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Harvard Divinity School

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THE LAST DAYS OF ERASTIANISM — FORMS IN THE AMERICAN CHURCH-STATE NEXUS

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I

INTRODUCTION

IN 1843, the Reverend Robert Baird, “an esteemed minister of the American Presbyterian Church,” sojourning seven years in Europe “for the prosecution of certain religious and philanthropic objects,” published a book for the benefit of the various Europeans who had addressed to him “innumerable inquiries . . . respecting his native country, and especially respecting its religious institutions.”¹

The work begins with suitable historical and geographical data, followed by a demonstration that the government of the United States, and of the several states, though formally nonreligious, is in fact actuated by Christian principles, and sympathetic to the work of the churches. From there, the author goes on to develop what he calls the “Voluntary Principle” that is “the American plan of supporting religion by relying, under God’s blessing, upon the efforts of the people, rather than upon the help of the government.”² He shows the rich variety of ecclesiastical and philanthropic institutions that have grown up under the impetus of this principle, including not only edifices for religious worship and missions for spreading the Gospel but also schools and colleges, institutes for the temporal and spiritual succor of seamen, prisoners, the poor, and the insane; schools for the training of the deaf, the dumb, and the blind; and societies for the abolition of liquor, Sabbath-breaking, slavery, and war. Some of these institutions rely entirely on the piety and philanthropy of those who wish to support them; others have a sufficient temporal dimension

¹ ROBERT BAIRD, *Religion in the United States of America* (Glasgow, Blackie & Son, 1844), v, vi.

² *Id.*, 69.

to gain some state support, after being founded out of zeal for Christian service.

What I find particularly striking about this paean is its resemblance to a modern release by the National Association of Manufacturers extolling the economic benefits of the Free Enterprise System. Indeed, the Voluntary Principle as Baird conceives it is precisely the American system of Free Enterprise applied to the ecclesiastical sphere. Small wonder it has the same kind of triumphs to report. The triumphs are conceived in utilitarian terms. Things eminently useful to the community are being accomplished at no cost to the taxpayer, through giving scope to the zeal and ingenuity of the free citizen. It is in these terms that the Rev. Mr. Baird conceives the institutional church and its place in American life.

Half a century later, a still more exuberant statement of similar effect was written, in the introductory volume of the important American Church History Series, by H. K. Carroll, who was in charge of amassing religious data for the 1890 census. After dealing with the ecclesiastical state of the country in a variety of statistical and organizational terms, Carroll provides a summary of "How the Church Affects Society" which is worth considering in full:

It is to be remembered that all the houses of worship have been built by voluntary contributions. They have been provided by private gifts, but are offered to the public for free use. The government has not given a dollar to provide them, nor does it appropriate a dollar for their support. And yet the church is the mightiest, most pervasive, most persistent, and most beneficent force in our civilization. It affects, directly or indirectly, all human activities and interests.

It is a large property-holder, and influences the market for real estate.

It is a corporation, and administers large trusts.

It is a public institution, and is therefore the subject of protective legislation.

It is a capitalist, and gathers and distributes large wealth.

It is an employer, and furnishes means of support to ministers, organists, singers, janitors, and others.

It is a relief organization feeding the hungry, clothing the naked, and assisting the destitute.

It is a university, training children and instructing old and young,

by public lectures on religion, morals, industry, thrift, and the duties of citizenship.

It is a reformatory influence, recovering the vicious, immoral, and dangerous elements of society and making them exemplary citizens.

It is a philanthropic association, sending missionaries to the remotest countries to Christianize savage and degraded races.

It is organized beneficence, founding hospitals for the sick, asylums for orphans, refuges for the homeless, and schools, colleges, and universities for the ignorant.

It prepares the way for commerce and creates and stimulates industries. Architects, carpenters, painters, and other artisans are called to build its houses of worship; mines, quarries, and forests are worked to provide the materials, and railroads and ships are employed in transporting them. It requires tapestries and furnishings, and the looms that weave them are busy day and night. It buys millions of Bibles, prayer-books, hymn-books, and papers, and the presses which supply them never stop.

Who that considers these moral and material aspects of the church can deny that it is beneficent in its aims, unselfish in its plans, and impartial in the distribution of its blessings? It is devoted to the temporal and eternal interests of mankind.

Every cornerstone it lays, it lays for humanity; every temple it opens, it opens to the world; every altar it establishes, it establishes for the salvation of souls. Its spires are fingers pointing heavenward; its ministers are messengers of good tidings, ambassadors of hope, and angels of mercy.

What is there among men to compare with the church in its power to educate, elevate, and civilize mankind? ³

This utilitarian tendency of the nineteenth-century American churchman was not new; it was his heritage. As early as 1306, the commons of England expressed a similar view of why men set up churches:

. . . to inform them and the people of the law of God, and to make hospitalities, alms, and other works of charity in the places where the churches were founded.⁴

Baird and Carroll, it seems clear, would have agreed.

³ H. K. CARROLL, *The Religious Forces of the United States* (New York, Christian Literature Co., 1893), lx-lxi.

⁴ *Rotuli Parliamentorum* (1767) I, 319a, quoted in the preamble to 25 Edw. III c. 6 (1350).

I have tried in other places to show the historical continuity between the viewpoint of the fourteenth-century commons as expressed in this passage and the Erastianism that occupied a central position in the Anglican Church from the seventeenth through the nineteenth centuries. I have also tried to show the affinities between English Erastianism and comparable movements on this side of the Atlantic.⁵ What all the manifestations of this Erastian tradition have in common, and what I have taken for my purposes as a definition of Erastianism, is a view of the institutional church as one of a variety of institutions through which a Christian society conforms itself to the will of God. In practice, this view has often resulted in a domination of the church by the state, but I think that is merely a byproduct of placing the church on a par with the other institutions of society. Certainly, Erastianism is not to be equated with the totalitarian view that religious institutions are to be subordinated to secular ends. Quite the opposite, it insists that religious ends are to be pursued purposefully and efficiently, just as secular ends are.

It is in this venerable Erastian tradition that Baird and Carroll write, and it is an audience in the same tradition they have in mind. If anyone doubts it, let him consider what Baird and a contemporary non-Erastian such as Keble would have had to say to each other, or how Baird would have answered the English pamphleteer who attributed our Civil War to a divine punishment for our failure to have an established church.

So we can think of the dominant theme in American church-state thinking as a kind of free-enterprise Erastianism. Adhering to the basic Erastian insight that views the institutional church as one of the many institutional forms through which a Christian society conforms itself to the will of God, it adds the American free enterprise insight that sees institutional forms as most efficient when freed from the inhibiting presence of government support. It appeals to Erastian criteria of efficiency to commend the whole system versus other systems in which government plays a more active role.

⁵ See my *The Passing of Nonsectarianism*, *Notre Dame Lawyer* 38 (1963), 115, 121-28.

This Erastian conception of the American church-state nexus is by no means confined to the nineteenth century. It is nowhere more apparent than in the monumental *Church and State in the United States*, published by the late Canon Stokes in 1950.⁶ The main themes around which Stokes develops the historical and social panorama of his subject are "adjustments" and "national issues." Adjustments are the ways in which the several institutional churches, minus the benefits and burdens of state support, have fallen into their role of embodying the ecclesiastical dimension of the overall national life. National issues are those matters in which the churches have played institutional roles in dealing with the concerns of the community as a whole. The general spirit of the work is one of thoughtful analysis of the experience of a nation under God, and of the place of the institutional church in that experience.

In the long history of Christendom, the Erastian view of which these American works are the modern representatives has existed in tension with what I have called a High Church view. This view, represented by the Gregorian reformers in the twelfth century, the Laudians in the seventeenth, the Oxford movement in the nineteenth, and a variety of less prominent movements in between, has emphasized a Christian witness to the otherness of God. Hence, it has seen the institutional church as standing *over against* society in general, rather than as constituting one of the institutions through which society in general conforms itself to the will of God. The High Church attitude tends to point up the shortcomings of society, and to offer the Christian a way of dissociating himself from them, rather than of ameliorating them. In the past, High Churchmanship has sought an institutional witness in forms that express the independence of the church, and her freedom from the corruptions besetting the rest of society.

On the whole, though, our own country has not developed forms of this kind. Our prevailing church-state doctrine shows traces of High Church thinking, as we shall see.⁷ But the generally

⁶ ANSON PHELPS STOKES, *Church and State in the United States*, 3 vols. (New York, Harper, 1950); hereafter, STOKES.

⁷ See MARK DEWOLFE HOWE, *The Garden and the Wilderness* (Chicago, University of Chicago Press, 1965), 1-31 and *passim*, in which he contrasts with Jefferson's doctrine of church-state separation (which he considers anticlerical if

optimistic tone of American society has kept such thinking from gaining a solid place in the institutional witness of any of the main-stream churches. It is well known that Roman Catholics in this country have tended to play down the transcendent institutional claims of their church and play up her place among the useful institutions of democratic society — so much so that the Roman authorities occasionally took alarm.⁸ It is also clear that High Anglicanism in this country, lacking the historical position of its English counterpart, did not duplicate the institutional aspirations of the earlier Tractarians.⁹ On the whole, a general denunciation of the world's ways in America has been left to fringe churches, which form enclaves and mind their own business, rather than bearing witness against the overall society.

The American legal structure has also played a part in inhibiting the growth of High Church forms. The utilitarian values characteristic of Erastianism can be implemented by a multiplicity of churches as readily as by one, by private action as readily as by the state. This is the cogent truth which American experience has shown with such finality to the other nations of the world. But the transcendent witness of High Churchmanship is hard to institutionalize in churches none of which can claim a dominant position in the overall society, or, indeed, any position at all beyond what it derives from its constituents. The Voluntary Principle is not a felicitous expression of the otherness of God.

In a period of increasing self-doubt at many levels of American

not antireligious) Roger Williams' doctrine on the same subject, as set forth in the following passage, *id.*, at 5-6:

. . . The faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that the church of the Jews under the Old Testament in the type, and the church of the Christians under the New Testament in the antitype, were both separate from the world; and that when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world; and that all that shall be saved out of the world are to be transplanted out of the wilderness of the world, and added unto his church or garden.

⁸ STOKES, II, 356-69.

⁹ JAMES T. ADDISON, *The Episcopal Church in the United States, 1789-1931* (New York, Scribner's, 1951), devotes a whole chapter to "The Oxford Movement and its American Results" without finding it necessary to say anything at all about the church-state aspects of the English movement.

society, a number of the traditional Erastian forms are beginning to look a bit shopworn, and Christianity itself is beginning to suffer through the identification of those forms with an overly optimistic view of the status quo. It would seem that at such a time as this the lack of a well-formulated High Church alternative will be increasingly felt. With this state of affairs in mind, I propose in this article to explore the current state of our basically Erastian church-state nexus and to consider what forces, if any, may bring a relevant and effective institutional High Church witness into being.

I will begin with a fairly extensive analysis of the legal forms in which we articulate our understanding of the nature of the institutional church and its place in our national life. Our understanding of the church itself is developed in a line of cases involving the judicial resolution of intra-church disputes and the effect to be given the mandates of ecclesiastical authority. Our understanding of the place of the church in our national life is shown in our legislative and judicial treatment of tax exemption and state support for church-connected activities.

Following this legal analysis, I will take up more briefly the Erastian forms through which the church implements the generally accepted understanding of its role in the national life, and the incipient High Church forms which may be in the process of claiming for the church a new and more radical role. In conclusion, I will offer a possible projection into the future.

II

LEGAL FORMS

A. Intra-church Disputes

The status of the institutional church before the secular law presents a double aspect. On the one hand, the establishment and organizing of churches is regarded as a legitimate activity of the citizens, in which they are entitled to suitable protection from their government. On the other hand, the mediation of the church between God and man is regarded as a mystery in which the tri-

bunals of the state, whether from constitutional limitations or from the nature of things, are incompetent to intervene. The two approaches are combined in varying ways in the decisions of the courts.

The first approach may be regarded as the Erastian-Voluntary approach. It sees the religious dimension of life as a part of the pursuit of happiness, and therefore as one of the functional commitments of secular government. It treats the church as one among the variety of institutions through which happiness is pursued. The second approach has affinities for the High Church position. It sees the religious dimension of life as imposing a fundamental limitation on the scope of secular government. It is capable, therefore, of looking at the church as occupying an area closed to secular government and to all those institutions secular government controls.

These two principles operate with general harmony in supporting the autonomy of American churches, but at certain points they clash. The problem when a question of ecclesiastical polity comes before the courts is whether to deal with it in terms of some principle of secular law — trust, contract, or corporation law — or in terms of the existential organic forms of the church in question. If we see the church as merely another of those arrangements developed by citizens in pursuit of their lawful occasions, we will naturally apply the principles of law by which other such arrangements are dealt with. For the purpose, we have ready to hand the substantial body of law developed in England for dealing with the affairs of dissenters from the Established Church¹⁰ (whose organizations are secular because only the Established Church is ecclesiastical).¹¹ On the other hand, if we see the several churches, for all their diversity, as embodying in some way the institutional transcendence of Christianity, we are more apt to let their internal processes work in their own way. For this purpose, if we are unwilling to rest in the higher reaches of theology, we can find an

¹⁰ Ecclesiastical Law in HALSBURY, *The Laws of England*, 3d edition, Simonds ed., XIII (1955), I, 527–34.

¹¹ See the extensive discussion of this point in *Selden v. Overseers of the Poor* (Va. Ch. 1830), *Cases on Church and State in the United States*, Howe ed. (Cambridge, Harvard, 1952), 16, affirmed 11 Leigh 127 (Va. 1830).

effective doctrinal base in the corporate mystique of Gierke and his followers.¹²

Let us see how these alternative approaches work out in practice. In 1840, suppose, the Brimstone Evangelical Church was founded, with a Central Synod and a number of local congregations. The founders adopted a Confession of Faith and an Order of Church Polity. The former document spelled out the doctrinal tenets of the church; the latter, the organization of the local congregations and their relation to the Central Synod. The local congregation in Jordan City was founded in 1853, and operated in accordance with the Order of Church Polity. The congregation sent delegates to the Central Synod, hired ministers ordained by the Synod, and otherwise conducted itself in accordance with the regulations of the Synod. Worship was conducted on land deeded by a church member in 1856 "in trust for the Brimstone Evangelical Church in Jordan City."

A couple of years ago, the Central Synod adopted a new Confession of Faith, which mitigated considerably the uncompromising position on predestination taken by the earlier document. The new Confession was bitterly fought in the Synod, and more bitterly still in the local congregations, but the more tradition-minded were in most cases outvoted. In the Jordan City congregation, a motion to reject the new confession and sever connections with the Synod was voted down 86–34.

At this point, the minority of the congregation appeals to Caesar. They are aware, of course, that the majority may adopt what doctrine they please; what they are interested in is getting the building and the bank account for their party. They claim they are entitled to these because they represent the doctrines for which the property was given. It is on this — a litigation more or less over the possession of property — that the secular courts must rule.

They have two stock legal categories to work with. The foundation documents of the church are a kind of contract, and the original deed of the land is a kind of trust. So we can look at the documents and see if they give the Synod power to change the

¹² This approach to ecclesiastical disputes is developed in J. N. FIGGIS, *Churches in the Modern State* (New York, 1914).

Confession, or we can look at the intentions of the grantor and see if a change in the Confession was envisaged when he deeded the land. Either of these approaches will probably come up with a negative answer and results in giving the property to those who oppose the new Confession.

Complicate the matter a little more. Suppose that in 1894 the Jordan City congregation took out articles of incorporation under one of the numerous state statutes for the incorporation of churches, providing itself with a Board of Trustees, and whatever other apparatus the statute requires. Then the courts, in addition to the appropriate questions of trust or contract, can worry about whether the vote was taken in accordance with statutory forms — whether the meeting was properly called, the voting rolls properly kept, and what have you.

On the other hand, if we look at the church as a living organization, we will be reluctant to use juridical concepts so foreign to its nature to frustrate its response to the promptings of the Spirit or the currents of the times. We may well conclude that when its institutional processes have moved as far as they are capable of moving, it is not the place of the secular authorities to stand in the way.¹³ To be sure, a man could set up a trust or enter into a contract to propagate a particular doctrine of predestination, but on this view of the situation we will not go out of our way to suppose that he has in fact done so.

Of the two approaches described here, the more forward-looking theologians have naturally favored the second, pointing out that the first, or trust-and-contract, approach tends to inhibit religious development, especially in the area of ecumenism.¹⁴ It tends to produce a separate institutional form to correspond to every nuance of doctrine. The courts, on the other hand, when forced to concern themselves with ecclesiastical matters, have found comfort in clinging to the familiar categories of secular law.

A variety of compromises have been attempted. Some courts, for instance, especially those of New York, endeavor to draw a

¹³ See the exuberant statement of this principle in *McGinnis v. Watson*, 41 Pa. St. 9 (1861).

¹⁴ STRINGFELLOW, *Law, Polity and the Reunion of the Church*, *Ohio State Law Journal* 20 (1959), 412; CASAD, *The Establishment Clause and the Ecumenical Movement*, *Michigan Law Review* 62 (1964), 419.

distinction between a “spiritual” entity, the “church,” and a “temporal” entity, the “society,” which exist in a kind of hypostatic union, the one governed by denominational custom, the other by state law.¹⁵ This distinction is more persuasive when applied to those Protestant bodies which restrict their communion to persons who have undergone a special experience of conversion, or who otherwise possess qualities the whole congregation does not have.¹⁶ It seems ultimately to relate to ecclesiological conceptions that radically distinguish the Mystical Body from the visible church. Those who reject the ecclesiology in question¹⁷ may find the judicial doctrine less than congenial. And even those who accept the ecclesiology may object to the scope the judicial doctrine gives for interfering in the temporal affairs of a church on behalf of members of the congregation who are not full-fledged communicants.

The United States Supreme Court, almost a century ago, in the famous *Watson v. Jones* decision,¹⁸ attempted to give some recognition to the existential organization of the church without going too far afield from familiar legal categories. Cases involving ecclesiastical property, the Court said, fell into three categories:

1. Where the property is subject to an express trust, that trust will be enforced as written.
2. Where the property is held by an independent congregation, the court will apply the usual principles of law governing voluntary associations to determine which of the contending parties constitutes the congregation in question.
3. Where the property is held by a congregation belonging to a “hierarchical” church with superior judicial or administrative bodies, the determination of those bodies will be given effect.

¹⁵ *Hayes v. Trustees of Holy Trinity Baptist Church*, 225 N.Y.S.2d 316 (Sup. 1962).

¹⁶ *Robertson v. Bullions*, 11 N.Y. 243 (1854), a leading case on the distinction between church and corporation, attaches considerable weight to the exclusiveness of full communion.

¹⁷ It is expressly rejected, for instance, in the encyclical *Mystici Corporis* of Pius XII.

¹⁸ 13 Wall. 679 (U.S. 1871).

As the case involved a church in the third category, remarks about the treatment of the other two categories may be regarded as dictum. Even as to the third category, the Court's decision was only federal common-law — the state courts were not obliged to follow it.¹⁹ But as a fairly sophisticated approach to the diversity of church forms in our society, it generally commended itself. In any event, the *Kedroff* decision in 1952²⁰ erected it into a constitutional doctrine.

Between *Kedroff* and the Supreme Court's latest pronouncement on the subject in the *Hull Memorial* case (January, 1969),²¹ the state courts developed a couple of modifications of the Supreme Court doctrine. The most important of these was the Fundamental Change Rule, whereby dissenters were protected against any change in doctrine which the courts were willing to characterize as "fundamental" even though the appropriate ecclesiastical machinery had adopted it. The theory was that the property was subject to an "implied trust" that it would not be fundamentally diverted from the religious affiliation the donors had in mind.²² This rule was applied more to congregational than to hierarchical churches, presumably because of the greater stability and expertise to be expected from the higher authorities of a hierarchical church.²³ But even these higher authorities were occasionally overruled on fundamental changes.²⁴

The other modification was more subtle. *Watson v. Jones* expressly disclaimed any right of the secular courts in dealing with the affairs of a hierarchical church to determine whether the higher

¹⁹ *Watson v. Garvin*, 54 Mo. 353 (1873), a product of the same Presbyterian schism over slavery that evoked *Watson v. Jones*, takes the latter case vigorously to task as an abrogation of the proper responsibility of civil courts:

The civil courts are presumed to know the law touching property rights; and if questions of ecclesiastical law, connected with property rights, come before them, they are compelled to decide them. They have no power to abdicate their own jurisdiction and transfer it to other tribunals. If they are not sufficiently advised concerning the questions that arise, it is their duty to make themselves better acquainted with them, in all their bearings, and not to blindly register the decrees of tribunals having no jurisdiction whatever over property.

²⁰ *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

²¹ *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 89 Sup. Ct. 601 (U.S. 1969).

²² See, e.g., *Stansberry v. McCarty*, 238 Ind. 338, 149 N.E.2d 683 (1958); *Holiman v. Dovers*, 236 Ark. 211, 366 S.W.2d 197, 15 A.L.R.3d 277 (1963).

²³ See *CASAD*, *supra*, note 14 at 445f.

²⁴ See, e.g., *Mills v. Yount*, 393 S.W.2d 96 (Mo. App. 1965).

authorities acted within the jurisdiction allowed them under the laws and customs of the church. The theory was that a church tribunal, learned in the laws under which it sits, is better equipped to determine its jurisdiction than a secular court would be.

The state courts — perhaps because they had a wider variety of churches to worry about — tended to be a little more sophisticated on this point. A number of them recognized that a church might straddle two of the categories in *Watson v. Jones* — be congregational in some respects, hierarchical in others — or that the founders of a church organization might have seen fit to impose constitutional restraints on ecclesiastical authority as such.²⁵

So, if our hypothetical case had been decided last year, the court would have been very apt to consider whether the modification of the confession of Faith on predestination was fundamental, and, if not, whether the Central Synod acted within its authority in making it. This year it is a different story. In *Presbyterian Church in the United States v. Hull Memorial Presbyterian Church*,²⁶ the Supreme Court held that the Fundamental Change Rule (which they characterized as the “departure-from-doctrine approach”) “can play *no* role in any future judicial proceedings”²⁷ (Mr. Justice Brennan’s italics).

If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of in-

²⁵ See, e.g., *Western Conference v. Creech*, 256 N.C. 128, 123 S.E.2d 619 (1962); CASAD, *supra*, note 14 at 440n. Among the complications not envisaged in the *Watson v. Jones* categories is that presented by a case with which I have some acquaintance in which the issue was which of three hierarchies was the one to which a certain local congregation had adhered. Another complication was suggested by an unsuccessful petition for certiorari to the United States Supreme Court in the famous *Mellish* case. See LEO PFEFFER, *Church, State and Freedom* (Boston, Beacon, 1953), 251–57 (hereafter, PFEFFER). The case involved a state court intervening in a dispute in an Episcopal parish by (quite properly under *Watson v. Jones* standards) granting an injunction in favor of the faction approved by the bishop. The point raised on the petition for certiorari was that the canon law of the Episcopal Church had a specific sanction for a parish violating the bishop’s order — deprivation of representation in the diocesan convention. Accordingly, the application of *Watson v. Jones* gave the bishop more power than the canons of the church gave him — more power, it might be added, than any Anglican bishop has had in all history before.

²⁶ 89 Sup. Ct. 601 (U.S. 1969).

²⁷ *Id.* at 607.

hibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.²⁸

Hull Memorial does not put quite the same italicized quietus on the concern of the state courts with whether ecclesiastical tribunals act within their jurisdictional limits. It cited with apparent approval an old case in which the court rejected the determination of the majority of the general conference of the United Brethren Church as to whether a purported constitutional amendment had been properly voted in by the membership.²⁹ So, though the Supreme Court is very stern in admonishing that

States, religious organizations and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions . . .³⁰

we cannot be sure quite how they would deal with a case like *Western Conference v. Creech*,³¹ in which the issue was whether a local congregation of Original Free Will Baptists had power under the polity of that church to withdraw from the Conference to which it belonged.

Be that as it may, it seems pretty clear at this point that these cases must be looked at in constitutional terms — that is, as fundamentally involving religious freedom rather than tenure of property. In applying the concept of religious freedom, there is still a double aspect. To say that a church has a constitutional right to govern itself is to give constitutional stature to entities unknown to the constitution, and perhaps establish a religion into the bargain. But to say simply that a citizen has a constitutional right to organize a self-governing church is to belie the posture of the typical litigation (in which the church itself in its corporate capacity is one of the parties), and in general to give a false picture of what we are doing.

It is not easy, for instance, to see what natural person had his religious freedom enhanced by the *Kedroff* decision,³² in which

²⁸ *Id.* at 606.

²⁹ *Brundage v. Deardoff*, 55 Fed. 839 (C.C.N.D. Ohio 1893), cited 89 Sup. Ct. 605.

³⁰ 89 Sup. Ct. at 606.

³¹ *Supra*, note 25.

³² *Supra*, note 20.

the Supreme Court held that constitutional religious freedom required the states to follow *Watson v. Jones*. Let us look at the case. In issue was the possession of the Russian Orthodox cathedral in New York City. On one side was Kedroff, backed by a quarter century and more of litigation, and by the venerable authority of the Moscow Patriarch. On the other side was almost the entire community of Russian Orthodox adherents in the United States, who had formed an independent church government in the 'twenties, on the theory that the Patriarch was too far under the control of the Soviet government to be an effective shepherd of an American (and White Russian) flock. Both the courts and the legislature of New York, sharing the concern with Soviet domination of the Moscow Patriarch, had done all they could to turn Kedroff out of the cathedral and put the American churchmen in.

To no avail. A majority of the Supreme Court, following *Watson v. Jones*, decided in favor of Kedroff. The Russian Orthodox Church, they said, was a hierarchical church, and the Moscow Patriarch was its top hierarch. For New York to subvert the Patriarch's authority was a violation of the religious freedom guaranteed by the federal constitution. While the opinions on the prevailing side pay some attention to property concepts, their general thrust is in the direction of freedom for the church and forbearance by the state:

There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion. — Mr. Justice Reed for the majority.³³

St. Nicholas Cathedral is not just a piece of real estate. . . . A cathedral is the seat and center of ecclesiastical authority. . . . What is at stake here is the power to exercise religious authority. That is the essence of this controversy. — Mr. Justice Frankfurter concurring.³⁴

Mr. Justice Jackson, insisting that the devolution of New York

³³ 344 U.S. at 120-21.

³⁴ *Id.* at 121.

real estate should be governed by New York law, underscored the presuppositions of the majority by dissenting from them:

I do not see how one can spell out of the principles of separation of church and state a doctrine that a state submit property rights to settlement by canon law.³⁵

In fine, the decision seems to be recognized by all concerned as holding that constitutional religious freedom requires the unimpeded exercise of ecclesiastical authority.

Well, then, let us return to the question: what natural person has his religious freedom enhanced by the principle in question? The only answer anyone has proposed is a natural person who has opted for a hierarchical church and contributed of his fortune to supply its material needs. But St. Nicholas Cathedral was built in 1903, when the chief rule in the Russian Orthodox Church was borne by the Czar. The Patriarchal throne had been vacant since the time of Peter the Great and its functions exercised by a Synod, headed up by the Czar's Procurator. The New York law under which the cathedral congregation was incorporated left the final say in disputed matters to the Czar's consul in New York City. If those who contributed their money to the Building Fund in those far-off days had been asked what they would want done in the event the Czar were to be overthrown by an atheist government, and the Patriarchate to be established in subservience to that government, what would they have said? The best answer is probably provided by what they in fact did twenty years after the cathedral was built — just what their Russian ancestors did, incidentally, when Constantinople fell to the Turks.³⁶

The question is not whether *Kedroff* was rightly decided in view of this state of affairs, but what kind of freedom it may be said to have recognized. My point is that to speak of the freedom of a group of citizens to practice their religion requires a somewhat contorted analysis of the case, whereas to speak of the free-

³⁵ *Id.* at 126, 131.

³⁶ See the same case below, 302 N.Y. 1 (1950): "The Russian Church originally was subject to the Patriarch of Constantinople but acquired greater autonomy when Constantinople fell to the Turks and the Metropolitan of Moscow was no longer appointed by the Patriarch of Constantinople but was elected by the Russian bishops."

dom of the Russian Orthodox Church to govern itself according to its canons does not.

This freedom of ecclesiastical processes to move in an area where secular processes cannot follow seems to be a High Church freedom. It is less reminiscent of traditional Bill of Rights learning than of the medieval conception of *libertas ecclesiae*. Gregory VII (1073–85) based the High Church movement that bears his name on an understanding of *libertas* as a state of affairs in which each of the several parts of a divinely ordered universe moved without hindrance in its appointed sphere.³⁷ It was on this basis that he (and his successors for many a generation) conceived of the church as standing over against secular society, suitably restricting the things that are Caesar's, and claiming as its own the things that are God's.

Needless to say, this High Church conception was not fully viable in Gregory's time, as it is not fully viable today. The medieval bishop was sometimes treated as an ambassador of God, but he was sometimes treated also as a magnate competing with other magnates for the available resources of society. He was sometimes a judge in his own tribunals, sometimes a litigant in the king's. So in our time, the various manifestations of the institutional church are sometimes groups of citizens on their lawful occasions, making only those claims on the state that any citizens do who are pursuing happiness in their own way — and sometimes a presence in human affairs which cannot be ignored, but which transcends the regulatory powers of the state.

B. Tax Exemption

Churches have been wholly or partially exempt from secular taxes since the time of Constantine at least; only the most rigorous ideologues feel that such exemption violates state or federal constitutional provisions. The most recent judicial word on the subject is that of the Court of Appeals of Maryland in *Murray v.*

³⁷ GERD TELLENBACH, *Church, State, and Christian Society*, Bennet ed. & tr. (Oxford, O.U.P., 1959). Instructive on this point is Frankfurter's language, 344 U.S. at 123–24, analogizing the action of the New York authorities to the German *Kulturkampf* of the 1870's, and to other disputes "not unfairly attributable to a claim by the State of comprehensive loyalty, undeflected by the competing claims of religious faith."

Comptroller of the Treasury (1966).³⁸ Madalyn Murray, Baltimore's indefatigable nemesis of the spiritual estate, fresh from a notable triumph over Bible reading in the schools,³⁹ brought the action as a taxpayer: her share of the burdens of government was the more in that the churches' was the less. She was the victim either of an arbitrary classification or of an establishment of religion.

Not so, said the Court. The state may bestow its tax exemptions wherever it has a legitimate public purpose in doing so. While the promotion of religion, as such, cannot be a legitimate public purpose because of the nonestablishment clause,⁴⁰ a variety of secular purposes are served by religious organizations. These the state can legitimately promote or permit the citizens to promote without paying taxes. If such purposes are so intertwined with religious activities that the latter cannot conveniently be separately taxed, the state may exempt the organization entirely. Note the Erastian tenor of the argument so far.

But there is another line of argument. Several *amici curiae* have urged, the Court points out, that *not* to grant tax exemption to a church violates the free exercise clause of the constitution. This argument has some support in Justice Douglas' 1943 opinion in *Murdock v. Pennsylvania* ⁴¹ (a difficult case, which I shall take up at length below). The Court in Mrs. Murray's case was not willing to pass on this argument one way or the other, beyond saying that it was plausible enough to be taken into account by the legislature in deciding to grant the exemption. Here, of course, is a solidly High Church contention, with roots in the anathemas of Boniface VIII:

That laymen have been very hostile to clerks antiquity relates, which too the experiences of modern times manifestly declare, whilst not content with their own bounds they strive for the forbidden and loose the reins for things unlawful. Nor do they prudently consider how power over clerks or ecclesiastical persons or goods is forbidden them:

³⁸ 241 Md. 383, 216 A.2d 897 (1966).

³⁹ Mrs. Murray's case was a companion case to *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

⁴⁰ Earlier cases would probably not make this concession. See the quote at *Stokes*, III, 419.

⁴¹ 319 U.S. 105 (1943).

they impose heavy burdens on the prelates of the churches and ecclesiastical persons regular and secular, and tax them, and impose collections. . . . — *Clericis Laicos* ⁴² (1296).

“Very hostile to clerks” seems a legitimate characterization of Mrs. Murray.

So the upshot of the *Murray* case is that it is no establishment of religion to exempt churches from taxation, because they serve a variety of secular purposes; and it just might be an interference with free exercise to tax them, because they are religious. The United States Supreme Court denied certiorari.⁴³

The Erastian interpretation of the tax exemption is borne out by a series of cases involving the exemption of atheistic organizations. Where such organizations gather for moral exhortation, hymn-singing, and the like, they are typically exempted from taxation on the ground that their activities, as one court put it,

are analogous to the activities, serve the same place in the lives of [their] members, and occupy the same place in society, as the activities of the theistic churches.⁴⁴

The general idea seems again to be that we are dealing with a way of pursuing happiness, that the more innocuous and high-minded of the pursuits of the citizenry ought to have this public encouragement because an innocuous and high-minded people is what we aspire to be. Another court referred to the “context of exemption to art galleries libraries, public charities hospitals schools and colleges,” and inferred a “broad legislative purpose to grant support to elements in the community regarded as good for the community.”⁴⁵

These cases generally suppose that the exemption accorded the atheist organization is a matter of constitutional right — that if the theistic religion were given a status denied the atheist, there would be a forbidden establishment of religion. This again relates

⁴² *Corpus Juris Canonici*, Canon 3, Book III, title 23 in Sext. Translation from *Documents Illustrative of English Church History*, Gee and Hardy eds. (London, Macmillan, 1896), 87.

⁴³ 385 U.S. 816 (1968).

⁴⁴ *Fellowship of Humanity v. County of Alameda*, 153 Cal. App.2d 673, 315 P.2d 394, 409–10 (1957).

⁴⁵ *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957).

to the fundamental Erastian insight that the church is one of a variety of institutions through which society pursues its goals. This makes the nonestablishment clause an Erastian principle. A benefit conferred on the church is free of the charge of establishment as long as the church is only one among the institutions on which the benefit is conferred.

But the notion, relied on to an indeterminate extent in *Murray*, that secular activities of churches form the basis of the exemption must be taken with a grain of salt. Instructive in this regard is the provision in the Internal Revenue Code for taxing "unrelated business income" of tax-exempt organizations.⁴⁶ This provision, enacted in 1951 to plug a substantial loophole in the existing law, imposes a tax on income made by a tax-exempt organization in a business that does not relate to the tax-exempt purpose except as a source of funds. But there is exempted from this tax the unrelated business income made by "a church, a convention or association of churches. . . ." "The committee reports," a substantial article on the subject remarks, "are barren of any statement of the reason for this."⁴⁷

The Internal Revenue Service has defined a church, for purposes of this exemption, to be a body that performs ministerial or sacerdotal services, or conducts religious worship. The Christian Brothers, proud heirs of a long tradition of ecclesiastical wine-making, but alas, no priests, tried to get around this definition, but could not.⁴⁸ As matters now stand, the Jesuits, by reason of their priesthood, enjoy the exemption, whereas the good Brothers, lacking the sacred unction, do not.

It seems unlikely (as well as unconstitutional) that Congress felt that religious worship was more deserving of encouragement than education or the relief of the poor. Rather, it seems they felt more diffident about taxing religious worship than they did about taxing equally worthy but more clearly secular works. In short, we may see in the contours of this exemption once again the mark of a High Church view.

⁴⁶ *United States Internal Revenue Code* (1954), §511.

⁴⁷ MOORE and DOHAN, Sales, Churches, and Monkeyshines, *Tax Law Review* 11 (1955), 87, 103.

⁴⁸ *De La Salle Institute v. United States*, 195 F. Supp. 891 (N.D. Cal., 1961).

But is this touch-not-my-anointed view of tax exemption built into the free exercise clause of the federal Constitution? The answer to this question must be found, if at all, in an analysis of the 1943 case of *Murdock v. Pennsylvania*.⁴⁹ The case involved a city ordinance imposing a license tax on itinerant peddlers — from \$1.50 to \$20.00, depending on how long they stayed in town. Murdock was a Jehovah's Witness, who sold (or sometimes gave) Bibles, Watchtowers, and the like to those he visited in his door-to-door evangelism. The city fathers thought this made him an itinerant peddler of Bibles and Watchtowers, subject to the same license tax as an itinerant peddler of anything else.

Mr. Justice Douglas, speaking for a bare majority of the Court (himself, Stone, C.J., Black, Murphy, and Rutledge, JJ.) held that the tax could not be applied to Murdock. Door-to-door distribution of the printed word, he said, was a traditional means of spreading a religion — as much so as preaching or holding revival meetings. To make the right to engage in such activities depend on getting a license and paying a tax is to interfere with the free exercise of religion. The fact that Murdock made a financial return from selling these books and pamphlets did not matter. "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."⁵⁰

Reed, Frankfurter, Jackson, and Roberts, JJ., dissented in a number of opinions. They felt that an itinerant evangelist should bear his fair share of the burdens of government like any other man, and that if a tax was not set so high as to be a prohibition and did not single out a constitutionally protected activity for a special burden, it could not be said to violate constitutional freedoms.

There seem to me to be three main lines of argument for saying that *Murdock* did not write *Clericis Laicos* into the free exercise clause. None of them is altogether convincing:

1. The prevailing opinion says:

We do not mean to say that religious groups and the press are free from all financial burdens of government. . . . We have here something quite different, for example, from a tax on the income of one

⁴⁹ 319 U.S. 105 (1943).

⁵⁰ *Id.* at 111.

who engages in religious activities or a tax on property used or employed in connection with these activities. It is one thing to tax the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.⁵¹

The exact nature of the distinction suggested here is a little difficult to see, and it becomes a good deal more so after it is subjected to the remorseless logic of Mr. Justice Frankfurter's dissenting opinion.⁵²

2. The language about "conditioning" the religious activity on the payment of a tax is somewhat reminiscent of the doctrine in the free speech cases that "prior restraints" are more objectionable than consequences visited after the event. Arguably, then, the state under *Murdock* can tax a man for having sold Watchtowers (by imposing a sales tax, for instance), but cannot make him pay before he sells. This argument has against it the fact that the prior restraint approach has not stood up very well in free-speech cases — most speech, if it is protected at all, is now protected after the event as well as before. At any rate, the "condition" test could be applied to most kinds of taxation. For instance, if a church building could be sold off in a tax sale, it is hard to see that paying the tax would not be a condition imposed on continuing to worship there.

3. The prevailing opinion in *Murdock* was very careful to put freedom of religion on the same footing with freedom of the press — as, indeed, most of the religion cases in the '40's were.⁵³ But if the constitutional tax immunity of a church is no greater than that of a newspaper, it is not very great. In fact, though, the follow-up case of *Follett v. McCormick*⁵⁴ (1944) seems to drop the

⁵¹ *Id.* at 112.

⁵² *Id.* at 134, especially 136–37: "Nor, as I have indicated, can a tax be invalidated because the exercise of a constitutional privilege is conditioned upon its payment. It depends upon the nature of the condition that is imposed, its justification, and the extent to which it hinders or restricts the exercise of the privilege."

⁵³ Howe, *supra*, note 7, at 91–118.

⁵⁴ 321 U.S. 573 (1944). The facts differed from those in *Murdock* only in that here the Jehovah's Witness involved was not an itinerant, but worked full time in the community that endeavored to tax him. A dissenting opinion by Roberts, Jackson, and Frankfurter, JJ., 319 U.S. at 579, 581–82, suggested that the entire publication industry would have to be afforded the immunity established in the prevailing opinion. The majority did not address this point.

talk about the press. Since *Sherbert v. Verner*⁵⁵ (1963) it would be hard to go on saying the two freedoms were the same.

Putting all these arguments together it seems to me we will have to say that the church has a constitutional right to some but not all of the tax immunity it now enjoys. I should think that a tax on investment property or investment income, a nondiscriminatory sales tax on Bibles, Watchtowers, crucifixes or rosary beads would be constitutional, whereas a tax on real estate used for religious worship or sepulture, a personal property tax on reliquaries or chalices, or an income tax on the contents of the collection plate would interfere with the free exercise of religion.⁵⁶

Further, it seems that such constitutional right to exemption as the church has is not shared with other constitutionally protected activities, but belongs to the church precisely because it is the church — because it deals with a dimension of human existence that the Founding Fathers intended to shield from government intervention. However hard we try, we cannot think of a personal property tax on a typewriter as all of a piece with one on a set of Communion plate.

In the end, it seems to me, the law treats tax exemption in about the same way it treats intra-church disputes. Its main thrust in both cases is Erastian. It recognizes the church as one of the institutions through which citizens engage in their harmless or commendable pursuits. It recognizes the support and encouragement of such institutions as high on the list of proper functions of government. But in both cases there is a core of High Church doctrine in the authorities, doctrine which sees the ambit of the

⁵⁵ 374 U.S. 398 (1963). The case holds that persons with religious scruples against obeying a law may have a constitutional right to exemption where others would have no such right. Thus, it is a drastic departure from the doctrine of the '40's, as represented by *West Virginia Board of Ed. v. Barnette*, 319 U.S. 624 (1943), where the court established the right of a Jehovah's Witness not to salute the flag by holding that everyone has a right not to salute the flag. The religious right in *Barnette* was assimilated to free speech by saying that free speech included freedom not to speak, and therefore freedom not to salute the flag. But if freedom of religion is conceived in terms of *Sherbert*, no comparable free speech analogues can be developed.

⁵⁶ The conclusions set forth in PFEFFER, 603, seem to accord fairly well with mine. It is interesting also that President Grant, an early proponent of doing away with general tax exemption for churches, was prepared to exempt "the last resting-place of the dead, and possibly, with proper restrictions, church edifices." Quoted *Id.* at 188.

church as standing both constitutionally and philosophically outside the scope of the princes of this world.

C. Financial Support

The expanded financial involvement of government in all aspects of public life has meant that a good many ecclesiastical projects of the kind alluded to by Mr. Baird are now receiving a measure of support from state or federal funds. Since taxes come out of the same pockets as private benefactions, it is more or less inevitable that this should be the case — the more money government spends, the less private agencies can raise and the more tax money they must have if they are to survive.

Government response to this need is by now substantial in amount, although somewhat haphazard in form. The federal government, and most of the states, subsidize denominational hospitals on the same terms as any others.⁵⁷ The Anti-Poverty Program involves church-related agencies in all kinds of ways, subject to a fairly elaborate set of provisions that prevent federal funds from being used for proselytism or religious worship.⁵⁸ The Education title of the United States Code Annotated contains a rich variety of provisions whereby denominational institutions can be supported in one or another of their numerous concerns. Here, the big money is for colleges, but there are a number of special projects (e.g., the furnishing of teachers for the children of migrant agricultural workers) in which church-related elementary schools can share.⁵⁹ A number of states provide lunches, health services, audio-visual aids, textbooks, or bus transportation for such schools.⁶⁰

Needless to say, the justification offered for all this support is Erastian. Functions in which the public is interested are sup-

⁵⁷ PFEFFER, 173–79. The federal law on the point is found in *United States Code*, title 42, §§ 291, 291d.

⁵⁸ Office of Economic Opportunity *Community Action Program Guide* (1965), 99–100.

⁵⁹ *United States Code*, title 20, §§ 445, 611, 671, 751, 952(e), 1107a, 1205(a)(5) are examples of provisions making private schools eligible for the various programs to which they apply.

⁶⁰ ANSON PHELPS STOKES and LEO PFEFFER, *Church and State in the United States*, revised ed. (New York, Harper & Row, 1964).

ported equally whether or not they are carried out under religious auspices. Citizens who do certain things in a religious way are given the same support they would be given if they did the same things in a secular way. The two Supreme Court cases of *Bradfield v. Roberts*⁶¹ (1899) and *Cochran v. Louisiana State Board of Education*⁶² (1930) state the arguments clearly and succinctly.

Bradfield involved a substantial appropriation by Congress to enable a Catholic hospital in Washington to expand its facilities for the benefit of indigent patients sent by the District of Columbia Commissioners. The hospital was run by a membership corporation chartered for the purpose under secular law. It just so happened that the members of the corporation were all nuns. The Court felt that this fact made no difference:

That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body.⁶³

As they were a secular corporation performing a public purpose, there was no obstacle to providing them with public funds.

Cochran involved a state providing free textbooks for school-children, regardless of the kind of schools they attended. It was contended that the statute, insofar as it conferred benefits on parochial students, was unconstitutional. The Court held, however, that as everyone got the same books, and none of the books in question was religious, there could be no question of supporting religious education, or of diverting public funds to a private purpose.

To this day, those who support the spending of public funds for this or that ecclesiastical project make their case with arguments like those just set forth.⁶⁴ Indeed, some carry the argument one step farther and insist that to exclude an activity from government support simply because it is carried out under religious

⁶¹ 175 U.S. 291 (1899).

⁶² 281 U.S. 370 (1930).

⁶³ 175 U.S. at 298.

⁶⁴ Including the Supreme Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), which came down while I was preparing this article.

auspices is to practice an improper, if not unconstitutional, form of discrimination:

In the event that a Federal Aid Program is enacted which excludes children in private schools these children will be the victims of discriminatory legislation. There will be no alternative but to oppose such discrimination.⁶⁵

In fact, it is this very discrimination which the opponents of public support not only favor but insist is constitutionally required. For them, the fact that an otherwise innocuous activity is carried on under religious auspices creates an overriding objection to public support for it, an objection that rests on the hallowed traditions of our fathers. The best statement of the view in question is that of Mr. Justice Rutledge, dissenting in the *Everson* school bus case (1947).⁶⁶ A bare majority of the Court, speaking through Mr. Justice Black, had held that New Jersey might include parochial students in a general program of tax-supported transportation to and from school. The majority found a public purpose served in a nondiscriminatory way. Rutledge met the argument head-on:

Stripped of its religious phase, the case presents no substantial federal question. . . . The public function argument, by casting the issue in terms of promoting the general cause of education and the welfare of the individual, ignores the religious factor and its essential connection with the transportation, thereby leaving out the only vital element in the case. . . . To say that New Jersey's appropriation and her use of the power of taxation for raising the funds appropriated are not for public purposes but are for private ends, is to say that they are for the support of religion and religious teaching. Conversely, to say that they are for public purposes is to say that they are not for religious ones.⁶⁷

Behind this reasoning Rutledge places Madison's Virginia Remonstrance (1785), which he reads into the First Amendment through Madison's part in the enactment of the latter. He finds in the

⁶⁵ Quoted in STOKES and PFEFFER, *op. cit. supra*, note 60, at 442.

⁶⁶ 330 U.S. 1, 28.

⁶⁷ *Id.* at 50-51.

public purpose argument of the majority the same view that was put forward in the proposed legislation against which the Remonstrance was addressed:

Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society. . . .⁶⁸

Such a view implies for Madison, as the majority view here does for Rutledge,

that the Civil Magistrate . . . may employ Religion as an engine of Civil policy.⁶⁹

This view Madison considers “an unhallowed perversion of the means of salvation.”

Our constitutional policy, [Rutledge insists] is exactly the opposite. It does not deny the value or necessity for religious training, teaching, or observance. But to that end it does deny that the state can sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection [i.e., free exercise and no establishment] and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. . . . It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so.⁷⁰

To sum up his argument on this point, Rutledge says:

The realm of religious training and belief remains, as the Amendment made it, the kingdom of the individual and his God. It should be kept inviolably private. . . .⁷¹

Rutledge's strictures can be taken in either of two ways. On the one hand, we may consider them a simple affirmation of Baird's Voluntary Principle as the essential American version of the Erastian tradition. The language about religion being a public

⁶⁸ *Id.* at 51n.

⁶⁹ *Id.* at 41n.

⁷⁰ *Id.* at 52.

⁷¹ *Id.* at 57–58.

purpose but one the government cannot promote seems to call for this interpretation. On the other hand, the language about "the kingdom of the individual and his God," taken together with the quoting of Madison's remarks about "an unhallowed perversion of the means of salvation," seems to go deeper, to envisage a realm in which not merely the government but the secular commonwealth as such can have no place. This, of course, in its implications, is High Church.

The first, or Erastian-Voluntary, interpretation is becoming increasingly difficult to maintain in a period when so many secular aspects of the free enterprise system are receiving government support. It seems that if our basic social functions are to go on being performed at the grass-roots level by a system of local and voluntary institutions, the system will have to be supported at crucial points by a judicious input of government funds. And if free church institutions are to grow and keep pace with the rest of the system, they will have to be subsidized when the occasion arises, along with the rest. To cut them off from the money in this day and age is to distinguish them radically from the other institutions of society, and thus deny the Erastian presupposition on which the Voluntary Principle was based.

So, however Rutledge may have conceived himself, I think we will have to conceive him in High Church terms. If ecclesiastical projects are to be cut off from government funds, it is because they occupy a place in the lives of men where the concerns of secular government cannot follow them.

We do not seem prepared on the whole to take any of the above arguments to its logical conclusion in our national life. On the one side, there is a group called Citizens for Educational Freedom, which insists that private schools do the same job as public schools and should have the same support. But in practice, their political projects have been limited to the customary auxiliary services plus token subsidies in cash, and even with these they have had no great success. On the other side, a few civil libertarians, and even a churchman or two, have questioned the constitutionality of federal funds for church-related hospitals, or the development of urban renewal lands by church-related universities. But for the most part they have not made much of an impression.

There are, it seems to me, two main principles to be discerned in our actual practice concerning state support for church-connected projects. The first is that the forms of public support which characterized the state establishments of the post-Colonial period or which fueled the Protestant-Catholic conflicts of the nineteenth century are generally to be avoided. This is why church-connected colleges fare better with the public purse than church-connected grade schools do. The principle has no logical basis; it represents simply a desire to avoid what experience has shown to be messy.

The other principle, more strictly ideological, is that the church's work of religious worship and instruction cannot, as such, be subsidized.⁷² This principle makes its way into the law in a number of ways — the provisions, for example, that keep anti-poverty money from being used for such purposes, or the provision that funds made available for graduate study in the humanities are not to be used for graduate theological study.⁷³ This limitation meets with general acceptance, even from those who think religion is good for the state. When it comes to the realms of religious worship and instruction (the very realms, by the way, that we saw could probably not constitutionally be taxed), we are ready to agree with Rutledge that they are “the kingdom of the individual and his God” or at least the kingdom of the individual and his church.

There is, then, in the area of state support just what there is in the other areas we have been considering. There is a main stream of Erastian rhetoric and practice, represented in this case by the public purpose arguments of *Bradfield*, *Cochran*, and the *Everson* majority, and by the reading of Rutledge's dissent that holds the Voluntary Principle to be a constitutional tradition. And there is a central core of High Church ideology that keeps the state out of the church's central concerns, that guards the borders of the kingdom of the individual and his God, that saves the means of salvation from unhallowed perversion.

⁷² The one serious exception is presented by military chaplains. On this, see PFEFFER, 151, 217f.

⁷³ *United States Code*, title 20, § 1116.

III

ERASTIAN FORMS

A. Social Service

The bread-and-butter Christianity of our people seems to accord pretty much with the church-state doctrines of our courts. That is, if we look hard enough, we can find latent in the witness of most churches a High Church vision of a transcendent order standing over against society. But their day-to-day understanding of what they are about is characterized by an Erastian acceptance of a place among the various institutions by which an overall and traditionally Christian society underwrites the pursuit of happiness by its members. Even in the Sunday and holy-day realm of religious worship, we are apt to think only secondarily about the sovereign demands of God, to think primarily about the means of grace or the sources of spiritual sustenance,⁷⁴ as if the pursuit of happiness in the next world were all of a piece with the pursuit of it in this.

The functions we attribute to our churches in this context are not unlike those envisaged by Baird and Carroll in the last century, or, indeed, those envisaged by the English commons in 1306. In the first place, we expect the church to call down the divine blessing on our public and private undertakings — much as the medieval peasant expected the priest to bless his sick cattle or pray for a bountiful harvest. So the minister, priest, or rabbi is appropriately called in for the laying of a cornerstone, or to give that peculiar combination of prayer and sermon called an “invocation” at a banquet.

Next, as our medieval forefathers expected the church “to teach them and the people the laws of God,” so we expect it to provide suitable moral instruction to make good neighbors and good citizens of us all. In conjunction with this endeavor, the churches maintain a general educational enterprise parallel to that main-

⁷⁴ Looking more or less at random for the sort of thing I have in mind, I turned to the “Church Organizations” entry in the South Bend, Indiana, telephone book on my desk. It has a quarter-page advertisement, compliments of the telephone company, saying: “Go to the Church of your choice . . . Take someone with you, you’ll both be richer for it . . .”

tained by the state and by private secular institutions. For the most part, even those who oppose government financial support for this enterprise recognize its value to the community.

Then, "to make hospitalities, alms, and other works of charity" is a function of the church today, just as it was in 1306. These works involve a rich variety of economic, social, and civic concerns, just as they did in Baird's time. Probably they are shared more today than formerly with governmental and secular organizations, but it is generally recognized that the church was first in the field, and is still entitled to an honored place.

To bring home the complexity of these concerns, let me sketch in briefly the situation in the community in which I live. There are two main hospitals in town; one is run by an order of nuns; the other by a nonprofit secular corporation. The two main child placement agencies are the Catholic Charities and the County Welfare Department. Traditional down-and-out types are dealt with by a traditional Protestant mission for the purpose. I would not try to enumerate the agencies that deal with various aspects of the race problem, but they include both the NAACP and the Catholic Interracial Council. The latter (like the Presbyterian Players, one of the two amateur theatrical groups in town) has a broad nonsectarian membership, and seems under no kind of control from the parent religious body. A number of other church projects seem to be in the same case. I know, for instance, of a Boy Scout troop that transferred from the sponsorship of a public school to that of a Methodist church without any appreciable change in personnel or program.

If I am beginning to sound like Baird, I have made my point about the continuity of the tradition Baird represents.

There is one other element in church support of civic and social activities that is generally overlooked. That is the payment of the salaries of the clergy. A good clergyman is apt to be concerned with a variety of civic projects, especially those involving race and poverty. His participation differs from that of ordinary Christian laymen in that it is generally regarded as part of his job, and yet takes nothing out of the funds available for a given project. The layman, unless he is paid, can be concerned with a civic project only in his "spare time."

Obtaining unpaid personnel for secular pursuits by expanding the vocational role of the clergy is not a new expedient. Most of the governmental services of the Middle Ages were staffed by means of it. So were many of the educational services of a more recent period. Not new either is the justification offered for such an expanded clerical role: a pursuit where dedicated Christian service is appropriate is a pursuit proper to be carried on through a clerical staff. The ever-optimistic Père Thomassin, writing in the seventeenth century, gave a justification for the clerical bureaucrat of the Middle Ages that could almost serve for the clerical NAACP leader of today:

. . . an opportunity to exercise their charity, to sanctify the court, to make of the kings' palace a sanctuary of piety, to purify tasks which are in themselves profane, to govern the world according to the laws of heaven, to make the truths and maxims of the Gospel prevail in the conduct of human affairs, finally, to make of Christian monarchies, with the concurrence of the monarchs, a kind of theocracy, or divine government.⁷⁵

The part about kings and courts would have to be brought up to date, and there are some distinctions between the sacred and the profane that are no longer in good repute; but the part about making the truths and maxims of the Gospel prevail in the conduct of human affairs — really the crux of the matter — is as persuasive as it ever was.

I do not mean to fault either the medieval or the modern cleric for his acceptance of this rationale. For one reason or another, it has never been found possible to organize the central works of the ministry — preaching, catechizing, and conducting religious worship — in such a way that all those engaged in these works can keep themselves busy doing nothing else. Accordingly, the clergy as a class have had to choose between working only part-time at their calling and accepting from the surrounding society an expanded definition of the calling itself. The latter alternative has generally seemed more in keeping with the dignity of the ministry. And if the minister's calling must be redefined to make

⁷⁵ LOUIS THOMASSIN, *Ancienne et Nouvelle Discipline de l'Église*, André ed. (Bar-le Duc, Guérin, 1867), VII, 343 (my translation).

a full-time job of it, the way we are redefining it in our society, in terms of supporting causes that otherwise lack a sufficient economic base, seems as good a way as any.

The other forms of civic involvement of the churches as I have been describing them have also a good deal to be said in their favor. If the projects in question were all conducted under governmental auspices, they would become disagreeably centralized, probably with a considerable loss of grass-roots support for them. And even if they were carried out by nonprofit secular corporations, the quality of our support for them would suffer. The participation of the churches in civic projects gives a certain religious sanction to all such projects, under whatever auspices they are conducted; it reminds us that they can be carried out from religious motives. Erastianism, in short, is a two-way street. If it carries a danger of secularizing the churches, it carries also a hope of sanctifying the world.

B. Social Criticism

The approach of the main-stream churches to what Canon Stokes calls "national issues" — issues, that is, involving the moral order of society as well as the moral choices of individuals — has characteristically involved two elements. First, there is a judicious affirmation of relevant moral principles with due regard to the complexities of putting them into practice:

The Synod. . . . recommend it to all their people to use the most prudent measures, consistent with the interest and the state of civil society, in the counties where they live, to procure eventually the abolition of slavery in America. (Presbyterians, 1787) ⁷⁶

Although history plainly testifies that the Church has always befriended the poor and laboring classes, and effectually procured the mitigation of the evils attached to servitude, until through her mild influence it has passed away from the nations of Europe, yet she has never disturbed established order, or endangered the peace of society, by following theories of philanthropy. (Roman Catholics, 1858) ⁷⁷

We, therefore, affectionately admonish all our preachers and people

⁷⁶ STOKES, II, 137.

⁷⁷ *Id.*, 187–88.

to keep themselves pure from this great evil [slavery], and to seek its extirpation by all lawful and Christian means. (Methodists, 1860) ⁷⁸

In the effort to establish a criterion or standard of measurement of wages, it is necessary to consider not only the needs of the working-man, but also the state of the business or industry in which he labors. (Roman Catholics, 1940) ⁷⁹

Beverage alcohol is a serious social problem and cannot be ignored. It is also a complex problem and cannot be solved at once. (Federal Council of Churches, 1946) ⁸⁰

Concomitantly, when specific courses of action or specific legislative goals consistent with the underlying principles appear to be within the range of practical possibility, the spiritual prestige and moral fervor of the church is apt to be directed to implementing them:

The undersigned, clergymen of different religious denominations in New England, hereby, in the name of Almighty God, and in his presence, do solemnly protest against the passage of what is known as the Nebraska Bill, or any repeal or modification of the existing legal prohibitions of slavery in that part of our national domain which it is proposed to organize into the Territories of Nebraska and Kansas. (petition to Congress, 1854) ⁸¹

It is therefore urged that on some fixed day preceding the then pending Louisiana election, from the pulpits of the whole land an appeal should be made to the Christian conscience and purse. (an account of the defeat of a state lottery in Louisiana, 1894) ⁸²

The forces of organized religion in America are now warranted in declaring that this morally indefensible regime of the twelve-hour day must come to an end. (joint statement of Federal Council of Churches, National Catholic Welfare Conference, and Central Conference of American Rabbis, on the steel industry, 1923) ⁸³

Be it Resolved, That the Executive Committee of the Federal Council of Churches, realizing that lynching has become a national shame,

⁷⁸ *Id.*, 167.

⁷⁹ *Id.*, III, 91.

⁸⁰ *Id.*, II, 344.

⁸¹ *Id.*, 196.

⁸² *Id.*, 298.

⁸³ *Id.*, 350.

believes that national legislation is a moral necessity to bring the Federal Government into prompt and effective cooperation with state and local authorities in the prevention of lynching and the prosecution of lynchers. (1934) ⁸⁴

We believe that there are certain measures which can be initiated now or in the near future which can reduce some of the evil effects of alcohol. . . . The following are, for the present, our operating principles for social control:

1. Revision of the alcoholic beverage tax structure. . . . (seven specific proposals all told — Federal Council of Churches, 1946) ⁸⁵

I'd like to vote against it [the Civil Rights Act of 1964], but I can't. The church groups are on my tail. (a Congressman) ⁸⁶

This stance of the churches on social problems has been criticized from two directions. On the one hand, the promotion of specific, and therefore contingent, political or social programs can be regarded as a diversion of the moral force of the Gospel. A Methodist critic of his church's part in the presidential campaign of 1928 puts it this way:

Preachers are accustomed to speak with dogmatism the truths of religion, and they should so speak, and when they make stump speeches, they use the same dogmatism, although they are then in the field where differences of convictions exist between equally good men. There has never been in the United States a political battle in which there were not equally good men on opposite sides, but this fact, preachers turned politicians, are almost sure to forget. ⁸⁷

Conversely, the concern of the church with politics can be faulted for its inevitable recognition that politics is the art of the possible. Here is the judgment of the Abolitionist prophet Garrison on the judicious efforts of churchmen to ameliorate the evils of slavery:

Resolved: That (making all due allowance for exceptional cases) the American Church continues to be the bulwark of slavery, and there-

⁸⁴ *Id.*, 377.

⁸⁵ *Id.*, 343.

⁸⁶ LEE E. DIRKS, *Religion in Action* (Silver Spring, Md., National Observer, 1965), 147.

⁸⁷ STOKES, II, 332.

fore impure in heart, hypocritical in profession, dishonest in practice, brutal in spirit, merciless in purpose. . . . (1856) ⁸⁸

Modern ecclesiastical temporizing in the areas of peace and civil rights has evoked similar condemnations from time to time.

The willingness of the church thus to play the lobbyist or the politician rather than the prophet seems to me to be part and parcel of the Erastian tradition as I have been describing it — the view that the church is one of the many institutional forms through which a Christian society conforms itself to the will of God. The will of God may be in some cases unchanging and unambiguous, but if it is to be approximated in a concrete situation, means capable of affecting the concrete situation must be used. As long as the church is considered part of the institutional structure of society, it cannot be faulted either for departing from the realm of generalities or for limiting itself to practical measures.

In fact, the two-pronged critique of the church's stance on social problems rests on presuppositions that seem to me High Church. Whether we propose an even-handed proclamation of ultimate moral and religious values or an even-handed denunciation of the concrete situation, we are conceiving of the church as standing over against society in general, the guardian of a revelation to which society in general cannot be expected to conform.

IV

HIGH CHURCH FORMS

The High Church view as I have been describing it provides the state with a limit and the church with a critique. What it fails to do is provide the whole church-state nexus with an institutional High Church witness. This, in my opinion, has been a serious defect in our national life. I have no wish to discount the value of our Erastian tradition in giving practical content to a number of Christian values. But the lack of High Church institutions to set that tradition off has impoverished us in a number of ways. Especially has it contributed to our tendency to an imbecile com-

⁸⁸ *Id.*, 190.

placency when things go well, and an equally imbecile despair when things go wrong.

This necessity for a High Church element in the Christian experience of society derives, I suppose, from a deeper necessity inherent in Christianity itself. Much of a Christian's life in the world must be worked out in terms of a dialectic between eternity and time, between the Godhead and the manhood of Jesus Christ. It is this dialectic that is reflected in the institutions of society when those institutions present a vital dialectic between High Church and Erastian forms. Only in this way can the overall structure of society give adequate institutional expression to the full range of the concerns of a Christian.

In this dialectic, I see High Church institutions⁸⁹ as playing a threefold part:

1. They stand witness to the transcendent sovereignty of God.⁹⁰ They are not utilitarian. They make no claim to accomplish anything. They are simply *there*, vindicating God's claim to a place in the society that cannot be encompassed within any human purpose.
2. Their response to social evils is not to call for amelioration, but to proclaim the judgment of God. For the institution to be relevant, the judgment must be related to the existential failings of the particular society; yet, it must point beyond those failings to the underlying failure of all Christians to live up to their profession,

⁸⁹ I have decided, with some reluctance, to brave the conceptual perils of characterizing an institution, *qua* institution, as "High Church." High Churchmanship, as I have defined it, is not an institutional form, but an insight into the overall church-state relation — that is, into the relation of institutions generally with one another. Historically, though, this insight has always cast up institutional forms peculiar to itself — not, perhaps, by any logical necessity, but by the exigencies of the dialectic in a given time and place. The medieval institutions of sanctuary and clerical immunity are examples. When I speak of "High Church institutions" here, I mean institutions that seem to take their *raison d'être* from a High Church insight, or that seem calculated to hold up the High Church end of the dialectic.

⁹⁰ How an institution can stand witness to anything is a question of some subtlety. I have tried to explore it a little in A Prospectus for a Symbolist Jurisprudence, *Natural Law Forum* 2 (1957), 88. I suspect, incidentally, that it is this symbolic aspect of High Churchmanship that supports its traditional connection with a "high" doctrine of the sacraments and the liturgy. This connection is, I think, one of congruity rather than of logical necessity. It is noteworthy that English Presbyterians tended to take a High Church stand in the seventeenth century, and that a number of nineteenth-century High Churchmen based their liturgical practices on their interpretation of the rubrics established by ecclesiastical authority rather than on their sacramental theology.

and of all society to be the Kingdom of God. John Jay Chapman's remarks on a racial lynching (it is hard to believe that they were written in 1911) may indicate what I have in mind:

The trouble has come down to us out of the past. The only reason that slavery is wrong is that it is cruel and makes men cruel and leaves them cruel. Someone may say that you and I cannot repent because we did not do the act. But we are involved in it. We are still looking on. Do you not see that this whole event is merely the last parable, the most vivid, the most terrible illustration that ever was given by man or imagined by a Jewish prophet, of the relation between good and evil in this world, and of the relation of men to one another?

This whole matter has been an historic episode; but it is a part, not only of our national history, but of the personal history of each one of us. With the great disease (slavery) came the climax (the war), and after the climax gradually began the cure, and in the process of cure comes now the knowledge of what the evil was. I say that our need is new life, and that books and resolutions will not save us, but only such disposition in our hearts and souls as will enable the new life, love, force, hope, virtue, which surround us always, to enter into us.

This is the discovery that each man must make for himself — the discovery that what he really stands in need of he cannot get for himself, but must wait till God gives it to him. I have felt the impulse to come here to-day to testify to this truth.⁹¹

A judgment so formulated might bring about a massive *prise de conscience* in the overall society and so work an amelioration of the conditions to which the judgment was addressed. But the task of the High Church institutions is still the judgment itself.

3. They offer a refuge, I hope not from involvement in the world, but from a kind of servitude to the world and its concerns. Within the framework of a suitable High Church structure, the Christian can assert his own freedom vis-à-vis society, and, in the light of that freedom, formulate his work and witness in the world.

Historically, the development of High Church institutions along these lines has been in the context of an absolute papacy, a divine

⁹¹ *The Selected Writings of John Jay Chapman*, Barzun ed. (Garden City, Doubleday, 1959), 288.

right monarchy, or at the very least a traditional national church. In our own society, as I have endeavored to show, the conceptions of the Voluntary Principle, and of limited government, have left a place for High Church institutions to develop, but the institutions have not developed to fill the place. The question is whether we may expect them to do so in the future, as they have not done in the past.

A book has just come out that may point the way to an answer. It is a collection of essays, called *The Underground Church*, edited by Malcolm Boyd.⁹² The authors are all involved with Christian movements that operate outside the ecclesiastical structures with which we are familiar — hence the term “underground.” The relations between these movements and the traditional structures, which the authors call somewhat contemptuously the “institutional church,” vary. Some are permissible — if unusual — by traditional standards. Some are exuberantly uncanonical, heterodox, or both. Some are even excommunicated. In any event, they take their own structures (they are less unstructured than most of them suppose) more seriously than those of the traditional denominations to which they belong.

The typical structure is described by one of the authors as follows:

What I have seen as the characteristic form of the Underground Church is the gathering together of Catholics, Anglicans, Protestants, and followers of Jesus (baptized or unbaptized) in a common meal — because it is the only way they have been able to find the strength of community for the job that faced them tomorrow. Sometimes that common meal has taken the form of a traditional liturgy, or an experimental liturgy, or a completely free liturgy, or a sharing of bread and wine, or of coffee and doughnuts; I am not able to make any sharp distinctions among these even if I wished to. When it has been a liturgy, more or less, there has never been any question about the validity of any minister present; it is taken for granted that if he is authorized in his own denomination and chooses to be present, he is the representative of Christ. As a matter of course, all the ministers present concelebrate, although this is irregular for the Anglicans and illegal in Canon Law for the Romans.

⁹² New York, Sheed & Ward, 1968 (hereafter U.C.).

We have had these common meals in parish houses, in private homes in the suburbs, in the ghetto, in houses of hospitality, in jail, outside San Quentin during an execution, on the Capital steps at Sacramento while capital punishment was being debated, on the vigil line at Port Chicago while the napalm trucks rolled by. Others can tell where they have gathered together. Above all, there has been no question of the meaning of what was done — the argument over which so many barrels of ink have been spilled during the Reformation, the Counter-reformation, the Ecumenical movement, the Councils. Because the meaning was defined in every man's heart to his own satisfaction by the common purpose, the job in hand.⁹³

The tendency, then, is to let the congregation define the Eucharist,⁹⁴ whereas I suppose a traditional churchman would have it that the Eucharist defines the congregation:

The visible church of Christ is a congregation of faithful men, in which the pure Word of God is preached, and the Sacraments be duly ministered according to Christ's ordinance in all things that of necessity are requisite to the same.⁹⁵

But the real quarrel of the authors with the institutional church is not over Eucharistic theology. They object to the institutional church because it is, as Malcolm Boyd puts it, "the chaplain of the status quo"⁹⁶ — i.e., is Erastian.

The Church, in losing ground as an institution which regulates behavior, now has little function outside of its place as an institution among other institutions in the jumble of modern man's social collectivities.⁹⁷

They are vitally concerned with those areas — notably, race, war, poverty — in which the witness of the institutional church has

⁹³ BROWN, *Toward a United Peace and Freedom Church*, U.C. 31, 41–42. See also ZIMMER, *The People of the Underground Church*, U.C. 7, 7–8.

⁹⁴ GROSSMAN, *The Invisible Christian*, U.C. 207, 216: "The liturgy is not meant to form the community, but, rather, to be an expression of that community."

⁹⁵ This is Art. XIX of the Anglican Thirty-Nine Articles. Art. VII of the Lutheran Augsburg Confession is to the same effect. Standard Roman Catholic doctrine would have to be stated a little differently to allow for the claims of the hierarchy, but the idea that the liturgy forms the community, not the community the liturgy, seems to underlie the insistence of the Second Vatican Council that liturgical innovation is a prerogative of the highest authorities in the church.

⁹⁶ BOYD, *Ecclesia Christi*, U.C. 1, 4.

⁹⁷ GROSSMAN, *supra*, note 94, at 209.

not measured up to the fulness of the Gospel. They are relatively indifferent to areas — notably, sex — in which the witness of the institutional church has been less deficient:

“The Church” will be seen less and less as a building, on a corner, to be visited to confess masturbation and adultery and to indulge in a period of “magic.”⁹⁸

This allocation of relative values — with which one could be a Christian and yet disagree — has a good deal to do with the urgency of their protest.

But we are still not at the roots of the quarrel. No serious Christian can suppose that race, poverty, and war are unimportant. These matters deserve his attention and the attention of his church. In fact, they are getting such attention. The problem is that the attention they are getting is in terms of the traditional Erastian response to social evils, as I have outlined that response above. The underground churchmen pass on this response the same condemnation Garrison passed on it a century ago:

The Church is struggling, sacrificing even its own integrity, to sustain its organic life recognized in terms of buildings, stained glass, real estate, and homiletical whoredom.⁹⁹

There are those Christians who agree that racism is a moral evil but advocate prudence in removing it from society. They fear losing people as Church members; they fear losing money. If preaching the message of justice and brotherhood and the condemnation of racism means that half of our congregations are going to stop coming to church on Sunday, we will lose millions of dollars. But perhaps the Church has to die, perhaps it has to be crucified, in order to experience resurrection.¹⁰⁰

Here, then, in the burgeoning cell groups described by these

⁹⁸ BOYD, *Imitatio Christi*, U.C. 238, 245. Cf. GROPPi, *The Church and Civil Rights*, U.C. 70, 75: “I do not believe that morality is synonymous with a negative attitude toward sex and abstinence from what we call bad language.” Cf. BROWN, *supra*, note 93, at 43–44:

The one thing which is lacking so far is a definition of family life as a Christian. To a large extent this is a reflection of the stresses of the Peace movement, which favor the unmarried, those with casual liaisons, Catholic celibates, the divorced, little old ladies in tennis shoes. Lest this be thought a criticism, it is simply intended as a translation of St. Paul’s recommendations to the Church at Corinth.

⁹⁹ ZIMMER, *supra*, note 93, at 14.

¹⁰⁰ GROPPi, *supra*, note 98, at 74.

essays, is a vital institutional Christian witness, and one which stands clearly over against society. It condemns alike the "status quo" orientation of secular society and the Erastian palliatives of the institutional church. These groups are also a clear embodiment of the Voluntary Principle. The accounts of their grass-roots development are curiously reminiscent of Baird's account of the building of churches in frontier communities.¹⁰¹

I think these groups are coming also to a High Church stance on the social evils with which they are concerned. While they speak in terms of reform and amelioration, their real significance is in their proclamation of the judgment of God. For the problems they face, they have no better solutions to offer than anyone else does. But their unblinking exposition of the problems makes the proposed solutions seem futile, and their moral fervor makes the proposed solutions seem trivial.

One of the contributors to the volume, for instance, is Father James Groppi, the Savonarola of Milwaukee, who spent the better part of a year in a bitter and sometimes bloody battle to put an open housing ordinance through his city council.

During the early days of our open-housing demonstrations they were literally almost killed. We have all been in jail; we have all eaten tear gas.¹⁰²

But anyone who is familiar with the operation of open-housing legislation in other communities will find it difficult to believe that that is what all the excitement was about.¹⁰³ It is good to have such legislation on the books, but it will hardly avail to appease the

¹⁰¹ BAIRD, *supra*, note 1, at 298-99.

¹⁰² *Supra*, note 98, at 74.

¹⁰³ My own community, for instance, has just enacted an open-housing ordinance. The first serious attempt to put such an ordinance through was mounted in 1963. Those who prepared the 1963 ordinance assembled a considerable amount of data on the need for it. The main thrust of the data was that middle-class Negroes were finding it outrageously difficult to get middle-class housing. By 1968, this situation was considerably ameliorated, though by no means done away with. On the whole, in 1968, a middle-class Negro could put a suitable roof over his head, though not always the roof he wanted. The ordinance may do something to widen the range of available choices for him. If it had been enacted in 1963, it might have also had some value as an earnest of good will on the part of the white majority. In 1968, it seems too little and too late to serve that purpose. As for increasing the range of housing choices available to Negroes who have not yet made the middle class, the problem in 1968 is just what it was in 1963 — they cannot get better housing because they have not the wherewithal to pay for it.

divine anger of a man like Groppi; still less to dissipate the conditions that called that anger forth. The Underground Church is not calling on us to erase a transitory blemish from our national life, but rather to live that life in a new and enduring (and, please God, redemptive) awareness of the divine judgment.¹⁰⁴

Meanwhile, the Underground Church institutions have developed strongly the element of refuge that I see as another High Church function. Here is Father Groppi, immediately after the passage quoted above:

As the demonstrations progressed, as we were marching and singing together, we were growing in our relationship as brothers. White people and Black people were growing. In true intergroup relations, a person never ceases to grow. And the more we grow in brotherhood, the more we grow in the Spirit, for brotherhood and life in the Spirit, like the spiritual and temporal orders, are inseparable.¹⁰⁵

That is, the Milwaukee Youth Council is for Father Groppi a refuge from the prevailing racism of the overall society, just as the monastery was for the medieval man a refuge from the prevailing petty warfare and violent sexuality of the overall society.

This theme is picked up by the Underground Churchmen again and again:

More than anyplace else, I too now find the Church of the Christ I have long loved in the "small groups of intimate friends getting together. . . ." It is here I find not only expression of, but care for, the most powerful ideas and ideals that I have known. . . . Bearing the humiliation with the few as the majority rationalizes its way toward more inaction: these are the truths of real life in Christ today. . . .¹⁰⁶

The "good news" about the freedom of the sons of God becomes perceptible and significant when its liberating message is specified as . . . the possibility of escape from the cycle of violence entralling teenagers.¹⁰⁷

¹⁰⁴ BROWN, *supra*, note 93, at 46, seems to be working toward an understanding of this: "But if we try and enter down into the secret places of our psychology or think about our knowledge of history, we truly know that the pressures that brought us together are permanent ones."

¹⁰⁵ GROPPi, *supra*, note 98, at 74.

¹⁰⁶ ZIMMER, *supra*, note 93, at 26.

¹⁰⁷ GRODEN and CLASBY, Church as Counter-sign: Process and Promise, U.C. 102, 113-14.

The most obvious and immediate asset one experiences in an Underground Church is a true sense of belonging. Unlike the average parish in which neither the priest nor the other parishioners are likely to know one another's name, in an Underground Church all the members soon know one another on a first-name basis, and, what is more important, are willing to share their thoughts and souls with one another.¹⁰⁸

We are trying to walk in the freedom of Abraham's faith, out of the oppression of our closed and too clubby little world and into open air and open history, into the middle of ultimate realities.¹⁰⁹

War, alienation, anonymity, gang fights: the evils are variously specified, but the sense of belonging to a small group free of the evil in question is there each time. It is one of the most powerful elements in the witness of the Underground Church.

Proclaiming God's judgment, then, on our social evils, and offering a point of refuge and freedom from them, the institutional forms of the Underground Church are authentically High Church. But they fall short of institutionalizing the fulness of the High Church witness, because they fail to stand for the transcendent sovereignty of God. It is not simply that they neglect to offer this witness; they counter it actively at two focal points. First, by claiming for the here-and-now congregation and worshipper full control over the significance of the Eucharist, they negate the transcendence of God in space and time. Second, by discounting traditional sexual values, they negate the transcendence of God in the life of the individual.

The relation of traditional Eucharistic doctrine and traditional sexual purity to the divine transcendence lies in the very fact that they are not of obvious relevance to the immediate situation. To accept them is to accept that God has something to offer to the church as a historical presence,¹¹⁰ and to me as a human being¹¹¹ beyond the needs I experience here and now. Living by them is

¹⁰⁸ HAFNER, Up from the Underground, U.C. 120, 131.

¹⁰⁹ KIRK, Emmaus: A Venture in Community and Communication, U.C. 138, 151.

¹¹⁰ It is significant in this regard that BROWN, the one professional theologian among the authors in U.C., seems to regard the church as gathered not by the word of God but by the exigencies of the historical situation. See the passage quoted *supra*, note 104.

¹¹¹ On this, see the critique of situation ethics in BURTCHAELL, The Conservatism of Situation Ethics, *New Blackfriars* 48 (1966), 7.

essentially living by faith; it yields only gradually an insight into what they are for.¹¹²

"My thoughts are not your thoughts nor your ways my ways, says the Lord." My fear is that these Underground Church institutions, by cutting themselves off from the channels of transcendence, will deprive themselves of any insights beyond those they now possess. If so, they will fall with the passage of time, as other High Church institutions have done, from proclaiming the judgment of God into mounting a captious and irrelevant critique, from offering a position of freedom and refuge into offering an enclave of human comfort. If, on the other hand, they could in some way relate the divine transcendence to the forms in which they now operate, they might provide our society with an enduring High Church witness to set off against our Erastian tradition, and structure a truly Christian society.

V

CONCLUSION

Let me now gather these threads together, if I can, and try to outline the institutions of the American church-state nexus as it just might come to be.

First, there would be a variety of institutions conceived, as they have always been, in Erastian terms. These, some governmental, some ecclesiastical, some private and secular, would operate schools, hospitals, cooperatives, credit unions, recreational activities, and other forms of practical social service that commend themselves to Christians. Their support would come partly from specific contributions, partly from United Funds, foundations and the like, and partly from tax money, in accordance with the need and importance of each particular institution.

The participation of churches and of individual Christians in these institutions would be directed by a continuing High Church critique of the whole society. Christians would respond to the divine judgment embodied in that critique by applying their wis-

¹¹² This idea of faith as an open-ended acceptance of enlightenment is well brought out in JOHN S. DUNNE, *A Search for God in Time and Memory* (New York, Macmillan, 1969).

dom and resources to the real needs of their society — not in the expectation of justifying themselves or the society, but in the humble expectation of redemption through Jesus Christ.

This kind of humble expectation would involve a Christian patience under the condemnations of the proponents of the High Church critique. Demonstrations, which seem to serve contemporary High Churchmen rather as excommunication served Innocent III, are neither practical proposals nor arguments. If a situation is complex, they will not make it less so; they will simply serve to make explicit the judgment of God. Those who are concerned with finding and implementing practical measures will have to take them seriously, but not panic under them.

Meanwhile, the High Church institutions would temper their strictures by a heightened awareness of the enduring realities of the human condition and the theology of redemption. Not that they would compromise their witness against the evils of society, but that they would maintain a certain respect even for those they condemned, remembering that in the last analysis the judgment they proclaim is not upon certain bad people, but upon all mankind, including themselves.

The form and development of these High Church institutions would be rather like that of the Underground Church movements I have been describing. Most of them would be spontaneous responses to particular social situations, and would come and go with the social conditions that called them forth. They would continue to offer a witness against and a liberation from the racist patterns that infect our society, the cycle of poverty in which so many of our people are involved, warfare and other forms of violence, and the dehumanizing effect of an overly efficient mass polity.

They would also offer a witness against and a liberation from the mechanistic and unlovely sexuality that permeates so much of our popular culture, and seems as dehumanizing and as displeasing to God as any of our other social evils. Perhaps they would come to this witness and liberation through a reconciliation with some of the more traditional church institutions — youth groups, Cana Conferences, and the like — that have long carried the burden of Christian witness with respect to sex. In any event, they

would be free of the identification of sexual purity with white middle-class respectability that currently distorts every aspect of Christian witness in our society.

These grass-roots institutions would abandon their claim to define the meaning of the Eucharist for themselves. They would recognize that as they do not possess the fulness of the divine revelation, the meaning of the Eucharist cannot be circumscribed by their understanding of it. At the same time, the main-stream churches would accept the adoption by these groups of liturgical forms suited to their own needs, but consistent with traditional views of Eucharistic theology. This acceptance would be furthered by the realization on everyone's part that participation in groups of this kind is a special vocation rather than the wave of the future for every Christian. The reconciliation of the mendicant orders with ecclesiastical authority in the Middle Ages might be a pattern for reconciliations of this kind today.

In this context, central authorities in the church would accept the Voluntary Principle, just as do central authorities in the state. They would expect people to set up groups for particular religious purposes, just as they do for particular secular purposes. They would supervise these groups, but not expect them to obtain advance approval.¹¹³

The primary function, then, of the institutional church would be to stand witness to what is timeless and universal in the Gospel and the sacraments, especially the Eucharist. Like the state, it would overarch both High Church and Erastian forms, supporting a variety of work and witness, according to the exigencies of time and place. It would claim for itself in unequivocal terms the position of transcendence left open by the self-imposed limits on the power of the state, the position of universality left open by particular High Church forms, the position of necessity left open by contingent Erastian forms.

I seem to be speaking here as a Roman Catholic, and perhaps in the end a High Churchman after all. I am aware that the

¹¹³ For instance in my own church, some modification of *Codex Juris Canonici* Canons 684–99 would seem in order, e.g., can. 686, § 1: “No association will be recognized in the Church that has not been set up or at least approved by legitimate ecclesiastical authority.”

Voluntary Principle is Protestant in origin, and that Protestants have lived with it more easily than Catholics. I am aware also that not every denomination of Christians is prepared, as my own is, to make the transcendent claims I have just envisaged. Some denominations would no doubt be content to see themselves as manifestations of the Voluntary Principle ("gathered" churches), and leave the claims to transcendence to Christ Himself. Certainly each denomination would have to consult its ecclesiological doctrine to see what claims of this kind it could make for itself, and its ecumenical doctrine to see what such claims it could recognize for others.

The upshot is that the American church-state nexus I envisage would not be free from denominational divergences. The facile ecumenism of the Underground Church is part and parcel of its failure to bear a sufficient witness to the transcendence of God. True ecumenism requires every denomination to bear an uncompromising witness before the others to its own experience of the inexhaustible reality of Jesus Christ. Perhaps the witness to institutional transcendence as I have described it will be a contribution of my own denomination to the synthesis that God may one day bring about.

Be that as it may, the church-state nexus I have envisaged is not one free from conflict, or one with all the problems worked out. It has built-in potentialities for tension, frustration, or even heart-break, as any human situation has.¹¹⁴ It might be a situation, though, in which the Word of God could break forth in its own way, or at least a situation in which a Christian could live by his own best understanding of the Gospel, and do such work and bear such witness as God has called him to. This is perhaps all we can hope for from institutional patterns in this world. As Chapman says:

This is the discovery that each man must make for himself — the discovery that what he really stands in need of he cannot get for himself, but must wait till God gives it to him. I have felt the impulse to come here today to testify to this truth.

¹¹⁴ I like Father GROPP's notion of "creative tension," *supra*, note 98, at 83.