATCHMAN-EXAMINER 920 (1917).

⁶⁰³ Note, *Church Union?*, 84 THE METHODIST PROTESTANT 6 (1914).

⁶⁰⁴ *Id.*

⁶⁰⁵ Note, *Prohibition in an Episcopal Convention*, 85 THE METHODIST

examined Tractarianism, the Oxford Movement, and found it essentially Catholic, not Protestant.⁶⁰⁶ Congregationalists sounded a similar, if somewhat more restrained tone:

On the one side of the natural line of cleavage which runs across [the] life [of the Episcopal Church] it [*via* the High Church party] seeks to relate itself to the Latin Church, which totally and scornfully denies the validity of its ordinations and its sacraments. On the other side [*i.e.* the Low Church party], where its whole hope of present fellowship remains, it is kept back by its own scruples and exclusions, to which it is held by the voice and vote of its reactionary elements.⁶⁰⁷

The editorial writer, of course, had aimed his fire at Anglican medianism. Roman Catholic critics of the Episcopalian Church attacked it from the other side, completing a picture or portrait of medianism as a theological stance that would please neither those standing to one side of that Anglican self-proclaimed *via media* nor those standing to the other side.

Episcopalians hit back from a medianist perspective. The High Church party, the one most heavily invested in medianism because Anglican medianism had an opening, however slight, to Catholic ideas, criticized Billy Sunday,⁶⁰⁸ contrasted the “positive” Christianity of the Catholic Church and the “negative” Christianity of evangelical Protestants,⁶⁰⁹ fatuously claimed that the Episcopal Church “officially” sustained closer relations to the Roman Catholic Church than to the Protestant Churches,⁶¹⁰ contended that Pan-Protestantism had no consequence for Episcopalians, contrasted the “incompleteness” of Protestantism with the wholeness of Catholicism,⁶¹¹ contrasted Catholic objectivity and Protestant subjectivity,⁶¹² and criticized much then recent Protestant writing as “too frequently . . . a combination of bad

PROTESTANT 4 (1915).

⁶⁰⁶ William W. Brewton, *Inevitable Result of Tractarianism*, 65 METHODIST QUARTERLY REVIEW 695 (1916).

⁶⁰⁷ Editorial, *The House of Bishops and Christian Co-operation*, 103 THE CONGREGATIONALIST AND ADVANCE 584, 585 (1918).

⁶⁰⁸ Note, *The Psychology of “Billy” Sunday*, 52 THE LIVING CHURCH 428 (1915).

⁶⁰⁹ Editorial and Comment, *Peace Among Christian Churches*, 52 THE LIVING CHURCH 607 (1915).

⁶¹⁰ Note, *Should the Church Participate?*, 52 THE LIVING CHURCH 645 (1915).

⁶¹¹ Editorial and Comment, *Church and Pan-Protestantism*, 52 THE LIVING CHURCH 515, 516 (1915).

⁶¹² Editorial and Comment, *The Objectivity of Faith*, 52 THE LIVING CHURCH 583 (1915).

scholarship and bad temper in fairly equal parts.”⁶¹³ And, as we have seen, Episcopalians resisted the attempts in Oklahoma to prohibit the religious use of wine.⁶¹⁴

Catholics attacked Anglicans with particular relish. In 1896, Pope Leo XIII had declared Anglican orders utterly null and void.⁶¹⁵ If Anglican orders were bad, then Anglican bishops could not be a part of this “historic episcopate” on which Anglicans doted, and the Anglican sacraments, including the Eucharist, would be invalid, even if the theology of the sacraments of some Anglicans was transubstantiationist. One reason for this ukase may well have been the need to challenge the proposition that there could be two “catholic” churches in England, thereby undermining the “catholic” claims of the heirs of the Oxford Movement, the Anglo-Catholics.⁶¹⁶ The defection of John Henry Newman from Canterbury to Rome⁶¹⁷ was, of course, a sensation and the Catholic Church sought to capitalize on that dramatic event. One could not say that relations between Anglicans and Roman Catholics had ever been good,⁶¹⁸ but these events added some sharpness or edge to Catholic criticism of Anglicans. However, Catholic attacks, in an ironic way, may have strengthened the position of Episcopalians vis-à-vis evangelical Protestants. Much of the evangelical Protestant criticism of Anglo-Catholics, of the High Church party, sought to distinguish between that party and the Episcopalian Church more generally. Put differently, whatever ill feelings they may have had towards the Catholic-minded High Churchmen, evangelical Protestants still felt some kindred loyalty or attachment to Anglican evangelicals or Low Churchmen with whom they shared, after all, similar views of

⁶¹³ Editorial and Comment, *Protestant Churchmanship Defined*, 54 THE LIVING CHURCH 595 (1916).

⁶¹⁴ See *supra* Part III.C.3.

⁶¹⁵ See Leo XIII, *Apostolicæ Curæ* (1896).

⁶¹⁶ See GEORGE H. TAVARD, A REVIEW OF ANGLICAN ORDERS: THE PROBLEM AND THE SOLUTION 95-97, 134 (1990).

⁶¹⁷ See VINCENT FERRER BLEHL, S.J., PILGRIM JOURNEY: JOHN HENRY NEWMAN 1801-1845, at 317-403 (2001) (describing in great detail the spiritual journey that led Newman to Rome); DONALD, *supra* note 484, at 1-73 (discussing Newman’s conversion to Roman Catholicism). Newman had, however, an enormous impact on Anglicanism as well, because of his role in the Tractarian Movement before his conversion to Roman Catholicism. See DONALD, *supra* note 484, at 1-2 (quoting *The Guardian* on the death of Newman in 1890 as saying that Newman “was the founder we may almost say of the Church of England as we see it” because “Newman was the living soul and inspiring genius [of the Tractarian Movement],” and that “[w]hatever solid success the high Church party have obtained since Cardinal Newman’s departure has been due to their fidelity to his method and spirit”).

⁶¹⁸ See Newsom, *Protestant Empire*, *supra* note 23 *passim*.

the Eucharist.⁶¹⁹ Evangelical Protestants, therefore, could not completely abandon and disown the Episcopal Church as could a non-Protestant denomination.

Roman Catholic criticism went to the heart of the matter, rejecting Anglican medianism, and flaying its lack of doctrinal unity, characterizing it instead as a "House of Babel."⁶²⁰ Several writers flatly denied Anglican catholicity. The Episcopal Church was Protestant because "it is a protest against the Catholic Church [It] practically teaches the right of every individual to his own private judgment,"⁶²¹ "it was effectually isolated from the rest of Christendom,"⁶²² and "is no part of the one, holy, Catholic and Apostolic Church of Christ."⁶²³ James Thomas Coffey summarized much of the Roman Catholic critique of Anglicanism:

It is hard, indeed, for any educated, sensible person to keep track of the ecclesiastical gymnastics of this hybrid religious body; Protestant in name and origin and profession, it wishes to be Catholic; anti-Roman from its inception, it purports to be a branch of the great Church of the Apostles; without a priesthood and a sacrifice, it brazenly claims sacerdotal rites and functions, and maintains barren altars.⁶²⁴ . . . It adopts prayers and hymns recognizing the Real Presence of Jesus Christ in the Sacrament of Holy Communion, and refuses to have the Sacrament conserved on its altars for the consolation of its communicants and the comfort of the sick and dying.⁶²⁵

He concluded that "[i]f common sense and reason are to prevail, there must be a radical split in the Protestant Episcopal Church of America, or else the imitators of Rome must continue to come over to the true Fold."⁶²⁶ Consistent with the arguable reasons for the Roman Catholic denunciation of Anglican orders, many Catholic critics, in addition to Coffey,

⁶¹⁹ See *supra* notes 489-92 and accompanying text.

⁶²⁰ *What is an Episcopalian?*, 15 AMERICA 451 (1916).

⁶²¹ *With Our Readers*, 97 CATHOLIC WORLD 280 (1913).

⁶²² Samuel F. Darwin Fox, *The Episcopal Church and Catholic Claims*, 102 THE CATHOLIC WORLD 289, 292 (1915).

⁶²³ *Id.* at 306.

⁶²⁴ By this, the writer meant that he believed that the Body and Blood of Christ were not Really Present on Anglican altars.

⁶²⁵ James Thomas Coffey, *The Protestant Episcopal General Convention in St. Louis*, 104 THE CATHOLIC WORLD 385, 386 (1916). See also, Michael Andrew Chapman, *Resemblance of the Anglican Communion Service to the Catholic Mass*, 109 THE CATHOLIC WORLD 774, 782 (1919) (challenging the claimed resemblance of the Anglican Communion Service to the Catholic Mass, noting that "the specious resemblance . . . as amended and elaborated by High Churchmen, to the Catholic Mass, . . . is the chief obstacle to conversions from among these separated brethren").

⁶²⁶ Coffey, *supra* note 625, at 387.

sought to encourage Anglican High Churchmen to come over to Rome, although they used rather different rhetorical approaches.⁶²⁷

Two rather remarkable colloquies capture the heart and soul of the criticisms leveled against Episcopalians by both evangelical Protestants and Roman Catholics. One involves a nasty dust-up between Episcopalians and Congregationalists over the idea of "union" chaplaincies. The exigencies of the Great War led the Congregationalists to propose to the Episcopal Church's House of Bishops that Episcopalian chaplains receive a joint consecration and authorization from both the Episcopal Church and evangelical Protestant churches to administer the Eucharist to Protestant soldiers on the battlefield without regard to denomination affiliation. Non-Episcopalian chaplains, by virtue of such a joint consecration and authorization, could similarly administer the Eucharist to Episcopalian soldiers.⁶²⁸ The Episcopal Bishops flatly rejected the proposal. The Congregationalists' first response to the denial was to offer to have their battlefield chaplains receive "a special Episcopal ordination for this particular ministry to members of the Protestant Episcopal Church."⁶²⁹ A month

⁶²⁷ See, e.g., John F. Fenlon, *The General Convention of the Episcopal Church*, 92 *THE CATHOLIC WORLD* 645, 647-48, 657-58 (1911). Fenlon expresses some sympathy for the founders of the Oxford Movement, noting how they had "wonderfully aided the Catholic revival in England" and for their heirs, noting:

None of us with Christian charity in our hearts can help a deep feeling of sympathy in this crisis [over the possible deletion of the word 'Protestant' from the name of the Episcopal Church] for loyal High Church clergymen, despite their too frequent expression of harshness towards us [as t]heir situation is certainly a hard one [because t]hey cherish most dearly the belief that they belong to a branch of the Catholic Church; yet the Catholic Church pronounces their orders invalid and themselves heretical, a judgment with which the Orthodox Church expresses no dissent.

Id.; see also Philip Graty, *Modernism in England*, 13 *AMERICA* 366, 367 (1915) (noting that some think that the High Church party is the only hope for the Church of England, but concluding that that party cannot save the Church because it "lacks a living authority and has no lasting principle of unity and cohesion; it may divide at any moment, and even now there are not wanting signs that the insidious spirit of Modernism is not altogether idle in its ranks"); Woods, *More Anglican Misrepresentations*, *supra* note 597, at 173-74 (harshly criticizing Anglicans for claiming that Roman Catholics "followed" Anglican precedents regarding the handling of the Eucharist on the battlefield, and concluding that if Anglican journals make such statements "in good faith, one must conclude that the Anglican mind is singularly dense; if in bad faith, it is clear that High Church Anglicanism must be on its deathbed, since such means are used to keep a spark of life in it").

⁶²⁸ Newman Smith & Williston Walker, *Letter, Reply to the Answer of the House of Bishops*, 59 *THE LIVING CHURCH* 52 (1918).

⁶²⁹ Editorial, *Will Our Episcopalian Brethren Respond?*, 103 *THE CONGREGATIONALIST AND ADVANCE* 456, 457 (1918).

later, they revisited the question, accusing the Episcopal Bishops of being

afraid of adventure in this hour of need. Their precedents have become inhibitions. Their own idea of witness is incompatible with any acknowledgement whatever of the right of the living Church to choose and empower its ministers to offer the ministry of the Sacrament of the Lord's Supper to those who are in need.⁶³⁰

Yet again, another editorial appeared shortly thereafter, revealing more insight into the problem: the difficulty was, at least for *The Living Church*, a High Church Episcopalian journal, that Congregationalists ordained by Episcopalian bishops could not work together with Episcopalian priests because the former understood the ordination differently than the latter did. However, as the editorialist correctly pointed out, not all Episcopalians agree on the effect and meaning of ordination to the priesthood.⁶³¹

The Congregationalists addressed the matter one more time. They expressed their regret and appealed to "wider minded brethren."⁶³² The editorial writer noted that the Episcopalian rejection of the union chaplaincy proposal would only serve to:

[C]onfirm the present opinion of many American Christians, natural, though prejudiced, that the Protestant Episcopal Church is perhaps the most self-centered, and therefore sectarian of all our American Christian communions. The effect of its attempt to hold the middle ground apparently is to cut off relations with Christians seeking the reunion of the whole Catholic body of believers on the right hand and on the left.⁶³³

In fairness to Episcopalians, the original proposal was too clever by half. It asked Episcopalians to adopt an ecclesiology which would undermine their medianist stance. Those bishops who thought that being a bishop meant more than just being some sort of bureaucrat or administrator, the

⁶³⁰ Editorial, *supra* note 607, at 584.

⁶³¹ Editorial, *The House of Bishops and Protestant Episcopal Opinion*, 103 THE CONGREGATIONALIST AND ADVANCE 680, 681 (1918). For a discussion of the difference between High Church and Low Church views of priestly ordination, see CHORLEY, *supra* note 48, at 73-75 (noting that Evangelicals denied "the 'doctrine of a sacrificing, mediating, vicarious priesthood for the remission of sins' with its grievous perversion [in the view of Evangelicals] of the Sacrament of the Lord's Supper, and its more grievous denial of the free access of every penitent soul, directly, to the sacrifice and intercession of Christ").

⁶³² Editorial, *The Episcopal Refusal*, THE CONGREGATIONALIST AND ADVANCE 135, 135-36 (1918).

⁶³³ *Id.* at 136.

High Churchmen, persuaded their brother bishops who did not, the evangelicals, liberals, and Low Churchmen generally,⁶³⁴ that World War I and the needs of the soldiers on the battlefields were not the occasion to risk a rupture of the Episcopalian Church. The proposal, then, has to be fairly understood as an attack on medianism, whether intended as such or not. The fact that some Episcopalians had little to no use for medianism did not matter. Episcopalian unity did.⁶³⁵ But apart from the merits of the proposal, it illuminated the fundamental tension between Episcopalians and evangelical Protestants.

The other revealing colloquy involved a debate between an Anglo-Catholic, Jared S. Moore, and various Roman Catholic interlocutors over Moore's claim that he shared, with Roman Catholics, for want of a better phrase, a "common Catholicism."⁶³⁶ The essence of the debate for present purposes was whether a "catholic" could be a medianist. Obviously Moore thought so, and his interlocutors thought not. Moore insisted that he could be "catholic" in a church which had some members who were distinctly Protestant in outlook and orientation, because the Episcopal Church possessed a "true Catholic character" nonetheless.⁶³⁷ The Roman Catholic response was pointed and direct: the "catholic" church can only teach truth, and it must expel error.⁶³⁸ While commending Anglo-Catholics for holding certain Catholic doctrines and thus making them "nearer to Christ than are the members of certain other sects," they still remained outside the Fold; "in the essential act of heresy they are as far away as the rest. For they, no less than the others choose from among Christ's

⁶³⁴ See CHORLEY, *supra* note 48, at 68, 187 (quoting an Episcopal journal that "contrast[ed] the High and Low Church views on Episcopacy . . . [t]he former regardin[g] it as of direct divine appointment, essential to the existence of the Church" but "[b]y the other view Episcopacy is simply an apostolic ordinance, shown by Scripture and ancient authors to have existed from the beginnings of the Church, but is not made indispensable to Christian faith, and hence though essential to the Church's *perfection*, is not essential to its *validity*" and also stating that "Evangelicals accepted the three orders in the ministry [i.e. bishops, priests and deacons], without impugning the validity of other ministries and sacraments . . . [but n]ot so the high Churchmen").

⁶³⁵ Recall that Episcopalians had been through difficult times in the nineteenth century keeping their own house in order. See *supra* notes 479-87 and accompanying text. Now was not the time to allow outsiders to roil the troubled waters.

⁶³⁶ See Jared S. Moore, *Letter, The Sincerity of Anglicans*, 14 AMERICA 37 (1915); see also Jared S. Moore, *Letter, The Anglican "Branch" Theories*, 14 AMERICA 181 (1915).

⁶³⁷ Moore, *Sincerity, supra* note 636, at 37.

⁶³⁸ E.I.F., *Letter, Mr. Moore and Anglican Claims*, 14 AMERICA 229 (1915).

doctrines, accepting and rejecting at their pleasure.”⁶³⁹ The colloquy also touched on the doctrine of Transubstantiation. Moore made the tractarian argument that the Anglican Articles of Religion only denied a certain extreme form of the doctrine.⁶⁴⁰ He utterly failed to persuade George Rusk, one of his Roman Catholic interlocutors.⁶⁴¹ Moore replied, reiterating his earlier arguments,⁶⁴² but Rusk got the last word. While the ostensible subject concerned the doctrine of Transubstantiation, Rusk remarked that “Mr. Moore is a thoroughly good Protestant; he, not Anglican formularies, nor Anglican doctors, etc, may tell him what Anglicanism is; he’ll exercise his right of private judgment and believe just what suits him [T]he result is a city of confusion.”⁶⁴³

Medianism, therefore, sat at the center of the tension between Episcopalians and evangelical Protestants and between Episcopalians and Roman Catholics. However, Catholic efforts to demean Anglicanism may ultimately have had the effect, as noted above,⁶⁴⁴ of improving the image of Episcopalians among evangelical Protestants: if the ancient foe, the Roman Catholic Church, was attacking Episcopalians, then Episcopalians had to be right about *something*, even if they irked and annoyed evangelical Protestants. If the Catholics were right, then Episcopalians were Protestants, medianist, huffy, haughty, or otherwise.

And yet, both evangelical Protestants and Roman Catholics found themselves paying homage to the cultural hegemony of Episcopalians. Baptists noted, with envy perhaps, that the Episcopal Church had raised “the magnificent sum of \$3,000,000” for its Pension Fund for its priests, and wondered when “wealthy Baptists [would] begin their giving to our Ministers and Missionaries Benefit Board?”⁶⁴⁵ Methodists seemed drawn to the clout of Episcopalians. One Methodist writer referred to the Episcopal Church as “a church with the prestige, the culture and the influence,” while bemoaning the

⁶³⁹ J. Harding Fisher, *No Compromise with Heresy*, 14 AMERICA 79, 80 (1915).

⁶⁴⁰ Jared S. Moore, Letter, *The “Articles” and the Sacraments*, 14 AMERICA 108, 109 (1915).

⁶⁴¹ George Rusk, Letter, *Mr. Moore and Transubstantiation*, 14 AMERICA 133 (1915).

⁶⁴² Jared S. Moore, Letter, *Mr. Moore and Transubstantiation*, 14 AMERICA 228 (1915).

⁶⁴³ George Rusk, Letter, *Mr. Moore and Transubstantiation*, 14 AMERICA 275, 276 (1916).

⁶⁴⁴ See *supra* notes 600-04 and accompanying text.

⁶⁴⁵ *Men and Things*, 4 THE WATCHMAN-EXAMINER 1186 (1916).

fact that "where Methodists cross over into that fold [the Episcopal Church], they often get dangerously 'high,' and forget their earlier training."⁶⁴⁶ A second writer described it as the Church with "the unique advantages that a body with vast wealth and high social standing can offer" even while accusing the Episcopal Church of disseminating "misinformation."⁶⁴⁷ And a third writer observed, defensively, that evangelical Anglicans taught the "uncultured classes of people, who were unfitted to appreciate the High-church ordinances, . . . that they had a right to understand God and the truths of the Bible."⁶⁴⁸

d. Episcopalians Demanded Propitiation

Much of the materials in Subpart B of this section tended to the proposition that Episcopalians would not lightly accept prohibition of the religious use of wine. While the Roman Catholics took the lead in both Arizona and Oklahoma, there is the matter of Anglican style, a style shaped by history and experience—medianism and first legal and then cultural hegemony. The High Church journal, *The Living Church*, had become exasperated with the liquor traffic, and concluded that it needed to come to an end.⁶⁴⁹ Yet something in the Oklahoma situation stiffened Anglican resolve. It might have been the brazen bigotry of evangelical Protestants on the question that moved Episcopalians to consider the possibility of civil disobedience.⁶⁵⁰

But propitiation was never far away either. Indeed, Episcopalian anger at the situation in Oklahoma might well have reflected the view that the evangelical Protestants in that state had not accorded Episcopalians their accustomed due. An editorial in *The Daily Oklahoman*, Sept. 13, 1917, objected to the interpretation of the Oklahoma Bone-Dry law contended for by the Drys: "[i]f the law is literally to be enforced it is only a question of time when the Catholic and Episcopal churches will be unable to conduct their beliefs and customs."⁶⁵¹ The Episcopal Church had not entered the fray in Oklahoma, for

⁶⁴⁶ Note, *Prohibition in an Episcopal Convention*, *supra* note 605.

⁶⁴⁷ John Alfred Faulkner, *Some High Church Misinformation*, 102 METHODIST REVIEW 122, 123 (1920).

⁶⁴⁸ Brewton, *supra* note 606, at 696.

⁶⁴⁹ See *supra* note 459 and accompanying text.

⁶⁵⁰ See *supra* notes 462-64 and accompanying text.

⁶⁵¹ See DELIVER, *supra* note 9, at 126 (quoting the editorial) (emphasis added).

aught that appears, when the editorial was written, but the newspaper stood up not for Roman Catholics alone, but also Episcopalians. *The Daily Oklahoman*, one notices, had nothing to say about the religious needs of Lutherans, Eastern Orthodox, Jews or anybody else who used wine for religious purposes. Only Episcopalians, who had a seemingly culturally hegemonic right to accommodation, and Roman Catholics, who had actually taken the matter to court, earned any notice or comment.

It would seem almost incontrovertible, therefore, that the exemption for the religious use of wine contained in the Volstead Act constituted the propitiation of Episcopalians. However, the text of the amendment, in its § 6 form protected not just the religious use of wine by Episcopalian priests but also accommodated the religious practices of rabbis, ministers of the gospel, and priests, whether Anglican or not.⁶⁵² However, the discussion in Subpart A clearly establishes that the relations between Episcopalians and evangelical Protestants rested on a special and unique history, captured by the logic and structure of the Act of Toleration⁶⁵³ on the one hand, and the logic and structure of Josiah Strong's critique of—and appeal to—wealthy, elite, urban Protestants⁶⁵⁴ on the other.

Roman Catholics had clearly been the victims of an unremitting bias and prejudice that was at the center of the Anglo-American Protestant Empire in the decades leading up to National Prohibition.⁶⁵⁵ Whatever "relations" existed between evangelical Protestants and Roman Catholics in 1919 could not be described as the same as the relations between evangelical Protestants and Episcopalians. Eastern Orthodox Christians, while few in numbers,⁶⁵⁶ were also the victims of racial prejudice and intolerance.⁶⁵⁷ Lutherans were of two minds on the question of temperance-prohibition. Lutherans of Scandinavian ancestry largely favored it,⁶⁵⁸ whereas Lutherans

⁶⁵² National Prohibition Act, Pub. L. No. 66, §6, 41 Stat. 305, 311 (Oct. 28, 1919).

⁶⁵³ Act of Toleration, *supra* note 478.

⁶⁵⁴ See *supra* Part IV.A.3.a.

⁶⁵⁵ See *supra* Part II.B.

⁶⁵⁶ See LATOURETTE, *supra* note 30, at 1230 (referring to the Eastern Churches as "small minorities" in 1910). See also DEMETRIUS MAZACOUFA, *THE STORY OF THE GREEKS IN AMERICA* 53 (1977) (noting that by the end of World War I, only 130 Greek Orthodox churches had been built in America).

⁶⁵⁷ See PAUL KOKEN ET AL., *A HISTORY OF THE GREEKS IN THE AMERICAS*, 1453-1938, at 149-55 (1995); MAZACOUFA, *supra* note 656, at 44-45.

⁶⁵⁸ See, e.g., FREDERICK NORDQUIST, *IS PROHIBITION JUSTIFIABLE* 9 (1917) (arguing for prohibition, so long as there is an exemption for the sacramental use of

of German background strongly opposed it.⁶⁵⁹ German-American Lutherans, however, had the unenviable distinction of being accused of disloyalty during World War I.⁶⁶⁰ They were particularly vulnerable to this smear campaign⁶⁶¹ because Lutherans tended to remain aloof from other Protestants.⁶⁶² As

wine). One commentator on Scandinavian-American immigrant literature described how Scandinavian Americans came to favor the Dry cause. See DOROTHY BURTON SKÅRDAL, *THE DIVIDED HEART: SCANDINAVIAN IMMIGRANT EXPERIENCE THROUGH LITERARY SOURCES* 227-28 (1974). She captures nicely the social dimension of Scandinavian American thought on the question of drink, revealing patterns strikingly similar to those of white Protestant Americans generally. Skårdal wrote:

A fair number of prohibition stories by immigrant authors were laid in the Old Country, attacking the Demon Rum in any setting; but the large majority, tracing the calamitous effect of the American saloon on Scandinavian drinking habits, recorded growing prohibitionist zeal within the group. This can be traced in the attitudes of Lutheran ministers. High-Church men, until the 1890s at least, opposed prohibition. They were against drunkenness, of course, but argued for temperance in using all God's gifts. During this period some more pietistic ministers joined and encouraged teetotaler clubs only under considerable opposition from businessmen in their congregations, who believed that saloons attracted shoppers to town. But the moderates lost out. After the turn of the century no Scandinavian immigrant minister could afford to be seen drinking so much as a glass of beer

A couple of stories referred to conflict within church groups over substituting grape juice for wine in Communion service; the milder drink was always adopted

Upper-class immigrant characters consistently advocated temperance rather than prohibition, if they expressed any concern over the issue at all Both extremes of the social scale were pictured on the whole liberal in regard to drink. It was largely the growing middle class, especially in its rural setting, which developed such thoroughgoing Puritanism toward drinking.

Id. See also ALTMAN K. SWIHART, *LUTHER AND THE LUTHERAN CHURCH: 1483-1960*, at 345 (1960) (noting that "[d]runkenness had become a national plague in Sweden during the nineteenth century, and was equally prevalent in America among those Swedes who worked in the lumber camps, mining towns, and in the larger cities" and that "[a]s early as 1875 [the Swedish Lutheran Synod] denounced even moderate drinking").

⁶⁵⁹ See, e.g., DAVID W. DETJEN, *THE GERMANS IN MISSOURI, 1900-1918: PROHIBITION, NEUTRALITY AND ASSIMILATION* 39-40 (1985) (noting that German-Americans saw prohibition as an attack on their culture); ABDEL ROSS WENTZ, *A BASIC HISTORY OF LUTHERANISM IN AMERICA* 205 (1964) (stating that the "Swedes favored prohibition, which the German element regarded as puritan legalism"). *But see* THE LUTHERANS IN NORTH AMERICA 140 (E. Clifford Nelson ed., 1975) (arguing that "German-speaking synods tended to avoid taking public stands . . . usually because their own membership was divided on whether or not temperance . . . [was an] infallible index[] to a person's faith").

⁶⁶⁰ DETJEN, *supra* note 659, at 136-54; AHLSTROM, *supra* note 26, at 888 (noting that "German-Americans of almost every religious hue also became the objects of suspicion, discrimination, and in many cases, even of violence").

⁶⁶¹ Anti-German-American prejudice produced a United States Supreme Court decision, fortunately in favor of German-Americans. See *Meyer v. Nebraska*, 262 U.S. 390, 390-91 (1923). It also bears noting that the Drys used the antipathy towards German-Americans in forcing Prohibition on the United States. See DETJEN, *supra* note 659, at 144.

⁶⁶² See LATOURETTE, *supra* note 29, at 1243-44. See also RIGHTEOUS EMPIRE,

such, it makes little sense to suppose that relations between evangelical Protestants and German Lutherans were cordial. Finally, we have seen that Jews were all too often ignored and discriminated against in the formulation of exemptions for the religious use of wine.⁶⁶³

It remains the stubborn fact, therefore, that there were very good reasons for the Drys to accommodate Episcopalians, reasons that did not extend to any other religious minority. Similarly, it remains the stubborn fact that a decision to accommodate other religious minorities might rest on any number of pragmatic and strategic considerations, having precious little, if anything, to do with religious liberty and freedom. Such considerations will be explored more fully in Subpart B, *infra*. For the nonce, there might be several ways to explain what Congress did in crafting explicit language regarding the beneficiaries of legislative grace. First, Congress could have decided that if it was going to take care of Episcopalians, it would have to take care of other religious groups: singling out Episcopalians for special treatment, regardless of their culturally hegemonic preferential right to protection, might pose practical political problems and stir up Catholics, Jews, Lutherans, and Eastern Orthodox Christians even more than might otherwise be the case. In other words, grant the right, but not the preference. Second, Congress might have concluded that practical prohibition law enforcement problems (as distinct from the larger and more general law enforcement problems that widespread resentment of a law, taking the form of civil disobedience and unrest might pose) might be compounded if the law only accommodated Episcopalians. Clergymen from other religious groups might masquerade as Episcopalian priests or bishops in order to obtain wine, or Episcopalian clergy might assist others in obtaining wine for religious use no matter what the law provided. Even if law enforcement could easily detect such charades and evasions—narrow gauge civil disobedience, detection and prosecution would cost money and might bog down the prohibition law enforcement agencies and

supra note 197, at 138 (stating that “Lutherans, chiefly of Continental origin, were not assimilated into the Protestant empire”); NOLL, *supra* note 26, at 216 (stating that “Lutheranism in America remained a largely self-contained, European outsider until the 1930s and the end of large-scale immigration from the European centers of Lutheran strength”).

⁶⁶³ See *supra* notes 289-93 and accompanying text.

institutions.⁶⁶⁴ Third, Congress might have decided that *if* it were going to accommodate Episcopalians, it might as well accommodate other religious groups in accordance with an anti-discrimination principle. Fourth, Congress might have decided to limit the protection of the exemption only to certain religions, leaving those religions which could not fit within the language of the exemption subject to the broad prohibitory rule of the Volstead Act. And fifth, Congress might have decided that it had to apply a broad principle of religious freedom and liberty.

Some or all of the first four possibilities are sufficiently plausible to warrant the conclusion that they might have influenced the decision to accommodate the religious use of wine by Jews, Catholics, Lutherans, and Eastern Orthodox Christians. I shall demonstrate that the fifth possibility cannot bear its own weight, that it lacks plausibility.⁶⁶⁵ But the first four make suitable candidates for the background or anterior argument that the interests of the Jewish and Christian religious groups, including Episcopalians, that used wine for religious purposes converged,⁶⁶⁶ even as the interests of Episcopalians motivated the Congress to provide for an exemption for the religious use of wine, a motivation manifestly rooted in the central history and experience of the Protestant Empire.

B. Pragmatic and Strategic Considerations

By 1919, American evangelical Protestants had fretted for over eighty years that Catholics might overrun the country, the great Protestant Empire, by sheer dint of numbers.⁶⁶⁷ The influx of Catholics into America began in the early- to mid-nineteenth century, largely from Ireland and Germany.⁶⁶⁸ After the Civil War, immigrants from Southern and Eastern Europe began to arrive in the United States in large numbers, bringing

⁶⁶⁴ Indeed, law enforcement problems, both in the narrow and the broad sense supposedly had much to do with the repeal of National Prohibition. See ENGELMANN, *supra* note 237, at 188-227. *But see* KENNETH D. ROSE, AMERICAN WOMEN AND THE REPEAL OF PROHIBITION 5, 137-47 (1996) (arguing that conservative Protestant women, espousing a home protection ideology, played a decisive role in the repeal of National Prohibition).

⁶⁶⁵ See *infra* Part IV.D.

⁶⁶⁶ See Bell, *supra* note 31.

⁶⁶⁷ See BEECHER, *supra* note 148.

⁶⁶⁸ See LATOURETTE, *supra* note 29, at 1234.

with them non-Protestant religions. Catholics, or at least those of Catholic heritage or background, figured prominently in the wave of immigration that rolled across the Atlantic Ocean in the forty years prior to the advent of National Prohibition.⁶⁶⁹

Many American cities in the Northeast and the Midwest—or at least their centers or cores—became Catholic enclaves of the Protestant Empire.⁶⁷⁰ While white evangelical Protestants still constituted the large majority of Americans in 1919,⁶⁷¹ religious minorities loomed large on the horizon. Enough so, one supposes, that the Drys had to stop and think long and hard about how far they wanted to push their social reform program to dry up America, and about whether to use National Prohibition to mount a sustained and deadly assault on Judaism, Catholicism, Orthodoxy and liturgical Protestantism.

Surely many Drys appreciated the fact that resistance to their wiles from a now rather large aggregation of religious minorities would not evaporate overnight, and that the specter of open rebellion, particularly if fed or intensified by claims of religious oppression, might present serious real world problems. It did not require a belief in a broad, liberal theory of religious freedom⁶⁷² for Drys to conclude that undermining and attacking cultures and ways of life that rejected the normative theological dualisms that define evangelical Protestantism—which siege or assault surely must lie at the heart of the temperance-prohibition idea that had so captured the fancy of American evangelical Protestants—presented enough problems and that taking on religious practices in addition might simply make the situation unmanageable. Tossing clergymen in jail for using illegal wine in their religious exercises would, for many, be an acute embarrassment—count Fletcher Dobyms among them.⁶⁷³ But, of course, one has to decide what to make of S. Prince Freeling, and others like him, who apparently were perfectly prepared to prosecute clergy for making use of wine in religious services.⁶⁷⁴

If the question were how many Drys would have lined up with Dobyms and how many with Freeling, no clear answer

⁶⁶⁹ *See id.* at 1235, 1258.

⁶⁷⁰ *See id.* at 1253-54.

⁶⁷¹ *See id.* at 1258.

⁶⁷² A liberal theory of religious freedom would celebrate and value religious diversity as a social and civic good.

⁶⁷³ *See supra* notes 433-39 and accompanying text.

⁶⁷⁴ *See supra* notes 385-89 and accompanying text.

would emerge. It suffices, however, to suppose that Drys divided on the question in one manner or another, and for one reason or another. Indeed, it may make sense to read the Arizona⁶⁷⁵ and Oklahoma⁶⁷⁶ cases as struggles between Drys! The fact that Catholics were the plaintiffs in the two lawsuits does not gainsay the proposition.

Catholics lost the Arizona case, with only a stipulation of the Arizona Attorney General lying between them and theological disaster. Arizona Drys took it upon themselves to ask the Arizona voters to approve a new constitutional amendment that would accommodate the sacramental use of wine by clergymen from churches.⁶⁷⁷ There would be no need for stipulations from attorneys general not to prosecute clergymen for the religious use of wine. One could say, with a great deal of force, that Drys were merely propitiating Episcopalians. There may, however, have been some number of Drys who may or may not have cared much about accommodating only Episcopalians. Nevertheless, their interest in granting some sort of protection for the religious practices of those who were not evangelical Protestants stemmed, not from some liberal theory of religious liberty, but instead from a concern for appearances and civil peace and decorum. Jews may have been left in the lurch, since only the "sacramental" use of wine was protected, even while clergymen from "churches" could obtain wine for "sacramental" uses, although a liberal construction of the word "church" could easily lead to another result.⁶⁷⁸ However far the concern extended, it is difficult not to conclude that concern for appearances, avoiding the spectacle of arresting, at a minimum, Christian clergy for using wine in their religious services had much to do with the result in Arizona.

Oklahoma presented, *inter alia*, the spectacle of an Oklahoma City newspaper editorial criticizing utraist Drys for what the newspaper clearly saw as overreaching on their part.⁶⁷⁹ *De Hasque*⁶⁸⁰ may have been the response of a court interested in making sure that Drys would not become embroiled in squabbles over how far to push religious

⁶⁷⁵ See *supra* notes 367-84 and accompanying text.

⁶⁷⁶ See *supra* notes 385-407 and accompanying text.

⁶⁷⁷ See *supra* notes 380-85 and accompanying text.

⁶⁷⁸ See *supra* note 321 and accompanying text.

⁶⁷⁹ See *supra* note 651 and accompanying text.

⁶⁸⁰ *De Hasque v. Atchison, T. & S.F. Ry. Co.*, 173 P. 73 (Okla. 1918).

minorities,⁶⁸¹ and seeking to recast the question in terms of what the court believed to be the intention of the Oklahoma constitutional convention: do not overreach.⁶⁸² That the disagreement in Oklahoma involved, as a matter of institutional structure, the Oklahoma legislature and the Oklahoma Supreme Court cannot mask the fact that Protestants constituted the overwhelming majority of both bodies. One can still see, therefore, a struggle between Drys in Oklahoma over how far to impinge upon the religious practices of those who were not evangelical Protestants, and a triumph of those Drys concerned with seemliness.

The addition of the § 6 form of the Volstead Act exemption also represents the handiwork of Drys desirous of avoiding extreme results. The House of Representatives had been satisfied with the protection of the “sacramental” use of wine, as the §3 form of the exemption makes perfectly clear. However, some number of Senators must have seen the matter differently and wished to provide for a more explicit protection of the religious use of wine by Jews and by non-evangelical Protestant Christians. Some or all of the considerations suggested at the beginning of this Subpart can explain what the Senate did. Seemliness and appearances counted.

Political theory can also help to explain the dynamics of the Arizona and Oklahoma cases and, most importantly, the dynamics of the legislative process that yielded up the § 6 form of the exemption. Moreover, it can explain the powerful appeal of some sort of moderation on the question of the religious use of wine. The theory ultimately rests upon the proposition that with respect to proposed legislation, three groups matter: those for it, those against it, and those who fall somewhere in between:

Legislation is the product of choices made by legislators pursuing strategic aims within the structure of legislative institutions, rules and norms. The principle of majority rule requires that legislators collect a majority of votes to transform their hopes into law. For most contemporary social legislation, this democratic imperative is hard to achieve. On important legislative issues, ardent supporters and ardent opponents can fulfill their objectives only by collecting enough support from moderates and undecided legislators – legislators

⁶⁸¹ One notes, with considerable interest, that the sole Catholic member of the Oklahoma Supreme Court, Chief Justice Matthew J. Kane, did not participate in the decision in *De Hasque*. See *id.* at 78. See also BROWN, *supra* note 386, at 85; DIARY OF A FRONTIER BISHOP: THE JOURNALS OF THEOPHILE MEERSCHAERT 489 n.16 (James D. White ed., 1994).

⁶⁸² *De Hasque*, 173 P. at 77.

whose support is pivotal to the final outcome. As a price of this support, ardent supporters must typically accept compromises to their legislative vision.⁶⁸³

These “compromises” typically take the form of “limiting [the] scope [of the proposed legislation]; redefining its coverage or including exemptions.”⁶⁸⁴

The exemption in its nineteenth century form clearly served a majoritarian function. It applied to all Christian religious observances, although there is great doubt as to whether it applied to Jewish religious observances,⁶⁸⁵ or the observances of any other non-Christian religion that used wine. It goes without saying, of course, that the exemption did not cover the religious use of any non-vinous alcohol. The dawn of the twentieth century saw a different situation. Evangelical Protestants had largely given up the religious use of wine.⁶⁸⁶ The exemption, therefore, took on an entirely new meaning, largely serving to protect the use of wine by minority religions. Habit and custom in the drafting of temperance-prohibition laws cannot easily explain the continued appearance of exemptions in twentieth century prohibition statutes.⁶⁸⁷

Drys had to decide whether or not to accommodate the practices of minority religions. Given demographic and other trends, failure to accommodate those practices could give rise to social disruptions, to say the least. We have seen that the Drys were not of one mind, as the exemptions appearing in the prohibition laws adopted in the first two decades of the twentieth century fell into four groups,⁶⁸⁸ and in Arizona and Oklahoma, at least for a while, there was no exemption at all.

The question at hand concerns the two different forms of the exemption that appear in the Volstead Act. The § 3 form, the form contained in virtually all of the bills introduced in Congress to implement the Eighteenth Amendment,⁶⁸⁹ followed the nineteenth century, Group I form.⁶⁹⁰ So consideration in

⁶⁸³ Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417, 1420-21 (2003) (footnotes omitted).

⁶⁸⁴ *Id.* at 1444.

⁶⁸⁵ See *supra* notes 284-96 and accompanying text.

⁶⁸⁶ See *supra* notes 138-39 and accompanying text.

⁶⁸⁷ Habit and custom can explain the continued presence of the exemption as propitiation of Episcopalians. See *supra* Part IV.A.

⁶⁸⁸ See *supra* notes 315-24 and accompanying text.

⁶⁸⁹ See H.R. 3458, 66th Cong. § 7 (1919); H.R. 5549, 66th Cong. § 4 (1919); S. 555, 66th Cong. § 7 (1919); S. 611, 66th Cong. § 7 (1919).

⁶⁹⁰ See *supra* note 316 and accompanying text.

Congress “began” with a rather pinched view of the religions whose practices it wished to accommodate. But the § 6 form, introduced in the Senate, parallels the Group IV form,⁶⁹¹ the most liberal of the exemption forms found in American law at the time.

It is this journey or progression in Congress from the § 3 form to the § 6 form that positive political theory might explain. The relevant inquiry does not involve the question of prohibition *vel non*, but whether there is to be an exemption for the religious use of wine, and, more to the point, for which religions. Those most intent upon “purifying”—i.e. drying up—America as quickly as possible, particularly given demographic trends, would want as narrow an exemption as possible. Those perhaps sharing the ultimate goals of the extreme Drys, but in fact more concerned about the implications and the ramifications of demographic and other realities, and the potential for disorder and disruption, would favor a broader exemption. The price for the support of the moderates would be, according to this theory, the acceptance of the more liberal § 6 form.

Unfortunately, the legislative history of the Volstead Act is remarkably opaque on the point. The text of the § 6 form plainly established that Congress had acceded to a liberal view of the scope of the exemption. But it makes perfect sense to suppose that “ardent supporters” had negotiated with “moderates” and reached a compromise. Pragmatic and strategic considerations, therefore, plausibly explain the exemption found in the Volstead Act. These considerations differ from the embedded cultural and theological considerations that shape the thesis discussed in Subpart A that the exemption reflected the needs of Episcopalians, and that other religions merely benefited from interest convergence. It is possible to put these two readings together. Taking care of Episcopalians makes the pragmatic and strategic problems presented by other non-evangelical Protestant religions all the more compelling. But it is also possible to leave these two readings as alternative understandings of the Volstead Act exemption.

⁶⁹¹ See *supra* notes 355-60 and accompanying text.

C. *Attrition and the Supposed Virtues of National Prohibition*

Anglo-American evangelical Protestants have displayed a remarkable admixture of optimism and pessimism. The Church of England never "purified" itself to the satisfaction of the evangelical Protestants.⁶⁹² The Seventeenth Century Civil War proved to be a disaster, and evangelicals were forced to accept a second-class position, thanks to the Act of Toleration.⁶⁹³ But America was different. Evangelical Protestants found themselves in the majority, and by the end of the nineteenth century, were making confident claims of manifest destiny.⁶⁹⁴ But the conceited optimism of the Gilded Age evangelical Protestants never completely escaped the orbit of a deeply entrenched pessimism. Even a stalwart minion of the Protestant Empire, Josiah Strong, could not avoid holding his readers spellbound with stories of great and menacing perils of various and sundry sort.⁶⁹⁵

At the same time, evangelical Protestants could not resist the notion that conversion—Protestantization—would come about because of, among other things, Sunday schools and evangelical Protestant preaching.⁶⁹⁶ Experience proved that prescription to be wrong. But naïve, even silly, optimism persisted. In Subpart B, I suggested that Drys read the demographic and other social trend data differently.⁶⁹⁷ Some believed that the trends were working against the interests of the Protestant Empire and National Prohibition, thus providing the occasion to strike a mighty blow in defense of the Empire, even if that meant *not* accommodating the religious practices of some if not all of those who were not evangelical Protestants. Others read the data the same way, but, drew a different conclusion from them: too much social disruption would result if the religious practices of those who were not evangelical Protestants were legally proscribed.

But the optimistic strain in evangelical Protestant thought suggests another possible reading of the exemption

⁶⁹² See Conrad Russell, *Introduction to The Origins of the English Civil War*, in *THE STRUGGLE FOR POWER: ENGLISH HISTORY, 1550-1720*, at 317, 333 (John M. Beattie & Michael G. Finlayson eds., Canadian Scholars' Press 1987) (noting that "Puritanism was the heir of all the disappointed hopes raised by the Reformation").

⁶⁹³ Act of Toleration, *supra* note 478.

⁶⁹⁴ See *supra* notes 196-203 and accompanying text.

⁶⁹⁵ See STRONG, *supra* note 27, *passim*.

⁶⁹⁶ See *supra* notes 204-06 and accompanying text.

⁶⁹⁷ See *supra* note 688 and accompanying text.

found in the Volstead Act. Some Drys believed that the fact of National Prohibition would persuade those not persuaded, and that those who were not evangelical Protestants would make the necessary adjustments to their religious practices, if not their beliefs as well.⁶⁹⁸ Given this view, the exemption represents nothing more than a decision to rely on suasion, rather than coercion! The fundamental trait or inclination of the Anglo-American Protestant Empire to rely on suasion, even with coercion lurking in the background,⁶⁹⁹ now comes into play and provides the basis for a third possible reading of the exemption. Suasion had gotten, or, depending upon one's time perspective, suasion would get, a new lease on life, thanks to National Prohibition. There was no need to destroy Christian and Jewish rites that depended on the use of wine. Users of wine would come to see that they did not need wine, and thus would abandon it, ultimately embracing evangelical Protestantism.

This reading also fits with the dynamic relation between Episcopalians and evangelical Protestants. Ever since 1688, if not earlier, evangelicals had been waiting out Anglicans, and vice versa. The exemption becomes, in this light, merely one more example of the deeply embedded cultural instinct of evangelical Protestants to wait out Episcopalians. Given the demographic realities of America in 1919, however, the exemption also functioned as a part of the strategy to wait out not only Episcopalians, but Jews, Lutherans, Catholics and Orthodox Christians. The exemption, under this reading, generated an instrumentalist view of religious freedom: those who were not evangelical Protestants were "free," but they would convert, and if they did not do so soon enough, the American Protestant Empire would resort to coercion to help the process along.

Enforcement of National Prohibition proved to be an enormous problem. Indeed, one could say that in important ways, National Prohibition was simply unenforceable⁷⁰⁰ and that it was its unenforceability that probably led to its demise.⁷⁰¹ After the fact, as it were, one could say that the idea that Prohibition itself would aid in the work of conversion, of

⁶⁹⁸ See *supra* notes 673-74 and accompanying text.

⁶⁹⁹ See *Newsom, Protestant Empire, supra* note 23, *passim*.

⁷⁰⁰ See PINNEY, *supra* note 116, at 435-36. See also THE DRY YEARS, *supra* note 226, at 110; ENGELMANN, *supra* note 237, at 149-51, 178; FRANKLIN, *supra* note 123, at viii, xiii; GUSFIELD, *supra* note 118, at 114; MCCARTY, *supra* note 188, at 11.

⁷⁰¹ BLOCKER, *supra* note 226, at 243.

Protestantization, was silly and absurd. But the question here is whether, at the time that the Volstead Act was enacted in 1919, Drys nevertheless believed that National Prohibition would aid in the work of conversion. There is evidence that at least some Drys so thought, and that the exemption for the religious use of wine merely represented an aspect of a larger strategy, reaching back to 1534, to rely on suasion, drawing on coercion only when suasion failed in effect.

D. Celebration of Religious Diversity and Pluralism as Pro Bono Publico

It is difficult to see how a commitment to principled religious liberty, a theory of religious liberty that celebrates religious diversity and pluralism as a public good, can easily explain the Volstead Act exemption. But, no matter how anti-Catholic the Drys might have been,⁷⁰² no matter how angry the Drys might have become when those who were not evangelical Protestants proved to be highly resistant to the protestantizing importuning of the Anglo-American Protestant Empire,⁷⁰³ no matter that some Drys might have sought to destroy the religious exercises of religious minorities,⁷⁰⁴ no matter that some Drys might have wished to see religious minorities beg routinely for judicial or administrative grace,⁷⁰⁵ it remains *theoretically* possible that the evangelical Protestant Drys—or at least a significant number of them—had embraced a broad, generous and principled theory of religious freedom and liberty, and drew upon it when they decided to exempt the religious use of wine from the reach of National Prohibition.

However, we have seen that the question whether or not to exempt the religious use of wine was abroad in the first two decades of the twentieth century, and caused little difficulty and dissension.⁷⁰⁶ And yet, if such a broad and liberal principle existed, Roman Catholics did not see it, or if they saw it, believed that it was neither real nor meaningful.⁷⁰⁷ They

⁷⁰² See *supra* Parts II.A, II.B, and II.C.

⁷⁰³ See *supra* Parts II.D and II.E.

⁷⁰⁴ See *supra* Part III.

⁷⁰⁵ See *supra* notes 436-41 and accompanying text.

⁷⁰⁶ See *supra* Part III.B.

⁷⁰⁷ One Catholic writer insisted that constitutional principles going back before the United States Constitution protected the religious use of wine. See Kenny, *supra* note 457, at 6 (declaring that “we find that unrestricted religious freedom has been repeatedly and consistently imposed by the United States Government, as an organic article and essential condition to admission, on all the States, generally and

continued the fight for religious freedom and liberty in the Catholic religious journals of the day. Fear, bravado, arrogance and despair, not to mention, perhaps, distrust, do not paranoia make. There had to be something that kept Roman Catholics on edge. And this must have been true even though religious freedom ultimately won out in Arizona, Oklahoma,⁷⁰⁸ and elsewhere where providing for the religious use of wine had troubled the waters.⁷⁰⁹ And yet, it may well be the case that most American evangelical Protestants believed in a principled religious freedom and liberty for religious minorities even though the bluster and fulminations of the ultraist Drys kept Catholics off balance.

So the matter appears to be unresolved. However, other considerations may tip the scales in one direction or the other. The question presents itself as to whether, anterior to any lawmaking process, American evangelical Protestants had developed a principled theory of religious freedom celebrating religious diversity and pluralism either on their own motion, so to speak, or as a result of the struggle of religious minorities for religious liberty.

1. The Possibilities of a Principled American Evangelical Protestant Theory of Religious Freedom Celebrating Religious Diversity and Pluralism

Sidney Mead insisted in 1963 that “[t]he major piece of the [American evangelical Protestant] churches’ unfinished intellectual business . . . is religious freedom.”⁷¹⁰ This position, if correct, strongly counsels against the conclusion that the Volstead Act exemption reflects fidelity to a principle of

severally, formed since 1790 . . . [and w]ho will contend that the Congress of Thirteen States . . . exempted themselves from the law” and that the First Amendment was not intended as a prohibition on Congress since most of the original thirteen states had enacted religious freedom).

⁷⁰⁸ The Arizona victory arguably turned on a claim of what the law required, perhaps a broad principle of religious freedom. See *supra* notes 380-83 and accompanying text. One must note, however, that the decision in favor of the State of Arizona apparently did not rest on any such principle. The Oklahoma victory in *De Hasque* was based on the Oklahoma court’s “construction” of the mind of the Oklahoma constitutional convention, although the court did note that the Oklahoma constitution in fact contained a religious freedom clause. See *supra* notes 401-02 and accompanying text.

⁷⁰⁹ The question surfaced in Kansas in 1917. While the Women’s Christian Temperance Union took no stance on the “controversial proposal that communion wine be exempted,” the bill as enacted did exempt communion wine. BADER, *supra* note 121, at 186.

⁷¹⁰ See MEAD, *supra* note 270, at 55.

religious freedom, if that principle does not exist either at all or in any coherent recognizable and generally accepted form.

William G. McLoughlin offered one reason why the business of religious freedom remained unfinished:

Between 1730 and 1830 Americans moved 180 degrees from a patriarchal to an egalitarian view of politics They did not, however, reject the European belief that loyalty to the state required loyalty to the religion of the sovereign of the nation. Sovereignty in British North America [in 1730] rested in the king as God's vice-regent on earth; sovereignty in the United States of America in 1830 rested in 'the people,' or at least in the majority of them.⁷¹¹

This *reversement* came to pass because by 1830 "romantic ideology, romantic nationalism, and romantic Christianity gradually gained power [and] the will of the nation came to rests in precisely the same place as the spirit of God, namely, in the people."⁷¹² On the point of the meaning of religious liberty that resulted, McLoughlin noted:

Under the epistemology of romanticism, external checks upon the people seemed unnecessary Thus the voice of the people became the voice of God and of the nation. From this there could be only limited dissent, mere tolerance, not true religious liberty. The new nation, as de Tocqueville saw, substituted one form of tyranny for another . . .⁷¹³

His conclusion, worth pondering, is that ever since then "we have been testing the limits of religious liberty under popular sovereignty."⁷¹⁴

Robert T. Handy reached largely the same conclusion: when evangelical Protestants "worked with other evangelicals on the basis of common ideas about a Christian civilization, they were more ready to limit freedom of the opposition."⁷¹⁵ Most importantly, "[t]he great devotion to religious freedom showed its limitation when the hope for a Protestant America seemed in jeopardy,"⁷¹⁶ and the Protestant Empire was under a great deal of stress in 1919 if only because of the persistent resistance of non-evangelical Protestants to Protestantization.

Mead, McLoughlin, and Handy have, of course, merely described the interior logic of the Protestant Empire. If the goal

⁷¹¹ McLoughlin, *supra* note 196, at 174.

⁷¹² *Id.* at 175.

⁷¹³ *Id.*

⁷¹⁴ *Id.* at 190.

⁷¹⁵ HANDY, *supra* note 26, at 58.

⁷¹⁶ *Id.* at 59.

of the Protestant Empire is conversion to evangelical Protestantism,⁷¹⁷ then any idea or theory of religious freedom would have to be entirely strategic or tactical, a reflection of the complex dynamic of suasion and coercion. Religious freedom means merely the privilege to practice one's religion until conversion to evangelical Protestantism shall take place. And that freedom might or might not include the right to resist conversion but only for so long.

Mead, therefore, was spectacularly wrong, at least in part: the intellectual business of religious freedom *was* finished, and finished a long time ago as the Anglo-American Protestant Empire took shape—religious freedom was an instrumental concept, designed to accomplish the overarching goal of Protestantization in a religious polity disinclined to resort solely to brute force. Not even the incorporation of the Religion Clauses via the Due Process Clause of the Fourteenth Amendment changes that fact. Incorporation merely entailed a shift in the dynamic of suasion and coercion in response to the felt political and national security needs of the time.⁷¹⁸ McLoughlin and Handy, having seemingly accepted the stubborn reality of the Protestant Empire, were far closer to the truth.

One could lay all of the foregoing to rest if there were some credible evidence that Drys, or at least many of them, nonetheless believed in a broad principled doctrine of religious freedom and liberty. No such evidence, however, exists. The pious preachments of the Anti-Saloon League⁷¹⁹ do not make the case for reading the exemption as stating such a principle. The legislative history of the Volstead Act is silent on the point. Indeed, in light of the horrid doctrine that sprang forth from the Court in *Smith*,⁷²⁰ one would be hard-pressed to argue that the Court, at least, has finished the intellectual business of religious freedom even today, much less in 1919. Congress did respond to *Smith*, of course, with the Religious Freedom Restoration Act,⁷²¹ which sought to establish a sounder free exercise doctrine, one that offers religious minorities more protection from the whims of the majority than the doctrine in *Smith* does. However, the Court gutted that law in *City of*

⁷¹⁷ See *supra* notes 196-97 and accompanying text.

⁷¹⁸ See Newsom, *Protestant Empire*, *supra* note 23, at 259-63.

⁷¹⁹ See *supra* note 430 and accompanying text.

⁷²⁰ See *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁷²¹ 42 U.S.C. § 2000bb (2000).

Boerne v. Flores,⁷²² taking an overly broad view of *Marbury v. Madison*⁷²³ along the way.

2. A Liberal Conception of Religious Freedom and the Struggle of Religious Minorities

The failure of evangelical Protestants to develop a broad and liberal theory of religious freedom does not settle the question. It is possible that other Americans might have done so, and might have persuaded or compelled the majority to act in accordance with that principle. What seems clear is that religious minorities have struggled mightily throughout our national experience to find acceptance as Americans without having to become evangelical Protestants.⁷²⁴ The story of the struggle against common school religion has been told.⁷²⁵ By 1919, however, the case law stood largely *against*, not for, the claim of Catholics, Jews, Free-Thinkers and others, that their children should be able to attend public schools without being forced to hear, participate in, or to opt out of the reading of King James Version, a Protestant version, of the Bible or the saying of an evangelical Protestant prayer.⁷²⁶ A minority of judges had, however, given support to the claims of the religious minorities, and did so largely in terms that reflect or mirror a theory of religious freedom, be it principled, strategic, or both.⁷²⁷ The struggle had, in other words, yielded up a response, albeit a minority or dissenting response. But it was impossible to find a widely-held, broad, liberal, American conception of religious freedom that celebrated religious difference, at least in the context of the common schools.

With regard to accommodating the religious use of wine, the situation stands differently. While common schools and houses of worship had much in common as critical participants in the formation and development of children, one saw far more determination to use the common schools to protestantize American school children than determination to interfere with the religious use of wine by those who were not evangelical Protestants. The overzealousness that one saw in 1917

⁷²² *Flores*, 521 U.S. 507, 507-09 (1997).

⁷²³ See generally *Marbury*, 5 U.S. 137 (1803).

⁷²⁴ See *supra* note 264 and accompanying text.

⁷²⁵ See Newsom, *Common School Religion*, *supra* note 6, *passim*.

⁷²⁶ *Id.*

⁷²⁷ *Id.*

Oklahoma⁷²⁸ appears to be the exception rather than the rule when it came to what material substances could or could not be used in the houses of worship, or even the private homes, of those who were not evangelical Protestants. Perhaps because evangelical Protestants had themselves just recently come to the decision to use grape juice instead of wine in their communion services,⁷²⁹ and perhaps because the law had just recently stripped beverage alcohol of its protection as an article of interstate commerce, and thus its immunity from state prohibition laws when alcohol was in interstate commerce,⁷³⁰ religious minorities had struggled but for only so long to protect their religious use of wine from the reach of prohibition laws. Perhaps there was simply not enough time to teach evangelical Protestants a lesson in religious freedom. But Oklahoma and Arizona must mean something. They taught something about the subject of religious freedom.

However, the review of the state statutes undertaken above⁷³¹ shows a decidedly mixed response to the free exercise claims of Jews. Catholics and other liturgical Christians may have been protected by virtually all of the laws,⁷³² but *Sweeney*⁷³³ may well have represented the attitude of a substantial number of people in the early twentieth century with regard to Jewish religious practices. No broad and liberal theory of religious freedom can emerge from a setting or context in which the religious claims of Jews are treated with such disrespect, notwithstanding the fact of struggle by religious minorities to gain acceptance in America.

The struggle of religious minorities is worthwhile, however, because a theory of religious freedom invariably flows from it—whether liberal and broad or not.⁷³⁴ However, one cannot easily say that the struggle of religious minorities to protect the religious use of wine yielded up a coherent, generous, and liberal principle of religious freedom celebrating

⁷²⁸ See *supra* notes 420-23 and accompanying text.

⁷²⁹ See *supra* Part II.A.4.

⁷³⁰ See *supra* notes 244-45 and accompanying text.

⁷³¹ See *supra* Part III.B.1.b.

⁷³² There surely is some question whether a law exempting the religious use of wine for the commemoration of the Lord's Supper reaches the Catholic Mass. See *supra* notes 284-91 and accompanying text.

⁷³³ *Sweeney v. Webb*, 76 S.W. 766, 766 (Tex. Civ. App. 1903).

⁷³⁴ The great intellectual dilemma of freedom flowing from the struggle of minorities is that the principle that emerges may only protect the minorities engaged in the struggle, leaving out or ignoring the struggles of other minorities. Consider Scalia's execrable opinion in *Smith*. See *Employment Div. v. Smith*, 494 U.S. 874 (1989). One is reminded of the old saw "I'm aboard, Jack, pull up the rope!"

the virtues of religious pluralism and diversity which the majority felt bound to accept, and which it did accept in carving out the exemption in the Volstead Act. The struggle of religious minorities for religious freedom may have merely produced a strategic or pragmatic response, rather than an intellectual or ideological acceptance of the premise on which the struggle rested.

Most importantly, any analysis of the Volstead Act seen through the lens of any supposed theory of religious freedom that resulted from the struggle of religious minorities must take into account the role of Episcopalians. The interests of Episcopalians, who may or may not easily fit the description of "religious minority," may well have controlled the question, as I have suggested earlier.⁷³⁵ It becomes difficult, if not impossible, to determine whether religious minorities, *excluding* Episcopalians, generated a liberal theory of religious freedom that the Congress adopted when it passed the Volstead Act. If one includes Episcopalians in the equation, then the social dynamics and mapping of Episcopalians must be taken into account as there is a real possibility that the interests of Episcopalians mattered greatly, if not decisively, in shaping the Volstead Act. Precious little justification exists for a reading of the exemption as based on a broad and liberal principle of religious freedom, whether one looks at the question from the point of view of evangelical Protestant doctrine or theory or evangelical Protestant response to the claims of religious minorities.

V. CONCLUSION

Context and setting trump text. This is the intellectual conclusion that seems inescapable. As exemptions for the religious use of wine go, the § 6 form of the exemption found in the Volstead Act represents a significant achievement, advance and improvement over the exemptions found in many other state and federal statutes. Something caused the United States Senate to think about the religious use of wine and to propose language that specifically protected non-Protestant Christians and Jews. Many state and federal statutes arguably only protected Christian religious uses of wine,⁷³⁶ and a few state statutes arguably only protected evangelical Protestant

⁷³⁵ See *supra* Part IV.A.

⁷³⁶ See *supra* notes 289-93 and accompanying text.

religious uses of wine.⁷³⁷ As a matter of formalist thought, one might well conclude that the § 6 form represented a broad, generous, and liberal conception of religious freedom.

Furthermore, a formalist interpretation of the exemption arguably finds some support in the context. For openers, National Prohibition represents one of the great American blunders. This vaunted Protestant Empire social reform fell on its own sword in 1933,⁷³⁸ after only 13 years. The attempts of contemporary commentators to rehabilitate the temperance-prohibition idea flounder on the shoals of the Anglo-American Protestant Empire.⁷³⁹ Whatever virtue may have existed in the temperance-prohibition idea was seemingly apparent only to the white evangelical Protestants who promoted it. Others knew better. We are well rid of National Prohibition. Problems of alcoholism call for regulation and treatment, not mindless and unenforceable prohibition.⁷⁴⁰ Second, as a matter of theology, there was no basis for granting an exemption. If the Drys were right about alcohol, given their dualistic, Manichaeian view of the world, a view deeply embedded in normative evangelical Protestant Eucharistic

⁷³⁷ See *supra* notes 281-88 and accompanying text.

⁷³⁸ The Twenty-First Amendment, entitled the National Prohibition Amendment, repealed the Eighteenth Amendment and reads as follows:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. CONST. amend. XXI.

⁷³⁹ See, e.g., THE DRY YEARS, *supra* note 226, at 6-7 (arguing against the thesis that Prohibition reflected a "stern and repressive paranoia, a driving intolerance of individual differences and sacred personal freedoms" by suggesting instead that such a view ignored "Puritan morality, . . . the terrors of nineteenth century drunkenness and debauchery, and . . . the progress in solidly scientific revelations—many of them discretely concealed since repeal—about the impact of alcohol on the human organism and the modern American" but betraying a bias in favor of middle class white evangelical Protestants by treating *their* fears as if they were or should have been the fears of all Americans); TIMBERLAKE, *supra* note 9, at 1-3 (like Clark, treating *Progressivism*, which he conceded was a white middle-class Protestant phenomenon, as if it were normatively American).

⁷⁴⁰ See, e.g., PETER ANDERSON, ALCOHOL AND PRIMARY HEALTH CARE 2 (1996) (stating that "[p]rimary health care is seen as an important setting for identifying individuals at risk from heavy drinking and helping them to reduce consumption").

theology,⁷⁴¹ then one cannot make a case for an exemption for the religious use of wine. Liquor is liquor, it is *malum in se*, and it matters not when one drinks it or for what purpose. Accommodations undermine the logic of the evangelical Protestant theological nomos.⁷⁴²

Given the foregoing, one could argue that the § 6 form must represent a broad and liberal theory of religious freedom precisely because it speaks in spite of monolithic support that evangelical Protestants gave National Prohibition. The exemption, one might argue, surmounted the deeply held views of those who gave it birth, and therefore must have reflected a broad and liberal conception of religious liberty. But such a conclusion is untenable: the question still remains *why* Drys might wish to accommodate and propitiate religious minorities. Rising above the religious bigotry of the Protestant Empire, as the § 6 form surely does, does not mean that religious diversity had become a social good in the Protestant Empire of 1919. There might have been, and indeed there were, less exalted reasons.

Accommodate and propitiate the Drys did. But there is every reason to believe that they did so because accommodation and propitiation served a useful purpose for the Protestant Empire: they kept Episcopalians in the Protestant fold. The Protestant middle and upper classes came to know, if they had not already known it, that they needed each other if they were to have any chance of keeping the laboring classes under "control." After all, Josiah Strong had spelled it all out a generation earlier.⁷⁴³

But the § 6 form of the exemption, of course, does far more than merely accommodate and propitiate Episcopalians. It explicitly protects liturgical Christians, Protestant, Catholic and Orthodox, and also protects the religious practices of Jews. Many states, and indeed, the federal government, had demonstrated an unfortunate inclination to protect only the "sacramental" use of wine.⁷⁴⁴ If one takes *Sweeney v. Webb*⁷⁴⁵ seriously, such a limitation left Jews unprotected. Some states

⁷⁴¹ See *supra* Part II.A.2.a.

⁷⁴² Congress also exempted sweet cider from the reach of the law, see Volstead Act, tit. II, § 4(f), 41 Stat. 309 (1919), and permitted those capable of laying by large provisions of beverage alcohol—the wealthy—to keep the same, see *id.* at § 33, 41 Stat. 317 (1919).

⁷⁴³ See *supra* Part IV.A.1.a.

⁷⁴⁴ See *supra* notes 316, 361-66 and accompanying text.

⁷⁴⁵ 76 S.W. 766 (Tex. Civ. App. 1903).

even managed to limit the exemption to Protestant religious uses only,⁷⁴⁶ leaving Catholic usages of wine unprotected. Congress, to its credit, had something in mind when it explicitly protected the religious practices of Catholics and Jews. Some kind of religious freedom was clearly at stake.

Perhaps the problem implicates scale. It might be one thing for a state, or even some number of states, to take a niggardly view of the scope or application of the exemption, but it might be quite another thing for the United States to do the same. Backwards states could be persuaded, perhaps, to change their laws, or the interpretation of their laws, to conform to a more enlightened, i.e., broader, exemption for the religious use of wine. In a sense, this would be nothing more than federalism at work. But if the United States took a pinched view of the exemption, to whom could those offended by that view seek recourse? Such a view would, in effect, eliminate any safety valve. Thus for National Prohibition to save Episcopalians while destroying other minority religions might well lead to disorder, unrest, resistance, and worse *somewhere* in the United States.⁷⁴⁷ It is difficult to avoid the conclusion that the exemption took the form and shape that it did for largely pragmatic and tactical reasons. The problem with resting the exemption on some broad and liberal theory of religious freedom, its formalist or textualist liberality notwithstanding, is that the Protestant Empire had no such theory.

In the end, it was the very logic and character of the Protestant Empire that explained the decision to explicitly

⁷⁴⁶ See *supra* notes 285-91 and accompanying text.

⁷⁴⁷ It may well be that there is an international dimension or aspect to the § 6 form of the exemption for the religious use of wine. Having fought in the First World War, the United States found itself, strangely perhaps, given its silly notions of Manifest Destiny, see *supra* notes 196-203 and accompanying text, connected with the wider world in ways that it had not been before. It could not cavalierly dismiss the religious interests of Catholics and Jews without doing great damage to its national interests in the world at large. Perhaps, therefore, the Senate had the great good sense to understand this when it inserted the § 6 form of the exemption into the Volstead Act, and Congress, as a whole, had the great good sense to agree. The connection between the concession of minority rights in shaping American domestic law and international relations has been noted before. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 66 (1988). The thesis of this paper does not turn on this hypothesis, there being enough in the domestic history of the United States to give the exemption found in the Volstead Act meaning. However, one cannot gainsay the possibility that there was indeed an international dimension to the problem. The fuller implications of this possibility lie beyond the scope of this paper. The full dimensions of early twentieth century international relations on American domestic law, particularly National Prohibition, await the ministrations of others.

accommodate the religious use of wine by those who were not evangelical Protestants. Everything came down to the characteristic tendency or inclination of Anglo-American Empires to moderate coercion with suasion, to wait out those who were not yet evangelical Protestants because, with a little help from suasion and, if necessary, coercion, they would die off, come around, or both. In the end, so the minions of the Protestant Empire believed, evangelical Protestantism would triumph and reign supreme. One finds some kind of religious liberty here, but not one that values religious diversity as a social good.

Justice Blackmun only scratched the surface of the enormously complex and difficult problem of social and religious dynamics in the Protestant Empire. The Catholic Mass is the "obvious" beneficiary of the exemption, given the culturally embedded anti-Catholicism of the Anglo-American Protestant Empire. But had he paid any attention to the § 6 form of the Volstead Act exemption, Justice Blackmun would have discovered that the exemption in substance, power, and effect was far more revealing about the meaning, nature, purpose, and function of the exemption, about who we are as a nation, and, most importantly, that the exemption was not "about" the Catholic Mass. The exemption was "about" a problem that evangelical Protestants found facing them which demanded a pragmatic solution, one which comported with the characteristic trait of Protestant Empires to rely on an admixture of suasion and coercion. I doubt that he would have persuaded the majority to look at the question before the Court in *Smith*⁷⁴⁸ sensibly and intelligently, had he explored the true dimensions of the problem that the exemption was meant to solve, but he surely could have made the majority look even sillier and more mean-spirited and bigoted than he managed to do. Justice Scalia's insensitive referral of religious minorities to the legislative process is even less defensible than it might otherwise appear to be because Roman Catholics did not save the Mass from the clutches of National Prohibition, their valiant struggles notwithstanding. For aught that one can tell, Episcopalians, the quintessential elite and privileged minority, if there ever was one, and if not them, then evangelical Protestants, composing their differences over strategy and tactics of Protestantization, did!

⁷⁴⁸ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

The exemption in the Volstead Act for the religious use of wine indeed represented "some kind of religious freedom." It may have been a generous form of religious freedom, it may have reflected a broader theory of religious freedom than many of the states were prepared to grant. It may even have been, implausibly, a principled, liberal, religious freedom *to a degree*. But it was surely a religious freedom that satisfied and responded to the needs of Protestants. The only real question is which Protestants. One reading, the most plausible one, suggests that the theory of religious freedom embedded in the exemption rested on the need to propitiate Episcopalians. Other plausible readings suggest that that the intra-Protestant dynamic was perhaps more subtle and complicated, that evangelical Protestants, the backbone of the drive towards National Prohibition, concluded, albeit reluctantly, that a relatively broad exemption best served their interests in "purifying" those who were not yet evangelical Protestants. But in any event, one sees the workings of the Protestant Empire here, whether one focuses on Episcopalians or on the strategies and sensibilities of evangelical Protestants. The appalling dishonesty of the majority opinion in *Smith* grows even deeper and broader, fouling everything that it touches.

Since the goal of the Protestant Empire continues to be the Protestantization of the people subject to its reach or jurisdiction, one cannot read the exemption as a statement of a broad and liberal theory of religious freedom that celebrates the social value of religious diversity and pluralism. Perhaps the six Justices comprising the majority in *Smith* understood all of this. But their arrogant, petty triumphalist approach in *Smith* suggests that they failed to appreciate the stakes.

Perhaps the six simply did not care. Perhaps they, along with the three dissenters, simply had not adequately explored or pondered the questions posed by the exemption in the Volstead Act, and thus could not fully appreciate the stakes. If this is in fact the case, we are left to consider whether the Court has demonstrated the institutional competence necessary to decide questions which are rooted in what I have described above as "an enormously complex and difficult problem of social and religious dynamics."⁷⁴⁹ Whether or not one accepts my claims regarding the Protestant Empire, one cannot gainsay the complexity of the question at issue. And

⁷⁴⁹ See *supra* note 748 and accompanying text.

thus we are ultimately left to consider the proper role of the Court in deciding questions, the proper disposition of which, requires a careful consideration of a wide range of historical, religious, cultural, political, and economic factors.⁷⁵⁰

⁷⁵⁰ This enormous question concerning the institutional competence of the Court lies beyond the scope of this Article. It is a question that I will take up in a future article.