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BY

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Contents

Pne/ace

When Christ replied to those who sought to trap him into a political commitment, "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's," he provided us with a fundamental Christian text on the relations between church and state. While his statement sanctioned the validity of legitimate civil authority, it also vindicated the *libertas ecclesiae*—the independence of God's kingdom, the Church, within the area of its own competence.

Fundamental as this text is in determining the relation of church and state, it indicates no clear answer to the natural corollary, "But what things *are* Caesar's, and what things *are* God's?" Our Lord doubtless had reasons for not defining his terms. Yet it is true that, in the perennial struggle of the Catholic Church to maintain her independence of state control, it is the corollary rather than the principle which has been the chief matter of controversy. The caesaro-papism of the Christian Roman emperors, the medieval investiture dispute, the Gallicanism of pre-Revolutionarÿ Europe, the laicism of the nineteenthcgntiu^ liberalist states and of the contemporary>J›*i*etet;_®a"lon® to mention a few of the majorjjp^Mtate controversies —have all concerned thjJ^® ₹ Jurisdiction in which the boundaries ar^«refinite, and the prerogatives of *regnum ^j^^dottum* tend to overlap. Some disagree-«^-^ns^nevitable since both church and state have author-^_^-"ity over different phases in the life of the same subjects. Disagreement, however, has all too frequently resulted in encroachment, usually by the state, but sometimes also by churchmen who have laid claim to a broader jurisdiction in mixed matters than could be really warranted. The bitterness engendered by these extreme claims has only further obscured the basic issues at stake.

Today the question of church-state relations has once again become the subject of extensive discussion. The contemporary debate is especially concerned with the possibility of reconciling the Catholic Church's teaching that it is the one true Church, with the tendency of the modern state to grant equal status before civil law to Catholic and non-Catholic religious denominations alike. Since our United States constitutional law takes this "separationist" stand, the argument has a special urgency for American Catho-

When Christ replied to those who sought to trap him into a political commitment, "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's," he provided us with a fundamental Christian text on the relations between church and state. While his statement sanctioned the validity of legitimate civil authority, it also vindicated the *libertas ecclesiae*—the independence of God's kingdom, the Church, within the area of its own competence.

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lies. Yet, when American Catholics look about for Catholic replies to the problem, they find few ready answers. Popes and councils have issued no dogmatic definitions on church-state relations. Nor is this incomprehensible. As Dr. Heinrich Rommen has pointed out, it is not principally a theological problem, but "a political problem because it is concerned with the living order of social life."

The American Catholic must therefore turn to Catholic theologians, canonists, and political philosophers, for guidance. These are the men who, in response to un-Catholic ideologies, must reason out a Catholic political philosophy which takes into account Divine revelation, Catholic tradition, and the data of history. Much of what they write—today, as in centuries past—may be subject to subsequent revision. But controversy itself, like adversity, wears yet this precious jewel: that it leads to clarification.

While the question is still under discussion, however, there is real need for a manual which gives a succinct summary of the whole subject as it stands today. Monsignor Baierl has made us his debtors in the present work by furnishing just such an objective summary. Since German theologians have been among the pioneers in this field, he has taken Professor Karl Bockenhoff's 1909-1910'lectures, *Katholische Kirche und modemer Stoat,* as his foundation. The lectures, after being delivered at the University of Strasbourg, were published at Cologne in 1911 ; but, as the issue of a second edition in 1920 testifies, they are of permanent value. Building on BockenhofFs-sound analysis, Dr. Baierl has brought the historical part up In dat^JPo this he has also added—what will be particularly welcome----^^^- to American readers—a thorough consideration of the problems of church and state in the United States, and a review of the American phase of the present-day church-state controversy.

Catholic seminarians, for whom the present work was primarily designed, will find it most helpful for study and reference. But it should prove equally helpful to other students, and, in fact, to any serious reader who is in search of a clear, objective summary of this difficult but very topical subject.

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August 1, 1954.

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THE CHURCH IN THE MEDIEVAL AND THE MODERN STATE

The problem of the relations of Church and State is of vital concern to us as citizens and Catholics. We are justly proud of this dual privilege: citizenship in our great country, and membership in the one true Church of Christ. It is our sincere desire to live in peace and concord with our fellow men of whatever racial origin, color, or creed. We seek no privileges in a land where our Church is respected and protected and where she is flourishing as in no other land on the face of the earth. But we do resent any and every attack against our rights and loyalties as Americans because we profess the Catholic faith. Perhaps the very fact that the Catholic Church enjoys such prestige as a spiritual and moral leader, has aroused some suspicion and even ill will against her. Whatever the reason, the Church's activities, especially in the field of education, are now being criticized and misunderstood. The Manifesto issued (1948) by Protestants and Other Americans United for Separation of Church and State adds more fuel to the flames of religious antagonism and civil discord. These attacks are only skirmishes in that larger battle that is being waged the world over, to wëakemandidestroy the Church's influence.

--^Hostility to the Catholic~Churehja_not restricted to individuals and groups; it has often beèïTthe^poUçyof the State itself. History testifies that the secular power~has successively despoiled the Church of the prerogatives she enjoyed in European society as moulded by the influence of Christianity for centuries. This hostile attitude has not abated; it has intensified with the passing years. Its final outcome is laicism, excluding religion entirely from the life of society. The laicized State recognizes no Church, no religion, and even excludes the name of God from all its institutions or establishments, and from all its acts. The canonist, A. Boudinhon, writes, "Laicization goes far beyond 'equality,' by which the State recognizes equal rights as possessed by various confessions or religions; it is much more than 'neutrality'—the attitude adopted by the State

in its dealings with the divers confessions to which its citizens belong; it is something quite different from 'separation,' by which the concordats existing between the two powers are dissolved, and the official character of the Church, as hitherto recognized by the State, is abolished."[1]

Not all the European countries have moved with equal rapidity in this direction, and few have arrived at the complete secularization effected by the French Revolution. In non-Catholic countries, where the civil power already possessed more or less complete authority over religion, it has been retarded and partially eliminated. The same is true in Catholic countries where there is a definite spiritual authority, not infrequently charged with being alien or foreign. Only in countries behind the so-called Iron Curtain has this hostility, wedded to atheistic communism, approached full flowering.

Despite local differences, the main purpose of this secularizing movement is clearly discernible throughout the Christian world. It would distinguish ever more sharply the spiritual and temporal spheres. It would limit the former to purely spiritual matters, depriving it gradually of all the prerogatives acquired in the building of Christian Europe throughout the Middle Ages.[2]

Our task is to determine whether and to what extent the nature and the juridicial claims of the Church and State *are* opposed, and, if so, whether that opposition is practically irreconcilable.

The relations of the Church and the^medefn~State is a difficult and complex problemrinVSlving historical, theological, and juridiciaPcênsîderations. As fair minde^-m^T' our amM^wcHTas to any problem of gravejmpevtTsÎïould be and unprejudiced. Thehistory of the difficulty is long and varied; injio-sefise is it modern. In the Middle Ages the relationship of Church and State was very different from today. We may not shut our eyes to the changes that have occurred. Nor can we judge the present by standards prevailing in the past. Due consideration for historical perspective will eliminate many of the objections otherwise arising in studying this knotty problem.

To ascertain the Church's position in regard to the role assigned her in the modern State, to know whether she approves or disapproves, or whether she accepts her present. status as a political necessity, we must discuss and interpret the sources of this whole matter. Ignorance of these and their misuse are the fountainhead of all the suspicions and unwarranted attacks on the Church.

1 "tikiutioa," *CtlMic E^cyclofitJU,* VHI, 745.
•*Hid.*

The title of this study, "The Catholic Church and the Modern State," suggests a profound difference in the relationships of these two powers from what they were in the Middle Ages. Then the Church was at the zenith of her power. That a change has resulted does not mean a change in the Church. She remains the same—same in constitution, in principles, in juridicial claims. But the State has changed profoundly since the Middle Ages, and this is the very beginning of the problem facing us. The medieval State was Catholic, the modern State is secular or suprasectarian in relation to religion. In other words, formerly the State was spiritually conscious, definitely committed to one faith; today the State regards itself not only as outside but above all creeds, all confessions, all denominations. In this attitude is to be found the origin, or at least the occasion, for all the differences relating to this question today.

THE CHURCH AND THE MEDIEVAL STATE

To employ figurative language, it is very true to say that the medieval State was built within the edifice of the Universal and Catholic Church; her foundation was its foundation; the vaulted arches that enclosed her halls also spanned those of the State; her cupola, the papacy, overtopped the turrets and spires of the State, and was for it, too, the culmination of all power on earth. The common foundation was the Catholic faith, the inviolable basis of society. Whatever was opposed to that faith was regarded as dangerous also for the State. The defense of the faith was the paramount duty of the temporal sovereign. Citizenship and membership in the Church coincided to such a degree that the loss of rights granted by one power meant the loss, or at least the lessening, of rights stemming from the other. In the medieval State there was no longer any placefog^one who not only persisted in disobeying-the-mrtirorTty^of the Church but also contumaciously denied her teaching in matters of faith. Such a one was at first excommunicated, fined, and deprived of his possessions; and it was not long before he was handed over to the State, whose duty it was to impose capital punishment. Oneness of faith and membership precluded the possibility of conflict-between the

two powers; for conflict between Church and State presupposes that the Church embraces only a portion of the subjects of the State, that is, constitutes merely a smaller circle within the organism of the State. In the ecclesiastico-political struggles of the Middle Ages both parties were within the Church. An emperor who did not belong to the Church, who was not both a leader and protector of religion, would not have been emperor at all. The only dispute regarded the division of this twofold authority that ruled Christendom, namely, the priestly and the royal power.

This intimate union of Church and State, born of a common philosophy of life, inspired a harmonious co-operation between the two powers, a peaceful co-ordination of aims affecting the temporal and eternal welfare of mankind. In consequence there was no sharp demarcation between the spheres of Church and State. The Church labored for many objectives which today we regard as aims of the State and, conversely, the State functioned in areas which now are considered ecclesiastical.

The same is true of secular and ecclesiastical jurisdiction. Thus the Church gradually extended her jurisdiction over all matters that were of ecclesiastical interest *(causae spiritualibus annexae),* all litigation concerning marriage, matters concerning burial, testaments, contracts ratified with an oath, matters pertaining to benefices, questions of patronage, litigation concerning church property and tithes. All civil litigation in which the element of sin was in question *(ratio peccati)* could also be summoned before an ecclesiastical court. In addition, the ecclesiastical court had jurisdiction over the affairs of ecclesiastics, monks, and nuns, the poor, widows, and orphans, also those persons to whom the civil judge refused legal redress. During the course of the Middle Ages the Church increased her penal jurisdiction in the civil domain by inflicting various penalties, some of them purely secular in character. Most important, by means of the *privilegium fori* the Church withdrew the so-called "criminous clerks" from the jurisdiction of the civil courts, Whereupon the Church obtained for the court held by the bishop during his diocesan visitation (the *send)* not only the power to punish those civil misdemeanors which involved the element of sin and consequently affected both Church and State, but also the power to punish, as such, purely civil offenses. In punishing offenses of purely ecclesiastical character, the Church

disposed unreservedly of the aid of the State in the execution of the penalty. When in the *send,* or court held by the bishop during his visitation, the Church inflicted punishment on the laity for civil offenses, the penalty as a rule was enforced by the count *(graf)* who accompanied the bishop and represented the civil power.[3]

Since the State was to subserve the higher aims of the Church, it was in duty bound to procure for all tranquility from without and juridicial protection from within. The regal office also received a religious interpretation. Temporal rulers were regarded as representatives of God, to whom they were answerable. Such a concept of justice gave stability to the throne. The ceremony of coronation was likened to episcopal consecration to remind king and people of their religious responsibilities.

The picture of the magnificent co-operation between Church and State for the welfare of mankind in the Middle Ages, shows vigor and splendor, although it is not without glaring contrasts and deep shadows. Monsignor Joseph Pohle, after alluding to the advantages that must be conceded to the medieval religious State, warns that these great advantages must not cause us to overlook the numerous drawbacks which this mystical marriage of Church and State involved. First of all, he reminds us, "The Catholic religious State was compelled to adopt an attitude of fundamental intolerance towards all errors of faith, which became so many crimes against the State. ... It is certain that the odium for all these severities and cruelties had to be borne, not by the State which inflicted them, but by the Church, which seemed to stand behind these measures as the secret motive force, even though she did not know of, much less justify, many of them." Secondly, "The ecclesiastical right to mediate directly in purely secular affairs might easily become a dangerous prerogative, in as much as the infliction of excommunication for purely political offenses must necessarily have brought ecclesiastical penalties—especially when unjustly inflicted—into great discredit among princes and people. On the other hand, the right of protection exercised by the sovereign in ecclesiastical matters, often without or even against the wish of the pope, had for its unavoidable consequence the loss of respect for both authorities. The proverbial contest between *imperium* and *sacerdotium,* which practically runs through

[3] J. B. Sägmüller, "Ecclesiastical Jurisdiction," *Catholic Encyclopedia, VIII, 568f.*

the whole history of the Middle Ages, redounded in fact to the advantage of neither." Thirdly, in such a system there was and always is the danger "that the clergy, trusting blindly to the interference of the secular arm in their behalf, may easily sink into dull resignation and spiritual torpor, while the laity, owing to the religious surveillance of the State, may develop into a race of hypocrites and pietists than inwardly convinced Christians." Finally, in this system there is "the imminent danger that the claim of the Church to supremacy over the State must almost necessarily call forth the opposite extreme of Caesaropapism."[4]

Despite this frank acknowledgement—which expresses the conviction of Catholics generally—we are often reproached for looking back regretfully at the departed glories of that period, as another writer reminds us; and "we are told that as Catholics we could not do otherwise than to strive to restore, as far as possible, the medieval power of the papacy."[6] It is true that we cannot help admiring the position of the Church in the Middle Ages, but at the same time we do not hesitate to admit, in the words of Pius X, that "the Church, throughout her long history, has always and on every occasion luminously shown that she possesses a wonderful power of adaptation to the varying conditions of civil society; without injury to the integrity or immutability of faith or morals, and always safeguarding her sacred rights, she easily bends and adapts herself in all that is contingent and accidental, to the vicissitudes of time, and the fresh needs of society."[0] Further, Monsignor Joseph Mausbach states, "The medieval supremacy of the Church over *all departments of social life* was not the result of any love of power on the part of the popes—only fanatics nowadays maintain this to have been the case—and neither was it, as a whole, the outcome of a dogmatic principle of the 'Catholic system,' as many believe. In more than one respect this supremacy was the natural result of the historical development of national life and of spiritual nations."[*] And it is not the intention

[4] "Religious Toleration," *Catholic Encyclopedia,* XIV, 771f.
[6] Monsignor Joseph Mausbach, *Catholic Moral Teaching and Its Antagonists.* Translated from the sixth revised and augmented German edition, by A. M. Buchanan (London and New York: Joseph Wagner, 1914), 342.
[0] Encyclical Letter, *Il ferma proposito,* June 11, 1905, to the Bishops of Italy on Christian Social Action, in *Acta Sanctae Sedis* (hereinafter referred to as *ASS),* XXXVII, 749f. English translation in *The Pope and the People* (London: Catholic Truth Society, 1937), 192.
[*] Mausbach, *op. tit.,* p. 342f.

of Catholics today to restore, as far as possible, the medieval power of the papacy.

THE CHURCH AND THE MODERN STATE

The attitude of the modern State in respect to the Catholic Church differs radically from that just described. To revert to the metaphor mentioned above, the modern State considers the Catholic Church as enclosed within its own mighty structure. As Polycrates from the turreted roof of his garrison gazed upon conquered Samos, so too the modern State looks out upon the cupolas and turrets that rise within its domain. Everything, communities large and small, the Catholic Church among others, is subordinate within its borders. In marked contrast to the medieval State, the modern State grants legal (public and political) tolerance to all religious denominations within its boundaries and permits its subjects, no matter what their religious faith, to practice their religion freely. This tolerance may under certain circumstances amount to equality of rights or parity, and even to the full enjoyment of all civil rights, regardless of one's religious faith; or it may be restricted to some religions only—as, for example, to Christian bodies, or already established religious bodies. "It may permit religions to make converts," says the theologian Father A. Vermeersch, S.J., "or it may simply authorize their existence. It may grant religions public and social life, either in their temples or outside, with liberty to form a hierarchical organization or to possess property; or it may put certain limitations on that public life by decrees on the subject of associations, processions, and the public exhibition of religious symbols; or it may even recognize only the individual liberty of conscience of their members. With reference to citizens, tolerance may leave them free choice to continue in their own religion, or to pass from one religion to another, or to no religion at all. It may place all citizens on a footing of equality, or content itself with punishing no one for his religion, while making certain civil rights depend on the profession of faith."[1] In its *exercise,* legal tolerance may be combined with the recognition of a State religion, with favors reserved to that religion, or to religion in general; or it may observe strict neutrality, giving preference to no one religion over another. It may manifest a sympathetic and a trusting or a

[1] *Tolerance,* translated by W. Humphrey Page (London: Washbourne, 1913), 104.

contemptuous and suspicious neutrality.[9] In any event, freedom of religion and conscience is indispensable for the modern constitutional State. The communist State proclaims freedom of religion and conscience in theory, but in practice it ruthlessly strives to destroy Christian civilization and the Christian religion.

In the modern State, civil and ecclesiastical jurisdiction are sharply separated by the arbitrary action of the State, often in opposition to the demands of the Church, which regards as her own internal affairs what the State calls mixed and secular matters subject to its legislation and competence. In consequence the Church is not only excluded from the sphere in which she co-operated with the medieval State, but she is restricted and impeded in her own peculiar sphere. One has only to think of matrimonial legislation which, apart from the property rights attached to marriage, the Church claims as her exclusive domain because of the sacramental character of Christian marriage. In opposition to ecclesiastical legislation, the State has established an essentially different legislation and permits no civil effects to the exercise of spiritual competence by the Church in matters of marriage and betrothal. After long struggle the Church has lost her jurisdiction in *res spiritualibus annexae,* and also the privilege of the clergy. She also eventually lost by far the greater part of her criminal jurisdiction and most of her contentious jurisdiction.[10]

These and other tremendous changes in the relation of the modern State to the Church are the fruit of a slow growth.[11] Its period of preparation is the late Middle Ages, from which the Modern Age emerges, and its completion coincides with the disruptive tendencies of the same Middle Ages upon reaching maturity. Their ultimate effect was the destruction of that unity which previously had formed the foundation of life. As soon as the Catholic faith ceased to be the only prevailing faith, dependence of the State on the Church had to end. The so-called Reformation of the sixteenth century destroyed that unity.

THE PROTESTANT REFORMATION

Luther's first reformatory attempts were radically democratic. He sought to benefit the people at large by cur-

• *IHJ.,* p. 105.
e Sigmuller, *op. tit.,* p. 568f,
u See Heinrich Rommen, *The State in Catholic Thought* (St. Louis. Missouri Herder I945),514'567.

tailing the powers of both Church and State. The Peasants' War was partly the outcome of the influence of Luther; but the struggle proved fatal for him. Ultimately he took the side of the princes and thereby sealed the fate of the free movement which he had inaugurated and postponed indefinitely the advent of democracy in Germany.[12] After the failure of the revolution, Luther and Melanchthon began to proclaim the doctrine of the rulers' unlimited power over their subjects. The result was a new form of social and religious order, the territorial or State religion—an order based on the religious supremacy of the temporal power. The Church was placed at the service of the State. The one discarded Pope of Rome was replaced by a score of popes at home; the temporal rulers became supreme bishops; symbols of faith were imposed by an outside authority and enforced by the secular arm. Church property was confiscated, or transferred to the new religious organizations. Ecclesiastical jurisdiction was secularized and taken over by the kings and secular courts, or at most left in small measure to the clergy, who were entirely dependent on the civil power. No bond of unity existed between the national churchs, except their common hatred of "Rome." A little more, and the two would have blended into one.[13] Soon however, though not from religious motives, the states granted tolerance to the dissident confessions within their borders. Gradually, since the peace of Westphalia (1648), the juridical co-existence of various confessions won recognition more and more in State polity.

The attitude of the modern State regarding dissenting religions assumes various forms. The territorial or State-religion form recognizes some among the various religions as "churches." These corporations, e. g., the Catholic or Protestant, receive special consideration for their vital significance both to society and the aims of the State itself. This system of State polity assumes that the majority of its citizens still hold in common the basic Christian truths, and thus furnish a basis for a favorable State policy. "The State-Church plan," says a recent writer on Church and State relations, "gives an official Church a large measure of self-government, and—at least theoretically—has the most complete toleration for all other law-abiding religious

[13] George Cross, "The Protestant Reformation/* in *A Guide to the Study of the Christian Religion,* edited by Gerald Birney Smith (Chicago: The University of Chicago Press, 1917), 387*.

[12] T. Wilhelm, "Protestantism/* *Catholic Encyclopedia,* XII, 498f.

bodies. ... It has existed in England (Anglican) since the Act of Toleration of 1689, and has to a large extent been prevalent in many other countries; such as Scotland (Presbyterian), Sweden (Lutheran), and some of the Balkan States (Eastern Orthodox) between World Wars I and II."[14] A different type of State polity is offered by Eire's Constitution of 1937. It "recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens." But its religious clauses do not make Eire an exclusively Catholic State; all non-Catholic denominations in existence at the time the Constitution was promulgated are recognized by name, and religious freedom is guaranteed.[15] The Separation plan, as under our Constitution, involves the severing of all legal ties between Church and State; an entire freedom of all religious bodies. It means that the churches are equal in the sight of the State, and that no church has the advantage or disadvantage of establishment.[16] There is a final type which secularist propaganda strongly urges the modern State to adopt. Where confessions or religions have multiplied, where there is a rather general defection from Christian practice by the citizens, the State withdraws from supernatural revealed religion and turns to truths and values knowable by natural reason alone. It dissociates itself entirely from every religious society, dealing with each individually or separately as a local private association, or as a foreign society to be regarded accordingly. Thus the way is prepared for complete secularization, the extreme form of separation of Church and State.

NATIONALISM

Another factor accelerating the evolution of complete State sovereignty, was the emergence of nationalism. Its beginnings antedate the Reformation, but its disruptive tendency appeared in bold relief for the first time in the conflict between Philip the Fair, King of France, and Pope Boniface VIII toward the end of the thirteenth and the beginning of the fourteenth century. It centered on the temporal goods of the Church. Taxes were imposed on church property. The Church's jurisdiction yielded little by

u Anson Phelps Stokes, *Charcb and State in the United States.* 3 vols. (New York: Harper and Brothers. 1950), I. 43.
a Constitution of Ireland (Dublin: Government Publications Sale Office, ipji), Religion, article 44, 144.
>· Stokes, *op. cit.,* p. 47.

little to that of the royal courts: these adjudicated not only questions arising out of marriage—inheritance, legitimacy of children, adultery—but also in most cases relating immediately to matrimony or benefices. The system also permitted almost all ecclesiastical acts to be brought, if the State so chose, under cognizance of the royal judge. Papal Bulls and decrees of Councils were recognized only after examination and in virtue of royal authorization; they had to be ratified to obtain the force of laws. The royal prerogative of nomination to vacant benefices was exercised. The papal right of reservation was questioned and direct, appeals to Rome were forbidden. Moreover, King Philip had at his command many learned politicians or lawyers who supported him. These servants of the State, enthusiastic for the Caesaro-papist ideal of Justinian, considered the authority of the State supreme. Here we see the beginning of laicization, carried on, not by expedient or by violence, but on principle; it was a battle in which the secular power, becoming more and more centralized and conscious of its strength, was destined always to prevail. Louis XIV put into practice the more advanced principles of Gallicanism, and regulated the affairs of the Church as if he were a Justinian. Other countries followed the same path. The extreme limits of this encroachment of secular power was reached by the minute ecclesiastical regulations of Joseph II of Austria. The most complete secularization was that effected by the French Revolution.[17] Almost everywhere, the ecclesiastical immunities disappeared, legislation became purely secular, civil marriage was established, and the Church, except in the case of divine worship, was excluded from public service, or participated in only by favor of the sovereign State. In countries where atheistic communism prevails, the very existence of religion is threatened. If we except our own country, where, by happy inconsistency, the excesses of absolute separation were avoided,[18] in no country where separation of Church and State is an accomplished fact do we discern in constitutional law even a faint trace of the powerful position the Church once held in the life of nations. In her public activity, the Church is referred to the civil law that regulates private corporations.

n Boudtnhon, oô. *cit.,* p. 746.

u See Encyclical Letter of Leo XIII, *Loneinaua Octant,* to the archbishops and bishops of the U. S. A., January 6, 1895, in *ASS,* XXVII, 390. English translation, *T6e Great Encyclical Letters of Pope Leo XIII* (New York: Benziger, 1903), 323.

The literature on the relations of Church and State has grown enormously in recent years.[19] Many writers unequivocally favor complete separation of these two powers; others urgently warn against the policy of allowing matters to come to such a state that separation becomes inevitable. Oddly enough, both groups seek to justify their respective attitudes largely in the same way: by appealing to the opposition of the Catholic Church to the State, and to the dangers that threaten the State by reason of that opposition. The former class of writers hails separation as the Deliah that is to deprive the Church of her Samsonian strength; the other group fears that the Church's power will grow beyond bounds once she is freed from the iron bonds of the State's tutelage and able with her sturdy arms to shake the pillars whereupon the modern State rests. And so in either case the Church is made to appear as an enemy and a threat. Even though the Church were able to reorganize itself as a religious society, the modern State could never tolerate a power which, as it suggests, is essentially ever ready to thwart the State, and is capable of concluding no genuine peace, but at best a truce when it is to her advantage.[20] Such opinions are not at all uncommon among writers on this question. Since, however, the Church actually exists and cannot be removed from the affairs of men, the State must ever be on guard against her. If the modern State were to allow the Church to go her way, she would become, according to this view, "a dangerous parasite" that would prove fatal to the organism of the State.[21]

Catholics maintain that there is no irreconcilable opposition between the Catholic Church and the modern State, as an impartial study of the authentic sources of the Church's teaching clearly demonstrates.

[19] See Luigi Sturao, *Church and State* (New York: Longmanns, Green & Co., 1939), 5455-569. See also, Stokes, *op. c'rt.,* III, pp. 711-836.
[20] P. Hinschius, "Staat und Kirche," in H. Marquardsen, *Handbuck des ôffentlicben Recbts der Getenwart* (1883), 265.
[21] W. Kohler, *Kaihoihismus und modemer Staat* (Tubingen, 1908), 34.

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A. USELESS SOURCES

If we wish to know with certainty to what extent the Catholic Church approves of—or at least accepts as a political necessity or positively rejects—the position that has been assigned to her in the modern secular or religiously neutral State, we must first search for the sources that enable us to determine authoritatively the Church's attitude in this matter. Our task would be considerably lightened had the Church ever directly and explicitly stated dogmatically her teaching on the relation of Church and State, that is, to what extent she claims to be superior to the State; whether she is satisfied with a position of equality; and finally, what she thinks of the modern system of a state-controlled Church. But actually there is no definitive and binding declaration in this matter. The dogmatic Constitution, *Pastor aeternus,* issued by the Vatican Council, although defining papal infallibility, restricts itself to the decisions which the pope makes, as pastor and teacher of the faithful, in matters of faith or morals to be held by the universal Church; the Council did not undertake to define the relations of Church and State, at least, not directly, as even many Protestant scholars admit. G. Krüger, for example, writes that not a single proposition of the Vatican decree oversteps the domain of the purely spiritual, and that inferences in terms of the medieval theocracy can at best be drawn therefrom in a roundabout way, namely, by means of Bellarmine's theory of the indirect power of the pope in temporal matters. But indirect inferences are ill-adapted to dogmatizing. As a matter of fact, it is not too much to say that the Vatican decrees indicate that a most efficacious barrier has been set up against the en-

croachments of the papacy in secular affairs.[1] Krtiger shows a much better understanding of the matter at issue than the former Catholic theologian, Paul von Hoensbroech,[2] who, after his defection from the Catholic Church, asserted that the Vatican Council made amends for the lack of an infallible definition on the political power of the papacy by inserting the canon: "If any shall say that the Roman Pontiff has the office merely of inspection or direction, and not full and supreme power of jurisdiction over the universal Church, not only in things which belong to faith or morals, but also in those things which relate to the discipline and government of the Church spread throughout the world ... let him be anathema." No theological training is required to perceive that the canon is concerned exclusively with the pope's supreme spiritual power.

Not even indirectly has the Vatican Council issued doctrinal definitions on the relations of Church and State. Some non-Catholics argue that by the Vatican definition of infallibility all claims of papal supremacy made in the Middle Ages have been permanently incorporated in the authentic sources of ecclesiastical belief and law; and as proof they submit that the definition of infallibility has made all previous claims made ex cathedra, irrevocable. But we deny that there was an ex cathedra definition on the claims of the Church in the political realm before the decree of the Vatican Council (1870).

In rebuttal, non-Catholics contend that five and a half centuries before this decree, Boniface VIII promulgated a definitive doctrinal decision on the Pope's political power in the famous Bull *Unam Sanctam.* Therein, in reference to the conflict with Philip the Fair, King of France, he distinctly affirmed that secular princes are subordinate to the pope even in temporal matters. The original of the Bull is no longer in existence, but its contents are absolutely established by their incorporation into the official registers of papal Bulls, and into canon law.[3]

The Bull does indeed contain a doctrinal definition: "Now, therefore, we declare, say, determine and pronounce that in order to attain salvation it is necessary for every

[1] *Das Papsttam* (Tubingen, 1907), 148f.
[2] *Moderner Stoat and katbolische Kirche* (Berlin, 1906), 37f.
[3] Vatican Archives, *Registra Rom. Pontif.,* no. 50 (an. VII-IX), fol. 387, cited by J. B. Lo Grasso, S.Î., in *Ecclesia et Statas—De Matais Officiis e/ Jaribas Fontes Selects* (Rome: Gregorian University, 1939). nos. 431-338.

human creature to be subject to the authority of the Roman Pontiff." On the margin of the text containing the record, this sentence is noted as the real definition of the Bull. As in the case of all Bulls expressing dogmatic definitions, it is necessary to keep separate the definition itself and the statements added to it to justify and explain. These latter statements are not covered by the guarantee of infallibility which attaches to the strictly definitive sentences—unless, indeed, their infallibility has been previously or subsequently established by an independent decision. Thus, the definition in the Bull *Unam Sanctam* merely expresses the necessity for every one who wishes to attain salvation to belong to the Church, and therefore to be subject to the authority of the pope in all religious matters. This is nothing new; it has been the constant teaching of the Church from the beginning. Even non-Catholics acknowledge that this definition has to do with faith, and that its purport is religious and not political.[4]

The Bull also proclaims the subjection of the secular power to the spiritual as the one higher in rank, and draws from this conclusion that the representatives of spiritual power can install the holders of secular power and exercise judgment over their administration should it be contrary to Christian law. "This is a fundamental principle which had grown out of the entire development, in the early Middle Ages, of the central position of the papacy in the Christian national family of Western Europe," says the distinguished historian J. B. Kirsch. "It has been expressed from the eleventh century by theologians like Bernard of Clairvaux and John of Salisbury, and the popes like Nicholas II and Leo IX. Boniface VIII gave it precise expression in opposing the procedure of the French king. The main propositions are drawn from the writings of St. Bernard, Hugh of St. Victor, St. Thomas Aquinas, and letters of Innocent III. Both from these authorities and from declarations made by Boniface VIII himself, it is also evident that the jurisdiction of the spiritual power over the secular has for its basis the concept of the Church as guardian of the Christian law of morals, hence her jurisdiction extends as far as this law is concerned. Consequently, when King Philip protested, Clement V was able, in his Brief *Meruit,* of February 1, 1306, to declare that the French king and

[4] See Kruger, *op. cit.,* p. 73; see also, Paul Hinschius, *Kirchenrecbt der Katboliken und Protestanten in Deutschland, 5 vols,* and one part of vol. VI (Berlin, 1869-1897), III, 767.

France were to suffer no disadvantage on account of the Bull *Unam Sanctam,* and the issuing of the Bull had not made them subject to the authority of the Roman Church in any other manner than before. In this way Clement V was able to give France and its ruler a guarantee of security from the ecclesiastico-political results of the opinions elaborated in the Bull, while its dogmatic decision suffered no detriment of any kind. . . . The statements concerning the relations between the spiritual and the secular power are of a purely historical character, in so far as they do not refer to the nature of the spiritual power, and are based on the actual conditions of medieval Western Europe."[5]

Consequently, since there is no definitive decision on the relations of Church and State at our disposal, we must look for other less authoritative sources, especially for such statements and actions on the part of the supreme governing power of the Church, namely, the papacy, as will enable us to draw conclusions concerning the problem under discussion. The Middle Ages offer the most copious material in this respect for the reason that in those days the Church had more occasion than at any other time to function in the secular sphere and to match her power with that of the State. And so it is not surprising that those who wish to prove that the Catholic Church is a real threat to the State take special delight in utilizing this source to the fullest extent. The sentence of deposition pronounced by Gregory VII against King Henry IV, the excommunication imposed on him and his followers, the freeing of his subjects from their oath of allegiance—these and a wealth of similar papal acts are made into a gaudy mosaic of encroachments on the rights of the State, which at first glance all but bring conviction to the unprejudiced that the Catholic Church is a constant threat to the State.

The argument used to prove these claims may be stated in these terms: in earlier ages the popes claimed this or that right with respect to the State; what they once claimed they continue to claim in principle, even though circumstances might for the time being prevent the realization of their claims; therefore, in our time, too, the popes though perhaps not publicly and explicitly, lay claim to all those rights. The conclusion of this syllogism is false because the minor premise is erroneous, namely, that the popes at least in principle never relinquish a right once they have

[5] "Unam Sanctam," *Catholic Encyclopedia,* XV, 126f.

exercised it. It is indeed characteristic of the papacy to be firm and unyielding, but only when there is question of necessary rights that flow from the essence of the primacy, rights, that is, which in the nature of things and in the infallible judgment of the papacy itself, are contained in the supreme episcopal jurisdiction over the whole Church which the Divine Founder of the Catholic Church bestowed upon St. Peter and his successors: "Feed my lambs . . . feed my sheep .... Whatever thou shalt bind on earth shall be bound in heaven, and whatever thou shalt loose on earth shall be loosed in heaven."[6] Such rights the popes can never relinquish, even though they may not exercise them at all times. Thus, in the early centuries the popes did not act immediately when there was question of confirming episcopal elections, of arranging for the consecration of bishops, of requiring an oath of obedience from them, of transferring or removing them, of establishing dioceses, of granting exemption from episcopal jurisdiction, etc. Nevertheless, Febronius[7] was wrong when he qualified these rights as accidental and derived them from historical factors, which could be taken away from the popes and called into question. All these and many others are essential rights stemming from the nature of the primacy. But this is not to say that in the non-religious sphere there could not be accidental rights deriving from and depending upon historical factors, which the popes at times claimed and which with an alteration of circumstances were taken again from them. There were in fact such rights during the Middle Ages. They rested on the public law of the nations which were united by a common faith and which formed a sort of national family under the head of Christendom, the papacy. The medieval philosophy of life was based on the idea of the solidarity of the human race as established and directed by Christ; and such a conception required a unified external juridical order and government to attain its objective, union in and with God. But with the disappearance of the necessary condition for this relationship between the Christian State and the Church, namely, oneness of a philosophy of life, the prerogatives that accrued therefrom to the papacy can no longer be claimed as rights. Therefore,

[6] *John* 21:15-18; *Matt.* 16:19.

[7] Pseudonym of J. N. Hontheim, Auxiliary Bishop of Trier, who in his book *De Statu Ecclesiae et Legitima Potestate Romani Pontificis Liber Singularis* (1763), became the author of the politico-ecclesiastical system founded on a denial of the monarchial constitution of the Church.

nothing can be demonstrated regarding the Church's attitude to the modern State by arguing from her attitude to the medieval State.

A concrete example will help to clarify what has been said. The power to depose princes and to free their subjects from the oath of allegiance which was ascribed to the popes marks the zenith of the politico-ecclesiastical power of the papacy in the Middle Ages. And this was actually claimed by the popes. In the code of the Church's laws we find a papal law with the caption: "The pope can for just reasons depose the emperor."[8] The law repeats the text of the Bull in which Innocent IV at the first council of Lyons announced the deposition of Frederick II. History records that from the time of Gregory VII the popes on several occasions made use of this prerogative; but it was by no means the principal or favorite sport of the popes to checkmate a king now here, now there, on the great chessboard of European politics, as would appear from the way some of the opponents of the papacy have exploited this subject in their writings.

One must try to understand the actions taken by the popes against the secular princes in the light of the public juridical conceptions that obtained in the Middle Ages. It was commonly admitted, indeed actually a statute of imperial law,[9] that in the great theocracy of Christendom the supreme secular power could not be entrusted to one who had been excommunicated from the Church. While the public law did not actually draw the further inference that whatever ruling prince incurred the penalty of excommunication thereby *ipso facto* forfeited crown and kingdom; nevertheless it was universally admitted that the head of Christendom enjoyed the right to confirm, by a sentence of deposition, the fact that the excommunicated ruler's defiance of the Divine and ecclesiastical order was of such a nature that his subjects could no longer obey him without endangering their eternal welfare, and consequently were free from their oath of allegiance to him.

The papal right to depose a guilty ruler was a protection of the civil rights of his subjects in the Christian states of the Middle Ages, a guarantee that the interests of his subjects, especially of their higher spiritual welfare,

[8] Sexti Decret., lib. II, tit. xiv, cap. ii, in *Corpus Juris Canonici,* edited by E. A. Friedberg. 2 vols. (Leipzig, 1879-1881), II, 1008.
[9] See E. Eichmann, *Acht und Bann in Reichsrecbt des Mittelalters* (Paderborn, 1909), 101.

would not be jeopardized by the ruler's despotism, immorality, and irréligion. In our modern states certain juridical enactments, which we term the Constitution, provide against misuse of authority by rulers. There were no such guarantees in the Middle Ages. At that time religion not only permeated all of man's private and public life, but Christianity, which finds its concrete realization in the Catholic Church, was the very foundation and shield of liberty. If the secular prince ceased to promote and defend this religion, if he abused his authority to the detriment of the Catholic Church, he violated his pledge of loyalty to his subjects, which had received the solemn blessing of the Church at his coronation; and he forfeited the right of allegiance. Consequently, the pope's announcement that the ruler had forfeited the right to rule and that his subjects were freed from the oath of allegiance was not so much a deposition as it was a statement of fact, a declaration made by the authority that once had blessed the union between prince and people in the coronation ceremony. This declaration was necessary to ensure the security of the law. We have an analogous case in the marriage laws of the Catholic Church. If a husband or wife has violated his or her pledge by adultery, the innocent party has *ipso facto* the right to separate from the guilty spouse and permanently to break off all matrimonial relations with him or her.[10] No ecclesiastical permission is required thereto. Nevertheless, ordinarily, the Church desires that, before a permanent separation occurs, the authority of the ecclesiastical judge should be invoked, not indeed to bring about the separation but to verify the conditions jutifying a permanent separation. So likewise the papal sentence of deposition did not in itself effect the dethronement of the secular prince; it merely confirmed the fact that the pledge of loyalty between prince and people no longer bound the conscience of his subjects. The efficacy of that judgment was recognized by all Christian nations.

Our contention that the papal right to depose secular princes owes its existence and justification to merely accidental factors of history, is not contradicted by the fact that in the exercise of that right the popes appealed to their apostolic authority and duty. The pope could indeed point to the office by which Christ had made him the su-

[10] According to *Matt.* 19:9.

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uie worms destiny cannot, of course, be thwarted bv protests of this kind."|*

No pope has pronounced a sentence of deposition on a secular prince since the sixteenth century. Indeed when the popes exercised that power for the last time (Paul HI against Henry VIII in 1535. and Pius V against Elizabeth of England in 1570), it was altogether ineffective and was important only as a protest. Nevertheless, even at the beginning of the eighteenth century the politico-ecclesiastical concept of the Middle Ages that only a Catholic was permitted to be invested with the royal dignity was firmly and officially defended. When the Elector Frederick HI- of Brandenburg coveted the title of king and it was suggested that he should have recourse to the pope to obtain it, he seems to have been under the impression that such action would be feasible only if he first became a Catholic. He therefore turned to tne emperor and settled the matter with him?" Tnereupou Pope Clement XI protested in words which, tar.en at tneir face value do indeed seem harsh, but not if interpreted jn terms of the concept of Church-State relatioiiaSips of the Midale Ages. The pope declared that the step taxen by the Elector, namely, that of assuming the tine of King of Prussia, in 1701, was an offense against the ^pos-cue fcêe and contrary to the sacred canons which a neretical prince of his honors rather than adorn nim w..tn new Honors.'» "The pope's action," savs Monsignor .James F. Loughlin, "though often derided and misinterpreted. was natural enough, not only because the bes'GA.i)t 01 rof&i, tlUer r»ad always been regarded as the pnvm-jm oi trm tlTy see, but also because Prussia belonged oy amoent ngr.t '■? the ecclesiasvlvo-military institute

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known as the Teutonic Order,"[19] The right of deposing princes was once more authoratively asserted, namely, at the beginning of the modem age, in the much maligned Bull of Paul IV, *Cum ex apostokdus officio,* of February 15, 1559. In the judgment of Hergenrother, there are reasons for asserting that the Bull is much to severe in tone, that it was inexpedient—indeed exorbitant—in its punishments.[20]

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that the doctrine of the primacy of the pope did not become the prevailing teaching of the Church until the Middle Ages, whereas the Church has always taught that supreme episcopal jurisdiction was conferred on Peter and his successors, the Roman Pontiffs, by Christ Himself. That such is the sense in which the proposition is rejected is clearly indicated in the Apostolic Letter *Ad apoetolicae* of August 22, 1851. If the author intended only to assert that the many rights latent in the primacy from the beginning, developed in the course of time, without the least substantial change, and so in the Middle Ages attained to an ever more systematic and doctrinal expression, his thesis would certainly not have been censored.

Thesis thirty-eight, also taken from a work by Nuytz, asserts: "The arbitrary rulings of the Roman Pontiffs have brought about the separation of the Church into eastern and western divisions." The condemnation of this thesis in the Apostolic Letter *Ad apostolicae* does not mean that the popes have in every respect and instance shown the highest prudence and moderation in their dealings with the Eastern Church. It is not so much the wording of the thesis that has to be considered as rather the author's intention, mirrored in the context. He means to say that responsibility of the Greek Schism is to be imputed in large measure to the papacy, and that the Greeks had a just reason for departing from the unity of the Church of Christ; whereas in actual fact the chief causes were national pride of the Greeks and the weakening of religious life.

The proposition that has caused the most mischief because of the injudicious and oftentimes malicious interpretation given to it, is the last one in the *Syllabus*‖ "The Roman Pontiff can and should reconcile and align himself with progress, liberalism and modern civilization." This proposition is to be explained with the help of the Allocution *Jamdudwrn cernimus* of March 18,1861. As Father Haag has said: "In this Allocution the pope expressly distinguishes between true and false civilization, and declares that history witnesses to the fact that the Holy See has always been the protector and patron of all genuine civilization; and he affirms that if a system designed to de-Christianize the world be called a system of progress and civilization, he can never hold out the hand of peace to such a system. According to the words of this Allocution, then, it is evident that the eightieth thesis of the *Syllabus*

applies to false progress and false liberalism and not to honest pioneer-work seeking to open out new fields of human activity."[8]

We now come to another question that has a direct bearing on the proper interpretation of the *Syllabus.* This document tells us only what is to be rejected as false. To arrive at a knowledge of the Church's positive teaching, however, is it enough to assert the opposite of the rejected thesis? The matter is not quite so simple. There is a distinction to be made between a contradictory and a contrary opposition. Contradictory propositions are so opposed to each other as to exclude any intermediate judgment. The one is a simple negation of the other, nothing more and nothing else; the one must be true and the other false. On the other hand, contrary propositions are so opposed to each other as not to exclude any intermediate judgment. One of the propositions affirms or denies more than is necessary to make the other false. Contrary propositions cannot both be true, but both may be false, at the same time. Comparing contradictory with contrary opposition, we see that the latter is less perfect than the former, inas much as contraries are incompatible only as regards their truth, not as regards their falsity, and the truth of one contrary proposition is not necessarily implied when the truth of the other is denied, as in the case of contradictories.[7] Accordingly, if I reject a thesis it does not follow that I wish to regard its contrary as true. If, for example, I deny that mushrooms are edible I do not thereby affirm that their consumption is fatal; but merely that for some reason or other they are not to be considered as food (contradictory opposite). Or if I say, "The cloth is not black" (contradictory opposite), I do not therefore say, "The cloth is white" (contrary opposite).[8] This elementary rule of logic is often overlooked in the interpretation of the *Syllabus.* When a thesis is rejected its contradictory (not contrary) opposite expresses the Church's teaching. One must be careful not to insert into the negative thesis more than is contained in it. If, as in thesis forty-five, it is denied that the entire direction of public schools may and must belong to the civil power, then it does not follow that their

• *Op. cit.,* 389.
' See P. Coffey. *The Science of Lo^k* (London: Longmanns, 1912). vol. J, 219ff.
* This does not mean that there is absolutely no exception to this rule. In a thesis which has been rejected as offensive (to basic Christian principles), the contradictory opposite may be just as offensive. To say: "You are not worth powder and shot," is just as uncomplimentary as the statement: "You are worth powder and shot/*

direction inpn'way concerns the State but only the Church. If it be false to say that matrimonial cases and espousals belong by their very nature to civil jurisdiction (thesis seventy four), it is not necessarily correct to assert that they in *no* way are subject to the State. While thesis seventy-seven condemns the statement that in our times it is no longer necessary that the Catholic religion be the only religion of the State to the exclusion of all others whatsoever, it merely follows that today, also, the exclusion of non-Catholic cults may prove expedient if certain conditions be realized.[9]

Since the view held by the Church in opposition to each thesis is contained in the contradictory proposition to each of the condemned thesis, this opposition is formulated by prefixing to each proposition the words: "It is not true that. . . ." The doctrine of the Church which corresponds, for instance, to the fourteenth thesis is as follows: "It is not true that 'philosophy should be treated without any regard for supernatural revelation.' " But the practical use of this negation is not always easy, especially if a compound or dependent sentence is in question, or if the thesis conceals a theoretical error under the form of a historical fact.[10] Hence, when determining the meaning and scope of the contradictory opposite, one must be careful to discover the central thought and that part of the rejected thesis which is emphasized. For example, thesis seventy-eight states: "Hence it has been wisely provided by law that in certain regions, Catholic in name, immigrants shall be allowed the public exercise of their own forms of religion." If one were to express this thesis in terms of its contradictory opposite, paying heed only to the wording, one could give it this construction: "It is reprehensible if in certain regions, Catholic in name, legal permission has been granted to immigrants to publicly practice their own forms of religion." But this construction is false because it does not give due consideration as to where the stress is to be placed; and in this respect only the historical occasion that led to the condemnation of the thesis can supply us with adequate information. The phrase to be stressed is: "in certain regions, Catholic in name (it has not been wisely provided)." The question at issue concerned countries hitherto purely Catholic, particularly the South Amer-

[9] Hxig, *op. tit.*, p. 569.
[10] Haig, *op. tit.*, p. 369.

ican Republic of Columbia, as is clear from the Allocution *Acerbissimum* of September 27, 1852, cited by the *Syllabus.* Another point stressed is "their own forms of religion." There was not sufficient reason for Columbia's legislating in favor of false religions, and consequently such action was not praiseworthy. Not even in states where there are various dissident religious bodies does the constitution give unqualified toleration to each and every kind of worship. Our own country, for instance, forbade polygamy, which had been a principle of Mormonism. Finally, the thesis stresses "the public exercise" and "provided by law;" thereby every sect whose members came to reside in a Catholic country was placed on a footing of perfect equality with the Catholic Church which, up to then, had been the only recognized religion of the land.

Thesis seventeen will also be completely misunderstood by anyone who in formulating its opposite, overlooks the parts to be stressed: "We may entertain at least a hope for the eternal salvation of all those who are in no way ÿl the true Church of Christ." Its condemnation as set forth in the Allocution *Singulari quadam* of December 9, 1854, and in the Encyclical *Quanto conficiamur moerore,* August 10, 1863, certainly does not mean that the Catholic Church sanctions the teaching that "We may not entertain at least a hope for the eternal salvation of non-Catholics," a truly monstrous doctrine which Protestants sometimes interpret as meaning that Catholics condemn all heretics to hell. Whoever consults the Latin wording of the condemned thesis will note that the emphasis rests on two expressions. In the first place the word "nequaquam" is stressed; that is, all who are "not at all" or "in no way" in the true Church of Christ. Catholic teaching has always maintained that a person can be outwardly (visibly) separated from the Church and yet be inwardly (invisibly) united to it. If a person is invincibly ignorant of the true Church or otherwise hindered from entering it, but would ardently long to belong to it if he knew it was necessary for salvation, he is affilliated with the Church unsuspectingly, united with it by invisible ties, by an implicit desire which God is pleased to regard as equivalent to external membership. The graces which such a soul receives are due to the merits of Christ, the Mystical Head of the Church, and flow, as it were, from the grand current issuing from the Head to His members in His Mystical Body. This desire is called

implicit because it is included in that good disposition of soul whereby a person wishes his will to be conformed to the will of God. This desire is not, of course, sufficient of itself to obtain eternal salvation; it must be joined to a more perfect act, namely, perfect charity or contrition. Nor can an implicit desire produce its effect unless a person has supernatural faith.[11]

Secondly, the emphasis rests on the phrase, "We may entertain at least a hope," as is evident from the fact that in the Latin text it stands at the very beginning of the thesis. It implies that one can at least hope (perhaps even be certain of) the salvation of all who belong in no way, not even inwardly (by implicit desire), to the true Church of Christ. Consequently it is this confidence bordering on certainty that must be rejected; but whether one may entertain any hope at all of the salvation of such souls is not decided. In other words, by virtue of the condemned thesis we are not obliged to pass positive judgment that all who are outside the visible Church are condemned to hell. "We may not entertain at least a hope. . . ." is not the same as saying that we must despair of the salvation of those who are not in the visible Church; for the phrase can be understood as admonishing that one must simply refrain from passing judgment on such persons. What, then, is condemned? It is the spirit that prompted the thesis, that is, a religious indifferentism that regards all religions as equally good, or that attitude of mind that looks upon deliberate separation from the Catholic Church as no obstacle to eternal salvation.[12]

The *Syllabus* is indeed an important source from which to derive authentic information on Catholic teaching in regard to the relations of Church and State; but it is by no means the only source. For the *Syllabus* is essentially negative and polemic in character and as such gives only an imperfect picture of the Catholic viewpoint. Ecclesiastical documents, especially pronouncements of the popes of

u See J. Bainvel, S.J., *Is There Saltation Outside the Catholic Church?* translated by J. L. Weidenhan (St. louis, Missouri: Herder, 1917), 57-62; see also, the Encyclical *Mystici Corporis,* June 29, 1943, in *Acta Apostolicat Sedis* (hereinafter referred to as //(5), XXXV, 193ff, published in English translation by the National Catholic Welfare Conference (Washington, D. G. 1943), 63f< A recent document bearing on this matter is the Letter of the Holy Office to Most Rev. Richard Cushing, archbishop of Boston concerning the problem of Rev. Leonard Feeney and the St. Benedict's Center of Cambridge, Mass. In this Letter the teaching proposed tn the periodical *From the Housetop* Fascicle HI, issued by St. Benedict's Center, is condemned and the true Catholic teachm explained. An English translation of the Lrtter of the Holy Office was published in *The Pilot,* official organ of the archdiocese of Boston (Sept. 6, 1952), F ' nca m

w See Aemil. Dorsch, S.J., *Institutiones theologiae fundamentalis* (Innsbruck: Rauch 1928), vol. П, 554.

ancient and modern times, offer additional authentic information. First and foremost among these are the Encyclicals and other apostolic statements of Leo XIII, which shed so much light on the basic question of civic and religious polity.[13] The principal Encyclicals of Leo XIII are the following: *Arcanum divinae sapientiae* (February 10, 1880), dealing with Christian marriage, a topic which brings up the hotly contested question of the borderline between civil and ecclesiastical power; *Diuturnum illud* (June 29, 1881), a detailed discussion of the origin of the State's power and the proof that State security must be rooted in God alone; *Immortale Dei* (November 1, 1885), on the Christian Constitution of states; *Libertas, praestantissimum* (June 20, 1888), which sets forth and proves the Church's attitude on modern liberty (freedom of worship, of conscience, of speech and teaching) as understood by liberalism; *Sapientiae Christianae* (January 10, 1890), on the chief duties of Christians as citizens; *Inter gravissimas* (February 16, 1892), addressed to the bishops of France and all French Catholics on allegiance to the Republic; and finally, *Longinqua Oceani* (January 6, 1895), addressed to the American hierarchy and dealing with Catholicity in the United States.

From the pontificate of Pius X the most important documents bearing on the problem at issue are the following: *The Vatican White Book* on the separation of Church and State in France;[14] the Encyclical *Vehementer nos* (February 11,1906), addressed to the clergy and people of France on the separation of Church and State; the Encyclical *Gravissimo officii munere* (August 10, 1906), addressed to the bishops of France, in which Pius X firmly refuses his consent to the formation of *"associations cultuelles"* ordered by the State, which would violate the rights of the Church; and finally, the Encyclical *Une fois encore* (January 6, 1907), sent to the bishops, clergy and people of France in regard to the persecution of the Church in that country.

The following documents of Pius XI touch upon various

[13] See J. B. Lo Grasso, *S.J.f Ecclesia et Status-De Mutuis Officiis et Juribus Fontes Selecti* (Rome: Gregorian University, 1930), a most valuable source of the most important documents bearing on this problem.

See alsOj *Church and State Through the Centuries.* A Collection of Historic Documents with Commentaries. Edited and Translated by Sidney Z. Ehler and John B. Morral) (Westminster, Maryland: Die Newman Press, 1954). This volume offers reliable English translations of the most significant official documents on Church-State relations through twenty centuries of history.

[14] La séparation de L'Eglise et de l'Etat en France, Exposé et Documents(Rome 1905), printed as a supplement to *ASS,* XXXVHI, 1905-1906.

aspects of the Church-State question: the *Lateran Pacts* (Treaty and Concordat between the Holy See and Italy) of February 11, 1929; and the Letter to Cardinal Gasparri (May 30, 1929), setting forth the agreement between the Holy See and Italy on liberty of worship and conscience; the Encyclicals *Divini illius magistri* (December 81, 1929), on the Christian Education of youth; *Casti connubii* (December 31, 1930), on Christian marriage; *Quadragesimo anno* (May 15, 1931), on reconstructing the social order; *Acerba animi* (September 29, 1932), and *Iniquis afflictisque* (November 18, 1926), on the sad condition of the Church in Mexico; *Dilectissima nobis* (June 3, 1933), on the injustices against Catholics in Spain; *Mit brennender Sorge* (March 14, 1937), dealing with the persecutions of Catholics in Germany; *Divini Redemptoris* (March 19, 1937), an Encyclical on atheistic communism; *Firmissimam constantiam* (March 28, 1937), addressed to the bishops of Mexico on resisting the civil power; and finally, the *Carta Apostolica* (March 28, 1937), sent to the episcopate of Mexico.

Pius XII, now gloriously reigning, has reaffirmed the teaching of his predecessors on the Church-State problem in various radio speeches (e. g., on June 1, 1941, in a discourse to commemorate the fiftieth anniversary of Pope Leo XIII's *Rerum novarum',* again on December 24, 1942, in an address dealing with the basic norms of national and international order; on December 24, 1944, when he spoke on problems of democracy and the absolutism of the State). He also stated his position in the Encyclical *Summi pontificatus* (October 20, 1939), treating of the growth of secularism, the brotherhood of man, the State and family, State-worship, and international confidence; in his Allocution on the *Church and National Socialism* (on the feast of St. Eugene, 1945); in his Allocution *Ci riesce* (December 6, 1953) addressed to Italian Catholic jurists on toleration of religious errors in a Catholic state.

Additional authentic sources will be indicated in the course of this study.

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A. ACKNOWLEDGMENT OF THE STATE'S SOVEREIGNTY BY THE CHURCH

Two closely allied attributes serve as distinctive marks of the modern State as compared with the medieval State. They are its sovereignty and its supersectarianism or secularism, as indicated in the Introduction to this study. It is alleged that these two attributes of the modern State place it in opposition to the Catholic Church, which in all its essentials continues to hold firmly to its medieval, ecclesiastical conception of life and the world. W. Kohler, for example, observes that if Catholicism is to continue to operate in the modern sovereign and secular State, it must exist only as a foreign element that does not conform to the central organism.[1]

Accordingly, we must discuss the attitude of the Catholic Church toward the sovereignty claimed by the State. In modern political science the term "sovereignty" is used in various senses.[2] Its meaning, as we understand it, is essentially negative, and derives from Jean Bodin (d. 1596), the founder of modern political science; it connotes the denial of everything that would claim independent power over and in the medieval State; therefore it is the same as the State's independence of every other power.

The medieval State was dependent on various powers. One of these was the the Roman empire of the German nation; for in theory all Christian states were integrated with the Roman empire and only the emperor enjoyed supreme monarchical authority; although actual conditions especially after the fall of the Hohenstaufen dynasty, were in glaring contradiction to this theory. Another power on which the medieval State was dependent was the estates of the realm: the feudal lords (and later also the towns) were invested with civil power within the State and did not

1 *KatbolrzijrrtBJ nnd modemtr StAai.* 35.
8 See H. Rommen, *The State in Catholic Thought,* 389-400. See also, G. JeHinek, *Dot Recbt det modemen Staates* (2nd ed., Berlin, 1905), 1, 439.

regard themselves as part of a larger unit, but as related to it merely as vassals holding land on condition of military or other service.[3] Finally, and this concerns us more directly, the Church claimed prerogatives in respect to the sovereign of the State and in the sphere of civil competence, which, as was noted in previous sections of this study, involved far-reaching dependence of the State on the Church. On the other hand, State sovereignty in regard to Church-State relations means that the State has supreme and full independence of existence and activity and is in no way subject to ecclesiastical power.

Now the question is whether the Catholic Church acknowledges such independence of the State or merely accepts it as something it cannot change, the while "continuing to hold in principle its medieval claims to sovereignty," and leaving undecided the restoration of its claims as a possible idea of development.[4]

The answer is: The Church acknowledges that the State is supreme and juridically independent of every other *temporal* power; that is, the State is the sovereign power in all purely secular matters. The Church makes this acknowledgement, not as critics accuse her of doing,[5] but without "latent reservations" and "by renouncing in principle the fictitious perpetuation of medieval ecclesiastical sovereignty." She also acknowledges the counterpart of this thesis: in all purely secular matters the Church does not claim any power whatsoever.

IN MODERN TIMES

That such is the conviction of the popes of modern times is clear from the great Encyclicals of Leo XIII dealing with the relations of Church and State. Speaking of the Christian Constitution of States, he says: "The Almighty, therefore, has given the charge of the human race to two powers, the ecclesiastical and the civil, the one being set over divine, the other over human things. Each in its kind is supreme, each has fixed limits within which it is contained, limits which are defined by the nature and special object of the province of each, so that there is, we may say, an orbit traced out, within which the action of each is brought into play by its own native right. . . . Whatever is to be ranged under the civil and political order is rightly subject to the

[3] Kjhl^'KÎrchttirwhV,'· in *Keller dir Gurnwan,* Pirt II. Sect. viii. 280.

[4] *Ibid.*

civil authority. Jesus Christ has Himself given the command that what is Caesar's is to be rendered to Caesar, and that which belongs to God rendered to God."[6] In another document Leo XIII says that "whatever is within the civil sphere the Church acknowledges and declares to be in the power and supreme jurisdiction (in potestate supremoque imperio) of the princes."[7]

A few years later Leo XIII had occasion to draw conclusions from these principles when a certain civil government sought to have him interpose his authority in the civil sphere. Leo expressly asserted his incompetence therein, even though it concerned a matter of which he said: "Relations of the religious and moral order were involved in this (political) affair." He had been approached by the Prussian government to co-operate in the approval of the so-called Septenate(the military budget for seven years, through which Bismarck hoped to further his military and foreign plans). Leo believed that "he ought to make the Centre Party cognizant of his desire in this regard" in the hope that thereby "the final revision of the May Laws would be given a strong impetus and a comprehensive realization by the government." The Centre Party respectfully replied to the Pope that "it finds it impossible to obey in non-ecclesiastical directives." The Holy See expressly acknowledged the justice of this viewpoint and confirmed the fact that "freedom of action has always been granted to the Centre Party as a political organization."[8]

Pius X had occasion to express a similar confirmation of the Church's attitude. Cardinal Vincenzo Vannutelli had delivered in Latin an address of welcome to German Catholics gathered in convention in the city of Essen. Through a false formulation or a misunderstanding of this address, which the press was quick to exploit, it was reported that the Cardinal had spoken of the "obedience of German Catholics by which they subordinate their entire conduct, whether in relation to religion or to civil or social affairs, to the authority of the bishops and the Holy See." When, despite an authentic correction of this wording of the text, the tendentious exploitation of the address continued, Pius X directed a letter® to Cardinal-Archbishop Fischer of

[6] *Imtnortale Dei,* November 1, 1885, in ΑΠ", XVIII, 166; translated by George Treacey, S. J. (New York: The Paulist Press, 1941), 7f.
[7] *Diuturnum Hind,* June 29. 1881, in *ASS,* XIV, 13.
[8] See E. Hûsgen. *Ludwig Windthorst* (Cologne, 1907), 286L
[9] *Archie fur natbolisches Khrcbenrecbt,* LXXXVH, 286ff.

Cologne in which he expressed satisfaction in the fact that "the German Catholics desire to obey the authority of the Holy See in all religious questions. This obedience, as constant experience shows, grants to each one full and unrestricted freedom in all those matters which do not touch religion, even though some, who do not know the truth, have passionately questioned it. Thereby is born in men's hearts that harmony which, extending from the individual to society, confirms the welfare of society, which welfare depends upon two factors, one civil and one religious."

Leo XIII's teaching has been reaffirmed by his successors to the present time. Pius XI declared that "civil society is a perfect society, having in itself all the means for its peculiar end, which is the temporal well-being of the community."[10] Pius XII expresses the same doctrine in these words: "The State exists to govern the commonwealth according to the prescriptions of an order of things which is immutable, because it reposes on the universal laws and principles which govern it. . . . The State has a noble function, that of reviewing, restraining, encouraging all those private initiatives of the citizens which go to make up the national life, and so directing them to a common end."[11]

IN THE FIRST MILLENIUM

The popes of modem times follow in the footsteps of their predecessors of the first millenium when the papacy had not yet achieved political hegemony in the family of Western peoples. These earlier popes, too, carefully distinguish between the spheres of activity of both powers. Gelasius I (492-496) in a letter to the Emperor Anastasius says: "There are two powers, august Emperor, by which this world is chiefly ruled: the sacred authority of the bishops and the authority of the kings. . . . And if in the public juridical order even the ecclesiastical superiors yield obedience to thy laws in the knowledge that to thee has been committed by God's ordinance the power to rule (so they will have nothing to do with a judgment bearing on earthly matters that thou hast disapproved of), how then must thou, I beg thee, zealously obey those who are ap-

[10] *Dfriei HUks mgiitfi,* December 31, 1929, iQ *AAS,* XXII, 53; N. C. W. C. trans-

October 2ÇL 1939, in ^AS. XXXI. 423f., translated by Msgt, Ronald Knox (London: Catholic Truth Society, 1946), 24.

pointed to administer the venerable mysteries!"[12] In 727, Pope Gregory II wrote to the Emperor Leo III: "As the spiritual ruler has not authority to interfere in the affairs of the palace and to confer offices at the royal court, so, too, neither has the emperor the right to intervene in the ecclesiastical sphere, to arrange the choice of the clergy, to consecrate and administer the means of grace; indeed he may not even receive them without the priest; rather each should remain in the vocation given him by God."[13] Even more significant are the pronouncement and attitude of a later pope, Nicholas I (858-867). He was a born statesman and an eminent jurist who took from tradition, and systematized, the concepts bearing on the rights of the Church and the papacy in respect to the civil power.[14] He consistently maintained the independence of the temporal power and, even though he felt that he was powerful enough to call himself the pillar and support of the throne, he was reluctant to claim immediate power in the civil sphere, as appears from his dealings with King Lothair II of Lorraine who had unlawfully seized the possessions of his sister Heletrude. For this wicked deed Nicholas held Lothair excommunicated, that is, as one excommunicated ;[15] but he did not on that account ascribe any political consequences to the censure. Pope Nicholas gave expression in classical style to his conviction of the diversity and independence of both powers (ecclesiastical and civil) in his famous letter to Emperor Michael III, which, so rich in content, has offered the greatest amount of material of all papal pronouncements for the compilations of Church law bearing on Church-State relationships. He writes that, if, before the advent of Christ "some were at the same time kings and priests. . . after the descent of Christ, who was at once King and High Priest, neither has an emperor attributed to himself high priestly rights nor has a pontifex laid claim to the imperial name. For the same Mediator of God and men, the Man Jesus Christ, by distinct activities and dignities has separated the duties and rights of both powers since He willed that they should by salutary humility raise themselves heavenwards, and not that they should

[12] A. Thiel, *Epistolae Romanorum Pontificum* (Braumberg, 1868), 350f.
[13] J. Hergenrôther, *Photius* (Regensburg, 1867), I, 233.
[14] A Greinacher, "Die Anschauungen des Papes Nikolaus I fiber das Verhiltnis von Staat und Kirche," in *Abhandlungen xur mittleren und neuertn Gescbicbte* (Berlin, 1909), Heft no. 10.
[15] See Horace K- Mann, *The Ltves of the Popes in the Early Middle Ages* (St. Louis, Missouri: Herder, 1906), III, 92.

by human pride again descend into the depths; so that, on the one hand, the Christian rulers would need the high priests to obtain life eternal, and, on the other, these latter would make use of the imperial laws for whatever concerns merely temporal things and thus spiritual activity might remain free from the intrusion of earthly things, and he who struggles to reach God might not become enmeshed in temporal affairs. . . . "ie

IN THE MIDDLE AGES

History shows, therefore, that the popes of modern times as well as those of the first millenium agree in acknowledging the full independence of the State in its own sphere. But what about the attitude of the medieval popes, whose legislation and political action come within the period when the external power of the papacy was supreme? It is evident that one may not expect to find among the medieval popes an acknowledgement of the State's independence expressed in the same absolute way as it was by the popes of Christian antiquity and of modern times. For this independence of the State was then not realized. Indeed we obtain the modern concept of sovereignty precisely by denying the medieval limitation of State power as it was conditioned by the supremacy of the Church. But that of itself does not prove that there is a contradiction between the papacy of the past and of the present. Such would indeed be the case if the popes of the Middle Ages had claimed their fulness of power in the political sphere in virtue of a theological system; in other words, as belonging to themselves in principle and from the very beginning. Not so, however, if they conceived that supremacy as conditioned by accidental factors,,of history; that is, as indicated in a previous chapter, by the historical development of the family of nations and of spiritual ideas; as a juridical pre-eminence, Heinrich von Treitschke puts it,lT that had its principal reason in the spiritual superiority of the Church over youthful and weak states that were then developing and that was therefore "quite logical" and "not unnatural for those times." Accordingly, we must consider in greater detail the question of the nature of the Church's sovereign rights in respect to the State, and of the juridical title from which the popes derived those rights.

* HergenrÔther, *Photiti,* I. 578.
" *Polttik* (Leipzig, 1897), I, 332f.

The first fact to be established is that no pope attributed to himself political supremacy in the sense that he claimed to be empowered, in virtue of the fulness of governing power entrusted to him by Christ, to intervene directly in affairs of State; hence not only to install and to depose princes, but also, where it seemed proper, to interfere in the sphere of State policy and civil affairs, even over the heads of the princes—just as the pope, by virtue of the plenitude of spiritual power, is authorized not merely to install and to depose bishops, but also to intervene in the government of their dioceses. The popes did not wish to infringe on the basic and essential independence of princes —not even the two popes to whom are attributed the most far-reaching claims to political hegemony, namely, Innocent III and Boniface VIII. The former, when approached to make a decision of political importance, examined with meticulous care his competence in that respect in several instances that have become famous. Witness, for example, the celebrated decree *Per venerabilem,* of the year 1202.[18] Count William of Montpellier had petitioned the pope to legitimize his children born out of wedlock. In the aforementioned rescript, Innocent inquires in great detail whether to grant the request and at the same time explicitly states how highly he esteems the rights of temporal princes. The Count had pointed to the fact that the Holy See had legitimized the children of the French King Philip Augustus at the latter's petition. The pope replied that these cases were not identical, that, "since the King of France does not acknowledge any superior in secular affairs, he could, without prejudice to the rights of a third party, submit himself to our authority, as he actually has done.... But in your case it is known that you (as vassal) are subject to other princes. Therefore, you could not submit yourself to us in this instance, without perhaps infringing on their rights, before they have given their consent." In the end the pope refused to grant the legitimation until such time as the Count should have presented reasons proving that his "guilt (regarding the illegitimate children) is less serious and our jurisdiction not so restricted."

Nor did it occur to Boniface VIII, the author of the much maligned Bull *Unam Sanctam,* to lay claim to purely secular rights in a State that did not happen to be subject

[18] c. Mïrbt, *Quelles tur Gescbkbte des Papstums,* 127ff. See also, Lo Grasso, S.J., *op.*

to the Holy See as a vassal State. True, Boniface did remark to the envoy of King Albert that "Christ has empowered His representative to enthrone the emperor and to confer the throne upon others"; and on the occasion of a certain dispute the Pope said to King Charles II of Naples: "Do you not know that I can deprive you of your kingdom?"[19] But in both cases there was the question of princes each of whom was allied to the Holy See in a special way: the German emperor and the Neapolitan vassal. Altogether different was the pope's stand in respect to the French king. Followers of Philip the Fair during his conflict with Boniface VIII inserted into a papal bull the spurious phrase: "We wish thee (O King) to know that thou art our subject both in spiritual and temporal matters." It was also added that whoever denied this was a heretic. In a consistory Boniface VIII protested this forgery and the false assertion that he claimed France as a papal fief. He insisted that he knew very well that a twofold power had been instituted by God and that he had been a doctor of both (civil and canon) laws these forty years; and he added, "who can believe that such folly (fatuitas) ever entered our head?"[20]

It is evident, therefore, that the popes did not champion a concept of their supreme jurisdiction that excluded full and complete independence of the State in its own sphere.

THEORY OF POTESTAS DIRECTA ECCLESIAE INTEMPORALIA

Did the popes advocate the theory of the direct power of the Church in temporal matters, which was defended by several canonists and jurists of the Middle Ages?[21] According to this theory, in the fulness of the power bestowed by Christ on the pope was contained universal sovereignty also in temporal matters, not be exercised by him, but to be transmitted to the princes. The spokesmen of this theory, by giving an allegorical interpretation to chapter 22, verse 38 of St. Luke made St. Peter the recipient of two swords—the spiritual and the temporal—and cited in proof of their teaching the words: "And they (the apostles) said, 'Lord, behold, here are two swords.' And He said to them, 'Enough.'" Therefore, it was suggested, the Church re-

» H. Finke, *Am Jin Tagin Bonfaz VUI* (Münster, 190?). 156. footnote 1, p. 156. See also. Thomas Oestrich, Boniface VUI," *Calholic Eftcycloptdift,* II, 667.

31 See above, p. 24.

ceived both swords by the will of Christ; but the secular sword she may not wield; it is to be employed by the hand of the princes, who, as her representatives, are responsible to her and can be deposed if they abuse that power. To bolster this teaching, the advocates of the sword-theory appealed to another biblical text: the Lord had said to St. Peter as he wielded his sword in the garden of olives: "Put up thy sword into the scabbard." (St. John 18,11). *Thy* sword; therefore the temporal sword, too, belongs to Peter; but he himself is not to draw it but to hand it enclosed in the scabbard to the prince who is to unsheath it according to Peter's pleasure and command.

Moreover—and this must be carefully noted—even the advocates of this theory would not wish the pope to interfere in political matters as such, even though all political authority had its source in him. Just as the sun allows the stars to which it has given light, to follow their own orbit, so too the pope must allow the secular powers their own full and independent action, so long as no spiritual interests are at stake.[22] Only when faith or morality seems jeopardized—*ratione peccati*—that is, when the morality of human acts is concerned—is it the business of the pope to make use of the fulness of the secular power residing in him; for example, by deposing one prince or installing another, by rescinding a wicked law or promulgating a better one, by using his power of jurisdiction, etc.

No detailed proof is needed to show that this theory is wholly incompatible with the sovereignty of the State. For by this tenet the authority of the State appears to emanate from the ecclesiastical power and to depend wholly on it. Such a theory is also altogether untenable theologically. Christ our Lord did indeed say: "*AU* power in heaven and on earth has been given to Me"[23] and He entrusted to Peter and his successors the function of representing Him on earth. But their office is restricted to the religious sphere, even as the God-Man did not presume any sort of earthly power from His right to rule in respect to the supernatural end; for He said: "My kingdom is not of this world. If My kingdom were of this world, My followers would have fought that I might not be delivered to the Jews. But, as it is, My kingdom is not from here."[24]

[22] Finke, *op. tit.*, p. 162f.
[23] *M*tt.* 28:18.
[24] *John* 18:56.

It would be difficult to prove that some popes—Gregory IX, Innocent IV, for instance—actually espoused this untenable theory; up to the present time that has not been fully demonstrated even as regards Boniface VIII. Finke, perhaps the most competent authority in matters relating to this pope, believes that the relations of Church and State as formulated by Boniface VIII may be designated neither as the system of direct power, nor as the system of indirect power claimed by other popes which we shall consider presently. Then he goes on to say: "This much is certain, that Boniface VIII was unwilling to surrender any of the rights as formulated in principle (in the Bull *Unam Sanctam)* which hitherto he had claimed (in practise)." But if one considers these rights which he claimed in practise, it cannot be asserted that Boniface VIII undertook a basic alteration of the politico-ecclesiastical theory of his predecessors.[85]

Besides the theory of the direct power of the Ohurch, there was yet another in vogue during the Middle Ages. Some great theological writers of that time, and—in a later era—St. Robert Bellarmine (1542-1621) and Francisco Suârez (1548-1617), developed the theory that the church has *indirect* authority over temporal (that is, "secular" or "civil") matters. The Church, these writers hold, is to govern the faithful in the supernatural order, thus enabling them to attain eternal salvation, and has no concern with political matters. And while these men hold that the Church received from her Founder only one kind of authority—that is, spiritual—they nevertheless maintain that whenever political matters are a hindrance to man's supernatural end *(ratione peccati)* or a necessary means for the attainment of that end, the Church has the right to intervene and to assert her spiritual power in the temporal sphere also. "When Suarez ascribes this power to the Church," says Monsignor Joseph Mausbach,[86] "he distinguishes it from direct authority by saying that it enables the Church to *correct* and *abrogate* laws prejudicial to morality, but not to replace them by *new reactments.* (See *Tractatus de Legibus,* in *Opera Omnia,* V. iii, c. 6, n. 6). In this way the Church would be using her own spiritual jurisdiction to carry out and uphold God's will and law against secular attacks ; God's will, which must be respected

[85] Finke, *op. th.,* vp. 159, 158.
[86] *Cetbolic Mortd Ttecbfat eiul Its AeUioetsfs,* 568.

in matters of the world as much as in those of the Church. She would not, however, proceed to lay down positive laws and regulations of a civil nature herself, hut she can oblige those who hold the civil authority to do so (and, if necessary, constrain them by means of ecclesiastical punishments).27 Being influenced by the legal tradition of the time, Suârez, like Bellarmine, went a step further and ascribed to the pope, in case of necessity, power to govern temporal affairs, e. g., to depose kings, to alter the boundaries of kingdoms and transfer them to other rulers, to reduce free nations to a state of dependency, and to assume jurisdiction in secular matters." (See *Tractatus de Legibus* in Suârez, *Opera Omnia,* V. iii, c. 7, n. 12; c. 10, n. 6; iv, c. 11, n. 12; *Defensio fidei catholicae, N,* iii, c. 23; see also, *Disputationes de Controversiis Religionis Christianae Fidei adversus Haereticos,* I: *De Potestate Summi Pontificis* in Bellarmine, *Opera Omnia,* II, v, c. 6.) It cannot be denied that the medieval popes espoused and put it to practical application.

The distinction, therefore, between the two theories (not very important in practise during the Middle Ages) consists in the fact that under specified circumstances, according to the theory of direct power, the pope can licitly exercise the fulness of the *political* power which was always his in principle; whereas according to the theory of indirect power the pope can extend the plenitude of his *spiritual* power to matters which by contact with spiritual interests have lost their purely temporal character.

Is the theory of indirect power compatible with the full sovereignty of the State? The answer must be: Not as it was actually applied in the Middle Ages. For it was precisely on the basis of this theory that the popes claimed the far-reaching sovereign rights to which we have previously alluded, namely, the right to depose princes, to frame laws, and to exercise jurisdiction in the secular sphere whenever the civil exercise of these functions did not sufficiently safeguard the interests of religion and morality.

"Later advocates of this system of indirect power," writes Monsignor Mausbach, "agree as to the fundamental idea, but tacitly or explicitly abandon the last-named applications of it. But this very attempt to avoid any deductions from it that would affect politics contributed to the setting

«See also, F. *J.* Wertz, S.J., *Jus Dtcrttalium* (Rome, 1898*1914), I, 16.

up of a third system according to which the Church possesses a *potestas directiva"*[28] More of this presently.

Neither the theory of direct power nor the theory of indirect power (in the meaning given this latter theory during the Middle Ages) has absolute value. They are theories that owe their form and structure to the historical and public juridical conditions of the times. Klemens Baeumker expresses it in this way: Actual conditions that should be explained historically, and which consequently were really temporal phenomena, were interpreted as having supposedly universal and absolute value and significance. This judgment rested first, on general religious and ethical principles having to do with the value of the spiritual and the secular; secondly, on certain biblical texts allegorically interpreted or at least separated from their context. From these premises the proponents of these theories sought by deductive and *a priori* reasoning to establish the theocratic conceptions that prevailed.[29]

An interesting sidelight regarding the "systems" (including Bellarmine's) on the relation of Church and State is offered at the beginning of the seventeenth century by the attitude of an eminent jurist, theologian, and bishop, St. Francis de Sales (d. 1622), who was enrolled by Pius IX among the Doctors of the Church. An acquaintance of his had sent him a discussion on this subject. St. Francis replied: "The theme displeases me very much, if I may say so sincerely.... By natural inclination, in consequence of an aversion rooted in my accustomed manner of looking at things, and—as I believe—by virtue of a heavenly inspiration, I loathe all controversies and discussions among Catholics that can have no useful purpose. . . . Even the writings of a holy and distinguished prelate (Cardinal Bellarmine) which deal with the indirect power of the pope over princes, I do not find to my taste. I say this not as

w O». ci/., p. 568.

'•"Die europlische Philosophie, des Mittdalten" ù> *Kκlιατ der Gitenwart* (Leipzig, 1909). Part 1. sect. 5. 552.

Father John Courtney Murray, S.J., acknowledges that Cardinal Bellarmine's theological systematization of indirect power was an historical achievement of the first order, immensely influential in his own time, and regarded as classic ever since. But then he continues: "At that, his achievement was only historical, not eternal. He did not 'fix' the political theology of the Church (meaning the theology of her relations to the temporal order) in its final form. In fact, serious difficulties have been raised with regard to the internal consistency of his systematization, and its exactness and adequacy as a statement and interpretation of the tradition of the Church." ("St. Robert Bellarmine on the Indirect Power,") in *Theological Studies,* DC (1948), 492.

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though I passed judgment as to whether it is so or not so, but because at the present time when we have so many enemies from without, we ought not, I believe, to stir up those who are in the bosom of the Church. . . . Finally, if the kings and princes get a bad impression of their spiritual father, as though he wished to attack them and deprive them of their power, which God, the supreme Father, Prince and King, has bestowed on them, what will be the upshot of it all except a very dangerous aversion of heart? And if they believe that he (the pope) acts contrary to his duty, will they not then be sorely tempted to forget their own duty? ... I did not wish to speak out my mind so fully concerning the things which according to my opinion should be treated delicately, and have contented myself to express to you in broad outline my insignificant but—to put it boldly—my very strong feeling in this regard."[30]

Finally, if we ascribe to the theory of the Church's indirect power in temporal affairs, in its medieval connotation, only relative value (gauged by the history of the times), that does not mean that the theory does not contain a kernel of universal truth and significance. For even today there are still many Catholic canonists who though maintaining that they do not wish to infringe on the State's right to sovereignty in its own sphere, yet call their conception of the relation of Church and State a system of indirect power. In what sense and with what right we must leave for a later discussion.[31]

[30] *"Lettres de S. Francois de Sale! adressées a des gens du monde* (Paris: Blaise, 1823), n. 140.

[31] "Catholic authors are *unanimous, and rightly so,"* writes Monsignor Mausbach, "in thinking that the Church has *indirect* authority over temporal matter and public life, since, in all that concerns religion and morals in the highest questions of life, she is and must be the court of last resort. It is only with regard to the traditional interpretation of *potestas indirecta* that any difference of opinion exists." *(Op. cit.,* p. 367).

Father Murray regards the expression "indirect power" as ambiguous and asserts that nobody seems to be able to define it to the satisfaction of anybody else. (See "Leo XIII: Separation of Church and State," *Theological Studies,* XIV (1953), 206, for a summary of various explanations of the term.) Father Murray prefers to call it the doctrine of the primacy of the spiritual. The authority of the Church is sacred, spiritual authority, and in its nature and in all its acts is always a *res sacra,* at times *in temporalibus.* The power of the Church is always direct, because always purely spiritual; it goes directly to the *res sacra* —the sacred in itself, and the sacred in the temporal, to everything that is sacred. It is an essential attribute of the freedom of the Church that she should liberate the sacred from any profanation at the hands of the State *(Ibid.,* pp. 206ff).

B. STATE SOVEREIGNTY RESTRICTED BY THE NATURAL LAW

The idea of sovereignty is very old, although the actual term came into use, especially in polemics, comparatively late—almost at the same time as the old words *"respublica," "regnum,"* and *"civitas"* gave way to the modern term "state." The term "sovereignty" came into popular usage only after Jean Bodin made it the key word for his definition of the State.[1] Like so many of our political concepts, that of sovereignty has a history. Changes and development in the meaning of the term have evolved out of varying interpretations offered by different political philosophies during the course of political controversy.[2]

Prior to the age of individualism and rationalism with its new concept of natural law,[3] political science conceived of sovereignty as signifying independence of every earthly power, but certainly not absolute independence; it took for granted that civil power was restricted by natural and divine law.[4] It was Thomas Hobbes (d. 1679) who first defined sovereignty as unlimited independence in the sense that there are no juridical, but only natural and ethical,

[1] Lw *tix livres de la République* (Paris, 1577), Bk. I, chap. 1. See Georges Goyau, "lean Bodin," *Catholic Encyclopedia,* II, 609.
[2] H. Ronunen, *The State in Catholic Thought,* 390.
[3] See Rommen, *The Natural taw,* translated by Thomas R. Hanley, O.S.B. (St. Louis, Missouri: Herder, 1947), 75-109.
[4] For the purposes of this paper, it is important to show (a) the distinction between the natural moral law and the divine positive law, and (b) the intimate connection between rights and the natural moral law. The *natural moral law is* the rule of conduct which is prescribed by the Creator in accordance with the constitution of the nature with which He has endowed us. According to St. Thomas Aquinas, the natural moral law is a participation in the eternal law (God's wisdom, in as much as it is the directive norm of all movements and action) mirrored in the created intellects (See *Summa Theologica,* Ia, IIae, Q. XCIV). Those actions which conform with the tendencies of our nature lead us to our destiny and are thereby constituted right and morally good; those at variance with our nature are wrong and immoral. The standard of conduct is our whole human nature with its manifold relationships, man being considered as a creature destined for a special end. There is, then, a double reason for calling this law natural: first, because it is set up concretely in our very nature itself; and secondly, because it is manifested to us by the purely natural medium of reason. In both respects it is distinguished from the *divine positive law,* which contains precepts not arising from the nature of things as God constituted them by the creative act, but from the arbitrary will of God. This law we learn through the light of supernatural Revelation. (See James J. Fox, "Natural Law," *Catholic Encyclopedia,* IX, 76ff.) *Right* is a claim inhering in the human personality, a moral power of having, doing or exacting something, of being unhindered in whatever conduct conforms with the natural moral law' It is concerned only with social conduct. Rights are the subject matter of justice. Natural rights are rooted in the natural law, which itself is grounded in the innermost nature of man or of society, independent of convention, legislation, or other institutional devices.

restrictions to the power of the State. The natural restrictions consist in the amount of actual power the State has at its disposal, the ethical in the duty to avoid sin. With Hobbes, the jws *naturale* disappears—becomes *jus utile*—as soon as the sovereign power is established. The sovereign power is considered to be the interpreter and dispenser of the natural and divine law. Thus the difference between natural law and positive law disappears and total sovereignty is born.[5]

NATURAL RIGHTS AND THE NATURAL MORAL LAW

This modern concept of political rights introduced by Hobbes was condemned by the Church in the *Syllabus of Pius IX,* these two theses being among those rejected: "The commonwealth is the origin and source of all rights, and enjoys rights which are not circumscribed by any limits"; and "Moral laws do not require a divine sanction, nor is there any need for human laws to be conformable to the law of nature or to receive their binding force from God."[6] Accordingly, we must discuss the frequently contested concept of the existence of natural rights, a tenet for which many modern political philosophers and most jurists have little sympathy. What, then, is meant by natural rights?[7] There are many norms that aim at ordering the actions of members of a community, that is, legal standards that owe their existence to positive ordinance, having been called into being, for example, by civil legislation or by the Church. But alongside these, there are also other norms that exist prior to all positive legislation because they are given with human nature itself and are immediately recognized by human nature as binding on all men; for example, Thou shalt not calumniate thy neighbor; thou shalt not kill him, thou shalt fulfill the contract thou hast made with him, etc. The sum-total of these immediately evident norms is called natural rights. They are not identical with the natural moral law; rather, they are part of it. In other words, natural rights are those norms of the natural moral law that relate to "mine" and "thine," those that regulate community life. The content of natural right is less comprehensive in scope, then, than that of the natural moral law. For this latter includes many duties that are not im-[9]

[5] Rommen, *The Stott in Catholic Thought,* 257, footnote.
[6] Theses 39 and 56.
[7] See Victor Cathrein. S.J., *Recht, Naturrecht und pojitives Recht* (2nd ed., Freiburg, 1909).

mediately connected with "mine" and "thine," with social life; for example, the obligation to be temperate, to be modest, grateful. As social norms natural rights, in contrast with the demands of the natural moral law, have this distinction: they claim to be enforceable, at least in general —that is, whoever has a right with respect to some other person is authorized to employ physical force to secure the fulfilment of this obligation if the other person will not voluntarily fulfill it. The enforceable character of this obligation arises necessarily from the objective of right. This objective is to secure for every member of society the means necessary for his development, and the attainment of this objective is evidently indispensable for social life; but this end would not be sufficiently attained if it were left to each one's discretion whether he should fulfill his obligations or not. However, if someone were to transgress the commandment of temperance and by his drunkenness destroy his health, his natural powers, and his fortune, no human power has the right to restrain him; he is answerable only to his conscience and to God. Only when he directly injures or endangers others does the norm of justice intervene to oppose him, and this norm claims authority to employ force to secure its fulfillment, for otherwise it could not effectually protect the social order.[8]

THE STATE NOT THE ULTIMATE AND ONLY SOURCE OF RIGHT

Unless we acknowledge natural rights that are immediately evident to human reason, rooted in man's nature, and hence traceable to the Creator of nature, it is impossible to explain the binding force attached, for example, to the positive laws of the State, and to distinguish them from mere despotic power.® Since the sixteenth century, attempts have been repeatedly made to prove that the State itself is the ultimate and only source of right. Such, for example, are the theories of Hobbes and Rousseau, which regard the authority of the State and the State itself as founded on a free contract of men who associate with one another in the unity of the State, in order fully to cede to the State their own caprice and power and so to subject themselves to the unlimited despotism of the sovereign

• Cathrein, *off, ctl,,* p. 127L
• See Aueustme J. Osgniach. O.S.B., *Tht Christian Stott* (Milwaukee» Wisconsin Bruce, 194S). 154-164

(Hobbes), or to go on living in the happy fiction that they are being ruled by their own will embodied in "the general will" (that is, the will of the community), in virtue of the social contract (Rousseau).[10] Such, too, from Kant to the present times, are the modern theories in the field of jurisprudence which claim that "right exists only in the State in virtue of the State" (Paulsen) ; that "right must be of later origin than the State" (Wundt) ; and that "right is known absolutely or without qualification by the fact that the State acknowledges it and enforces it by its own might" (Lasson) ,[11]

All these theories are condemned by the *Syllabus;* it is the teaching of the Church that the State is not the origin and source of all rights. One of the merits of Catholicism, an opponent of the Church admits, is its acknowledgement that natural and rational rights are superior to all positive rights.[12] The authority of the State is traceable to natural law and hence to the Creator of nature; that authority exists because it is demanded by natural law. That the authority of the State is in accord with the will of the Author of human nature can be seen by a simple inference. For man is so constituted that he cannot develop and thrive in solitude but only as a member of society. And social life is unthinkable without authority that has the right, that is, the power, to train individuals to overcome egotism and to co-operate for the common good—in other words, political authority. Therefore, the ordinances of the State that aim at securing the public weal (that is, civil laws) receive their binding force from natural law, ultimately from the Divine will. That is true of all civil laws, whether they merely inculcate the relatively few juridical norms offered ready-made by natural law (as for instance, thou shalt not steal, calumniate) ; or only give concrete formulation to vague and indeterminate demands of natural law (for example, laws of taxation which put into clear and definite form the demand that each one contribute to the common good according to his means) ; or for important reasons of the common weal, make the object of the command or prohibition, things that are morally indifferent or not essentially related to the natural law (for instance, that every public assembly at which political affairs are discussed is

* See M. Sauvage, "The Social Contract," *Catholic Encyclopedia,* IV, 336. See also, Rommen, *The State in Catholic Thought,* 229-236 and *The Natural Law,* 82-86, 91-92.
>*See Osgniach, *op. cit.,* pp. 138-155.
is C. Jentsch, *Christentum und Kircbe* (Leipzig, 1910), 541.

to be reported to the police twenty-four hours in advance of the meeting, or that no one is to be called to serve as juryman twice in the same year).

CHRISTIAN PHILOSOPHY OF RIGHT AND THE DOCTRINE OF POSITIVISM

The far-reaching significance attached to the difference between the Catholic teaching concerning the natural moral law (which holds that this law is the ultimate source of all positive law) and the positivist doctrine[13] (which sees the State as the final source of all law and hence of all rights) appears at once if we consider the consequences of these two points of view.

The juridical positivist who regards the State as the ultimate source of all, or at least of its, rights must necessarily hold that every law issued by legitimate authority in accordance with the constitutional form required for validity, constitutes right, no matter what its content, whether morally good or morally reprehensible. Accordingly, it would follow that the edict of the Assyrian king demanding that adoration be paid to the golden statue (which, according to St. Jerome, was a symbol of the king's own sovereign greatness) and the four edicts whereby Diocletian inaugurated his persecutions against the Christians, created right in the proper sense of that term. Actually, certain juridical positivists did not hesitate to draw such conclusions. One of the best-known opponents of natural rights expressly declares that "even the vilest law must be acknowledged as binding, provided only that it has been correctly framed as to form"; and "the most contemptible law, provided that it is correct from the formal and constitutional viewpoint, constitutes right; but one ought to discard it as soon as possible."[14] Thus the juridical order is separated from the moral order, and an important element is removed from the definition of law, namely, the *"debet esse honestum":* a law must have morally licit content.

Now we should indeed be unjust to juridical positivists if we claimed that all demand obedience to a civil law that

» Poshrvism teaches that the search for a moral or natural basis of positive law is inexpedient. It conceives of laws as exclusively a result of historic factors such as race environment, cultural development, the defense of economic interests, class struggle Positive law alone exists (i. e., coercive law), according to positivism, for only what is actually enforced is law; and law is merely a creation of the State. (See Rommen. *The Natml Law,* 124-134).

*«K. Bergbohm, quoted by Cathrein, *of. at.,* p. 258.

contravenes the moral law. They do as a matter of fact attribute to legal enactments, even to such as are immoral, an absolute binding force in the forum of conscience; but many expressly admit that, in addition to and apart from the juridical order—paralleling it, so to speak—the moral order with its norms, also binding in conscience, persists. Now, if the juridical order commands something that the moral order forbids, a conflict of duties results and it is necessary to decide which of the two opposing demands on conscience deserves the preference in a concrete case. According to these jurists, one is obliged, for the sake of conscience, to obey the higher demand and to refuse obedience to the other, contradictory norm, although it also binds in conscience. This means, in other words, that it is possible for a person to find himself in a situation where he cannot act fully in accord with conscience, but where he must content himself with choosing the lesser violation of conscience. But to say, "I must sin, but I shall perform the lesser evil," is a philosophical and theological absurdity.

Others, proceeding more logically, claim that the jurist's greatest test of character is to be able, out of respect for a State law, to repudiate even the deepest and holiest convictions of his own heart. For example, Bergbohm says: "Every statute of positive law puts the question to us, 'Do you acknowledge me as a valid right?' The answer must be unequivocal. If the aforesaid legal statute reveals a constitutional defect, it is not a legal statute at all; if it is faultless as to form, the answer must be in the affirmative, without reservation. The answer is in fact independent of the statute's goodness. Such is the stand of the jurist regarding that which claims to be a legal right. And it is precisely when confronted with a law which is viewed with disfavor on account of its harmfulness or inhumanity that the most eminent virtue of the genuine jurist stands the test; namely, the ability to withdraw his intellect from every influence, even such as spring from deep personal convictions and heart's desires, and to realize that these may be satisfied only by a change of the law."[18] The Swiss jurist Affolter thinks that it is not even permissible to discuss whether or not one may obey an obviously immoral law, so certain is the obligation to obey all properly formulated laws.[18]

[18] Quoted by Cathrein, *op. cit.*, p. 258.
[18] (Ibid., footnote 1, p. 50).

The *Syllabus,* on the contrary, expresses the conviction of the advocates of natural rights when it asserts that it is absolutely necessary that human laws be kept in harmony with natural rights and thus derive their binding force from God. Accordingly, laws lack juridical character, that is, they are invalid, if they offend against natural right or the natural moral law. And in such a case they cannot demand our obedience. But the latter conclusion requires a more exact qualification: for in certain cases one must refuse to obey such laws; but under other circumstances one may refuse to obey yet not be obliged to do so—in other words, one may even obey them; and finally, in still other instances one must obey such laws for reasons extraneous to the law itself.

If the content of a State law offends against a natural law in so far as the latter, clearly knowable to everyone, absolutely commands or forbids something, one may not obey that law, even though the penalties for its transgression be ever so severe. In these circumstances man must give the lawgiver the answer that Antigone in the writings of Sophocles gave to Crean: "Thy commands cannot abolish the eternal, unwritten laws of Zeus." Just as parents were obliged to refuse to obey the Spartan law which commanded that weak boys should be exposed to certain death in the ravine adjacent to Mount Taygetus, so, too, modern parents would be bound to refuse obedience to a law that would compel them, for example, to expose their children in anti-religious schools to religious and moral destruction.

In contrast with such laws, which in content are in absolute contradiction to a command of the natural law, there are others that do not demand something immoral but are nevertheless invalid because they violate so-called subjective natural rights. That is, they infringe on the rights of individuals in their relations with each other or in their relations with the community; in other words, these laws are invalid because they are unjust. The rights of the community (that is, the sovereignty of the State) are not absolute; they are restricted by the contracts it has made; and also, wherever inviolable rights are concerned, by liberty and ownership on the part of the individual; for example, the right to personal freedom and to the possession of private property by physical and moral persons. Thus, Pius X determined the nullity of the French

law of separation of Church and State from its infringement on natural rights: "We reprove and condemn as violating . . . fidelity to treaties ... as destroying justice and trampling under foot the rights of property which the Church has acquired by many titles and, in addition, by virtue of the Concordat."[17] But the observance of such laws is not forbidden under all circumstances; it may be permitted if the violation would entail severe disadvantages for the individual; indeed, its observance might even be regarded as obligatory if passive resistance were associated with evil consequences for the common weal.

We may reasonably conclude, therefore, that only the Church's traditional theory of natural rights, as we have explained it, gives a satisfactory solution to the question of the relationship between law and morality. In modern times at least one outstanding writer in the field of political science showed himself a little inclined toward our viewpoint when he declared himself not satisfied with the statement that there are no limitations to the rights of the State. He affirms that it is inevitable that those who hold to the existence of natural rights should claim for those rights the juridical qualification of sovereignty, since the very idea of natural rights proceeds, from the concept of a power or right prior to the State. He continues: "Our conception of rights, on the contrary—which makes the very existence of rights depend upon the presence of an organization that gives them reality—shows that the question of whether the organization that asserts and guarantees rights stands above or below rights, is one of the most difficult problems of all political science. At first thought, it would seem that there cannot possibly be any juridical limitation to the sovereign State. . . . Even today the opinion is frequently defended that, although the State never attempts to make every juridical possibility a reality, there is, actually, nothing that is juridically impossible for the State, no law it cannot rightfully make. This abstract thought, however, has never been carried out to its ultimate practical conclusion. If the State, juridically, can do all things, it can do away with the juridical order, introduce anarchy, thereby making its own existence impossible. But if such a thought may not be entertained, it

w Encyclical Letter, *Vehementer not,* to the clergy and bishops of France, February 11, 1906, in /fSJ, XXXIX, 12. English translation in *American Catholic Quarterly* (Philadelphia, 1906), Vol. XXXI, no. 122, 217.

follows that there must be a juridical limitation to the powers of the State."[18]

NATURAL RIGHTS ATTACKED FROM THE THEOLOGICAL VIEWPOINT

The Church's teaching in regard to the non-obligatory character of State laws that infringe on natural rights, has also been hotly contested from the theological point of view.

L. K. Gdtz remarks in the final section of his work on Ultramontanism (a term which he uses as synonymous with Catholicism) that "by holding fast to natural law as the foundation of all positive law" Catholicism creates for itself "a basis for annulling all State legislation in so far as it does not accord with the principles and interests of the Roman Church."[19] He claims to have demonstrated this in his chapter entitled "Catholicism and State Law." There he concedes that, in point of fact, the attitude of a Catholic toward civil law is quite proper in so far "as the civil legislation coincides with the enactments of natural and ecclesiastical law. Indeed,[20] so long as this unity exists, the Ultramontane (that is, the Catholic) seemingly merits the preference over other citizens, since he not only holds fast to the wording of the law, but recognizes and exercises a duty of conscience that goes beyond the law. But more important than this, and of greater importance for our life as citizens of the State, is the opposite situation, which can indeed frequently occur, namely, the attitude assumed by a Catholic in principle as regards the civil law, his assumption that civil law does not bind in conscience (Here, of course, Gotz misinterprets the Catholic viewpoint), that alongside the legal duty there is also a duty of conscience. As a result of this, the Ultramontane may, for the sake of conscience (in certain cases) not do what the law demands, but in point of fact fall short of these demands and not fulfill the law. The duty of conscience thus impressed on the Ultramontane does not make for an enhancement of civil law, but for a deprecation, a disparagement thereof, and is actually an attempt to make civil law inefficacious."[21]

These statements of Gotz, a theologian of the Old-

MG. Jellinek, *Daj Rrcbt dti mademtn Staaiti,* (1905), 462ff.
** *Dtr Ultramontanijmaj «Jj Vflianscbaaang a»f Grand dti SylUitu dargtitclk* (Bonn, 1905). 329. g
* Here, in a ▾ err illogical train of thought, the text nsea the phraae "Im Gegenteil—on the contrary."*
p. 308.

Catholic sect, not merely in their formal expression but also in their content are unworthy of a man trained in theological science. They will be sufficiently revealed for what they are if, without entering into details, we establish the following points. First, Gotz seems to think (and this is hardly credible) that the belief that immoral State laws may not be obeyed is to be found in Catholic theology alone, and that all other political philosophers and moralists maintain that one owes absolute obedience to such laws. But this Ultramontane teaching not only is not limited to Catholicism, but is not even limited to those philosophers who uphold the existence of natural law and rights. On the contrary, even among those who deny natural law from the Christian viewpoint, are some who hold the very same conviction as Catholics concerning obedience to immoral law, with this difference—that they are unwilling to ascribe juridical character to the natural moral law, although this is really the basis for the binding force of State laws. Hence, in our opinion, they are guilty of inconsistency. At any rate, let us hear what two non-Catholic theologians have to say in this respect. In the *Realenzyklopàdie für protestantische Théologie und Kirche,*[22] which also counts the Old-Catholic Gotz among its collaborators, we read: "Subjects owe obedience to superiors. Obviously, this obedience can be rendered only in so far as it does not contradict the basic relationship of the subordination of man's will to that of God: One must obey God rather than men.' Where the divine order conflicts with the social order, the Christian must, in the last resort, be willing to suffer as a disobedient subject in the face of a human command." L. Lemme makes a similar statement: "A limitation of obedience to civil authority follows from the very fact that God's command surpasses human command; that one is therefore obliged to obey God rather than man." The Christian must overcome immoral laws, he adds, by moral disposition, in that he patiently endures the suffering resulting from passive resistance."[23]

Coming to the second point, we wish to establish: The danger that each individual may pass off his own views and conceptions as precepts of the natural law and so, by appealing to them, arbitrarily refuse recognition and obe-

»Vol. VI, 422, edited by Albert Hauck, 21 vols., 3rd ed., 1896-1908. English translation the *Schaff-Hetzog Encyclopedia of Religious Knowledge* (New York and London: Funk and Wagnalls, 1910), VIII, 212.
u Christliche Etbik (Berlin, 1905), II, 983.

dience to State law, is altogether impossible according to the "Ultramontane" theory of natural law. Catholic doctrine holds that only the few norms of natural law that are immediately evident to the normal man—and these are almost completely contained in the decalogue (The Ten Commandments)—can demand obedience unreservedly in the face of human law. In ecclesiastical and theological parlance, the application of the term "natural law" is not restricted to these norms, but is extended to their subordinated inferences and conclusions, which are deduced therefrom by a more or less learned speculation, but by no means appear at first consideration to each person as necessary conclusions. The further these inferences and conclusions are removed from the higher basic principles the more obscure and uncertain do they become. Their perception is then conditioned not only by the mental power of the individual but also by his religious, political and other opinions. For example, in the *Syllabus* of thesis sixty-seven it is stated that the marriage bond is indissoluble according to the natural law, but this is by no means immediately evident to everyone; on the contrary, only in the light of Revelation can the natural necessity and scope of the principle of indissolubility be fully recognized. By way of another example, let us consider the personal immunity exempting clerics from military service. The fact that this immunity may not be abolished "without violation of natural right or equity" (thesis thirty-two) is something that can be rightly perceived only by one who already knows and acknowledges the task of the Catholic clergy as willed by God; and even then, as the formulation of the *Syllabus* thesis shows, he still may not grasp the absolute necessity of clerical immunity. Therefore, in these and similar instances, where immediate evidence is wanting, no man may, by appealing to the natural law alone, refuse to yield obedience to a contrary State law.

Thirdly, Gotz's statement that "in the eyes of its followers, Ultramontanism makes for a disparagement of State legislation as contrasted with ecclesiastical legislation, by its supposition of ecclesiastical laws that bind absolutely in conscience and such laws, namely, those of the State as do not bind,"[24] is altogether untenable. The popes themselves have often expressly insisted that their own laws would be invalid if they ever violated natural

[24] *Op. cit.*, p. 329.

law,[20] and theologians of the Middle Ages and of modern times are agreed that one might resist the pope were he to make laws patently unjust, were he to encroach on the property of another,[28] etc. And Suarez, in his famous work *De Legibus,* in the section dealing with the rule to be observed in defining the matter or content of ecclesiastical law, declares:". . . as to when an eccleciastical law does or does not overstep ecclesiastical power, I need not add anything to what I have already said about civil law,"[27] thereby clearly inferring that those holding ecclesiastical authority may at times go beyond their bounds.

C. STATE SOVEREIGNTY RESTRICTED BY DIVINE POSITIVE LAW

The Divine will not only manifests itself to man in the moral law which inscribes in every human heart a series of norms that have to do with the life of men in common (natural rights) it is also made known to him, Christians believe, through supernatural Revelation. Hence the moral and juridical commands that are posited in Revelation likewise imply a restriction of State omnipotence. It is in view of this that the *Syllabus* rejects the fifty-seventh thesis that "civil laws may and should be withdrawn from divine authority." This tenet is not specifically "Ultramontane," as Gôtz for some incomprehensible reason seems to think;[2] but it is also advocated as being in obvious accord with Holy Scripture, by other denominations that profess an ethics based Revelation. The non-Catholic, L. Lemme, for example, says, "A limitation of obedience to authority follows from the very fact that God's command surpasses human command, that one must therefore obey God rather than man; but for Christian morality this limitation is all the greater in as much as, according to Christianity, all true morality must flow from faith; therefore, all commands imposed by authority that directly contradict the faith are opposed to God and morals. But most of all, this restriction follows because the absolute rights of the Christian personality, subject as that personality is to God, are above all human ordinances, and juridically valid ordinances that do away with the divine rights of the Christian personality *ipso*

[20] For proof» see Hergenrsther, *Kalholiiche Kircht,* 917f.
[27] *Ibid.,* p. 733.
[28] Lib. rv, chap. xi. no. 2 of his *Optra Omnia* (Paris: Vivis, 1856). 370.
[1] See Rommen, *The Naîtrai Law, 611.*
[2] *Dlr Ultramantathmti ah Wiltanrchannng,* 3049.

facto prove themselves reprehensible. This is shewn, for example, in the fact that Christ commanded His disciples to exhibit and assert their faith in the face of perverse legal ordinances. The Christian may never acknowledge laws that in any way whatever expose him to idolatry or the denial of his Faith; rather, he must overcome them by strong faith and moral disposition, in that he gladly endures the suffering resulting from passive resistance to such laws."[3]

If one were to assert that such a concept is dangerous to the State, one would have to concede that it leads to far more perilous consequences on the part of Protestants than of Catholics. For Protestantism lacks an objective means for controlling the Faith. The source of the Protestant faith is exclusively the Bible as known and interpreted by the individual. But the State cannot know what this interpretation of the individual may be, and is therefore unable to foresee the conflicts that may arise between faith and State laws. The Catholic Church, on the contrary, her faith and the principles rooted in that faith which regulate her relationship with the State, are not indeterminate quantities for the State. "The strength and certainty of apostolic authority," says a Protestant historian,[4] "rest everywhere on the history ... of its art and science of government. The papal governments manifest in one respect an amazing affinity and likeness: the popes deal with the great questions of Church and State according to viewpoints that are essentially alike; the principles of their politics are always the same. In this point lies an indestructible tradition, in whose development the most diverse personalities have labored with equal zeal. The individual recedes into the background, the personal element disappears behind the pope who always continues to be the pope."

THE CONTENT OF THE DIVINE POSITIVE LAW

Turning now to the content of revealed law, we see that the moral law of the New Testament does not constitute a further limitation of State sovereignty in as much as it does not make demands over and above the natural juridical order. The fact is merely that the *natural law* is, in some points, defined and restated with greater certainty and detail in the New Testament. "Whoever puts away his

[3] *Cbriitlicht Etbik*, II, 6, 7.
[4] O. Lorenz, *PapstwtM Kvitrttm* (Berlin, 1874), 1, 6, 7.

wife and marries another, commits adultery against her; and if the wife puts away her husband, and marries another, she commits adultery,"[8] the Lawgiver of the New Testament declares. Therefore State laws can never establish as right: "Whoever by reason of capricious abandonment by his spouse or mental illness or grave violation of marital relations brings suit against his spouse and, after sentence of divorce has been passed, marries another, is not an adulterer." Such a law would be null and void. Therefore the *Syllabus* (thesis sixty-seven) has rejected the thesis that: "In certain cases divorce, properly so-called,[♦] may be sanctioned by civil authority." In his Encyclical on Christian Marriage, Leo XIII teaches that marriage was instituted by God and from the very beginning manifested, above all else, two very excellent properties, deeply seated, as it were, and signed upon it—namely, unity and perpetuity. Jesus Christ bore witness to the Jews and to His apostles that marriage, because of its very nature, should exist between one man and one woman; "that of the two they are made one, so to say, one flesh; and that the marriage bond is by the will of God so closely and strongly made fast that no one may dissolve or render it asunder."[7] Pius XI reaffirms this teaching: "This inviolability of the marriage bond, although not in the same perfect measure in every case, belongs to every true marriage, for the word of the Lord; 'What God has joined together, let no man put asunder,' must of necessity include all true marriages without exception, since it was spoken of our first parents, the prototype of every future marriage."[8]

Moreover, Christ has expressly declared that there are persons who for the sake of the kingdom of God, by violent means, have made marriage forever impossible for themselves.[9] That the words of the Lord are not to be understood as signifying physical intervention but rather a forceful act of the will that imposes on the lower man the determi-

[8] *Mark* 10:11f.

[♦] *There is* no immediate opposition to the divine law if the civil law only offers the possibility, in definite cases, of the entering of a plea of divorce and gives assurance that a person will not be punished if, after the sentence of divorce has been decreed, he or she enters into another marriage. For the State can, for grave reasons in the interest of the public weal, legally permit immoral actions, that is, expressly assure that they will not be punished. The only question is whether the State in this case, namely, in the matter of divorce, has sufficient reasons to create special juridical possibilities of the transgression of the divine law.

[7] *Arcanum divinat safientae,* February 10, 1880. in ASS, XII, 386. English translation in *The Great Encyclical Letters of Pope Leo XIII, 60.*

[8] *Casti connubii,* December 31, 1930, in *AAS,* XXII, 551, published in English translation by the National Catholic Welfare Conference (Washington, D. C. 1937), 24f.

[9] See *Matt.* 19:12.

nation of lifelong celibacy, is beyond doubt. It follows, therefore, that the *lex Julia* and *Papia Poppaea* against celibacy that obtained in the Roman State even up to the fourth century after Christ, forbidding celibacy to all men under sixty and all women under fifty, were invalid. During the nineteenth century an attempt was made in France to create a duplicate of this Roman law in a legal draft that was drawn up proposing to exclude from civil service (the armed services being the only exception) every citizen who was still single at the age of twenty-five.[10]

This survey is limited to legal enactments that touch the sphere of ethics, but in the New Testament there is a large number of other juridical norms that owe their origin to the Founder of the New Testament and imply a far-reaching limitation to the omnipotence of the State. Christ the Lord has founded a Church and has determined its essential constitution and rights.

In the natural order, in theory, concern for religion should be the business of the State since without the promotion of religion the temporal welfare of society cannot be realized. If such concern was in practise carried out, the State would have to issue regulations regarding the common form of divine worship, for example, in respect to feast days, public prayer and sacrifice, and the ministers of religion. Christ could have permitted the State to continue to render this service in behalf of His (supernatural) revealed religion. But He has not done so; rather, He has created a specific administrative organization for the sphere of the religious life and has endowed this organization with sovereignty; that is, He has made it entirely self-sufficient, and in its sphere of activity wholly independent of every other power on earth. According to the *Syllabus,* contradiction of thesis nineteen, the Church is "a true, perfect and entirely free society and she enjoys peculiar and perpetual rights conferred upon her by her Divine Founder; and it does not belong to the civil power to define what are the rights of the Church and the limits within which she can exercise them."

A Catholic interpreter of the *Syllabus* justly remarks that this proposition brings us face to face with the heart of the questions and controversies concerning the relations of Church and State.[11] Gôtz echoes this opinion but adds:

[10] See *Min* XIV (1910), 165.
[11] J. Tosi, *Vorltinnitn iltr dtn SjlLthj* (Vienoa 1865)» 66.

"The Ultramontane doctrine here, too, stands in direct opposition to the conception which the modern State must entertain on these matters and which are expressed in the idea of a state-controlled Church."[12]

What this power of the State over the Church embraces has already been stated in the Introduction to this study: the sum-total of prerogatives that the State as such claims in respect to all the ecclesiastical societies existing within its borders. These prerogatives are termed State power in contradiction to Church authority. For by asserting power over the Church, the State disavows any claim to ecclesiastical authority as such; the state-controlled Church is merely a by-product of State sovereignty. The absolute State of the seventeenth and eighteenth centuries claimed ecclesiastical authority: competence to issue commands regarding doctrine, the administration of the sacraments, divine worship, etc. The modern State, on the contrary, wishes to leave Church authority in the hands of the organs designed by ecclesiastical constitution and thus allow full independence to the Church in the sphere of the so-called *sacra interna.* But the State would subject to its power the *sacra externa:* that is, wherever ecclesiastical affairs manifest an external aspect that reaches into the sphere of the State's interests, the State should be able to assert itself by regulating such matters independently and unilaterally, in virtue of State power. Accordingly, the state-controlled Church simply means a mediate power of the State over the Church—a counterpart of the potestas indirecta of the Church over the State.

That the Church "can never acknowledge in principle" such a power over herself on the part of the State, no Catholic can question. H. Singer, too, admits this, although he once tried to prove, from a theological viewpoint, that the State's rights to exercise supreme inspection and intervention is relatively justified under present-day conditions. For the modern State, he argues, dealing as it does with divers confessions and religions, cannot grant to the individual unrestricted freedom but must be allowed to determine for each one what are the limits to be adhered to in the interest of public order and sectarian peace.[13] But the position in which the State has been placed by reason of historical evolution (namely, in virtue of the dissolution

n VUramontanismus, 126.
u Deutsche Zeitschrift fSr Ktrchenrecht (1895). 66ff; (1898), 30f.

of religious unity) cannot influence the judgment made from the theological standpoint as to the "rights" of State supervision in the religious sphere. In other words, rights of the Church that are of divine origin are and remain, under all circumstances, inalienable, and can never—in the smallest degree—become State rights, even though the circumstances of the times can be for the Church an occasion or even a moral necessity for offering to the State her cooperation in the exercise of those rights.

CHIEF OPPOSING VIEWS ARISING FROM THE THEORY OF THE STATE-CONTROLLED CHURCH

We will briefly indicate the chief opposing views and conflicts that arise when a right claimed by the Church in virtue of Divine Revelation appears to be disregarded or violated by the theory of the state-controlled Church. First —and this should be carefully noted—*m* shall set forth only the opposing views; just how far in some instances (to use the terminology of Hegel) it is possible to form a synthesis from the State thesis and the Church antithesis we will not for the present investigate in particular; that such a harmonization is possible will become clear in some instances without further discussion.

It is a fundamental dogma of Catholic faith that *the right of the Church to exist* goes back to the will of the God-Man Who instituted it as an organized society for the purpose of communicating to mankind and to the individual, the salvation merited by Christ for all men. In founding the Church, the Saviour did not acknowledge or respect any State rights whatever. True, when the Pharisees inquired about taxes, Jesus replied that one must render to Caesar the things that are Caesar's; but when He instituted His Church He did not "render" anything to Caesar nor did He petition Caesar for recognition. Obviously thereby Christ wished to show that in this instance there was no question of "the things that are Caesar's"; that is, the Church's existence was to be wholly independent of secular authority. But he stressed this in a positive way also; for in declaring the universality of the Church's mission, He appealed to the unrestricted prerogatives given Him by the Father to define the spheres of right and duty in human society: "All power in heaven and on earth has been given to Me. Go, therefore, and make disciples of all nations."[14]

[14] *Matt.* 28:18f.

Hence it follows that no State law, even if unanimously decreed by both houses of duly elected representatives, can call into question the Catholic Church's right to exist in any country, large or small. Therefore all laws and edicts of the Roman emperors in the first three centuries, of Queen Elizabeth in the sixteenth, of the Japanese Mikados in the seventeenth, or of atheistic communism in the twentieth century that denied juridical existence to the Church lacked juridical binding force. Now the modern State does not, indeed, question the Church's right to exist, but it gives as a reason for such right the State's favor or concession. For one function of the system advocating the state-controlled Church is the *jus reformandi* (in historical development having for its basis the Peace of Westphalia),[18] whereby the State has to determine whether the Catholic Church—like any other religious body—should be permitted to exist within its confines. If the Church cannot admit such a right on the part of the State, that does not of itself necessitate a conflict. Rather, the Church gratefully accepts permission to operate within the confines of the State as an explicit assurance of a right which, apart from such a concession, belongs to her. For it is certain that—as even those who advocate the theory of a state-controlled Church admit—the State does not as the present time use its "right of reforming" to deny or refuse permission to the Church to exist and function within its boundaries. The State, they claim, has such power formally, but not in fact, because of the immense influence the Church exerts on Catholic citizens of the State, an influence which cannot be overcome by laws.

There is in this connection another right which, although in itself of a temporal nature, follows as a natural juridical consequence of the Church's existence. The *Syllabus* has condemned thesis twenty-six, which states: "The Church has no natural and legitimate right to acquire and possess property." The Church is indeed not a kingdom of this world," but she is in this world and cannot realize her purposes without possessions. Therefore, given the fact of her existence, the Church has *a natural right to acquire and possess property;* she is a juridical being by the will of her Founder and not merely in consequence of a property right the State may grant her and her institutions within

[18] See E. A. Ryan, S.J., "Catholics and the Peace of Westphalia," in *Theological Studies,* Vol. IX, December, 1948, No. 4, 597f.

the confines of the State. And the Church can administer, use and dispense of her possessions at will. Indeed, by reason of her sovereignty, which extends to all things necessarily connected with her ends, the Church is not only a juridical being, but she also has autonomy in regard to property rights; that is, she can also determine freely and independently the kinds of ownership and the forms whereby ownership is realized in the interests of her institutions.[10] From this it follows that when the modern State appeals to its presumed power over the Church in order to claim authority in the sphere of property rights, it is not justified. The State has no right to make the property rights of ecclesiastical institutions dependent upon its authorization, to intervene in the administration and use of Church property, or even to subject to its juridical forms the handling of ecclesiastical property, or, finally, to impede or restrict the acquisition of property by the Church by so-called amortization laws, not to speak of the alienation of Church property by what is euphemistically termed secularization.

The *Church's constitution* in its essentials rests, like her existence, on the will of her Divine Founder and is therefore wholly inaccessible to State intervention or change.

The Church is first of all a *societas inaequalis,* that is, a society whose members do not enjoy equality of rights; and this ought not to be forgotten, especially at the present time, in view of the gratifying efforts of the laity to participate more actively in the Church's work. There are two categories of persons in the Church, shepherds and flock: that is, those who ocupy an official position in accordance with their grade in the governing organism, the hierarchy; and the multitude of the faithful. According to Christ's will the power to guide and rule rests exclusively with the hierarchy; the faithful have in the final analysis, the duty of obedience in all religious matters. If they somehow share in the exercise of ecclesiastical teaching and administration, they do so only by order and under the control of the hierarchy. The intentional disregard of this truth in the French law of separation of Church and State in 1905 was the deciding factor for the possibility (offered by this law) of forming associations for religious worship *(associations*

[10] The Code of Canon Law says: "The Church and the Apostolic See have the inherent right, freely and independently of any civil power to acquire, retain, and administer temporal goods for the pursuit of their own ends" (canon 1495,1). The Church also has the right, independently of the civil power, to demand of the faithful whatever is necessary *for* divine worship, for the decent support of the clergy and other servants, and for the pursuit of the rest of her proper ends" (canon 1496).

cultuelles) to which the administration of a part of the Church's property would be entrusted. Pius X forbade such administrations[17] and preferred the total pauperization of the Church in France to a violation of one of the principles of the Church's constitution. Many, especially among the laity, even some who were unquestionably ecclesiastical-minded, found it difficult to understand the reasons for the pope's declaration. Twenty-three Catholic writers and members of the Chambers who in March, 1906, subscribed to the sensational letter to the bishops formulated before the final decision of the Pope, saw absolutely no ignoring of the hierarchy in the law of separation. As a matter of fact, there was inserted in the original draft made during the course of a debate in the Chambers, a provision that such associations must, in their constitution, "conform to the general rules of organizations of public worship, the exercise of which it is their purpose to guarantee."[18] For Catholic associations of religious worship this could only mean the demand that their members, under pastors and bishops, must be in unity with the pope. So it was thought that the hierarchy and its exclusive right to rule the Church was, so to speak, tacitly recognized. But all the while another fact was being overlooked—namely, that in another part of the law (Article VIII) the assurance just mentioned proved to be an illusion; for Article VIII contained the stipulation which left to the Council of State, a purely lay authority, the settlement of any dispute that might arise between a *cultuelle* faithful to the bishop and a schismatic *cultuelle.* Thus it belonged to the Council of State to pronounce upon the orthodoxy of any *association cultuelle* and its conformity with "the general rules of public worship," as provided by Article IV. It is obvious "that these associations of worship are therefore placed in such a state of dependence on the civil authority that the ecclesiastical authority will, clearly, have no power over them."[19]

The Lord also founded His Church as a *monarchical society* by bestowing upon Peter the fulness of governing authority to the end of time, that is, upon him and his successors. It follows, therefore, that the State cannot make

[17] Encyclical *Gravhtimo officii,* August 10, 1906, in *ASS,* XXXIX, 386F. In 1924, this unfortunate situation was in part removed by the institution of diocesan associations for religious worship with the consent of Pius XI, as will be shown presently.

[18] Article IV of the law of December 9, 1905.

[19] Encyclical *Vehementer not,* in *ASS,* XXXIV, 9. English translation in *American Catholic Quarterly Review,* XXXI, April 1906, 214f. See also, Georges Goyau, "France," *Catholic Encyclopedia,* VI, 185ff.

national churches from parts of the Catholic Church existing within its confines. The *Syllabus* (thesis thirty-seven) rejected the thesis: "National Churches can be established after being withdrawn and openly separated from the authority of the Roman Pontiff." In a tyrannical maimer Henry VIII attempted to do just that by demanding the Oath of Royal Supremacy which acknowledged him as the supreme head on earth of the Church of England. Modern statesmen, too, have aimed at the same objective but in a different, a more artful manner, better adapted to present-day conditions. The Kulturkampf[20] was intended primarily to bring about the incorporation of the Catholic Church into the State organism of Prussia, under the supreme direction of the State and to the exclusion of papal supremacy. Indeed, it was even planned, through co-operation with European governments, to strike sharply and directly at the primacy of the pope and to effect a revision of papal prerogatives. In fact, on May 14,1872, Bismarck in his famous papal election dispatch invited the European cabinets to agree on the conditions under which they would recognize the next papal election.[21]

Since the State has no right to abolish the primacy of the Roman See by a fiat, it cannot restrict the significance of that primacy for a part of the Church, by formulating laws for the purpose of gradually separating the Church of a particular country from union with Rome. The *Syllabus* (thesis forty-nine) rejects the proposition: "The Civil authority may prevent Bishops and the faithful from free and mutual communication with the Roman Pontiff."[22] The Organic Articles of Napoleon 1 (1802) had provided that the bishops might not leave their dioceses without the permission of the French government. Many of the Articles became "dead letters" but were dragged from their obscurity when the authorities wished to show their enmity to the Church. Thus in 1904, French Prime Minister

* *See* Martin Spahn, "Kulturkampf," *Catholic Encyclopedia,* VHI, 703ff.

11 Brück-Kissling, *Gescbichte der kaiboliscben Ktrche tn Deatcbland,* (2nd ed.. Munster in Westf., 1907k IV, 121«.

n The Vatican Council teaches: "From the supreme power of governing the universal Church, possessed by the Roman Pontiff, it follows that the Pope, in the exercise of his office, has the right of free communication with the pastors of the whole Church, and with their flocks, that they may be taught and ruled by him in the way of salvation. Therefore, we condemn and reprobate the opinion of those who hold that the ćom munication between the supreme head and the pastors and their flocks can lawfully be impeded; or who make this communication subject to the will of the secular power, maintaining that whatever is done by the Apostolic See, or by its authority, for the government of the Church, cannot have force or value unless it be confirmed by the assent of the secular power." Sess. IV, de Ecclesia, chap. 3 (Denainger-Bannwart-Umberg, *Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum* [54th ed-, Freiburg: Herder, 1922), no. 1829-

Combes appealed to a provision in the Organic Articles in order to accuse the Holy See of having violated the Concordat of 180123 by requesting the Bishops of Laval and Dijon to come to Rome to answer charges made against them. In this way, the breach between Franch and the Holy See was effected without any formal repudiation of the Concordat.24 One has only to recall the refusal of Soviet-dominated governments on various occasions to grant visas to local bishops to visit Rome, in order to realize that restrictions of this sort are by no means unusual even at present.

The Church's right to exist and her constitution, which in its essentials has been established by divine right, cannot be affected by legislative or any other kind of action on the part of the State. The same is true of the *essential rights* of the Church, which rest on the will of her Divine Founder. The fact that there are such rights, the *Syllabus* has vigorously defended by rejecting the nineteenth thesis already referred to and by insisting that the use of such rights must be free and independent of all State intervention, as is evident from the twentieth rejected thesis in the *Syllabus:* "The Ecclesiastical power must not exercise its authority without the permission and assent of the civil government."

The fulness of power to guide and rule (the power of jurisdiction) which Christ has committed to His Church comprises a plurality of rights. It includes in the first place *the right to teach.20* The Lord gave to the apostles the solemn commission to go forth into the whole world and to spread His doctrines everywhere, to the end of time. But to Peter He gave a special power, the supreme teaching authority: "Simon, Simon, behold, Satan has desired to have you, that he may sift you as wheat. But I have prayed for thee, that my faith may not fail; and do thou, when once thou hast turned again, strengthen thy brethren."28

» The Concordat of July 16, 180V between Pius VII and Napoleon I, restored the Catholic Church and Catholic worship to their normal condition in France. The Organic Articles, a name given to a law regulating public worship which limited the scope ot the Concordat, were published as law together with the Concordat and have always been regarded as inseparable from the Concordat. These Articles in various ways infringed on the spirit of the Concordat and gave rise to frequent disputes between the Church and State in France. The law of 1905, which separated Church and State in France, abrogated the Organic Articles at the same time it abrogated the Concordat. (See Georges Goyau, "The Organic Articles," *Catholic Encyclopedia,* I, 756).

*See Georges Goyau, "France," *Catholic Encyclopedia,* VI, 179.

» The Code of Canon Law says: "The Church, independently of the civil authority, possesses the right and the office to teach all nations the truths of the Gospel." (canon 1522, 2).

**Luie* 22:311.

In Jerusalem when the Sanhedrin, which was established to interpret the Law, to adjudge more important cases, and to exercise surveillance over the administration of affairs, refused its placet to this commission of Christ to teach ("we strictly charged you not to teach in this name"), the apostles gave this direct reply: "We must obey God rather than men."[27] Now the modern State, which grants equality of rights or parity, does not indeed wish to intrude upon the inner life of the Church to which ecclesiastical teaching obviously belongs. W. Kahl, one of the ablest interpreters of the system of the state-controlled Church, declares: "The teaching of the Church remains essentially unmolested, even when it contradicts the juridical order of the State. Any concession to State authority to make direct decisions regarding the substance of doctrine itself, would in principle be incompatible with the system of the state-controlled Church."[28] Accordingly, even from the viewpoint of the state-controlled Church, it would be an encroachment if the civil legislatures demanded for purely doctrinal decrees issued by ecclesiastical authorities, the so-called placet (that is, the vote of assent which civil rulers gave to an ecclesiastical enactment in order that it may have binding force in their respective territories).[29] The Syllabus opposes such demands by condemning the twenty-eighth thesis: "It is not right for Bishops without permission of the government to promulgate even their apostolic letters."

Since only the Church is sent to guard and propagate the teaching of Christ, the State has no right to exclude her from collaborating in *the sphere of education.* In his Encyclical On Christian Education of Youth, Pius XI says: "Education is essentially a social and not a mere individual activity. Now there are three necessary societies, distinct from one another and yet harmoniously combined by God, into which man is born: two, namely, the family and civil society, belong to the natural order; the third, the Church, r~io the supernatural order. . . Ç~Ând first of all education belongs pre-eminently to the Church, by reason of a double title in the supernatural order, conferred upon her by God Himself; absolutely superior, therefore, to any other title in the natural order. The first title is founded upon the express mission and supreme authority to teach, given to

"'itbr^ine Klrcbmrctti ñi irr KircbnpolitU, I. Ml-

- See S. Lolio, "Exsequitur, *Caihahc Encjclope^ta, V,*

her by her Divine Founder: 'All power in heaven and on earth has been given to Me. Go, therefore, and make disciples of all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost, teaching them to observe all that I have commanded you; and behold, I am with you all days, even to the consummation of the world.'30 Upon this magisterial office Christ conferred infallibility, together with the command to teach His doctrine. . . . The second title is the supernatural motherhood, in virtue of which" the Church, the spotless Spouse of Christ, nurtures and educates souls in the divine life of grace, with the sacraments and her doctrine. . . . Hence it is that in this proper object of her mission, that is, 'in faith and in the teaching of morality, God Himself made the Church partaker of His divine authority, and through His heavenly gift she cannot be deceived. She is therefore the greatest and most reliable teacher of mankind, and in her dwells an inviolable right to teach them.'31 By necessary consequence the Church is independent of any sort of earthly power as well in the origin as in the exercise of her mission as educator, not merely in regard to her proper end and object, but also in regard to the means necessary and suitable to attain that end. Hence, with regard to every other kind of human learning and instruction, which is the common patrimony of individuals and society, the Church has an independent right to make use of it, and above all to decide what may help or harm Christian education. And this must be so, because the Church as a perfect society has an independent right to the means conducive to this end, and because every form of instruction, no less than every human action, has a necessary connection with man's last end, and therefore cannot be withdrawn from the dictates of the divine law, of which the Church is the guardian, interpreter and infallible mistress."33

Wherever religious instruction is imparted to Catholics it can be imparted only by order of the Church, in virtue of her commission *(missio canonica)*, even though he who imparts it may be a civil official. Religious instruction "for Catholic children," writes a Catholic layman," can be regulated only with the Church's co-operation; on this point there can be no difference of opinion among Catholics. For

• *Matt.* 28:19f.
** Leo XIII, Encyclical Letter. *Lsbertai,* June 20, 1888, in ASS, XX. 607. English translatino in *The Pope and the People,* 86.
» *Divini Ulins magistri,* December 51, 1929, in AAS, 52-54. N. C. W. C. translation, 2-8.

us no form of religious instruction, no method of imparting the Christian spirit is trustworthy except that which has the authority that has been commissioned by Christ according to our faith, that is, the teaching authority of the Church. All that is told us to the contrary owes its origin to a concept of religion that stems from the individualistic spirit of Protestantism. It proceeds from false conceptions and misses the point at issue. Let such a concept of religion be applied to the instruction to which it is suited; but we can never, so far as is in our power, permit the application of such a concept to the instruction of our children, and should such an attempt be made, Catholic teachers, Catholic families, Catholic citizens, and the Catholic clergy would resist to the last breath."[33]

But since the success and influence of religious instruction can be endangered and even entirely thwarted by other parts of the regular course of school instruction, the Church has the right to supervise all schools in which Catholic children are being instructed, so that faith or morality may not be injured or undermined. As Pius XI has said: "It is the inalienable right as well as the indispensable duty of the Church, to watch over the entire education of her children, in all institutions, public or private, not merely in regard to the religious instruction there given, but in regard to every other branch of learning and every regulation in so far as religion and morality are concerned."[34] Therefore the bishops of France were perfectly justified when they opposed the public schools' use of religious teaching aids that jeopardized the Faith.[38] For to these prelates, also, Christ has said: "Teach them to observe all that I have commanded you"'/and theyzwonld have grîëvôUsly-violated-their~officiarflûtvÎad they agreed to leave^in thë'hands^fchndfën books wherein belief in the supernatural was called a prejudice, the divine origin of the moral law was contested, original sin denied, the vow of chastity taken by priests and religious said to be immoral, the indissolubility of marriage denied.

Moreover, teachers of religion in secondary schools and professors of theology in universities, even though they be in the civil service, cannot take office without ecclesias-

»M. Spihn. *Dtr K<mff ℔* (Kempten, W7), 25.
x *Divirti illitti magistrt,* N. C. W. C. traasutioa, 6-9· See älso *Cade of law,* •TW» ♦'ppMition wM introduced by the P«tpr»l ivv|™?!", "!dtr d1* of September 14, 1909; see *Sttmmen am Maria-Laacb,* (1910), LXXVin, 4o5f.

tical permission and are subject to the Church's supervision in the exercise of their office. Only ecclesiastical authority can decide whether the teaching of a professor of theology in a State university accords or does not accord with Catholic doctrine. In the latter instance, the State may not protect such a person in the continued exercise of his position as a teacher of candidates to the Catholic priesthood.[38]

In the following theses the *Syllabus* condemns the exclusion of the Church from school affairs: "The entire direction of public schools in which the youth of any Christian state are educated, except to some extent in the case of episcopal seminaries, may and must belong to the civil power; and this in such a way that no other authority whatsoever shall be recognized as having any right to interfere in the discipline of the schools, the direction of studies, the conferring of degrees, and the choice and approval of teachers" (thesis forty-five); "The best theory of civil society demands that the public schools which are open to the children of all classes, and in general all public institutions intended for the education of youth in letters and higher learning, shall be free from all ecclesiastical authority, government, and interference, and shall be completely subjected to the civil and public authority according to the desires of the rulers and the opinions of the age" (thesis forty-seven); "Catholics may approve of that theory of education for youth which separates it from Catholic faith and ecclesiastical power, and which is confined exclusively, or at least principally, to the knowledge of natural order alone and the purpose of social life on earth" (thesis forty-eight).

The power to guide and rule given by Christ to His Church also embraces *the right to regulate by laws* the actions and customs of the Church's subjects. The Lord Himself expressly empowered the apostles to establish binding norms: "Amen I say to you, whatever you bind on earth shall be bound also in heaven."[37] What is the attitude of the modern State toward the Church's right to legislate?[38] Defenders of State rights disagree with one another

* Article V of the agreement between the French government and the theological faculty of the University of Strassburg is a correct and clear model in this respect. See *Deutjcbt Zeitjcbfift fur Kirchtnrecbt,* 1903» 151. (As is evident, this problem pertains to circumstances in certain European countries and does not concern present-day conditions in the United States).

" *Matt.* 18:18.

w See E. Rothenbucher, D/r *Trtnnttng von Stoat and Kirche* (Munich, 1908), 440ff.

in this matter. Some deny the Church all right to make laws for her subjects; they hold that only in so far as the State grants her such right, or in as much as the State imparts to the social regulations passed by the Church civil coercive power, is it possible to speak of ecclesiastical rights properly so-called. Such is the opinion of Otto Mejer, of Zorn Ernst Meyer, Paul Hinschius, Thudichum. Hinschius, for instance, says: "The modern State does not acknowledge a sovereign legislative right of the Catholic Church, to be exercised independently. In virtue of its sovereignty, which it exercises over its own territory and Catholics residing therein—contrary, of course, to the Church's teaching—the State regulates also the scope and measure of the Church's right to issue general and binding norms for ecclesiastical affairs. In so far as these latter announce general laws over and above these limitations, they are null and void and lack validity, not merely in the civil but also in the ecclesiastical sphere."[39] One of the most consistent champions of this viewpoint is Friedrich Thudichum,[40] who refuses altogether to apply the term "right" or "law" to ecclesiastical norms not sanctioned by the State, having coined for such norms the offensive expression: "the predilections of the society of the Catholic religion." At the present time, however, this tendency is no longer dominant. There are other adherents to this doctrine of State rights who, from the purely juridical viewpoint, concede true juridical character to the canon law of the Catholic Church, entirely apart from the State's attitude toward it. Among these are F. V. Savigny, Eichhorn, Puchta; and more recently Kahl, Frantz and Rothenbiicher. The latter submits detailed justification of his opinion: "The Catholic Church, in virtue of her historical evolution and because of the international character of her communion, has developed the most perfect canon law. In point of creed she embraces Catholics throughout the world. For her laws, State boundaries mean nothing. For her the Church is visible and—in terms of the viewpoint of the modern State—she is an institution of a juridical nature founded by Christ for man's salvation. Her rights exist independently of the State. To be sure, the State invests only some of these rights with juridical character en-

[39] *Kirchenrecht dtr Katholiken und Protcttanten in Deutland.* 6 vob. (Berlin, 1869-1897). III. 838.

[40] *Deutsches Krrchenrecbt des 19» Jabrbunderts.* 2· vols. (Leipzig, 1876-1878), I, 6.

forceable by State power, and often these only with modifications that are compatible with agreements reached by concordat."[41] We have discussed this diversity of juridical conceptions for another reason; namely, to show that the concept of the state-controlled Church and its consequences for the Catholic Church is by no means exactly and firmly fixed; and that opposition to one or another theory of State rights that just happens to be in vogue, in no way signifies opposition to the claims of the modern State.

The Church claims not only autonomous but also the exclusive right to legislate and command for the entire sphere of interests affecting religious life wherever she regards State power to be altogether incompetent. Leo XIII says: "It is the Church, and not the State, that is to be man's guide to heaven. It is to the Church that God assigned the charge of seeing to, and legislating for, all that concerns religion; of teaching all nations; of spreading the Christian faith as widely as possible; in short, of administering freely and without hinderance, in accordance with her judgment, all matters that fall within her competence."[42] Now the modern State, generally speaking, is not greatly inclined to intervene in the sphere of the purely spiritual; such intervention was rather a specialty of the absolute State of the Josephinist type (inaugurated by Joseph II of Austria) that prescribed the length and style of the sermons, prayers, and hymns and determined the number of candles for the altar.[43] But in one specific instance the *Syllabus* found occasion to reject a proposition grounded in this type of interference—namely, thesis forty-four which states that . . with regard to the administration of the divine sacraments, the civil authority possesses power to decree the disposition necessary for their reception." The Piedmontese government had compelled Archbishop Luigi Franzoni (1832-1862) to live in exile because he felt obliged to refuse the Last Sacraments and Christian burial to a high state official. Similar encroachments of the State on the inner life of the Church were made on the basis of the Organic Articles, and during the Kulturkampf several Prussian courts looked upon the refusal of the confessor to grant absolution as a violation of the law of May 13, 1873, in the matter of applying spir-

[41] *Op. cit.*, p. 445.
[42] Encyclical *Immortale Dei*, November 1, 1885, in *ASS*, XVIII, 165; Engish translation in *Tie Pope and the People*, 50f.
[43] See H. Franz, 5'Joseph II," *Catholic Encyclopedia*, VIII, 50811.

itual punitive and disciplinary means, and condemned the priests accused of that violation.[44]

Then, too, there is a very important sphere of life which, in virtue of her dogmatic teaching, the Church must maintain has to do with a matter predominantly religious in nature and is therefore reserved to ecclesiastical legislation. The State, on the contrary, claims that in consequence of a slow, century-long evolution that has altered the concept Jn this sphere, it is subject to State legislation. We refer *ito the sphere of marital rights,* if one prescinds from it those civil effects of the marriage contract which are wholly within the competence of the State; for example, the property rights of married people, rights of inheritance, dowry, title of nobility, alimony, and similar matters. But everything else—that is, the juridical norms governing betrothal, the marriage contract, the permanence and indissobulity of marriage, its natural juridical consequences and effects—only the Church can regulate by ecclesiastical legislation. The reason for this lies in the natural religious character, and especially in the sacramental character, of

Pius XI in his Encyclical On Christian Marriage states: "We follow the footsteps of Our predecessor, Leo XIII, of happy memory, whose Encyclical *Arcanum,* published fifty years ago, We hereby confirm and make Our own . . . and declare that, far from being obsolete, it retains its full force at the present day. And to begin with that same Encyclical, which is wholly concerned in vindicating the divine institution of matrimony, its sacramental dignity, and its perpetual stability, let it be repeated as an immutable and inviolable fundamental doctrine that matrimony was not instituted by man but by God; not by man were the laws made to strengthen and confirm and elevate it, but by God, the Author of nature, and by Christ Our Lord by Whom nature was redeemed, and hence these laws cannot be subject to any human decrees or to any contrary pact even of the spouses themselves."[48] The Council of Trent says: "If anyone saith that matrimonial causes do not belong to ecclesiastical judges, let him be anathema."[4'] It is only the reverse of this canon that the *Syllabus* rejects in condemning the seventy-fourth thesis: "Matrimonial

*· Btück-Kissliag, *Gfscbicbto dtr katbolhcbfft Ktrcbt,* IV, 526.
« *Casti connabit,* N. C. W. C. translation, *4.*
Ses». XXIV. oo the sacrament of Matrimony, canon 12, m Denzinger, *Bncbtrtdion,* no. 982. See also, *Codr of Canon Law,* canon I960.

cases and espousals belong by their very nature to civil jurisdiction."

Hence it follows that the Church must condemn *civil marriage* among Christians, especially the legislation now introduced into so many countries which makes the civil ceremony compulsory. It cannot be said the State wishes only to regulate the civil contract and cede the sacrament to the Church, for a separation of the marriage contract from the sacrament of marriage is impossible; a "valid marriage coritract between a baptized man and a baptized woman Jis always arid without exception also a sacrament.[47] Then tdô,~~thênpëâcëfül co-existence of "double^marriage legislation, the ecclesiastical and the civil, is not possible because today almost everywhere civil law allows divorce and so regulates it that little consideration is given Christian dogmatic teaching on the indissobulity of a consummated marriage, and hence serious conflicts ensue. Accordingly, the Church recognizes as valid a union entered into solely according to the law of the State (that is, a purely civil marriage) only if in an individual case it is so regarded according to canon law. Thus, the Church does not consider a civil contract made by two Catholics as a valid marriage, whereas she did for a time recognize as valid a mixed marriage contracted solely before a registrar in Germany, provided that the two parties had the intention of contracting a valid marriage. In other words, such a marriage could be contracted without the proper Catholic form (that is, without the presence of an accredited priest and two witnesses and hence also before a civil registrar).[48] It is a further consequence of the Church's concept of civil marriage that all Catholics (and that includes a Catholic and a non-Catholic) are strictly forbidden to attempt to contract a marriage valid before God in the civil forum: every Catholic is in conscience bound to contract marriage according to the Catholic form, that is, before an accredited priest and two witnesses.

In the light of this brief explanation, it is easy to understand why the *Syllabus* has condemned the following theses: "The Tridentine form does not oblige under penalty

« See *Arcanum divinae sapientae,* English translation in *The Pope and the People,* 31-34; see also. *Casti connubii,* N. C. W. C. translation, 27-28.

• By virtue of an exceptional right granted Germany by Pius X in the decree *Provida sapienti^ue, ASS,* January 18, 1906, XXXIX, Slff. In response to a query whether the provisions of the *Provida* have been abrogated by virtue of the new Code of Canon Law, Cardinal Gasparri, president of the Pontifical Commission for the interpretation of the new code, replied (Mardi 30, 1918) that the Constitution *Provida* has oeen abrogated; therefore the particular right that had been granted for Germany is ÜOW obsolete.

of nullity where the civil law prescribes another form or wishes to validate the marriage by means of this new form" (thesis seventy-one) ; "A civil contract can constitute true marriage among Christians ; and it is false to affirm either that the marriage contract was always sacramental or that there is no contract if the sacrament be excluded" (thesis seventy-three).

The power to guide and rule committed to the Church embraces also *the right to appoint shepherds,* in other words, to fill ecclesiastical offices. This right has been exercised within the hierarchy in a variety of ways at different times. Now the pope as supreme shepherd sent by Christ has reserved to himself the appointing of bishops, while the bishops in turn make appointments to the various offices within their dioceses. It is obvious, of course, that the State has a great and just interest as to what sort of persons should be appointed to ecclesiastical offices, especially the more influential positions, within its confines. But this does not imply that the State may claim the inherent right, independently of ecclesiastical bestowal, of co-operating in making official appointments, to say nothing of independent, despotic filling of ecclesiastical offices. Therefore the *Syllabus* rightly condemned the assertion made in the fiftieth thesis: "Civil authority has in itself the right of presenting bishops." If some governments possess this right, they possess it only in virtue of papal bestowal (such was the case, for example, in France for a time by provision of the Concordat of 1801). But, to claim such a right as a consequence of State sovereignty is downright usurpation.

The same is true regarding the deposition of bishops. The *Syllabus* rejected thesis fifty-one: "Furthermore, lay government has the right of deposing Bishops from the exercise of their pastoral ministry." During the Kulturkampf, Pius IX had occasion to protest against the assumption of such a "right" when the Prussian Royal Court of Justice for Ecclesiastical Affairs in quick order declared two archbishops, four bishops, and one auxiliary bishop deposed: "For the Lord has not set the mighty of this world over the bishops in religious matters, but St. Peter, to whom He committed the office of tending not merely His lambs but also His sheep. Hence it follows that they whom the Holy Spirit has placed to rule the Church of God can-

not be deposed by any earthly power, however mighty."[49] It can indeed happen that a bishop by his activity may endanger the commonwealth; then the way remains open for the government to present its complaint and remonstrance to the Holy See. In such cases the popes are wont to meet the wishes of the government more than halfway, by removing from office—in a way satisfactory to both parties—even bishops who through no fault of their own have incurred the displeasure of the government. Thus, during the Kulturkampf, Archbishop Paul Melchers and Archbishop Miecislas Ledochowski, and before them, Archbishop Clemens August Droste-Vischering, who had resisted the government's demand in the matter of mixed marriages, and were therefore considered *personae non gratae* by the Prussian government, with Rome's consent did not return to their dioceses. At an earlier date, to conciliate Napoleon I, Pius VII called upon the entire episcopate of France to resign office, stipulating that if any bishop should refuse to abdicate, new appointments would be made without regard for their refusal.

The State has no right in the matter of co-operating with the Church in the appointment of pastors, unless the Church has ceded such a right to the State. In times of conflict with the Church, the State has sometimes, on its own responsibility, bestowed the office of pastor on persons who have permitted themselves to become tools of the State; but the Christian people have treated such State pastors as they deserved; that is, they have ignored them. In 1873 the Catholics of Geneva, Switzerland, preferred to put up with the loss and suppression of their rights by the Old Catholics rather than accept and exercise the right, as established by law, to choose their pastors through the vote of the congregation. At the present time, the communist regime in Rumania is seeking to eliminate those priests who were delegated by their respective bishops in accordance with canon 459. The government aims to give their posts to "patriotic priests" subservient to communism. Poland's communist regime is also actively supporting a movement to create a schismatic Polish Church completely submissive to the government.

That it belongs to the Church and to her alone to determine how her future officials, young candidates for the

[49] Encyclical *Quod nunquam,* February 5, 1875» to the archbishops and bishops of Prussia, in *ASS, VIII,* 253.

priesthood, should be instructed and educated cannot be questioned on the ground that this is "a matter that touches the State also, in a large measure."[80] Even though one disregards the basic viewpoint of the Church that every sovereign society regulates the training of its prospective officials as it deems best, one has only to imagine how the Church would be menaced if everyone who happens to be at the head of the government were given the right, by intervening in *the education of the clergy,* to make laws that would prevent those who occupy that influential position in regard to the public and private life of the people from being trained in harmony with their high office. If, therefore, the *Syllabus* had to condemn the forty-sixth thesis that "Even in ecclesiastical seminaries the method of studies is subject to civil authority," that condemnation certainly does not not imply the denial that ecclesiastical officials have the moral duty to have a regard for and to preserve also, the interests of the State in the instruction and training of the clergy. Amicable agreement with the Church in this matter is better calculated to lead the State to the attainment of its desire than harsh legislative interventions which the Church repels by passive resistance. The experiences of the Kulturkampf have shown that, and Bismarck, too, realized that, the attempt made by the May Laws to regulate "the education and appointment of priests" was nothing but "a hunt on horseback behind wild geese, a hunt that never led to its objective."[51]

A necessary complement of legislative and governing power is coercive or punitive power. A juridical ordinance that cannot be made to prevail over the recalcitrant and disobedient is only a very imperfect ordinance. Therefore the Church has *the right to apply force by imposing spiritual punishments,* for example, excommunication, which is exclusion from Church communion and from participation in the common blessings of ecclesiastical society, namely, participation in the sacraments and Christian burial. The Church's coercive power as regards laymen, in contradistinction to that of the State, is almost always restricted to those purely spiritual punishments, since only by such means, especially among cultured and ethically sensitive peoples, can the chief purpose of all ecclesiastical disciplinary measures be attained; that is, the correction

P, Hinschïus, *Krrcbtnrtcbt,* IV, 346.
« In a session of the Prussian House of Lords, April 12, 1686; stenographic record, p. 184.

of the culprit and his return to the path of righteousness. In ruder times the Church, too, made use of other penal sanctions.

Generally the State acknowledges the Church's power to punish, but restricts its exercise by creating civil courts to hear complaints of persons who believe that they have been unjustly treated by ecclesiastical judgment. In Prussia, in 1873, a Royal Court of Justice for Ecclesiastical Affairs was established (but abolished again after the Kulturkampf) to which appeal could be made from any ecclesiastical penal sentence, not only by the accused but also by the Chief President (on grounds of public interest). Another law issued at the same time forbade the exercise of spiritual justice over the Prussian clergy except by German Church officials, and demanded for every removal from office a formal legal procedure. A similar restriction of the Church's coercive power was offered by the Organic Articles, which every administration in France between 1801 and 1905 considered to be integrally bound up with the Concordat of 1801. The Council of State, thanks to the formality of the *appel d'abus,* could declare that there was *abus* in any given act of the ecclesiastical authority, and thus thrust itself into the affairs of the Church. Bismarck declared legal measures of this sort abortive attempts, "a thrust of a dagger into water";[52] and the Church imposed upon everyone who successfully took advantage of such an appeal the censure of excommunication *latae sententiae;* that is, by reason of the offense itself *(ipso facto)*, without intervention of any ecclesiastical judge." —

What is the present attitude of the Church in regard to the claim which she defended, at least in the Middle Ages, to exercise civil and criminal justice even in temporal causes and in secular offenses whenever ecclesiastics were the defendants? Does she regard this claim as inviolable, as resting on a divine right? The *Syllabus* has rejected thesis thirty-one, which says: "Ecclesiastical courts for temporal cases of the clergy whether civil or criminal should by all means be abolished, even without the concurrence and despite the protest of the Apostolic See." By condemning such a proposition the Church confirmed her stand; namely, that in countries where hitherto the entire

" *tirj.,* p. 185.

« No. 6 among the excommunications reserved in a special manner to the Pope, cited in the Bull *Apostolicae Sedis moderationi* of October 12, 1869, dealing with ecclesiastical censures, published in *Pii IX Pontificis Maximi Acta* (Rome: Vatican Press), V, 58.

jurisdiction over clerics had belonged exclusively to the Church, the State was not justified in changing the clerics' legal status by a one-sided exercise of its power, without an understanding with the Holy See, and without any regard for the Holy See's protest no matter how well founded such a protest might be. Such an arbitrary procedure must be designated as an injustice since the aforementioned privilege of the clergy *(privilegium fori)* does not represent merely a concession of civil laws. The proposition that "The immunity of the Church and of ecclesiastical persons (which includes the concept of a special court for the clergy) derives its origin from civil law," formulated in this general fashion, has been condemned by the *Syllabus* (thesis thirty). And rightly so; for, apart from other considerations, the historic claims of the Church themselves forbid a ruthless and one-sided procedure on the part of the State on the pretext that, once conditions have changed, it must be intent on abrogating this privilege. Then, too, there are many other reasons implicit in the very nature of the case. If the Council of Trent states that ecclesiastical immunity rests "on divine command and canonical sanctions,"[84] it certainly does not mean that this immunity may be traced back immediately to a divine right; but it does intend to assert that the Church can demand it in this sense: namely, that she can consider a certain exceptional position of her clergy necessary, in accordance with the conditions of the times, for the fulfillment of her divine mission and that of her ministers. It is not difficult to see how the *privilegium fori,* for example, is desirable in order to enhance the authoritative position of the clergy and that the interests of religion and the Church require that the trial of a cleric in civil and criminal causes should be held before fellows on his own status, that is, before ecclesiastical judges; indeed, in certain circumstances a special tribunal would seem to be necessary in the interests of justice. At the same time, it is easy to understand that the Church cannot explicitly renounce in principle, absolutely and forever, her claim to a special court for the clergy, although she can do so as individual situations arise—for example, in concordats with this or that State. Nor can the Church tolerate the abrogation of this clerical privilege which results from a one-sided action on the part of the

[84] Seas. XXV, De Refarmoireee, chip. 20.

State." Today, according *to* secular law, the civil and criminal causes of clerics belong to the lay court. Only with respect to the purely spiritual conditions of their station and office are clerics subject to their bishop, and then not without certain State limitations—especially with respect to certain practical punishments.[56] With respect to the United States, Anson Phelps Stokes says: "In colonial times, most of the colonies gave certain legal rights to clergymen, including that of a trial before an ecclesiastical court in many cases where laymen would have to appear before a civil court. Such cases, when exempting a clergyman from criminal process, are generally referred to by a term common in the Middle Ages, 'benefit of clergy.' This was abolished, as far as proceedings in the Federal courts are concerned, by the Act of Congress of April 30, 1790, entitled 'An Act for the punishment of certain crimes against the U. S.'. . . The Act of Congress of 1790 was and is a direct evidence of the founders of government to carry out their ideals of Church and State separation."[57]

The Church's power to guide and rule extends to all her members, including also those wearing the royal crown. Boniface VIII in his conflict with his royal opponent, Philip the Fair, expressly defined the article of faith that "for every human creature it is necessary for salvation to be subject to the authority of the Roman Pontiff." The *Syllabus,* too, had to correct the erroneous conception (which has persisted from the era of Josephinism to our day) that Catholic sovereigns are exempt from all spiritual jurisdiction. This it did by condemning thesis fifty-four, which reads: "Kings and princes are not only exempt from ecclesiastical rule but are even superior to the Church in disputed questions of jurisdiction." In religious matters a sovereign is as much subject to the Church as any other Catholic, and must submit himself or herself to the Church's laws and ordinances. To be sure, the Church makes allowances for the dignity and position of sovereigns as to the manner in which she exercises her spiritual power over those Christians who are secular sovereigns. This is clear from the fact that princes are exempt from episcopal jurisdiction and all their affairs are immediately subject

[56] See the interesting exposition of the *pririlegiitm fori* presented by the Sacred Roman Rota, March 15, 1910, in *AAS,* II, 494ff.
[57] See *J.* Sâgmûller, "Ecclesiastica! Privileges," *Catholic Encyclopedia,* XII, 492. *Church and State in the United Stater,* I, 492.

to the Holy See.[58] Strange to say, sometimes the sovereigns themselves prefer to be subject to the jurisdiction of their own diocesan bishop, as, for example, Napoleon I in the matter of his divorce. He probably hoped to obtain more easily the fulfillment of his desire from the court bishops than from the Pope, even though he was at the time the question arose, a prisoner of the emperor.

D. RANGE OF JURISDICTION OF CHURCH AND STATE

Affirmation and denial of the power of the State over the Church—such is the heart of the opposition between the proposed rights of the modern State and the doctrine of the Catholic Church, as our previous investigations have shown. G. Jellinek summarizes this viewpoint in the words: "The State of modern times appropriates the exclusive right to regulate the external relations of human life, to assign to each individual and to each social unit its juridical position in the community, without sharing this right with any other power whatever. After long conflict and many changes it admits today the Church's right to regulate her own internal affairs and leaves it to the conscience of her members to submit to ecclesiastical norms. But for the State there is only *one* sword, which it alone wields and which it uses only as it determines by its own arrangement. The *plenitudo potestatis* which the Church claimed for herself, has today passed over to the State. Relying on this fulness of power, the State has dispossessed the Church and gained for itself realms into which formerly the secular power was refused entry."[1]

SYSTEMS OF STATE RIGHTS IN THEORY AND PRACTICE

Nevertheless, opposition between the doctrine of the Catholic Church and a modern theory of State rights does not of itself signify antagonism between the Catholic Church and the modern State. Theories of State rights are learned abstractions which become considerably attenuated when placed in the crucible of practise. The concept of sovereignty from which the power of the State over the Church is derived is not so firmly fixed that peremptory demands by the State necessarily follow. In the minds of philosophers concerned with right and law, this concept

[58] In regard to their dispensation from marriage impediments, see the decree of the Sacred Congregation of the Sacraments, March 7, 1910, approved by Pius X in *AAS,*

[1] *Dtr Kamfi Jtt ttn mit dim ttntm Ricif* (Heidelberg, 1907), 9.

has by no means assumed a unified connotation. For example, from the Hegelian doctrine of sovereignty or social authority follows not only the power of the State over the Church but also the moral absolutism of the State: good and evil, right and wrong, virtue and vice have no other criterion than State caprice. Hence we have a veritable *deus ex machina.*2 Today there are very few who will be inclined to adopt this concept. Systems of State rights ought not to be framed in the realm of speculation, but should be regulated by actual exisiting conditions; they should, as G. Anschiitz puts it, "adapt themselves to political reality, do justice to it, not contradict it.'"

Now the State must reckon with the Catholic Church as it exists here and now. Even though the State does not share the Church's belief in her Divine origin and Divine rights, surely it cannot demand that she give up this faith or permit any portion of it to be bartered. For the Church would thereby destroy herself. That this cannot be expected from the Church is acknowledged also by right-thinking non-Catholics. Thus, for example, the church historian, Walter Kohler says: "The State will never be able to do away altogether with the political character of the Roman Church; it is absolutely impossible, as Hoensbroech proposes, for the State to strive to obtain a purely religious Catholicism; for political elements are bound up with the essence of Catholicism. It is utterly impossible, for example, to declare the sovereignty of the papacy null and void. That here there is question of an historical right need not be stressed, and we cheerfullly agree with Hoensbroech that historical rights can be forfeited : no, the sovereign papacy is an essential part of the Catholic religion ; and to abrogate it means to cut deeply into the very heart of the Catholic religion, that is to say, to repeat the very thing for which Hoensbroech has so sharply criticized the Kulturkampf of the seventies in the preceding century. Ever since the Vati- Council, Catholicism has been firmly anchored in the (spiritual) sovereign papacy; and the State must take that into account if it wishes to bring about a tolerable situation."* The jurist Jellinek writes in a similar vein: "This 'one-sword' theory the Church has never acknowledged and can never admit because she cannot do so without surrendering

*Osgniach, *The Cbfutian State,* lOlf.
• ·'Deutsches Staatsrecht in F. Holtzendorff, *Enzyklopaaie aer Recbtswtssenscbaft* (6th ed. 1904), II. 471.
**CbrhtHcbe Wocbe* (1907), column 263.

the principle of her life. She rests in the belief that her rights are of Divine origin and that Divine rights cannot be altered by human ordinances. . . . According to her teaching, the State can suppress her rights but cannot change them. In regard to these matters the Church can only affirm that might is stronger than right, but she can never concede that might has changed into right."[5] And Prince Bismarck concluded his famous speeches in the Prussian Assembly on April 21,1887, by admitting that the objective of restoring ecclesiastico-political peace can never be secured merely by promulgating State laws. "I at least must refuse my co-operation to the attempt to molest our Catholic compatriots against their will," he stated.[6]

There is yet another group of reputable professors of civil law who cannot be suspected of sympathetic bias to the Catholic Church and who nevertheless praise her for not acceding to every theoretical exaggeration of State power but holding to her rights with firm hands. On more than one occasion the eminent jurist of Berlin university, Professor Bernard Kübler, expressed the conviction that "The papacy is one of the most magnificent phenomena seen the world. Without the papacy, the Middle Ages would have fallen prey to barbarism. Even today, except for the papacy, popular liberty would be exposé to the most extreme danger. It is the best counterweight to the omnipotent power of the State. If it were not in existence, one would have to invent it."[7]

Accordingly, if in the exercise of its sovereignty the State must of necessity have regard for the Church's claim to sovereignty in the spiritual sphere, political science ought to do likewise in defining the concept of sovereignty. It ought to admit the co-existence of a double sovereignty: the sovereignty of the State in the temporal realm, the sovereignty of the Church in the spiritual realm; instead of the theory of the state-controlled Church, it ought to concede the full independence of the Church. In the famous Articles XV-XVIII of its charter of the Constitution of January 31, 1850, Prussia in a truly liberal fashion adopted this concept: "The Evangelical and the Roman Catholic Church, as well as every other religious society, orders and administers their affairs independently. . . . Intercourse

[5] *Der Kampf dti alien mh dtm nenen Recht, 9.*
[6] Quoted from a stenographic record, p. 809.
[7] Quoted from an address given on November 16. 1894; see F. X. Heiner, *Dee Syllabus in ulifamontaner ttnd antixltramonlaner Belettcbtnn^* (Mainz, 1905), 358.

between the religious societies and their superiors is unmolested. . . . The right of nomination, proposal, election and confirmation in filling ecclesiastical positions, in so far as this belongs to the State and does not rest on patronage or special titles, is annulled." Unfortunately, these articles fell a victim to the legislation of the Kulturkampf.

PAPAL EXERCISE OF "INDIRECT POWER" IN CIVIL AFFAIRS

If, then, the Church desires that the State should admit her full independence in the spiritual sphere, the question arises as to whether the Church on her part acknowledges the complete independence of the State in its sphere. Perhaps you will be surprised at the formulation of this question since in a previous chapter[8] we have already pointed out that the Church and, in particular, the papacy acknowledge the sovereignty of the State in its own sphere. But you will recall that at that time we left one question open. The difficulty concerned the system of indirect power of the Church in temporal affairs, according to which the Church as such possesses no competence whatever in temporal matters, but may in exceptional cases utilize her spiritual power also in the secular and political sphere—that is, when vital interests of the Church and the spiritual welfare of the faithful must be safeguarded. We have also seen that the wide interpretation and application given to this theory in the Middle Ages is not compatible with State sovereignty, but that perhaps this concept does contain'a kernel of truth which would permit its rightful application even outside the historical and concrete conditions of the Middle Ages.[9] In fact, not only do contemporary theologians and canonists espouse a theory which they call "indirect power," but many of them are also of the opinion that they may appeal to the *Syllabus* since it rejects thesis twenty-four: " The Church has not any direct or indirect temporal power."[10] Others believe—indeed more justly—that here the expressions "direct" and "indirect power" are not be understood in the narrow sense that might be suggested by these technical designations of the two ecclesiastico-political systems: only to be rejected is the view that the spiritual purpose of the Church excludes her from every right to command with respect to secular and temporal

• See above, pp. 35ff. · See above, pp» 44-47.
* See I. Laurentius in *Stimmen am Maria-Laacb(l9^6)t* LXXI, 2463. See also, John A. Ryan and Moorhouse F. X. Millar, S. J., *The State and the Church* (New York: Macmillan, 1937), 42-49.

affairs. However that may be, it cannot de denied from the Catholic viewpoint that the pope can, at least in one instance, assert his authority in the face of, and contrary to, measures taken by the State. If a State law contradicts the natural moral law or the revealed will of God, the Divine law of which the Church is the appointed guardian, it lacks, as we have shown, obligation in conscience. Now, since the pope is the supreme head and—when he speaks ex cathedra—even the infallible interpreter of the natural moral law as well as of the content of Revelation, it follows that he can determine the contradiction of certain State laws to natural or Divine positive law and can give Catholics binding directives as to how they are to conduct themselves in regard to these laws." Whether in this form and definition "indirect power" still merits the name, we shall presently inquire;[12] but it is certain that this power, in the sense explained, was claimed in practise also by popes of modern times. Pius IX, for example, in an allocution on June 22,1862, condemned the Austrian laws that infringed in essentials on the Concordat of 1855: "By Our Apostolic authority we reprobate and condemn these laws, as well as everything else that is commanded, executed or only somehow inaugurated, by the Austrian government or its subordinate officials against the rights of the Church, and declare by Our authority the laws themselves, with all their effects, now and in the future wholly invalid and of no force."[13] A few years later the same pope had to pass a similar sentence of condemnation on the Prussian May Laws; "We declare to all whom it may concern, and to the entire Catholic world, that these laws are invalid, since they wholly contradict the God-given constitution of the Church."[14]

[11] Monsignor Joseph Mausbach quotes from the writings of modem advocates of the theory of *potestas indirecta* who teach that in secular matters the Church has to appeal to God's rights, and to her own *duties* towards Him, as the appointed guardian of His laws; that interference by the Church in secular matters must be justified by the aims given her by God and by her own rules and rights; whereas in the sphere of religion she is free to set up aims for herself, as circumstances require, and to make entirely new laws *{Catholic Moral Teaching and Its Antagonists,* 369). He adds: "In cases where greater claims are made, the authors have only *Catholic* countries in view; the close connection between the spiritual and temporal order in such countries is a reason why the State should support the Church more generously than elsewhere, but it also pledges the Church to use more extensive care in promoting the welfare of the citizens." *(Ibid.,* p. 371).

[12] See below, last part of Section E.

[13] *« PH IX Pontificis Maahni Atta* (Rome. 1868). IV, Part I, 410.

[14] Letter to the Archbishops and Bishops of Prussia, February 5, 187J, in *Pn IX Pontificis Maximi Acta,* VII, Part 1, 8.

We discover an equally categorical pronouncement, and at the same time a very clear declaration of the reasons justifying a condemnation, in the Encyclical *Vehementer nos,* of February 11, 1906, in which Pius X rejects the French law of separation_ of Church and State: "Hence, mindful of Our Apostolic charge and conscious of the imperious duty incumbent upon Us of defending and preserving against all assaults the full and absolute integrity of the sacred and inviolable rights of the Church, We do, by virtue of the supreme authority which God has confided to Us . . . reprove and condemn the law voted in France for the separation of Church and State." The reasons for condemning the law are the following: (1) because it is "deeply unjust to God, Whom it denies, and lays down the principle that the Republic recognizes no cult"; (2) because "it violates the natural law, the law of nations, and fidelity to treaties"; (3) because "it is contrary to the Divine constitution of the Church, to her essential rights and to her liberty"; (4) because "it destroys justice and tramples under foot the rights of property which the Church has acquired by many titles and, in addition, by virtue of the Concordat."[10]

The twentieth century offers similar illustrations. Pius XI protested in the most solemn manner against the persecution of the Church by the Mexican government, especially through the vigorous application given to Article CXXX of the Constitution, in consequence of which the Mexican bishops had to determine to suspend public worship.[18] A few years later the same pope, seeing some hope of remedying greater evils, but certainly with no intention of accepting the Mexican regulations of worship, nor of withdrawing protests against these regulations, much less of ceasing to combat them, directed the Mexican bishops to abandon this method of resistance before it could bring harm to the faithful, so that the maintenance of Divine worship might be safeguarded. Pius XI repeated his protest: "Certainly the laws are iniquitous; they are impious,*

0 See *ASS,* XXXIX, 12. English translation ia *American Catholic Quarterly Review,* XXXI, 217.

0 Encyclical *Intquij afilictisque,* November 18,1926, in *AAS,* XVIII, 467. The Mexican government ordered that every State in the Confederation should determine the number of priests empowered to exercise the sacred ministry, in public and in private. The number was ridiculously small, only one priest for every 30,000, 50,000 and even 100,000 Catholics io certain instances. The Federal law also provided that any priest desirous of performing religious services in any community affected must advise the authorities of that community, who would, if the quota were not already filled, register the priest and authorize him to officiate at religious services.

as We have already said, and condemned by God for everything they iniquitously and impiously deregate from the rights of God and of the Church in the government of souls."[11] In 1937 Pius XI, with deep anxiety and increasing dismay, registered protest against the violations of the Concordat of 1933 by the government of the German Reich—against theories and practices which, if officially approved, must destroy the people's confidence in the government and render useless any word that might be pledged in the future. The believer has an inalienable right to profess his faith and put it into practise in the manner he believes right. Laws that repress or make this profession difficult contradict the natural law. Laws or other regulations concerning schools that disregard the rights of parents guaranteed to them by the natural law, or laws which by threat or violence nullify these rights, contradict the natural law and are utterly and essentially immoral.[18] Finally, the same pope condemned atheistic communism—which aims at upsetting the social order and at undermining the very foundation of Christian civilization—as absolutely contrary to the natural law itself and as a system which, adopted, would utterly destroy society itself, as Pius IX had already taught as early as 1846.[10]

It is easy to understand what is meant in all these papal declarations by the expressions, "These respective laws are invalid, of no force." The meaning is this: The Popes affirm that such laws are in conflict with the juridical order of a higher rank and hence in all points where such a contradiction is present, the laws do not possess true juridical character; therefore they are invalid. In principle the quality of injustice in such laws cannot injure the higher right at all, although in fact it does perhaps great harm. Pius X expressed this thought quite clearly in the words: "We protest solemnly and with all our strength against the introduction, the voting and the promulgation of this law (namely, of separation of Church and State), declaring that it can never be alleged against the imprescriptable rights of the Church."[20]

«Encyclical *Acerba animi,* September 29, 1932, in *AAS,* XXIV, 329; published in English translation by National Catholic Welfare Conference (Washington, D. C.» 1937),

""Encyclical *Mit brennender Sorge,* March 14, 1937, in *AAS,* XXIV, 139ff; published in English translation by N. C. W, C. (1937), 24-25.

""Encyclical *Divini Redemptoris,* March 19, 1937, in *AAS,* XXIX, 69-72; published in English translation by N. C. W. C. (1937), 7-11.

""Encyclical *Vehementer nos,* in *ASS,* XXXIX, 13; published in English translation by *American Catholic Quarterly Review,* XXI, 215·

PRACTICAL CONSEQUENCES OF THE EXERCISE OF INDIRECT POWER

Now if this is the basic meaning of a papal protest against invalid State laws, a further question arises as to what are its practical consequences. Are all Catholics obliged to refuse obedience and to offer passive resistance to such laws? Not at all. We have already noted that there are formally unjust and therefore invalid laws which in content are more or less questionable since they make something indifferent or even something useful a matter of duty. Generally speaking, such laws may be observed; indeed oftentimes one *must* obey them: for example, for motives of self-love, or for reasons of the common good in cases where harm might come to the community if its members offered passive resistance to such laws. In such cases unjust laws imply a duty of conscience, but only a mediate duty, because such laws do not of themselves, immediately, have a claim to our obedience since they are invalid. To what extent they may be observed, and in what measure they must be obeyed, and at what point resistance must begin, is often difficult indeed for the individual to decide. And so the Church, when protesting against a State law, generally also appends norms of conduct for the guidance of the conscience of Catholics.

We have already alluded to the fact that, even after papal condemnation, there was a great difference of opinion in and outside France as to whether it was permissible to obey the unjust law of separation of Church and State, in order that, by the establishment of associations for religious worship made possible by the law, at least a part of the property of the Catholic Church in France might be saved. Among the voices favoring such a procedure the address of certain Catholic laymen aroused special attention, as noted earlier.[21] In this address to the French episcopate these laymen said: "As convinced and true Catholics we cannot, of course, have any other opinion regarding the character and spirit of this law than that which the pope has expressed. But what will be the practical effects of this solemn condemnation? . . . How far ought we go to in our observance of the law? We frankly answer ... that as citizens we do not accept the law, but submit ourselves to it

[21] See above, p. 67f.

to the point where its application would violate the rights of our consciences and the ordinances of our religion. . . . We believe that we . . . ought to use all the possibilities, however limited, for the organization the laws allows, and by so doing we believe that we are working in the interests of the fatherland and of religion." The majority of the episcopate were of a different opinion and the pope acknowledged the justice of their view: ". . . . With reference to the religious associations as the law established them, We decree that it is absolutely impossible for them to be admitted without violation of the sacred rights pertaining to the very life of the Church."[22]

In consequence of this decision the Church lost her possessions, but what was to become of Catholic worship? The government could not suppress it without conjuring up religious anarchy and martyrdom; its hope of a schism through disobedience to papal ordinances was not fulfilled. And so the government had to adapt itself to the situation, proposing first of all to legalize the continuance of worship by juridically classifying assemblages for religious worship as public meetings; and since "the Church refused to make the anticipatory declaration on public meetings required by the law of 1881, a law passed on March 28, 1907, abolished this requirement in respect to all public meetings, those for religious worship included."[23] From this course of events one can see how the organization of passive resistance to a State law by the pope can make such a law in many respects futile. Already, a year after the promulgation of the law of separation of Church and State, the situation had become so altered that the conditions devised by civil legislation for the continued existence of Catholic worship were no longer authoritative; but, rather, the State was compelled to clothe with the mantle of legality the conduct of the Church in the continuance of her worship. Next, in reply to petitions offered through the Secretariat of State and the Sacred Penitentiary, the Holy See isued a series of specific decisions regarding conflicts of conscience which would readily arise in certain instances, where mayors and municipal counselors, buyers and tenants, especially, might become involved in what virtually constituted robbery of Church property and alienation of

[22] Encyclical *Gravissimo officii mnnere,* August 10, 1906, in *ASS,* XXXIX, 586; published in English translation in *Catholic University Balletin* (Lancaster, Pa., and Washington, D. C.: The Catholic University of America), XII, 1906, 555.
[23] Georges Goyau, "France," *Catholic Encyclopedia,* VI, 186.

Church possessions.[24] Without exception, these decisions were characterized by great mildness that looked rather to the spiritual welfare of individuals than to the material property of the Church.

On the other hand, there are instances where the Holy See, after protesting against a law, as in duty bound to do, even explicitly directed Catholics to observe it and co-operate in its fulfillment. In the midst of the debates centering on the May Laws, a law was passed on June 20, 1875, which confiscated all the property of the Catholic parishes in Prussia. Already during the parliamentary deliberations the bishops had been weighing the difficult question of how they ought to conduct themselves with respect to this law, which deprived the Church of the free administration of her properties and turned over their administration to lay trustees to be elected by the parish members. To accomplish this, Bismarck had previously to commit another act of supreme violence, that is, the abolition of all those paragraphs of the Prussian Constitution which concerned the Church. The question was, then, one of encroachment on the independence of ecclesiastical administration. But on the other hand it differed essentially from the other laws of the Kulturkampf because, as stated in the confidential letter of the Prussian bishops to the Clergy: "Its object does not concern the highest and holiest rights of the Church," and, "The co-operation demanded of the faithful in the execution of the law involved nothing which of itself might be regarded as forbidden under the circumstances." But there was danger that in the event "of lack of co-operation of the faithful in the election" of the trustees and parish representatives "the administration of Church property might fall into the hands of non-ecclesiastical and even of anti-ecclesiastical parish members."[25] Hence the Holy See assented to the decision of the bishops (which had been framed in the light of these considerations) to co-operate in the execution of the law. In consequence, the pope was accused of prejudice and inconsistency: "It has been said that We had refused to approve in France what We had approved in Germany. But this charge is equally lacking in foundation and justice," Pius

M See Faculties granted to the bishops of France regarding alienation of Church goods, September 24, 1907, in AΓ5, XU, 202ff, 612. 680ff. See explanations of these faculties, January 16, 1909 in *AAS*, J, 239f. For decisions as to the juridical penal status of members of the Chamber and senators who voted for the law of separation as well as purchasers of ecclesiastical properties see *ASS,* September 21, 1907, II, 6O2f.

e Brûck-Kissling, *Gescbicbie der katbolhchtn Kitebe* (1906), IV, 499f.

X justly protested. "For although the German law was blameable on many points, and has been merely tolerated in order to avoid greater evils, the cases were quite different, for that law contained an express recognition of the Catholic hierarchy, which the French law did not."[26] As noted earlier, Pius XI similarly directed the Mexican clergy to submit materially to the law that obliged priests to ask the government for the privilege of holding Divine service, in order thereby to avoid greater evils.[27]

The situation is very much the same with regard to legislation governing civil marriage. The Church, as we have seen before, sees in such legislation an encroachment of the State in the spiritual sphere. But she does not call upon Catholics to offer passive resistance to such legislation. She does not have to do so because the regulation# covering civil marriage can be understood and applied in such a way as to leave intact and unimpaired the Church's teaching and rights, whereas on the other hand the non-observance of State laws would entail on the part of Catholics grave disadvantage for the individual and the community. For this reason the ecclesiastical rules of conduct declare the observance of the civil form of contracting marriage not only admissible but even binding in conscience. This ruling was promulgated in the instruction of the Sacred Penitentiary of January 15, 1866,[28] and in especially clear and definite form in the catechism prescribed by Pius X for the ecclesiastical province of Rome. To Question 12, "Should the bride and groom also perform the civil act?" the answer is given, "The bride and groom should also perform the civil act, even though it is not a sacrament, in order to assure for themselves and their children the civil effects of the marital union; therefore, ordinarily the Church does not permit the religious marriage unless the acts prescribed by the State have been performed."[29]

The verdict of the Church is different, however, on the subject of legal actions (pertaining to matrimonial cases) which the civil law does not prescribe but only makes possible. Yet there is no answer which applies to all countries and circumstances to the question of whether Catholics may

■•Encyclical *Une fois encore,* 6, 1907,. in *ASS,* XL, 8; published in English translation in *American Catholic Quarterly Review,* XXXII, 141.
Encyclical *Acerba animi,* in *AAS,* I. 46I&. N. C. W. C. translation, 7-14.
" *Collectania S. Congreg. de Prop. Fide (Rotor.* Ttpografa Poliglotta Vaticana. 1907), I, no. 1280.
Catecbismo della Doctrina Cristtana (Rome: Tipographia Poliglotta Vaticana, 1926), 84.

take their marriage cases to the civil courts. In England and the United State the Church tacitly or explicitly permits Catholics to apply to the civil courts for at least a juridical separation, but before doing so they should submit their case before the ecclesiastical authorities. With regard to divorce cases, Catholics in English-speaking countries may have recourse to the civil courts in order to obtain a declaration of nullity when a marriage has already been declared invalid or annulled by the ecclesiastical authorities. They may not go before the civil courts in order to obtain dissolution of a valid marriage with the intention of marrying again. A Catholic may petition for a divorce in the civil courts, not with the intention of considering the marriage dissolved and marrying again, but in order to obtain the civil advantages connected with divorce, such as property settlements or release from the obligation of supporting one's wife child by another man. For greater safety and to show submission to the Church, Catholics should obtain permission from the bishop.[80]

E. POSSIBILITY OF AN AMICABLE AGREEMENT BETWEEN THE MODERN STATE AND THE CATHOLIC CHURCH

CO-ORDINATION—NOT SUBORDINATION

Church and State are, each in its own sphere, absolutely independent and sovereign: The State in the secular, the Church in the religious realm. Hence it follows that the model for the relationship between the two powers is co-ordination, not subordination of one power to the other. Neither subordination of the State to the Church as was demanded by the theocratic systems of the Middle Ages—by the system of direct power or that of the indirect power—if these systems are understood according to the meaning and scope given them at that time by reason of the actual dominant position held by the Church in the family of Christian nations; nor subordination of the Church to the State as postulated by the modern system of the state-controlled Church.

[80] See *Code of Canon Law*, canon 1961; see also, Thomas Slater, S.J., *A Manual of Moral Theology*, with notes on American legislation by Michael Martin, S.J., (3rd ed., New York: Benziger, 1908), II, 241-248,

ADJUSTMENT OF CONFLICTS REGARDING MIXED MATTERS THROUGH CONCORDATS

But this theory of peaceful and amicable co-ordination does not give an adequate explanation. It would suffice if the spiritual and temporal objectives of Church and State were wholly unconnected and dissociated in all points; if the interests of State and Church were enclosed within two orbits side by side. Such, however, is not the case; rather, they cut into and overlap one another; in other words, there is a whole series of matters of a mixed nature that on the one hand appears to belong to the realm of the State's purposes, and on the other hand to the domain in which the Church is peculiarly interested. "Mixed matters," for example, are education of youth, contracts ratified by an oath, matrimony, safeguarding of public morality, the care of the poor and the sick, the institution and modification of ecclesiastical offices, if such acts are to enjoy legal value in the eyes of the State also; further, the construction of churches, convents, ecclesiastical institutions; the establishment of schools, if their certificates are to claim recognition by the State; the designation of holy days, if they are to be observed also as civil holidays, and so forth.

Now what course of action should be taken in these spheres in order to secure harmony and to avoid conflicts? The answer is: mutual understanding, by means of agreements of a more or less formal nature leading up to the solemn contracts between Church and State which are termed concordats.[1] Leo XIII repeatedly urged this procedure in his famous Encyclical on the Christian Constitution

[1] **Anson Phelps Stokes -writes that "In the United States there never has been a concordat, although Benjamin Franklin was approached as to the possibility of making one in the early days of the republic and stated that it would be impossible." *{Church and State in the United States,* I, 32f). Father John Tracy Ellis replied that "It is incorrect to say that in the early days of the Republic the American minister to France, Benjamin Franklin, was approached by the representative of the Holy See with the proposal of a concordat with the United States. Actually the nuncio in Paris, Archbishop Guiseppe Doria Pamphili, made no such proposal. He merely informed Franklin in a letter of July 23, 1783 that the Congregation of Propaganda Fide, in its desire to effect an organization for the infant American Church, had determined 'to propose to the congress the installation of one of their Catholic subjects . . . with the powers of vicar-apostolic, and with the character of bishop . . .'" ("Church and State in the United States: A Critical Appraisal,") in *The Catholic Historical Review* (Washington, D. C.: The Catholic University of America Press, October, 1952, Vol. XXXVIII, 288). See Doria Pamphili to Franklin, Paris, July 28, 1873, in Jules A. Baisnée, *Prance and the Establishment of the American Catholic Hierarchy. The Myth of French Interference,* 1783-1784 (Baltimore, 1934), 50.**

of the State, after his predecessors in the nineteen century had made frequent and practical use of this means. In this Encyclical he states: "There are, nevertheless, occasions when another means is available for the sake of peace and liberty, we mean when rulers of the State and the Roman Pontiff come to an understanding touching some special matter. At such times the Church gives signal proof of her motherly love by showing the greatest possible kindliness and indulgence."[2] These words suggest that in such agreements the Church is almost always the giver, in that, from her certain and incontestable rights, she always makes to the State concessions of far-reaching import, whereas the State on its part in most instances does nothing more than solemnly promise what it already owes to the Church and can hardly call into question. Leo XIII is altogether right when in another letter he states even more clearly: In all her dealings, "the Church is wont to be yielding and indulgent as a mother; yes, it not infrequently happens that in making large concessions to the exigencies of the State, she refrains from the exercise of her own rights, as the compacts often concluded with civil governments abundantly testify.'" Jellinek admits as much, of course, after his own fashion, when he says that the oldest and most skilled diplomacy of the world has given the Roman Curia the most wondrous flexibility, which made it possible for the Church and the adherents of the Church to live in the community of the State, indeed for the Church to make herself highly useful in the fight against modern subversive movements. As one of these means he names the concordat by which, he maintains, the Church acknowledges State rights (or civil legislation) only in terms of privileges granted to the State by the Church, at the same time having no intention of ever altering her own legal and juridical norms. Such pronouncements of the Church, he says, are not to be compared to the voice of threatening Furies (Erinyes), wrathful at the violation of their rights, but, rather, to words of blessing uttered by kind deities (Eumenides).[3]

Such agreements between State and Church have this good characteristic: They make possible adjustment of the

[2] Encyclical *Immortale Dei,* November 1» 1885, in *ASS,* XVTII, 15, Gerald S. Treacey translation, 8.
[3] Encyclical *Prttcurt trafuSalionh,* June 20, 1894, tn *ASS,* XXVI, 712; published in English translation in *The Great Encyclical Letter/ of Pope Leo XIII,* 313.
4 Der Kampf de/ alien mit dem netten Recbt, 23.

relations between the two powers without the need of opening up the question of principles. No decision has to be made (and in view of the opposing opinions in many instances, it would never be possible to arrive at an amicable agreement) as to whether the matter at issue belongs more properly to the sphere of civil-secular, or to the realm of the Church's spiritual interests, and which of the two parties is of itself more competent to act as sole arbiter. At a significant moment, when the Prussian State realized the uselessness of a war of principles waged against the Church by means of the so-called *Speergesetz* (that is, the law by which all State payments to Catholic bishops and priests were withheld until they or their representatives complied with the new law), Crown Prince Frederick William, acting in place of the Emperor, acknowledged the futility of such a strife in his reply to Leo XIII dated June 11, 1878, a few days after the attempts by Hodel and Nobilingen on the life of William I. The author of the letter states even though it is not in his power, and perhaps, also not in the pope's, to adjust the war of principles at this time (which for a millenium has made itself felt in the history of Germany more than in that of other countries) he is quite ready to treat, in a spirit of love and conciliation, the problems that both parties have experienced as a result of the conflict handed down from their predecessors and forefathers respectively; he will not give up hope that where a basic understanding cannot be reached, an amicable disposition on the part of both parties will open also to Prussia the way to peace which was never closed to other States. He believes that unity and agreement between both authorities will come to pass, in which the question of principles—namely, who in the last instance is to determine the boundaries between State and Church, should no agreement be achieved—will be left undecided.®

Ecclesiastico-political adjustments of "mixed matters" can concern individual points, in which case they are made in a less solemn manner than by concordats. Thus, by agreement with Cardinal-legate Caprara, Napoleon I secured the reduction of ecclesiastical feast days to four: Christmas, the Ascension, the Assumption, and All Saints; the other feasts were transferred to Sunday. Again, when peace between France and Germany was ratified at Frank-

8 See Brück-KÎssling» *op. tit.,* IV, il, 6f.

fort on May 10, 1871, and Alsace became a German possession, negotiations with Rome were proposed for the adjustment of the boundaries of the dioceses of Strassburg and Metz to make them conform with the new political boundaries. But since one of the high contracting parties (after the recall of Harry Arnim, Prussian ambassador to Paris) lacked diplomatic connections with the Holy See, the matter was not settled until October 7,1874. Then it was announced, in protocol in which the French plenipotentiaries informed the German deputies of the two papal decrees of the Sacred Consistorial Congregation which exempted the two bishoprics from the jurisdiction of Besançon, their former metropolitanate, and at the same time fixed the two boundaries.® Another illustration is offered, this time in the sphere of public instruction, by the agreement reached on December 5, 1902, between the Holy See and the German government regarding the theological faculty of the University of Strassburg after negotations had been under way since 1894.7 Count Paul von Hoensbroech expressed his relentless disapproval of that compact in a bitter anti-Catholic diatribe.

The solemn contracts called concordats usually deal with agreements in which the whole juridical status and organization of the Catholic Church in a State are more or less determined. The results of such compacts are not always published as formal treaties; often they appear in papal bulls, the contents of which are then recognized by State law. In many cases they are termed Bulls of Circumscription in as much as the spheres of ecclesiastical jurisdiction are therein redefined or circumscribed anew. Often this form is preferred by States that demur at making formal treaties with the pope; for example, in 1821 by Prussia, where the Bull *De salute animarum* became the organic statute for the new legislation of ecclesiastical affairs after the secularization of the State.

BINDING FORCE AND LEGAL OBLIGATION OF CONCORDATS

The legal nature of the concordat has long been a matter of dispute.® In deciding the question of the binding force and legal obligation arising from concordats for the con-

• See *Pii IX Pontificis Maximi Acta,* Vol. VI, Part I, 332ff.
τ *Deutsche Zeitschrift fur Kirchenrecht* (1903), 151.
• See Rommen, *The State in Catholic Thought,* 588-590.

trading parties in modern times, two extremes must be avoided: both minimize the legal binding force of concordats—one in reference to the obligation of the State, the other in reference to that of the Church. The first extreme is to been seen in the legalist theory, so called because it does not admit that concordats have the force of bilateral contracts, but claims they are merely civil laws passed by the State concerning the Church. As defenders of the modern system of a state-controlled Church, those who hold the legalist theory regard it as absurd that the State should make contracts with its subjects in matters touching the exercise of its rights. They build all their arguments upon the supposition that the Church is subject to the State, of which it is but a department; just as any other body is subject to the whole of which it is a part and on which, consequently, it depends.9 Therefore, whatever compacts may be made can indeed have the form but not the juridical character of a concordat; they are, rather, sovereign or ministerial ordinances, or only administrative decrees, that remain valid as long as they are not rescinded or altered. This concept, together with its consequences, was rejected in thesis forty-three of the *Syllabus* which condemned the proposition: "Without the consent of the Holy See and even against its protest, the lay power has the authority to break and to declare and render null the solemn treaties, commonly called concordats, concluded with the Apostolic See concerning the use of rights appertaining to ecclesiastical immunities." But the legalist theory and whatever it offered to substantiate its claims are untenable also on intrinsic grounds. The assertion that the State cannot make contracts with its subjects proves nothing, for the very reason that concordats are, of course, not made with the Church in a State, but rather with the international world Church, namely, with its Supreme Head, the pope. To be sure, in making such compacts the modern State is slightly inconsistent, since as a State which grants equality to all denominations within its boundaries it wishes to deal only with the Church existing within these boundaries and enjoying the privileges of a public law corporation. And further, if it is a State where separation from the Church obtains, it has the intention of carrying on negotiations only with the religious societies dedicated to Catholic worship which, of course, have only the status of private cor-

· See Benedetto Ojetti, "Concordet," *CMbolic Ertcjdoprdia,* IV, 190ff.

porations. But the State simply cannot ignore stark reality for the sake of venerable theories of State rights. Likewise, the assertion put forth by the regalists does not carry much weight. They argue that the Church cannot make compacts with the State since she lacks the material power to fulfill and observe the terms of such agreements. Prescinding altogether from the fact that the possibility of fulfilling a right or obligation does not pertain to the essence of right but is only one of its secondary characteristics,[10] and that the enforcibility of international law generally leaves a great deal to be desired, we may safely say that the Church by no means lacks effective reprisals to counteract the arbitrary actions of a contracting party. This was demonstrated by her conduct in opposing the French law of separation.[11]

The other extreme is the privilege theory, according to which concordats—if we regard their general character and the bulk of their contents—lack for the most part the force of a true contract, and are to be considered as imposing an obligation on the civil power alone, while on the part of the Church they are merely privileges or concessions granted by the Roman Pontiff, which he can also revoke, even though there be no special reason for so doing. The very fact that it might be more useful for the Holy See not to be bound to this or that point, for example, in the case of nominations of bishops, would be reason enough for the Holy See to annul the concordat. While Dr. Bockenhoff rejects this theory, it is only fair to note that many Catholic canonists stoutly defend it.[12]

The commonly accepted theory of concordats among Catholic authorities in canon law and political philosophy is known as the contractual (or compact) theory. "It holds that the concordat is a true legal treaty in accordance with the theory of contracts and specifically in accordance with international law," says Heinrich Rommen. "The concordat is a bilateral, legally binding treaty under the rules of international law, which recognizes both parties, the State and the Church, as having moral personality, with rights and duties, as subjects sovereign and independent, therefore competent to contract treaties. The Holy See, the pope, is recognized as a sovereign authority by the practice of the majority of states which entertain diplomatic relations with the Holy See by plenipotentiary ambassadors

[10] See V. Cathrein, S.J., "Right/' *Caiboltc Encjclopfdia,* XIIÏ, 56.
[11] See above, p. 92f.
[12] See Ojetti, *op. cit.,* p.

or ministers and which recognize an Apostolic nuncio as the representative of the Holy See to their governments in accordance with international law. Even states that do not entertain international relations with the pope recognize his sovereignty in the sense of international law."[13]

That the concordat partakes in the nature of an international treaty becomes evident when we scrutinize the papal views. A treaty is an agreement between two parties about the same object. This definition is implied by Leo XIII when he states that the concordat is concluded when rulers of states and the Roman Pontiff come to an agreement of minds on a special matter.[14] The French Concordat of 1801 was called a solemn bilateral pact by Leo XIII.[15] When in 1905 the French legislation regarding the Concordat was placed on the agenda of the Chamber, Pius X complained about the injustice inflicted on the Holy See in terms that leave no doubt as to the pope's conviction that concordats partake of the nature of true contracts: "The ties that consecrated this union should have been doubly inviolable from the fact that they were sanctioned by oath-bound treaties. The Concordat entered upon by the Sovereign Pontiff and the French Government was, like all treaties of the same kind concluded between States, a bilateral contract binding on both parties to it. The Roman Pontiff on the one side and the French nation on the other solemnly stipulated both for themselves and their successors to maintain inviolate the pact thus signed. Hence the same rule applied to the Concordat as to all international treaties, namely, the law of nations, which prescribes that it could not in any way be annulled by one alone of the contracting parties. The Holy See has always observed with scrupulous fidelity the engagements it has made, and it has always required the same fidelity from the State."[18]

According to Romen, the concordat by its very nature involves an inherent difficulty as a legal treaty: "Both parties of the treaty are sovereign powers. They are consequently not subordinated to any higher authority competent to arbitrate or to judge, when a dispute arises over the interpretation or the application of the treaty in a concrete

u The State in Catholic Thought, 589.
*♦See *Immortale Dei,* Gerald C. Treacy translation, 9. ↖
» For other quotations from Leo XIII s writings as evidence of the treaty character of the Concordat, see Peter Tischleder, *Ursfrrnng und Trager der Staatsgewalt nacb der Libre det bl. Thomas and seiner Scbtde*
*· Encyclical *Vehementer nos. ta ASS,* XXXIX» 6f., *American Catholic Quarterly Review* translation, XXXI» 212.

case, or over the important problem which arises when one party contends that the treaty has become inapplicable on account of a substantial change in the circumstances which gave rise to it. This is the general problem of the *clausula rebus sic stantibus.* It means that, when a notable change has occurred in the circumstances and matters with which the treaty deals, the literal application of the treaty to the unforeseen changes would be against equity and justice, especially so if the application of the treaty provisions should endanger the substance of the independence and existence of one of the parties. If such a notable change and a danger to the existence and independence actually exists, this cannot be decided by a superior authority in a final decision because no earthly authority exists over the Church by definition, even if the utopian dream of a world state should become true, because even then the Church would be a potential partner to the world state and never its subject. This seems to be theoretically a dilemma on account of the immanent limits of the juridical form. Yet is does not prevent the establishing of a new agreement by mutual consent. At least the popes have shown much readiness to oblige in such cases."[17]

The co-operation of both powers, mutual understanding and agreement in all matters of a mixed nature, are "a consummation devoutly to be wished." But what if agreement is not achieved, what if each power proceeds to act according to its pleasure and in consequence opposing demands are made of the Catholic citizen? We have then an instance of the conflict of which the *Syllabus* speaks in rejecting the forty-second thesis: "In the case of conflicting laws of the two powers, civil law prevails." How can one determine the Church's teaching on this point? Certainly not by concluding that in such an instance ecclesiastical law prevails, as is sometimes assumed by Catholic writers, for example, by J. Tosi[18] and A. Micheltisch.[19] For thereby the contrary, not the contradictory, opposite of the condemned proposition would be the deciding norm, a procedure which in a previous chapter we rejected as illogical.[20] One must be careful not to read into the negative thesis more than is contained in it. Hence one may only conclude that the greater right is not with the State in every conceivable

[17] *The State in Catholic Thought,* 590f.
[18] In *Vorlettingen uber den SjUabut,* 105.
[19] "Der Syllabus," in *Glaaben and Witten* (Munich, 1907), XIV, 75.
[20] See âbvre, p. *29Î·*

case of conflicting laws. But neither may one assert that the greater right is with the Church in every conceivable case of conflicting laws, although usually it is. First, this is absolutely the case when there is not question of ecclesiastical law in the strict sense, but of the natural law and the Divine positive law; and secondly, this is generally the case also when there is question of a human law—that is, a law framed by ecclesiastical legislation for man's spiritual and eternal welfare. For here, as everywhere else in life, the natural norm holds sway: in case of irreconcilable difficulties it is the end that decides; that is, the higher end prevails over the lower. And from the Christian point of view it cannot be doubted that the religious—and the absolute—end of mankind takes precedence over the temporal and political end. But this is not tantamount to a categorical assertion of the superior force of ecclesiastical law. For in the first place it is not inconceivable that an ecclesiastical superior, a bishop, for instance, should by an erroneous judgment as to the status of a concrete case overstep his authority and meddle with a purely secular and political matter. In that event the State would certainly be justified in protecting its rights by protesting or by taking other measures against the ventursome interference of ecclesiastical authority. This case is interesting, of course, only from a theoretical viewpoint; for it would be difficult to cite from modern history a single example of a bishop who meddled with matters not intimately connected with the salvation of souls.

Secondly, even when there is really a question of mixed matters, it is by no means necessary to assert categorically the superior force of an ecclesiastical law; for in a particular instance preference can be due a civil law because the matter at issue is more clearly, perhaps even vitally, connected with the common weal, while for the Church the necessity or usefulness of the enforcing of a particular ecclesiastical law is more remote.

THE CHURCH SUPERIOR TO THE STATE

If we acknowledge the juridical independence of State and Church each in its own sphere of power, it does not follow that there is no distinction of rank between them; rather, we must hold firmly that the Church, by reason of her higher end or purpose, is ethically superior to the State. He would be a bad or illogical Christian who would ques-

tion that. The value and moral perfection of a society must be gauged by its purpose. For it is the purpose that circumscribes and determines the nature and mode of operation of a society and justifies its right to exist. In his Encyclical on the Unity of the Church Leo XIII says: "God indeed made the Church a society far more perfect than any other for the end for which the Church exists is as much higher than the end of other societies as divine grace is above nature, as immortal blessings are above the transitory things on the earth."[21] The different purposes of the two powers have been compared and weighed one against the other by the supreme authority of God, Who states the result of the comparison in the terrible words: "For what does it profit a man if he gain the whole world, and suffer the loss of his soul."[22] In order to express the moral preeminence of the Church over the State, ever since patristic times certain comparisons have entered into and become a lasting part of Christian literature, particularly the comparisons of soul (Church) and body (State), heaven and earth, gold and lead, sun and moon. The words taken from the narrative of the creation of the world in the Bible were sometimes utilized to stress the Church's superiority over the State: "And God made the two great lights, the greater light to rule the day and the smaller one to rule the night, and . . . God set them in the firmament of the heavens to shed light upon the earth."[23] As in the life of the individual spiritual and eternal interests should be the dominant ones and those of the State subordinate to them, so also for public life the words of Christ are of paramount importance: "Seek first the kingdom of God!"[24]

THEORY OF THE DIRECTIVE POWER OF THE CHURCH

Accordingly, the Christian State may not give any orders which make impossible or seriously hinder the attainment of the supreme purpose of the Church, namely, the salvation of souls. It must leave to the Church unimpaired that right which all theorists of Church-State relations unre-

y *Sath cognitum*, June 20, 1896, in ASS, XXVHI, 724; published in English translation »?Jw *Great Encyclical Letters of Pope Leo XIII.* 571.
a Matt. 16:26.
" ₹ I'?6- th» connection it is interesting to note the striking example of medieval triviality offered by the glossators of the *Corpus Juris Canonici* in commenting on the comparison of sun and moon as used by innocent III. Thev attempt to calculate arithmetically to what degree the papal dignity surpassed the royal dignity; one thinks t!@6? fiteater, another 57, and a third 7744%. See gloss to *Corpus Juris Canonici* edited by Friedberg, vol. II, c. 6, X, 1, 33, ad verba inter solem et lunam, 198.
**Matt.* 6:53.

servedly concede to her, even those who will not grant the Church's direct or indirect power over temporal matters. We mean the so-called "directive power" of the Church, that is, the authority and duty, by official pronouncements, admonitions, expositions, counsels, commands, to enlighten the consciences of princes and peoples, of all the faithful or of particular classes that may be in spiritual danger, to make them aware of their duties to God and religion, to instruct them as to the scope and limits of such duties. This *potestas directiva* is admitted even by Paul von Hoensbroech. He praises especially its application by Pope Gregory I, the Great, and sees in it "the religious, Catholic, anti-Ultramontane interpretation and application of Christ's words: 'Render, therefore, to Caesar the things that are Caesar's.' "[25] But there is little doubt that Paul von Hoensbroech and many of his followers would have discovered a lust for power in the conduct of that great pope if the ecclesiastico-political conflict in question had taken place in the twentieth century. This conflict came about because the Roman Emperor Maurice had issued (592) a decree that no one who was actually engaged in any public office should accept an ecclesiastical office; and he made it illegal for such a one or for a soldier to enter a monastery until the period of his service was over. Gregory praised the former provision but rejected the latter because it closed the way of salvation to many and was therefore an unjust law that was altogether at variance with the will of almighty God. In vigorous words which appear in telling contrast with the very mild tone of the rest of the letter, Gregory reproaches the Emperor for his injustice but states that he is ready to provide for the transmission of the imperial law to the provinces in accordance with the political situation of the Emperior in Italy; then, however, Gregory appends to the imperial decree his own, which gives the ecclesiastical regulations for civil servants and soldiers; the former should not be allowed to enter monasteries till they have cleared themselves of their obligation to the State; soldiers who wish to enter the religious state must first of all be carefully tested as to their conduct and must submit to a novitiate of three years; but after that they may make vows.[26]

» *Mcdemer Stoat tend katbolhcbe Kircbe,* lOf.
* J. HergenrÔther, *Katbolische Kircbe tend chrtstlicbef Stoat,* 449f. See also, Horace Mann, *The Liret of the Popet in tbg Parly Middle Ages,* (London: Kegan Paul, Trench, Tniebner, 1902). Vol. X, 117-120.

Whenever the "directive power" of the Church absolutely rejects and condems a State law, it automatically becomes an "indirect power," in as much as the teaching, warning and directing activity of the Church then assumes the character of an act of jurisdiction with consequences for the sphere of secular and political life. But if one looks closely, it becomes clear that it is not thejurisdiction_pf the Church that functions here, but only her teaching authority that verifies what isjrighLaccording_tO-.the.natural and Divine positive law. It is not the pronouncement of the pope that deprives a State law of its juridical character but the Divine law which the State law contradicts and which the pope authoritatively declares. Dr. Bockenhoff believes, therefore, that there is no justification, under the circumstances, for speaking of the exercise of the "indirect power of the Church in temporal matters" ; here, too, there is only question of the guiding and directing power of the Church (potestas directiva).[27] There is, as every Christian must admit, "a boundary line where obedience to the secular authority becomes sinful, where the higher duty to God takes precedence over the secular; but this boundary line one may not by oneself set (perhaps according to one's own advantage). Here, on the contary, the teaching authority of the Church intervenes, and is exercised in accordance with the Divine law. By the Church's decisions, made impartially and conscientiously in a spirit of strict responsibility to God, on the one hand the way for the believer in difficult situations is indicated, and on the other the State

[27] See above, pp. 87f.

Monsignor Joseph Mausbach points out that "when Gallicansim prevailed, the expression *(postestas directiva)* was understood as designating authority to counsel and to teach, and nothing further. Cardinal Hergenrother *(Katbolische Kirche und christlicher Stoat,* I, 448), too, uses it primarily by way of contrast to real jurisdiction; but he goes on to say that Gerson, who originated the system, uses the word *directiva,* only to contrast this power with the Pope's *'postestas civilis* et juridica'; and that other later theologists include in the *potesta directiva* authority not only to teach, but also to command, judge, and punish. After surveying this whole dispute, about the *potestas indirecta* and *directiva,* Hergenrother asks: 'Does not die controversy turn on the *name* rather than on the *thing?* --- In essentials the two kinds of power appear to be identical' *(ibid.,* p. 452).

"The modem advocates of the theory do not question the fact that the authority of the Church involves jurisdiction. Some (especially Dr. Bikkenhoff) add indeed, that strictly speaking, not the juridical but the teaching office of the Church is concerned, meaning that the *foundation* of jurisdiction in secular matters is the *Jus divinum,* which the Church has to expound and observe in practice, namely, the carrying out of God's law; it is not a *Jus humanum* which she creates as her own legislative will." *(Catholic Moral Teaching and Its Antagonists,* 368ff).

is protected against arbitrary rebellion. Let freethinkers and enemies of the Church inveigh as much as they will against the pretensions and encroachments of the clergy, against moral restraint and delusion of the people. It still remains a fact that for every morally minded person there exists a boundary line of obedience. But if such be the case, it is undoubtedly more to the State's advantage that the boundary line be drawn uniformly and suitably by a responsible authority than to leave its determination to the caprice of the individual. True, in that event the Church becomes a controlling factor, a real power over the State. But that is perfectly in order, since she represents a moral, not a physical power, and because after all a moral power must in some form or other assert itself, whether as individual conscience, as local religious community, as national church or as Catholic, universal Church, and obviously the Catholic Church is the most favorable form. She possesses marvellous wisdom and experience, she has only religious interests and she is independent of the State."[28]

And so we conclude our discourse regarding the attitude of the Church towards the sovereignty of the modern State. To sum up: The Church acknowledges this sovereignty and qualifies her acknowledgment in the same manner as the New Testament -writings themselves. The distinguished jurist, F. Maassen with delicate irony has lectured the Apostles from the viewpoint of the modern theories of State omnipotence: "The Apostle Paul, although he hypocritically teaches that one ought to obey the authorities that have power over us, has placed himself in the sharpest opposition to the prevailing political law and the political, institutions of his country. In agreement -with the other Apostles he challenged the sovereign rights of State power absolutely to decide as to the limits between Church and State, and thereby he denied the sole and indivisible sovereignty of the State .. . The Apostle Paul was a disturber of public peace."[28]

[28] A. von Roville, *Zuntck zur btligm Kircbt* (Berlin. 1910), 98f.
[28] *Mean Kapittl Uber frète Krrcbe and Gewiiiensfrerbett* (1876), 450.

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A. THE CHURCH'S ATTITUDE TOWARDS FREEDOM OF RELIGION

In the introduction to this study of Church-State relationships we showed that the essential difference between the modern State and the medieval State, as far as relations to the Church are concerned, may be summed up in a single statement: In contrast to the Catholic State of the Middle Ages, the modern State is secular or suprasectarian. Such is the essential difference between the modern and the medieval State in this regard, for the one other distinguishing characteristic of the modern State, namely, its sovereignty (from which springs the State's exaggerated claim to power over the Church), is closely bound up with secularism.

The modern State is an outgrowth of the political revolutions of the seventeenth and eighteenth centuries. "It is built upon the rights of man and of the citizen," states Heinrich Rommen. "It adheres to the principle of popular sovereignty. It produces a new ruling class. The clergy of the ancient regime is succeeded by the intellectual man of secular education who, in the European continental countries, is most often an agnostic or even a militant anticlerical. The nobility is succeeded by the entrepreneurs and capitalist proprietors. Often these latter are interested in a sustained influence of the Church only as long as that influence serves their interest. . . Life centers around man as the secular citizen and his economic, political, and scientific interests. Undeniably there is a strong tendency to put the religious life into the private sphere ... The Church becomes an association, â private organization of people, legally not different from clubs and associations of men with hobbies . . . Hence the social institutions, as, for example, marriage, change their meaning . . . Education means less a strengthening of the moral character; ever more and more it means technical preparation for a lucra-

tive job . . . But the process of dechristianizing society is undeniable.

"Under these circumstances the modern State became neutral in relation to the Church, however much in some countries an aura of Christian culture survived. This neutrality as a practical polity was the recognition of the fact that the people living in the State were religiously split up into numerous groups, none of which was even a considerable minority, not to speak of a majority. The peaceful separation of State and Church was thus the consequence; for it is the unified religion of the great majority of its citizens that makes the State a Catholic or Protestant State. Therefore, the modern constitutions established the principle of the free Church in the free State. When the ruling class in the modern State is violently anti-Christian, then, of course, the separation of State and Church becomes, under the name of laicism, a persecution of at least the Catholic Church, as has happened in some Latin countries. A third type of the modern State, usually possible only when the traditional monarchical element has not been overthrown, is the Christian State; that is, a State which gives civil tolerance to all religious groups, but privileges in public law to the Christian churches (and the synagogues) under the rule of equality. This Christian State practises a legal and political co-operation with the Church by concordat, thus maintaining a qualified union between Church and State. German states like Prussia and Bavaria until 1918, Switzerland, and the Netherlands are typical of this kind of Christian State, while the outstanding example of a peaceful and friendly separation is the United States. On the other hand, France under the Third Republic since 1903 and the late Spanish Republic of 1931 are examples of the militant type of separation."[1] Even more radical than this latter type, however, is the State that is under the aegis of bolshevistic and atheistic Communism; that is, the State which, as Pius XI reminds us, aims at upsetting the social order and undermining the very foundations of Christian civilization.[2]

Since the modern State does not identify itself with any creed, confession, or denomination, it grants full liberty to every citizen in respect to religion; in short, it proclaims

[1] *The StAte in Caibalic Thoxtbt,*
[2] Encyclical *Dtvini Redrmptorti,* March 19*1937· N. C· W. C. translation, 2.

religious freedom,[3] although in actual practise, in some cases, such freedom may not be exercised. True religious freedom includes three things: first, freedom to believe, to hold as true, what one wills; such liberty of creed is also called freedom of conscience, although this latter concept is broader in scope, since it extends beyond the sphere of religious conviction. Secondly, genuine religious freedom involves liberty to manifest religious conviction outwardly also, by word and deed; that is, freedom of religious profession. Thirdly, it includes freedom to practise that religion in common forms of worship, in union with others sharing the same conviction: in other words, freedom of worship.

FREEDOM OF RELIGION

Now what is the Church's attitude with respect to religious freedom? More precisely, what is the Church's attitude as regards freedom of belief and conscience? The Church's position in this matter—let us say it at once—has been branded by liberalism as unparalleled reaction and arrogance. Liberals, holding man's absolute autonomy in the intellectual, moral and social order, submit that Gregory XVI and his successor Pius IX, asserted (in discussing the Catholic point of view) that is is an erroneous, nonsensical opinion—ruinous to the Catholic Church and to the salvation of souls—to say that every man has a right to freedom of conscience and worship and that therefore this right must be solemnly proclaimed in every well-regulated commonwealth.[4] Thus the inference is frequently drawn that the Church rejects freedom of belief and regards compulsion in matters of belief, whether exercised by herself or by the State at her instigation, as justified. But this impression is due to a misunderstanding. To be

[3] In regard to varying concepts of religious freedom, Anson Phelps Stokes remarks: "It is manifestly difficult for all religious bodies to unite on a definition of religious freedom, partly because there is a line of cleavage between the Roman Catholic Church and the other communions, as the former officially claims that it is the sole authorized depository of religious truth and that consequently it has the right to be accorded special treatment in its attitude towards some matters connected with faith and morals, and partly because there is a similar division between liberals and conservatives among Protestants, Jews, and other religious groups." (*Church and State in the United States,* I, 17f.). The Declaration of Independence, the Constitution of the United States, and the Bill of Rights guarantee religious freedom to Americans. For the pertinent sections of these documents affecting religious freedom, see Stokes *op. cit.,* I, xli, xlii, where they are quoted.

[4] Encyclical *Mirart vos* of Gregory XVI, August 15, 1852. in *ASS,* IV, 538; Encyclical *Quanta (untcf* Pius IX» December 8» 1864» in *ASS* III, 162.

sure, compulsion in matters of creed is the antithesis of freedom of belief; but what is meant by the popes is not physical but *moral* compulsion; in other words, duty of conscience. What the Church refuses to acknowledge is, first of all, merely that man has the moral freedom to believe or not to believe; to believe in this or in some other manner. Neither political nor ecclesiastical authority can exercise physical control over interior conviction, since only God can enter the secret sanctuary of the mind, He alone can compel the heart. Hence the principle of Roman law, "De *internis non judicat praetor.*"[5] But to deny the ethical necessity of accepting the one true religion, once it has become known, means to assume an attitude towards this truth which the Church can never tolerate; namely, either to question the possibility of discovering absolute truth, or to deny the duty of accepting it. Modern critical and skeptical philosophy holds to the former premise. Finding it impossible to be reconciled to a church which glories in being "the pillar and mainstay of the truth,"[6] it denies the existence of absolutes outside the scientific field and maintains that with the rise and decay of culture all truth is subject to continual change and evolution. This destructive skepticism was condemned by Pius X in his rejection of the thesis: "Truth is as changeable as man, because it evolves with him, in him and by him."[7] The other alternative is equally unacceptable to the Church—i.e., that man may remain unconcerned and indifferent as regards religious truth. Rather, the Church holds fast to Christ's words: "He who does not believe is already judged."[8] Man must accept the truth which Christ has entrusted to His Church, regardless of whether it appears to his human knowledge as a cross or a yoke; he is not free to embrace some other philosophical or religious belief that perhaps appears more acceptable to his personal reasoning. The *Syllabus* indirectly affirms this teaching in its condemnation of proposition fifteen, the rejection of which is so often misinterpreted. The proposition reads: "Every man is free to embrace and profess that religion which, guided by the light of reason, he shall believe true."[9]

• St. Thomas Aquinas says: "Man can make laws in those matters of which he is competent to judge. But man is not competent to judge of interior movements which are hidden, but only of exterior acts which are manifest/* *(Summa Theologica»* Ia, IIae, q. 91, a. 4; see also IIa, IIae, q. 104, a. 5).

•Z *Tim.* 3:15.

† Proposition 58, see Decree of the Sacred Office, *Lamentabili taire,* July 3, 1907, against the errors of modernism, in *ASS.* XL, 477.

* *John* · See above, p. 27.

In his book on Ultramontanism,[10] Gotz offers an admirable explanation of the *Syllabus* by quoting a passage from P. Roh: "Your reason has the duty and the right to examine the grounds of belief and so to lead you to believe; but it has not the right to set itself up as the judge of the pronouncements of God and His teaching office, in order to reject as false what it does not understand." In the light of these words it is all the more inconceivable how Gotz could nevertheless say: "Therefore in proposition fifteen of the *Syllabus,* the principle of compulsion in matters of faith is preached by the same Ultramontanism whose champions rave about religious peace and submit proposals of tolerance."[11] The intolerance taught by the *Syllabus* is theoretical dogmatic intolerance, something entirely different from civil and political intolerance. And this kind of intolerance the Church must unflinchingly adhere to, unless she wishes to commit suicide.[12]

"Nowhere is dogmatic intolerance so necessary as in the domain of religious beliefs," says the German theologian Monsignor Joseph Pohle, "since for each individual his eternal salvation is at stake. Just as there can be no alternative multiplication tables, so there can be but a single true religion, which, by the very fact of its existence, protests against all other religions as false. But the love of truth and truthfulness requires each man to stand forth as the incorruptible advocate of truth and truth alone."[c] No matter what lengths the Church may go to in acknowledging freedom of worship and denominational parity (this we shall presently discuss in greater detail), this much is at once certain: She can never acknowledge in principle that other religious denominations are entitled to a place alongside her as sister churches with equal religious rights, "as the historical expressions of the one revelation," Christianity; in other words she can never hold that in the true religion different forms are possible. The Church can never maintain that the objective Christian revelation in its entirety is not the property of any one denomination;

[10] Der *Ultramontanismus aïs Weltanschauung,* 105. [11] *Ibid,*

[c] Although the concept of dogmatic intolerance and its distinction from political and civil intolerance has been often publicly discussed, its true meaning is repeatedly misunderstood. To cite one example in this regard, during the Church-State relationship debate in the Baden Chambers during the second half of the nineteenth century, acting State Minister Alexander von JDusch expressed hope that the dogmatic intolerance of the Catholic Church might vanish in the interest of religious peace. He was corrected by the Protestant church counselor. Professor Troeltsch, who informed him that dogmatic intolerance is to be found in the evangelical confession just as well as in the Catholic Church *(Allgemeine Rundschau,* 1910, 446).

[12] "Religious Toleration," *Catholic Encyclopedia,* XIV, 765.

that, rather, each denomination possesses merely concepts of possibly valid truths, concepts about which no decision is possible as to their objective and universal validity but only in regard to their subjective power of binding in conscience.[14] The Church holds fast to the natural rough-hewn idea of truth that acknowledges only the one truth and hence only one Church; and she condemns what is alleged to be the more subtile idea of truth that upholds the existence of differing truths that bring subjective conviction and hence different churches. The *Syllabus* has confirmed the Church's stand in this respect by rejecting thesis eighteen: "Protestantism is nothing but another form of the same true Christian religion, in which it is equally possible to please God as in the Catholic Church."

In the light of this attitude of the Catholic Church toward religious truth, the title 'the one saving Church," which she claims and which has brought many reproaches and bitter words, is readily understandable. It signifies that the Catholic Church is the only society established by Christ to impart His truth and grace and that there is no choice in respect to her, just as there is none in respect to truth itself, in the sense that one may not freely decide, as in the case of any "optional" society, to join it or keep aloof from it. The persistent refusal of one who neglects to join the Church through his own fault is condemned by the Church's Founder: ". . . If he refuses to hear even the Church, let him be to thee as the heathen and the publican."[15] Such is substantially the meaning of Pius IX in condemning the sixteenth proposition of the *Syllabus*: "Men may, in any religion, find the way of eternal salvation and attain eternal salvation." But the Church's claim to be the only source of salvation does not mean that all who are not in the Church will be lost. This same Church in 1713 condemned the dreadful assertion of Quesnel that "outside the Church no grace is given,"[16] and even earlier (1690) rejected the Jansenistic proposition of Arnauld to the effect that pagans, Jews, heretics and others of a similar stamp have received no influx (of grace) from Jesus Christ.[17] In contrast with these fanatics, Catholic dogmatic theology passes a different judgment. How much piety, god-

[14] E. Troeltsch, *Dir Trtnnang von Stoat and Ktrcbt* (Tubingen, 1907), 12 8, 7
* *Matt.* 18:17.
[15] Proposition 29 among the errors of Paschal Quesnel condemned in the dogmatic constitution *Vnigtnitnt,* September 8, 1715; in Denzinger's *Enchiridion,* no. 1379.
[16] Proposition 5, condemned in the decree of the Sacred Office, December 7, 1690; in Denzmger, *op. tit.,* no. 1293.

liness and heroic charity toward one's neighbor one meets with among non-Catholics also! In the words of Monsignor Pohle: . . The gentle breathing of grace is not confined within the walls of the Catholic Church, but reaches the hearts of many who stand afar, working in them the marvel of justification and thus ensuring the eternal salvation of numberless men who either, like upright Jews and pagans, do not know the true Church, or, like so many Protestants educated in gross prejudice, cannot appreciate her true nature. To all such, the Church does not close the gate of Heaven, alhough she insists that there are essential means of grace which are not within the reach of non-Catholics. In his allocution *Singulari quadam of* December 9, 1854, which emphasized the dogma of the Church as necessary for salvation, Pius IX uttered the consoling principle: 'But it is likewise certain that those who are ignorant of the true religion, if their ignorance is invicible, are not, in this matter, guilty of any fault in the sight of God.' ... In her tolerance toward the erring the Church indeed goes farther than the large catechism of Martin Luther."[18] For there, as Monsignor Pohle tells us, we read the words: "All who are outside the Christian pale, be they heathen, Turk, Jew, false Christian or hypocrite, even if they believe in the one true God and invoke Him, but know not how He is disposed toward them, cannot promise themselves God's grace and favor. Therefore they abide in His eternal wrath, and in everlasting damnation."[19]

After what has been said so far, the condemnation of the second half of thesis eighteen of the *Syllabus* should no longer seem strange, although it might be easy for a non-Catholic to misunderstand this proposition. In its entirety the thesis reads: "Protestantism is nothing but another form of the same true Christian religion, in which it is equally possible to please God as in the Catholic Church." The error to be rejected is religious indifferentism (which in England came to be known as Liberalism or Latitudinarianism). It holds that the particular Christian church or sect one belongs to is an indifferent matter; all forms of Christianity are on the same footing, all are equally pleasing to God and serviceable to man.[20] Here it must be

a 0t> cit P· 767. See also, Karl Adam, *The Spirit of Catholicism,* translated by Dom Justin McCann, O.S.B. (New York: The Macmillan ζο·. 1935), 191ff.
* *Deutsch Catéchismes* (1529). m *Dr. Marten Luther's Werke C^Jevas^t,* 1910), XXX. Part I, 192.
» See James J. Fox, "Religious Indifferentism," *Catholic Encyclopedia,* VII, 759«

remembered that in the condemnation of the thesis there is no intention of calling into question the fact that there are many Christians in the Protestant sects who are as pleasing to God as others who are Catholics; or that without doubt in the Protestant religion there are many, who are more pleasing to God than are many others who live within the fold of the Catholic Church but not according to her spirit. In fact, in this and similar theses it is only *principles* that are rejected, never *men* who are judged or classified.

That the rejection of freedom of conscience, or freedom to believe or not to believe the revealed truth, follows necessarily from the principles held by the Catholic Church must be admitted also by persons outside the Church. Thus, M. Kahler states: "It (freedom of conscience) depends upon the individuality of the conscience, and is opposed to the claim that one may be morally bound by an authority other than that of God. Such a claim appears in its most obvious form when an institution like the Roman Church identifies its utterances with divine revelation."21 Catholics would object only to that statement of Kahler's which suggests that the Church accepts the claim that one may be morally bound by an authority other than that of God. The Church has the adamant conviction of faith that behind her teachings in matters of faith and morality stands the guarantee of truth vouched for by God revealing.

FREEDOM OF RELIGIOUS PROFESSION

If we now turn our attention to freedom of religious profession, we enter the sphere of social and civil life, and its community of interests. For freedom of profession consists in the absence of external limitations and obstacles, namely, those that restrain or make impossible an outward manifestation of an inner religious conviction, whether by word or by sensible action.

The medieval State was unacquainted with freedom of religious profession. Only to the Jews did it grant toleration.22 But one who as a Christian expressed a religious opinion at variance with the Church's teaching and who, despite admonition and warning, finally adhered to this error, was regarded as a rebel against the State also and

» "Freedom of Conscience," *The* Nrw *Scbaff-Hertog Encyclopedia oj Religioni Knowledge,* edited by Samuel Macauley Jackson and others (New York: Funk and Wagnails, 19Q9),

a^ee Herbert Thurston, S.J., "History of Toleration," *Catholic Encyclopedia,* XIV, 292.

was punished as such. Likewise in countries where the Protestant Reformation gained the ascendancy, freedom of profession was unknown.[23] In the judgment of a Protestant professor of church law and political science, "Restraint of conscience was, in consequence of the unity of State and Church, firmly established in Protestant territories, no less than under the Byzantine emperors and the coercive domination of the papacy."[24] Even the police State of the eighteenth century was little disposed to grant freedom of profession in the full sense of the term. Witness, for example, the capricious manner in which Joseph II of Austria curtailed the autonomy of the recognized churches and intervened in their inner religious life, going so far as to forbid Catholics to recite the rosary; and finally, consider his severe measures against various sects. On June 10, 1783, in characteristic fashion he issued a decree against a deistic sect that had gained followers among the peasants of Bohemia: If a man or woman, when required to register his religious profession, reported to the district bailiff that he or she was a deist, twenty-four stripes with a leather whip were to be administered to the culprit and the punishment was to be repeated as often as the person made the same admission on the occasion of any future registration.[25] If during the nineteenth and twentieth centuries, freedom of religious profession has gradually come to prevail in most countries except those dominated by Communism, this has been accomplished not so much by the doctrines of freethinkers and the philosophers of Illuminism, such as Locke in England, and Semmler and Lessing in Germany, as through various factors in historical evolution: the great number of religious denominations, the constant infiltration of their doctrines into shifting masses of the population, the increase of communication facilities, the rank growth of unbelief and religious indifferentiam, excessive interest in the material aspects of life amid the achievements of modern culture.

The modern State grants freedom of religious profession; that is, in the first place it avoids all direct suppression of the profession of a religion and its propagation. Consequently the so-called freedom of expression—freedom

»See Paul Schanz, *A Christian Apology*, translation by Michael Glancey and J. Schobel (New York: Pustet, 1892), III, 310-314; see also, Stokes, *op. tit.*, I, pp, 104-106; *et passim*.

H W. Kahl, *Lebrsystem des Ktrchtnrchts und der Kirchenpolitih, 292*.

* Maassen, *Nenn Kapitel Sher frete Kircbe and Gewissensfreiheit. yn*.

of speech, freedom of teaching, freedom of association and assembly—can be used for religious and irreligious purposes alike. The State also refrains from, or should refrain from, all indirect restraint in favor of, or against, a definite religious confession; it should also leave the possession of civil and political rights intact and independent of the religion of the individual citizen.

To be sure, not even the modern State grants unrestricted freedom of religious profession; it considers certain limitations unavoidable. In many German states during the early part of this century the minimum age for the free choice of a religious denomination was set at the age of fourteen years. But a boy or girl can very well have an avowed religious conviction even before this age yet could be bound by this State law to perform religious acts at variance with such a conviction. The State also has the power to restrict all expressions of religious conviction incompatible with the social order. For instance, it brings before the criminal court persons guilty of murder, even though such persons, goaded by religious fanaticism, regard such a deed as heroic. As early as 1872 the Congress of the United States of America legislated against the institution of plural marriage, commonly called polygamy, which had been taught and practised by the Mormons, or the Church of Jesus Christ of the Latter-Day Saints; but the law had proved inoperative, and was later supplemented by the Edmunds Act, and later (1887) by the Edmunds-Tucker Act, which disfranchised polygamists in the territories. In 1890 the United States Supreme Court affirmed the constitutionality of the anti-polygamy statutes, and in consequence the General Conference of the Mormon Church withdrew from further solemnization of plural marriages in the Church.[20]

Now what is the Church's attitude toward the granting of freedom of religious profession by the State? She acknowledges that under present conditions there is justification and necessity for this political large-mindedness whereby the State permits everyone to say and do what seems to him to be good and just in general in the sphere of religion. The Catholic Church cannot demand, or even desire, that in the circumstances now prevailing almost everywhere, the State should restrict or suppress religious

[20] "Mormons," *Enejclofr Jie Britiaxiai* (11th ed., Cambridge and New York, 1911), XVIH, 846f.

opinions or positively interfere in behalf of the exclusive claims of Catholic truths. For in so doing she would seek something which, after the disappearance of the unity of Church and State based on the common religious philosophy of its citizens, is altogether outside the purpose and function of the State. For civil law, as the norm of the social life of all citizens of the State, can protect only what is common to all. In view of the diversity of religious opinion and profession it is impossible for the State to use its coercive might to effect the exclusive domination of the religious philosophy of a portion of its citizens. Nor would such action be desirable even from the point of view of the Catholic Church. Freedom is the sole weapon whereby the modern man can be won again to religion. If one considers the frame of mind of modern man, it becomes evident that religious truth would immediately arouse hatred if, panoplied with the coercive power of the State, it sought to make its way through the world. "Certainly error has no right, but the faithful Christian must make the best of the situation if the one *truth* be misunderstood and despised by dissenters and unbelievers. He must, in the light of existing conditions, devote himself all the more zealously and unselfishly to the service of truth. The juridical norms which regulate the peaceful co-existence of citizens of diverse religious convictions can be built only on the concept of freedom," says G. von Hertling.27

Such is the viewpoint officially championed by the Church, particularly in the Encyclical of Leo XIII on human liberty. He writes: "The Church well knows the course down which the minds and actions of men are in this our age being borne. For this reason, while not conceding any right to anything save what is true and honest, she does not forbid public authority to tolerate what is at variance with truth and justice, for the sake of avoiding some greater evil or of obtaining or preserving some greater good." Accordingly if, "it is quite unlawful to demand, to defend, or to grant unconditional freedom of thought, of speech, of writing, or of worship, as if these were so many rights given by nature to man," it likewise follows "that freedom in these things may be tolerated wherever there is just cause; but only with such moderation

" *Rtcht, Stent end GtstUtcbaft* (Kempten. 1906). 101.

as will prevent its degenerating into license and excess."[28] In an article written for the Roman fortnightly, *Civiltà Cattolica,* Rev. A. Messineo, S.J., holds that religious tolerance is an "impervious necessity," a practise of the virtue of political prudence, in view of the concrete conditions of an everchanging human society. "Right reason in matters of action—*recta ratio in agibilibus* (to use St. Thomas' expression) itself requires a prudent course of conduct on the part of a state which would adapt itself to the evident situation found in a mixed community, if people of differing beliefs are to live together in peace. But over and above any matter of prudence or Christian charity, there exists, in Father Messineo's view, a "true and proper requirement (esigenza)of justice, not towards error itself, but toward the persons who profess it." He believes in the right to exercise a tolerance "absolutely independent of any concrete situation, because it is based upon a perennial and universal requirement of the human person, and therefore is of the widest and most valid application as a practical principle of individual and public conduct."[29] Catholics in various countries who have manifested intolerance, he maintains, have failed to grasp the full implications of the traditional Catholic doctrine. Commenting on this article, Rev. John LaFarge, S.J., remarks that "these words of Father Messineo are in themselves a heartening utterance"; and that the assurance which Father Messineo is quoted as having given to the editor of *Time* is also welcome—an assurance "entirely in line with what Catholics in this country and elsewhere have been saying all along. "This is to the effect," writes Father LaFarge, "that if the adherents of the Catholic Church were to gain the upper hand in any country where they are now a minority, they would still continue to practise the same virtue of tolerance as they justly claim for their own benefit under existing circumstances."[80]

The idea that the Church holds to a principle of legal intolerance of religious freedom but favors tolerance only when it is impossible—or at least impractical—for her to choose any other course, is an opinion that cannot now be upheld in the light of recent pronouncements of Pius XII.

[28] Encyclical *Liiertas, praestantiijimam,* June 20, 1888, in *ASS,* XX, 609, 612; English translation in *The Great Encyclical Letters of Pope Leo XIIJ,* 157, 161.
[29] "La Toleranza e il suo fundamento morale," (Rome, 1950), November 4, 1950 Anno 101. 314-525,
[80] "A Catholic Statement on Tolerance,' *Amenta,* LXXXiv (January 6, 1951), 399f.

The most important of these papal discourses is his address on December 6, 1953, to Italian Catholic jurists,[31] in which he settled a question long at issue in a Catholic state. He declared that the question is whether *non impedire* (passive toleration) as regards non-Catholic religions is permitted in certain circumstances and whether positive repression may not always be a duty.

"Although it would be possible and easy for God to repress error and moral deviation, can He in some cases choose the *non impedire,* without coming into contradiction with His infinite perfection?" the Pontiff queried. "Can it be that in determined circumstances He does not give men any mandate, does not impose any duty, does not give even a right to impede and repress what is erroneous and false?" A glance at reality, the Pope continued, gives the affirmative answer. God does tolerate sin and error. Furthermore, God has not given to human authority such an absolute and universal precept, either in the field of faith or in that of Christian conscience. Neither the common conviction of men, nor the Christian conscience, nor the sources of revelation, nor the practice of the Church knows of such a precept. The affirmation, therefore, that moral and religious deviations must always be impeded when it is possible, because their toleration is in itself immoral, cannot be valid unconditionally and absolutely.

"Therefore the duty to repress moral and religious misdirection," the Pope continues, "cannot be an ultimate norm of action. It must be subordinated to higher and more general norms, which in certain circumstances permit, and even make it appear the better part, not to impede error in order to promote a greater good." The Pontiff points out that "what does not objectively correspond to truth and the moral norm, has no right to existence, to propagation, or to action. But in the interest of a higher and broader good, it is justifiable not to impede this error by state laws and coercive measures."

Religious and moral needs will demand for the entire community of nations a well-defined regulation (concerning religious freedom) valid for the entire territory of sovereign states that are members of such a community of nations. Pius XII concluded, "Within its territory and for its own citizens, each state will regulate religious and moral

[31] Allocution *Ci riesce,* in AAS. XXXV (December 16, 1953), 794-802. English translation in *American Ecclesiastical Review,* CXXX (February, 1954), 114-123.

affairs by its own law. Nevertheless, in the whole territory of the community of states, the exercise of their own beliefs and religious and ethical practices will be permitted to citizens of every state in so far as these do not turn contrary to the penal laws of the state in which these persons reside." Thus the common good must be the highest controlling principle in establishing national laws on religion.

Accordingly, Pius XII teaches that legal tolerance of other religions in a state is not a reluctant concession to force on the part of the Church, or a mere matter of expediency; and repression of false religions by the State is not the ultimate norm for solving the problem of the plurality of religious beliefs in a country.

The utterance of Pope Leo XIII quoted above,[32] suggests that according to Catholic teaching the granting of freedom of religious profession by the State must have its limitations. The State, according to Catholic belief, may not permit the spread with impunity of sects which trample under foot the supreme principles of morality and reason on which human society rests, principles that jeopardize marriage, property, human life. In this sense the *Syllabus* (in thesis seventy-nine) challenged the assertion: "It is falsely maintained that civil liberty of every kind of worship and full power granted everybody to manifest openly and publicly any opinions whatever, conduce to corrupt more easily the minds and morals of the people and to the propagation of the plague of indifferentism." Accordingly, the State, from motives of self-interest, must be careful lest under the guise of religion and piety tendencies dangerous to the State and destructive of morals seek to obtain free outlets. It must exercise a sharp control over the new and oftentimes fantastic creations that call themselves religious systems. On the other hand, the State may serenely put its trust in the great communities of the Christian religion whose doctrines of faith and morals have proved to be compatible with the common weal. The State need not trouble itself, as did Joseph II of Austria, as to whether there are in the breviary matters dangerous to the State that must be deleted, or whether the Marian sodalities which are meant to help high school students preserve the faith and the purity of their hearts are at the same time calculated to undermine the foundations of state government.

[32] See above, p. 119.

There are two other reservations which the Church and any Christian philosophy of life must make when acknowledging that the State has the limited (not absolute) right to grant freedom of religious profession: namely, that interdenominationalism must not progressively develop to such a degree as to make the separation of Church and State necessary in principle, or to cause the State to become irreligious or anti-religious. These two points will be discussed presently.

FREEDOM OF WORSHIP

When completely realized, freedom of religious profession leads to freedom of worship, which grants to every citizen the right to practice his religious convictions outwardly and publicly in common with others of the some profession; for one can hardly speak of freedom of worship if a denomination differing from the State religion is only permitted to worship within the confines of the home. From the purely religious viewpoint it is obvious that the Catholic Church cannot acknowledge any other worship to be justified save that which is willed by God—namely, her own. Therefore she cannot desire that other forms of worship increase in number, nor can she approve of any purely arbitrary concession, not justified by the circumstances, whereby the State puts various religions on an equal footing with her own. This and this only is the sense in which proposition seventy-nine of the *Syllabus,* mentioned above, is condemned. But if for political reasons (such as are rooted in the social aspects of the State) the introduction of freedom of worship proves to be necessary—and today that is the case practically everywhere—the Church does not object to such a procedure. And what is more, she will not even concern herself with freedom of worship once it has been introduced. For even though no right attaches to error, yet as regards the erring—who usually can appeal to written constitutions, special charters, or prescriptive rights based on long traditions in favor of their cults—there does exist the duty of loyalty and justice which neither governments nor secular and religious authorities nor individual citizens may shirk.[33]

Accordingly, a Catholic in the modern constitutional State can, without becoming involved in any sort of conflict with the principles of his Church, demand freedom of

[33] See Joseph Pohle. "Religious Toleration," *Catholic Encyclopedia,* XIV, 764-765.

worship for all who respect the religious and moral foundations upon which man's life in society rests.

But must not a Catholic at least deny the past history of his Church to be able to maintain his "modern" viewpoint in the matter of religious freedom? This problem we shall consider in the next chapter.

B. ESSENTIAL CONSISTENCY OF THE CHURCH'S ATTITUDE TOWARDS PERSONS OF OTHER BELIEFS

We must now examine more closely an argument which, as experience amply shows, is repeatedly advanced against the sincerity and trustworthiness of the Church in its toleration of the secular or suprasectarian State. It may be stated as follows: The Catholic Church's acknowledgement of freedom of belief and worship rests merely on ecclesiastico-political, and not on religious, considerations; it is a matter of expediency, not of principle; the fact that the Church with her faith and worship has been removed from her privileged position is regarded by her as an evil, though a necessary one. Indeed Leo XIII in his Encyclical on Human Liberty admits that, "Although in the extraordinary conditions of these times the Church usually acquiesces in certain modern liberties, not because she prefers them in themselves, but because she judges it expedient to permit them, she would in happier times exercise her own liberty; and, by persuasion, exhortation, and entreaty, would endeavor, as she is bound to do, to fulfill the duty assigned to her by God of providing for the eternal salvation of mankind."[1] If, therefore, the argument continues, the Church should ever succeed in regaining her unique privileged position in some Catholic State, she would once more restore all the institutions which in the Middle Ages made her position secure, including the Inquisition with slaying of heretics by the civil power. Paul von Hoensbroech, who considers himself an expert in matters pertaining to the Catholic Church, asserts that he knows her as no other living adversary knows her, and that he fears the worst in this respect. He writes: "The Inquisition was not, as one would like one to believe, a passing aberration, a human tax which the papacy too has paid to the brutality and want of culture of earlier times; rather, it is a system born of the primitive, abiding, Romish Ultramontane spir-

[1] Encyclical *Liberia/,* June 20, 1888, in *ASS,* XX, 809; English translation used here

it, which today is no longer active only because the papacy lacks the external power therefor. The history of the Inquisition with all its oppressions that desecrate freedom and truly shock conscience is the history of Rome exerting its power freely, the history of its basic conception of freedom of conscience, religion and worship, ever the same in all ages."[2] Such assertions and inferences would indeed be unassailable if the coercive measures which the Middle Ages utilized for the supression of dissident opinions were a necessary phenomenon resulting from the exclusive domination of the Catholic Church; not so, however, if they were merely a concomitant phenomenon attributable to historical factors of the medieval religious State, as noted above when reference was made to the right of deposing princes.[3] Hence the question arises as to what attitude must be taken, according to Catholic principles, towards persons holding different religious beliefs, and whether the principles on which these attitudes are based are always the same.

CONVERTS

It is a fundamental principle of Catholicism that it is immoral to induce a person outside the Church to enter it by utilizing any compulsory measure whatever. Leo XIII reaffirmed this point of view in clear terms in his Encyclical on the Christian Constitution of States: "In fact the Church is wont to take earnest heed that no one shall be forced to embrace the Catholic faith against his will, for, as St. Augustine wisely reminds us, 'Man cannot believe except by his own free will' "[4] Throughout the Middle Ages Christians firmly maintained what the Prince of Scholasticism stated in these words: "Among unbelievers there are some who have never received the Faith, such as the heathens and the Jews: and these are by no means to be compelled to embrace the Faith."[5] In the year 1190 the prohibition of Pope Clement III was incorporated into the Church's *Corpus Juris Canonici:* "We decree that no one may compel Jews to come to baptism against or without their will."[6] The new Code of Canon Law in canon 1351 expressly forbids the use of force in the matter of faith. The Church, of

[1] *Moderner Staat und katholische Kirche,* 3, 136.

[2] Encyclical *Immortale Dei,* November 1, 1885; Gerald C. Treacey translation, 127.

[3] *Summa Theologica,* IIa, IIae, q. 10, a. 8.

[4] C. 9, X, De Judaeis, lib. V, tit. vi, in *Carpat Junt Canonici,* Pars II. Decretalium Collectiones, edited by Friedberg, 774.

course, did not understand tolerance toward non-Christians as meaning that she was to dissuade the Christian State against using energetic measures against propaganda, for example the propaganda of Islamism, which threatened Christian culture and civilization.

FORMAL HERETICS

The Church assumes a different attitude when there is question of defection from the faith on the part of those who once were in the full possession of Catholic truth and then deserted it. St. Thomas Aquinas says: " . . . Acceptance of the Faith is a matter of the will, whereas keeping the Faith, once one has received it, is a matter of obligation."[7] The Church regards formal heretics, that is, baptized persons retaining the name of Christian, who voluntarily and obstinately refuse to accept one or more of the truths revealed by God and taught by the Church, as her recalcitrant children whom she must correct and bring back to the path of righteousness by punishment; above all, by the most severe censure, the medicinal and spiritual punishment that cuts off the delinquent from the Church and deprives him of all participation in the common blessings of ecclesiastical society, namely, the Church's worship, her sacraments and other means of grace. In fact it could scarcely have occurred to the Christians of the first three centuries after Christ to assume any other attitude toward those who erred in matters of faith. St. Cyprian (d. 258) draws attention to the contrast between the ordinances and spirit of the Old and those of the New Testament as a reason for the Christian dispensation not following the Old: "Formerly, under the old law of the carnal circumcision, rebels against the law paid for their rebellion with their lives; but now that a spiritual circumcision distinguishes the faithful servants of God, the rebellious and obstinate fall under the edge of a spiritual sword when they are rejected by the Church."[8] The Church continued to be satisfied with this spiritual punishment even when the State on its own responsibility persecuted heretics by penalties of violence, including death.

The imperial successors of Constantine soon began to see in themselves divinely appointed "bishops of the exterior," that is, masters of the temporal and material affairs

[7] See above note 5.
[8] *Epistola Ixii ad .Pomponium»* no. 4; in Migne, *P. I~»* II» 571·

of the Church. It was in fact the Roman emperors who, after Christianity became the State religion, made heresy a civil crime punishable by confiscation and banishment, and who soon declared heresy high treason against the State also and hence worthy of the death penalty. Within fifty-seven years, sixty-eight penal enactments were thus promulgated.[8] What was the reaction of the representatives of the Church? They were overwhelmingly opposed to such extreme measures. The fact that St. Hilary of Poitiers (d. circa 367) in fiery words reproached Emperor Constantius with being no better than a Nero, a Decius and a Maximianus,[10] is not significant, since Constantius was an Arian and a persecutor of Christians. But other utterances of this "Athanasius of the West," as Hilary was called, are noteworthy. Especially so is this eloquent complaint against the use of force in the province of religion. These words, found in the memorial he addressed to Bishop Auxentius of Milan, were written at a time when the Church of Milan was under Arian influence: "I ask you bishops to tell me: whose favor did the Apostles seek in preaching the Gospel, and on whose power did they rely to preach Jesus Christ? Today, alas! while the power of the State enforces divine faith, men say that Christ is powerless. The Church threatens exile and imprisonment; she in whom men formerly believed while in exile and prison now wishes to make men believe by force. . . . She is now exiling the very priests who once spread her Gospel. What a striking contrast between the Church of the past and the Church of today!"[11] The whole West was excited in the year 385 by the news of the punishment which Emperor Maximus had inflicted on the heretic Priscillian, who was accused of sorcery, and on certain of his associates at Trier; and St. Martin of Tours, who exerted himself to save the accused, refused to hold converse with those who had denounced them.[12] The execution was almost universally condemned in the Church. St. John Chrysostom, speaking of the para-

[8] A. Vacandard, *The Inquisition: A Critical and Historical Study of the Coercive Power of the Church,* translated by Bertrand L. Conway. C.S.P., (New York; Longmans, Green, 1908), 9.

[10] *Contra Constantium Imperatorem,* I, 7; in Mîgne, *P. L.,* X, 583.

[11] *Contra Arianos vel Auxentium Mediolanensem,* I, 4; in Mîgne, *P, L.,* X, 611. Auxentins, a native of Cappadocia, was made Bishop of Milan (335) through Arian intrigue after the banishment of Bishop Dionysius. He was publicly accused at Milan (364) by St. Hilary and convicted of error in a disputation held in that city by order or the Emperor Valentinian I. His submission was only apparent, however, and he remained powerful enough to retain possession of his see until his death. He was the main support of Arianism in the West.

[12] See Otto Bardenhewer, *Patrologie* (2nd ed., Freiburg, 1901), 376.

ble of the wheat and the cockle and our Lord's admonition that the cockle should not be uprooted at once lest the good wheat be also uprooted, explained the parable as meaning that our Lord wishes to prevent war and the shedding of blood; by killing heretics en masse (namely, the Arians) relentless war would come into the world.[13] St. Augustine, too, was always opposed to the use of the rack and the death penalty against heretics. Despite the fact that the Donatists by vulgar crimes, plunder and murder wore out the patience of the imperial power, Augustine pleads their cause with the Proconsul of Africa: "There is only one thing I fear from thy justice, and that is that it will consider the enormity of the offenses committed without sufficient regard to Christian clemency. Do not act in that manner, we beg thee in the name of Jesus Christ. We do not desire to take vengeance on our enemies. . . . We love them, and pray for them. . . . We hope that terror of the laws and judges will enable them to escape from eternal condemnation. We do not desire their death. . . . Forget that thou hast power to kill, but do not forget our prayer. We pray thee not to put them to death, as we pray our Saviour to convert them. . . . Remember, moreover, that these ecclesiastical causes only come before thee for trial on the petition of the clergy . . . If thou shouldst pass sentence of death, thou wilt receive no more of our complaints. We would rather be killed by these criminals than institute proceedings which may result in their being put to death. . . ."[14]

Nevertheless, Christian antiquity did not speak out against every intervention of the State in those days in behalf of ecclesiastico-political unity and for the suppression of heresy. Even St. John Chrysostom, who calls the killing of heretics an unpardonable crime, when explaining the parable of the wheat and cockle, asserts that Our Lord does not forbid us to keep a tight rein on heretics, to deprive them of freedom of speech and to break up their meetings.[16] Of the greatest importance in this respect is the attitude of St. Augustine, because in later times it served as a basis for a stricter and more ruthless persecution of heretics than he intended. For years he was opposed to all coercive measures

u Homilla xlvi, al. xlvii in Matt xiii, cap. 1; in Migne, *P.* LVIII, 477.

14 Epistola c ad Donatum, nos. 1 and 2; in Migne, *P. L.,* XXXIII, 366f. See also *Epistolae cxxxiii tt cxxxix ad Marcellinnm,* in Migne, *P. L.,* XXXIII, 555-558· *Etirtali cxxxiv ad Aprin^ittm,* in Migne. *P. L„* XXXIII. 510-512· *cptsroia*

" See above, note 13.

for the conversion of the Donatists in order to avoid pseudo-conversions; but later on, the judgment of his brother bishops, as well as his own experience, led him to change his opinion and to prefer a mitigated form of coercion (exile for their bishops and priests, confiscation of their church property, flogging and fines). The favorable results achieved by civil intervention, as well as the aggressive anti-social and revolutionary character of the heretics of his time, which seemed inevitably to demand strict measures to safeguard public security, were the proximate reasons why Augustine modified his original viewpoint. But what is more, he sought by abstract reasoning to establish the right of the State to use force for the suppression of heresy and schism. He looked upon the coercive measures of the State not so much as a punishment as rather a deterrent, a powerful corrective, a painful healing process, called forth by compassion and love for the erring. But it cannot be proved that his attitude in this matter was an essential result of his basic idea of the spiritual pre-eminence of the Church over the State.16

To sum up: The ecclesiastical point of view during the first five centuries of Christianity may be stated as follows: (1) The Church should for no cause shed blood (St. Augustine, St. Ambrose, St. Leo I, and others) ; (2) other teachers, however, such as Optatus of Mileve and Priscillian, believed that the *State* could impose the death penalty on heretics in case the public welfare demanded it; (3) the majority held that the death penalty for heresy, when the heresy was not civilly criminal, was irreconcilable withfthe spirit of Christianity. The help of the civil arm was therefore not entirely rejected; on the contrary, as often as the Christian welfare, general or domestic, required it, the secular power was left free to stem the evil by appropriate measures.17 In the seventh century St. Isidore discusses this question in practically the same terms as St. Augustine.18

Germany during the Middle Ages did not at once take over the secular legislation of the Roman State against heretics. When Clovis became a Catholic, the conversion of the German Arians was not accomplished by force, although they were not granted freedom of worship. During

16 Joseph Mausbach, *Die Etbik des beiligen Augustinus* (Freiburg, 1909) I, ?45f.
17 See Joseph Blotter, "Inquisition," *Catholic Encyclopedia,* VIII, 27.
18 *Sententiarum,* lib. III, cap. li, nos. 4-6; in Migne, *P, L., VXXXm,* 723.

the long dominion of the Merovingians and Carlovingians, heresy was not regarded as a civil crime, and was not punished with a civil penalty. The question of the right of the sword was not raised for the Church during the ninth and tenth centuries, but there is no doubt as to the answer it would have received had it been raised at that time.[19]

From the eleventh century accounts of the execution of heretics become more numerous. This increase is not due to new laws; rather, it stems from an enraged populace which demanded the execution of the disturbers of the peace, and which, fearing the clemency of the priests, invaded the prisons in the same fashion as a lynching crowd in modern America, and thus drew upon themselves the condemnation of the Church.[20] Deplorable as these excesses are, to be fair one must measure them in the light of the temper and the civilization of the times. We have become so callous by custom that even the most monstrous and blasphemous attacks against those things we hold sacred scarcely disturb us. But when in the times of the oneness of faith and religious fervor a heresiarch, Peter of Bruys, for example, ridiculed Baptism, holy Mass, almsgiving, purgatory, and on Good Friday burned a pile of crucifixes, and roasted meat in the flames,[21] it is understandable that one day a mob should seize him and drag him to the stake. Then, too, that the selection of death by fire was the penalty for heretics owes its origin to the custom of burning sorcerers in Germanic pagan times.

Hence the occasional execution of heretics during this period may be ascribed partly to the arbitrary actions of individual rulers, partly to the fanatical outbreaks of the overzealous populace, and in no wise to ecclesiastical laws or the ecclesiastical authorities. There were already, it is true, canonists who conceded to the Church the right to pronounce the death sentence on heretics; but the question was treated as a purely academic one, and the theory exercised virtually no influence on real life. Excommunication, proscription, imprisonment and so forth were indeed enforced but more as forms of atonement than of real punishment; and capital punishment was never inflicted.[22]

Towards the end of the twelfth century mob justice

[19] See Vermeersch, *Tolerance,* 78f.
[20] Vacandard, *op. cii.t* pp. 33-49.
[21] See Petrus Venerabilis, *Epistola adeetsns Petrobrnsianos;* in Migne, P. L., CTY vχτχ
[22] J. Blotter, *op. tit.,* p. 28.

yielded more and more to the State, acting in concert -with the Church to defend—by rigorous measures—ecclesiastical unity against religious revolution. During this period powerful voices within the Church could still be heard warning against the punishment of heretics by the executioner's sword,[23] but they became ever less frequent. More and more the principle was accepted that heretics found guilty by an ecclesiastical court should be punished by the civil power. One of the main reasons for this change, we are informed by a modern historian of the Inquisition,[21] is to be found in the character of various sects of that period (especially the Catharists), which menaced not only ecclesiastical unity but also the very foundation of civil society. These sects were not composed of priests and monks who engaged in their speculations behind monastery walls and on the benches of schools; their members had a mania for propaganda and made proselytes among the laity; their disputed questions, brought into the market place, very soon became realities. There can be doubt of the grave danger inherent in the fanatical spread of a doctrine which rejected the construction of churches, the veneration of the cross, oaths, war, civil authority and matrimony, and which granted its partisans, provided that they had not yet received the so-called baptism of the spirit (which generally was supposed to occur on one's death bed), the fullest liberty to satisfy their lusts, since they would not thereby imperil the certainty of their salvation. H. C. Lea, who cannot be suspected of partiality toward the Catholic Church, writes : "However much we may deplore the means used for its (Catharism) suppression and commiserate those who suffered for conscience's sake, we cannot but admit that the cause of orthodoxy was in this case the cause of progress and civilization. Had Catharism become dominant, or even had it been allowed to exist on equal terms, its influence could not have failed to prove disastrous."[25]

It cannot be denied that it was to the interest of the State and it was the right of the State to resist with force such sects as had publicly written revolution and anarchy on their banners. That in so doing the State employed very severe measures and even legally imposed the death sentence is further explained by the revival of Roman law and

» See *J.* Hergenrother. *Kafboliscbe Krrcbe and cbristlicber Stoat,* 560.
*· Th. De Causons, *Historié de l'Inquisition en France* (Paris, 1909), I, 219. See also, *Slimmen ans Maria-Laacb* ÇL909)» vol. 77, 263.
History of the Inqumtion tn the Middle Ages (New York, 1888), I, 106.

its enactments against heretics, as well as by the intimate connection of the Catharists with the Manicheans, against whom the severity of the Roman imperial laws had been specially directed.[28] "It seems to me," says the historian De Cauzons, "that with regard to certain heretics who themselves indulged in the shedding of blood, murder, incendiarism, and so forth, it would have been quite impossible during the medieval times to have maintained the security of the social order without having had recourse to cruel chastiments. To be sure, we should prefer now that the Church had left it to the State alone to suppress such excesses. But we may not forget how intimately they were associated with one another, socially, civilly, religiously, and how difficult it was for the one to intervene without the other."[27]

The statements of distinguished individual churchmen of the Middle Ages intimate how their solicitude for the menaced common weal, for Church and State, for the inviolable unity of Faith, was in conflict with the conviction that spiritual errors, so long as they remain only in that category, should be fought with spiritual weapons only. This is especially true of St. Bernard. He lays down the axiom, "Let us capture heretics by argument not by force";[28] that is, let us first refute their errors, and if possible bring these heretics back into the fold of the Catholic Church. When he heard that a mob had applied lynch law, to certain heretics, he declared: ". . . . But while I may approve the zeal of the people for the faith, I cannot approve their excessive cruelty; for faith is a matter of persuasion, not of force *{fides suadenda est, non imponenda).*" But then immediately he envisions again the havoc that may befall Christian society by a merely speculative treatment of heretics, and so he adds: " . . . although without doubt it is better that heretics be coerced by the sword—that is, *that* power which 'not without reason does . . . carry the sword, for it is God's minister, an avenger to execute wrath on him who does evil' (Rom. 13:4)—than that heretics be permitted to seduce many by their error."[20] St. Bernard was always faithful to his own teaching that obstinate heretics should be excommunicated by the bishop, to prevent their doing further harm; if occasion require it,

«•See Vacandard, *op. cit.,* pp. 10-12.
** *Op. cit.,* p. 489. note.
28 *Sermo Ixiv in Cantica,* no. 8; in Migne, *P. L.,* CLXXXHI, 1085.
» *Sermo Ixvi in Cantica,* no. 12; in Migne, *P. L.,* CLXXXHI, 1101.

the *civil* authority should arrest them and put them in prison. Imprisonment was a severe enough penalty, because it prevents their dangerous propaganda. The councils of the period voice the self-same teaching.30 Such was the theory of the twelfth century.

And thus during the thirteenth century, events led to a mutual procedure on the part of the popes and the civil power against all heresy and to the gradual organization of the Inquisition (established about 1231 A. D.), a special ecclesiastical institution for combatting or suppressing heresy. By means of the Inquisition heretics convicted by an ecclesiastical court who obstinately persisted in their error were handed over to the secular power to receive punishment according to civil law; from the time of the legislation of Emperor Frederick II this punishment consisted in death by fire.

The institution of the Inquisition is long since a thing of the past. It is not our task to evaluate it factually or. from the viewpoint of legal history. "The history of the Inquisition," writes Father Max Pribilla, "still needs further study. In the past it has been exaggerated and distorted because of prejudice and lack of attention to the peculiar circumstances of the age. But further study will not alter the fact that while the Inquisition was a tragic thing in the history of mankind and of the Church, it does not constitute an essential element in the disciplinary code of the Church."31 Since we are dealing with Church-State relations, the only point that immediately concerns us is the consistency of the Church's attitude toward heresy: to establish whether the Church whose medieval representatives invoked the aid of the State for the violent suppression of heresy, and the Church of today (which recognizes the irrevocable secularization of the State and the coexistence of the most varied beliefs in every land imposing the principle of state tolerance and freedom of belief upon rulers and parliaments as a dire necessity and as the starting point of political wisdom and justice) is one and the same in her basic attitude toward heresy. Catholics are frequently asked to choose one or the other of these alternatives: either your Church at heart desires the return of the days of the Inquisition and regrets that the present-

» See Vacandard, *cit.,* pt>. *46-49.*
at "Dogmatic Intolerance and Civil Toleration," TA/ *Month, New* Series. IV, (October, 1950), 255. This article is translated and adapted from the original. "Dogmatische Intoleranz und bürgerhche Toleranz," *f/tmnrtn aer Zeit,* CXLIV (April, 1949), 27-40.

day conditions make it impossible for the State to lend its sword to the restoration of unity of faith, that the modern State, because of changed conditions, is no longer willing to send anyone to the stake for his religious opinions—and in this event the Church's acknowledgment of religious freedom is intrinsically insincere—or the Church has revised her ideas as to her exclusive possession of religious truth and the punishability of religious error.

THE CHURCH EXPRESSLY DISTINGUISHES BETWEEN "MATERIAL AND FORMAL" HERETICS

Actually there is no justification for either of these alternatives. For in the first place Christians who hold beliefs different from ours and with whom we come into daily contact are generally not heretics at all in the criminal and penal sense of that term.[32] Therefore not even the spiritual punishments, to say nothing of other kinds of penalties, can be said to be applicable to them. The penal legislation of the Church was directed solely against formal heresy—that is, open, malicious and obstinate rebellion against the divinely instituted teaching authority of the Church. Now a man born and nurtured in heretical surroundings and with prejudices against the Catholic Church may live and die without ever having a doubt as to the truth of his creed; hence willful and obstinate adhesion to error cannot be assumed but must be proved in each individual case. St. Augustine called attention to "the great distinction" between culpable and inculpable heresy, between a heretic and those who believe in heresy. "Even though the doctrine which men hold be false and perverse, yet if they do not maintain it with passionate obstinacy—especially when they have not devised it by the rashness of their own presumption but have accepted it from parents who had been misguided and had fallen into error—and if they are with anxiety seeking the truth and are prepared to be set right when they have found it, then such men are not to be counted heretics."[33] Today too, it cannot be repeated often enough that baptized members of Christian (non-Catholic) sects are not the same as heretics, and truly one does the Church a grave injustice by assuming that she places a convinced non-Catholic in the same category as an apostate priest, for example, who fancies that henceforth

« Canon 1525, |2, *Code of Canon Law.*
n Ephtola xliii, no. 1; in Migne, *P. L.t* Ii, 160.

his life's task is to defame the mother from whose breast he once drank the milk of Catholic truth. For those who err through no fault of their own the Church has no rod of spiritual punishment, let alone any coercive measures whatsoever, but only prayer and a mother's love for her erring children. Therefore in so far as the Church's penal legislation is concerned, they are in the same position as persons outside the pale of Christianity, but unlike these latter persons they are infinitely closer to her motherly heart since they have been committed to her care by Baptism. Karl Adam says, "The Church's claim to be the Church of salvation by no means excludes a loving and sympathetic appreciation of the subjective conditions and circumstances under which heresy has arisen. Nor is her condemnation of heresy always at the same time a condemnation of the individual heretic."[34] Pope Pius IX in an allocution of December 9, 1854, declared: "It must be regarded as true that he who does not know the true religion is guiltless in the sight of God in so far as his ignorance is invincible. Who would presume to fix the limits of such ignorance, amid the infinite varieties and differences of peoples, countries and mentalities, and amid so many other circumstances? When we are free from the limitations of the body and see God as He is, then we shall see how closely and beautifully God's mercy and justice are conjoined."[38]

But the situation is different when there is question of real or formal heretics, that is, persons who in spite of adequate instruction fall away from the Church and obstinately persevere in their defection; such conduct, according to Catholic teaching, necessarily implies grievous culpability. In the eyes of the Church such persons are, by virtue of Baptism, subject to her authority before and after their defection, and the Church seeks to induce them to correct the error of their ways by severe penalties, especially by excommunication. But if such punishments generally do not produce the desired results because of the indifferentism of modern society, surely penalties of a temporal nature would accomplish even less, to say nothing of the fact that such punishments could not be carried out at all against the will of the persons concerned. But does the

m *Tbt Spirit of Catholicism,* 200.
m Sinrulari quidam, allocution against rationalism and indifferentism; in *Pii IX Pontificis Maximi Acta* (Rome, 1854). I, 626f.

Church in fact claim the right to proceed against her disobedient and recalcitrant children by means of *temporal punishments?* There can be no doubt that she does, especially in view of the condemnation of the twenty-fourth proposition in the *Syllabus,* which denies that the Church has the power to employ force.[36] And even at the present time the Church cannot waive all claims to the exercise of this power, or she would have to allow an apostate pastor, for example, to retain the income of his benefice. But apart from this consideration, the "curialist" canonists,[37] too, acknowledge that during the era of a refined civilization and a sensitive awareness of freedom this exercise of the Church's penal legislation is inappropriate and therefore impracticable. Felice Cavagnis (died 1906), a canonist and cardinal of the Roman Curia, remarks: "When we say that the Church can apply temporal penalties, we do not inquire for what crimes; for that is another question. Likewise we do not say that she can do so to advantage at any time; for what is inadequate for a people on a lower level of culture is fully sufficient for a people on a higher level; what is adequate for the former would be excessive for the latter. . . . Therefore we must defend the right of the Church as such, but not every exercise thereof."[38] J. Hollweck agrees with this statement and adds: "One can therefore admit the principle, but reject its applicability for the present age."[38]

But what of the further question: Has the Church, at least in principle, the right to impose *temporal punishments of every sort?* No, for just as in the case of all her power, so too her penal power is restricted by the spirit of mildness and mercy of Christ, her Founder and Lord.[40] Punishments incompatible with this spirit are therefore excluded also

** Especially since the phraseology of the *Syllabus* was explained more definitely and its authority as regards the point at issue supported by the Encyclical *Quanta cura* (December 8, 1864)» which was officially dispatched together with the *Syllabus* and undoubtedly contains doctrinal decisions issued by the Church's teaching authority. This Encyclical states that the Church has the right to punish transgressions of her laws by inflicting temporal punishments *{poenis temporalibus).* Abbé Vacandard seems to attach too much weight to the work of Don, Salvatore, who stands almost alone in his claim that the constraint imposed by ecclesiastical law is by divine right exclusively moral constraint. See Vacandard, *The Inquisition,* 252f. See also, *Revue au clergl français,* XLVI (1906), 579ff.

17 For a full explanation of the term *cartalist,* which denotes those who held that the secular ruler receives his authority only through the pope and not directly from God, see Rommen. *The State in Catholic Thought,* 534.

» *Institutiones juris publici ecclesiastics* (3rd ed.. Rome, 1899)» I. p. 295.

w Hergenrôther-Hollweck, *Lebrbucb des katboltschen Kircbenrechts* (3rd ed., Freiburg, 1905), 541. Hollweck was a member of the Roman Commission for the new codification of canonical (penal) law.

*°St. Augustine, speaking to high officials of the State and dissuading them from inflicting punishment of death and mutilation on heretics, points again and again to the *mansuetudo Christi, mansuetudo catholica,* see above, p. 128, note 14.

in principle. Capital punishment is certainly to be reckoned among these. "We freely admit," says the Jesuit Father Vermeersch, "that from the sixteenth to the eighteenth centuries theologians and canonists claimed for the Church the right to inflict capital punishment for certain offenses in case of necessity. . . . Great as is the authority of such distinguished writers, they are but human; and without detracting from the respect due to them, we have in the present case very good reasons for declining to follow them." After reviewing the evidence of tradition, he continues: "For twenty centuries the Church has had to deal with heretics and criminals, and never, even during the thousand years when she had every facility for doing so, has she passed an irreparable sentence. . . . Armed with formidable spiritual weapons to defend the faithful and preserve them from contagion, she has the power to punish her guilty children; but it is the power of a mother who never gives up hope of a great joy, the joy of converting and saving them. ... If since the thirteenth century some great authors have taught otherwise, and if the language of the laws themselves (though containing no mention of capital punishment) is susceptible of a different interpretation, we desire to express our opinion with due modesty, but we cannot change it without contradicting what seems to us the true tradition of the Church."[41] Then, too, capital punishment is incompatible with the end or purpose of the Church, which does not concern only the common good, as does the end of the State; for the Church is not merely a society—it is also an institution of salvation that is to lead every individual to intimate union with Christ through grace, and to eternal bliss. Therefore the Church can never inflict a punishment which, because of the impenitence of the delinquent that often persists till death, puts a violent termination to the period of grace and amendment; but the State can do so, for it is still able to accomplish the purposes of retribution, and deterrence of others even though the corrective purpose be impossible of achievement."[42] Father Vermeersch states the formula of the Church's right to punish in these words: "Originally the Church had at her disposal spiritual punishments, and afterwards reparable punishments and we recognize in her the right to claim the assistance of the State in the application of

Toleranct, 63» 72, 84f.
« See *ibif„* pp. 85-100 for a full treatment of the argument from reason.

those temporal punishments which, in view of her spiritual end, she considers it proper in certain circumstances to prescribe or inflict. . . . But if we confine ourselves to the inherent power of the Church, that power which she possesses always and everywhere, we consider that her power is limited to those penalties, spiritual and temporal, which find their last sanction in the supreme penalty of excommunication."[43]

The distinguished Protestant canonist Paul Hinschius admits that the Catholic Church "has maintained that she can neither threaten with, nor impose, such punishments (as death and mutilation), and that, therefore, should it be necessary to do so only the secular authority may and should establish and carry out such penalties"; he further states that, "particularly every exercise of criminal competence and co-operation therein is formally forbidden to clerics." Again, he says, "Also, as regards criminals condemned to capital punishment by the civil authority the Church has from the beginning used her influence that they be spared such punishment in the interest of their amendment. Likewise the development and vindication of the right of asylum rests on the same conception, as does the directive that at the surrender of a degraded cleric to the secular power (one deprived of his dignity and reduced to what is technically called lay communion) the Church must explicitly intercede in favor of his exemption from the death penalty. Formally the Church has maintained this point of view also in her attempts to suppress heresy; in practise however, she has not always done so; in as much as there is question here of her most vital interests, she not only at times did not intervene in the application of the death penalty (by the State) or the spread of its use, but actually sanctioned it and used her influence in a decisive manner to ensure its universal introduction."[44]

THE CHURCH AND STATE INTERVENTION IN HER BEHALF

The last part of this statement of Hinschius introduces the question as to whether today the Church still regards as permissible State intervention in favor of her exclusive position, or whether she defends a view at variance with her medieval attitude. It is certain that the Church does

[43] *Ibid.*, pp. 100-102.
[44] *Kirchenrecht*, V, 50.

not change her principles. As Friedrich Maassen shows, by no means does she subscribe to the opinion that in principle "the Christian religion itself is contradicted when the Church is given preference by the State over non-Christian religions, or even when she is given preference over other Christian denominations."45*While the Church admits that under present conditions the State no longer has the vocation of intervening in favor of her exclusive privileged position as the one true religion, she does not acknowledge as a principle, a norm that admits of no exceptions, that "in our times it is no longer necessary that the Catholic religion should be the only religion of the State to the exclusion of all others whatsoever."49 Indeed in those lands where she still enjoys a privileged position as a State Church (e.g., Italy and Spain), says Monsignor Pohle, the Catholic Church would not allow herself to be driven from this position without protest. For she not only has a right but even an obligation to offer such protest. For a justly acquired right may not be surrendered in silence.47 Thus in the middle of the last century when the Republic of Columbia, at that time a purely Catholic country, granted freedom of worship to all persons without exception coming to reside therein, Pope Pius IX (1852) solemnly protested against such legislation.48

On the other hand no one, even if he be versed only in history, will believe that the Church—should she again attain sole supremacy in some lands or universally, and should she become closely associated with the State—could desire the restoration of the medieval Inquisition or bloody persecutions against apostates from the true Faith. But this by no means implies that she places herself in opposition to the Church of the Middle Ages. For the medieval Church did not teach that the State must inflict the death penalty on heretics who refused to be converted. She merely acknowledged that in view of the conditions that prevailed

* *Kapitfl Sber frtir Kircbf und frtit Grwisstftsfrtibtit,* 20.

" *Syllabus,* thesis 77. Father Max Pribilla points out that "This was said in 1864; since then events have altered the face of the world. At any rate, neither this nor any other declaration justifies the view that a Catholic majority must deny religious freedom to the non-Catholic minorities. Both Goyau and Vermeersch rightly point to Belgium as a practical example of the contrary, and Belgium Catholics have not been accused of offending against Catholic principles. Above all, Catholics have a duty to uphold religious freedom where it has been guaranteed by the constitution or by treaty." *(Dogmatic Intolérance and Civil Toleration,* 258).

v "Religious Toleration," *Catholic Encyclopedia,* XIV, 769-

➧ See above, p. JOf.

in the medieval (theocratic) religious State, the State was justified when it judged those who denied the doctrines, laws, and ordinances of the Church to be rebels also against the civil power ("public enemies of our kingdom," as the heretics of Spain were called by Pedro II of Aragon at the first official introduction of the death penalty in 1197),[48] and made them answerable for the crime of high treason. That the State commits an injustice, "a sin against the Holy Spirit," when it punishes with death a convicted and contumacious criminal against the ecclesiastico-political power, (as Luther taught),[60] the Church indeed refused to acknowledge. Moreover, as has already been noted, the Church asserted often and strongly enough that it befitted her to urge the State to pursue a milder course. Even during the time the institution of the Inquisition was in the process of formation, Pope Innocent III proposed a directive which Pope Gregory IX, in whose reign the Inquisition was established, inserted into the Church's Code of Canon Law, in a passage that lays down the principle governing the relation of ecclesiastical and civil power. This directive states: "The Church must effectivelly intercede that the sentence for a degraded cleric be kept within due bounds outside the danger of death."[61] This was a way for the Church to inculcate more and more in her ministers the spirit of mercy which Jesus Christ had left them as an inheritance.[62]

It is therefore certain that the stand taken by those representatives of the Church who favored the bloody persecution of heretics by the State was much less in accord with the principles of the medieval Church—and for that matter, of the Church throughout the ages—than the definite and decisive refusal with which the Church today would reject any such help from the rulers of the State. "Let us assume," a modern historian remarks, "that all the blood-curdling tales of the Inquisition were completely true and that there was absolutely no grounds for excuse, no extenuating circumstances for its ruthlessness; the only inference that could be drawn therefrom would be a frightful aberration, a shocking brutalization of the clergy and

[48] G. Schürer, in *Staatslexicon* (3rd. ed., Freiburg, 1909)· II, col. 1394.
[60] Thesis 33 of Luther, condemned by Pope Leo X in the Bull *Exsurge Domine,* June 13, 1520; See Denzinger-Bannwart, *Enchiridion,* do. 772.
[61] De verborum significatione, c. 27, X, V, 40, p. 924, in *Corpus Juris Canonici,* edited by Friedberg. Pert. 11.
[62] See Vermêersch, *op. cit.,pp.* 146455. for a discussion of the objection that the prayer for mercy which the Church compelled het inquisitors to make was a sham and a subterfuge.

people of that age. The Church herself . . . was preserved by God's guidance and by countless pious and humanitarian elements so that her inmost essence was not affected by such conceptions, and no vestiges thereof made their way into her doctrinal system. It must be admitted that a Divine power resides within her, in virtue of which she was able to preserve her essential being even through such wild times, just as she saved herself in many another perilous crisis."[53]

[53] Albert von Ruville, *Zurück zur heiligen Kirche* (Berlin, 1910), 138.

4. (J/ic βαMiὐ anJtie Question of ôejia/taiien a/C/iuiïch anJState

A. NATURE OF SEPARATION

In a previous chapter we have shown that the granting of freedom of religious prefession and the indifference of the State to the religious profession of its citizens may not develop to such a degree that separation of Church and State becomes necessary in principle. Before discussing the nature of separation and its principal types, it is proper to recall briefly the first appearance of separation on the stage of history.

Separation of Church and State is of comparatively recent origin. The idea occurs perhaps for the first time in Luther's spiritualistic concept of the Church in his earlier years, when he burned the *Corpis juris canonici* (1520). In this symbolic act, writes H. Rommen, Luther struck at the visible Church with its hierarchy, its sacraments and canon law. "Surprisingly soon," says Rommen, "Luther gave up this idea, and Lutheranism surrendered to an Erastian subjection under the prince as *summus episcopus,* that is, to the strictest union of Church and State with the Christian ruler as the head of an organized Church and with membership of all subjects in this Church as a form of political homogeneity. Many sects tried a separation in the times after Luther. Yet here, too, the sects showed remarkable tendency to let the whole realm of civil and political life be controlled by their religious dogmas, whenever they could do so, as, for instance, the early Puritans in New England showed in their theocracy, which is a union between Church as an organized religious group and the political community. Only after the principle of tolerance had given the religious minorities a guaranty of non-interference by the government and after acknowledgement of the freedom of conscience as a human right in states without a unified religious majority, could the idea of a separation of Church and State arise. From now on the State not only retires from any intervention in the spiritual sphere, but declares full indifference to, and disinterested-

ness in, the religious opinions of its citizens and the organized religious groups of the State, thus separating man as a church member from man as a citizen. Politically the sphere of religion is wholly and strictly neutralized, and the State becomes a secular institution with a Christian atmosphere as long as the majority of the citizens hold some essential tenets of Christian doctrine and morals. The State may become a wholly secularized non-Christian State when, in its external and internal policy, even these Christian tenets are surrendered. Then even the Christian religious faith of a group of its citizens is as indifferent to the State as is membership in a club for the promotion of spiritism or of vegetarianism."[1]

What is meant by separation of Church and State? How does one arrive at a more or less accurate definition of its essence? Is it perhaps by way of pure speculation, with no immediate concern with separation as an accomplished fact in a group of countries? That would scarcely be possible; indeed it would be as unrealistic and useless as are the triviliaties of those natural-law philosophers who construct out of their inner consciousness complete systems of law and then pass them off as natural, moral law. K. Rothenbücher, in his comprehensive work dealing with the separation of Church and State,[2] chose the opposite method exclusively, taking concrete reality as the basis of his definition. After having meticulously examined the juridical relationship of Church and State in the various countries where separation is established, he strives by comparison, and by a systematic grouping of common elements, to arrive at the distinctive characteristics of separation. But he is well aware of the fact that this juridical comparison cannot lead to a normal concept of separation; For the type and degree of separation in various countries manifest such varied and often contradictory characteristics that it is not possible to reconcile them, to unite them in a simple definition. One arrives at such a definition only by a method that stands midway between the purely speculative and the historical, comparative methods. The historical development of the relations between Church and State shows a gradual advance from the most intimate unity in the medieval religious State to an ever-increasing divergence leading to the modern parity

[1] *The State in Catholic Thought,* 598f.
[2] *Die Trennttng von Krrcbe und Stoat* (Munich, 1908).

State—hence, a progressive separation. Now if in thought one removes, one after the other the relations, which exist between Church and State in a parity State, one arrives at the minimum of contact which may be designated as true "separation." But complete isolation of the two societies is neither achievable in practice nor devisable in theory. This will be shown in various ways during the course of our investigation; and, apart from other considerations, such separation must reckon with the hard fact that both societies—Church and State—consist of men who are at once citizens of the State and members of the Church.

Now if, according to the method just described, we wish to illustrate specifically the juridical status created by separation, we must distinguish between the juridical effects separation produces as regards religious societies as such and its juridical effects upon the individual citizens of the State.

THE EFFECTS OF SEPARATION AS REGARDS RELIGIOUS SOCIETIES

According to Rommen, in general the constitutional principle of separation implies the following. "First, no religious group or Church enjoys any juridical privileges; none receives any direct or indirect financial support from the State. . . . Secondly, the churches and the religious associations, the parishes and dioceses, are legally organized on the basis of the civil law, the law of the land. They are not corporations of public law, that is, with privileges and prerogatives acknowledged by the State, such as the right to make laws, to levy taxes, to be exempt from certain rules of civil law. In the United States cities and towns are corporations of public law. Thirdly, from the standpoint of secular law the organization of the churches is left to the will of the members. . . . Fourthly, the legal relations between Church and State are reduced to a minimum. The State may regard the Church as a social and spiritual influence able to affect a certain internal and external policy favorably or unfavorably. But legally the Church and the State have no official relations with each other. The separation presupposes full religious freedom and at least a kind of government in which man as a believer is separate from man as a citizen."[3] Such was Leo

XIII's view of separation of Church and State. It was this separation which he declared was the result of divorcing "human legislation from Christian and divine legislation."[4][5]

TWO TYPES OF SEPARATION

Two types of separation may be distinguished: the radical or militantly hostile type and the peaceful, friendly type. We find the first in the so-called anti-Catholic countries which have been under the influence of anti-Catholic intellectual and social groups. The second has found its best expression in the United States.

A. The *radical* type of separation, militantly hostile to the Church, has been developed especially in France. The Law of Separation of Church and State in 1905 proceeded from the principle that the State professes no religious belief. When religious worship ceased to be a department of public service, the Chambers, in order to replace the institutions which had been suppressed, brought into existence certain private associations for religious worship *(associations cultuelles)* to which the Church's property could then be transferred. The Council of State, a purely lay authority, was to have the right to pronounce on the orthodoxy of any *association cultuelle* and its conformity with "the general rules of public worship." Thus public worship was to be withdrawn from the care and protection of the State and yet remain under the dictatorial control of the State. After Pius X had prohibited the formation not only of *associations cultuelles* but of any form of association whatever, the State placed public assemblies of religious worship in the same category as ordinary public gatherings. The price which the Church had to pay for this valiant defense of her rights was the loss of her property.®

Since in a State where separation holds the clergy are not regarded as public officials, they are granted no privileges by the State. Thus in France the Law of Separation (Title 6) abolished the special criminal jurisprudence that had protected ministers of religion against outrages directed against them or against the clerical garb as their official attire; it likewise revoked the special tribunal for criminal actions against bishops, various honorary rights of the clergy, and finally—what is most painful in its

4 Encyclical *Ab millien des sollicitudes,* February 16, 1892, in *ASS,* XXIV, 529f; English translation used here from *The Great Encyclical Letters of Pope Leo XIII,* 262.
5 See above, p. 66f.

effects—exemption of theological students and priests from service in the armed forces.

With separation of Church and State the material assistance granted the Church by the State generally also ceases; in the civil economy no sums are provided for the construction of churches, for the salaries of bishops, canons and pastors. Article 2 of the French Law of Separation prohibits the State, the departments and the communes from voting appropriations for public worship. But it is doubtful whether the suppression of appropriations for public worship must be regarded as an essential consequence of complete separation. For there is no valid reason, so it would seem, why the State may not lend its support to church affairs, however organized on the basis of private rights, as undertakings in the interest of the common weal, just as the State supports other scientific and benevolent enterprises. Belgium, for instance (which however is not regarded by many as a State where separation really is established by constitution), assumes the obligation of paying the stipends of the Catholic clergy as well as of the clergy of the Protestant and Jewish churches. This State also assists in the expense of erecting buildings for religious purposes and of keeping them in repair. The parishes have been granted civil recognition and can hold property; each parish has a board of administrators (of which the mayor of the town is a member by law) to aid the clergy in the management of the finances of the church.' At any rate, the French Law of Separation, which forbids the communes to extend material assistance to the churches, constitutes an unwarranted interference in the self-government of the communes, which in other respects are free to promote all sorts of enterprises.

Georges Goyau, one-time associate editor of *Revue des Deux Mondes,* writes: "The law authorizes the State, the departments and the communes to pay salaries to chaplains in public institutions such as colleges, *lycées,* and other schools, and in hospitals, asylums, and prisons. In the Army the office of chaplain has not been abolished, but it remains unoccupied. Since January 1, 1906, no minister of religion has been a member of staff of any military hospital; local ministers of religion may enter these hospitals at the request of sick soldiers. A decree dated February 6, 1907, abolished the naval chaplaincies, but certain ecclesiastics

• Godefroid Kurth, "Belgium," *Catholic Encyclopedia,* II ,406.

who formerly filled these posts will continue to discharge the functions proper to them. The State does not allow appropriations for the maintenance of chaplaincies in schools where there are no boarders."[7]

After separation became an accomplished fact in France, the Church was no longer permitted to exercise influence in the sphere of public education. Regular instruction in religion was excluded from the curriculum in the primary and secondary schools of the State; but individual bodies were left free to impart religious instruction to children on their own initiative and also to establish denominational schools in which the entire course of instruction was based on the tenets of a particular belief. Since the universities are State universities, the theological faculties for training candidates for the ministry of a definite religion were done away with. In public elementary schools one day each week, in addition to the Sunday, was left free to enable parents who so desired, to have their children instructed in religion. But the school rooms could not be used for this purpose since this might give the impression that religion was part of public education. The establishment of private schools was indeed legally permissible, but in point of fact it was made very difficult because of the exclusion of religious teaching congregations.

In all these respects the Church, as a result of separation, lost that juridical and material support which a parity State grants to her as a privileged corporation. Hence it follows that if separation is to be just and honorable, the State must cease that *odious* display of power whereby it restricts, obstructs and fetters the Church's freedom of action. In other words, the multitude of laws whereby the State seeks to regulate the affairs of the Church, the so-called right of the State to control the Church, must disappear. Thus by the Law of Separation the Church in France was supposedly freed from the yoke imposed on her when Napoleon restored Church-State relations. The Concordat was abolished with separation; and along with it the important right—which had been exercised for four hundred years by French rulers—of nominating the bishops of France, as well as the privilege of entering protest against the person of a designated pastor. With the repeal of the Concordat the Organic Articles also were revoked—

[7] "France." *CatMir Encjtlopuiia,* VI, 187.

these, seventy-seven in number, had in various ways infringed on the spirit of the Concordat and in part had regulated the activity of the Church in an intolerable manner. Likewise the decree regulating church property and benefices, as well as many other laws, disappeared. For after separation that domain disappeared in which ecclesiastico-civil legislation operates and in which most of the friction between civil and ecclesiastical power occurs —namely, the sphere of the so-called mixed matters *(res mixtae)*. Theoretically, after separation the State may no longer meddle with the establishment or alteration of ecclesiastical offices and spheres of jurisdiction, with the dioceses and parishes, just as it may not concern itself with the organization and jurisdictional scope of a society such as that of St. Vincent de Paul. The introduction of a new Church feast becomes no more the business of the State than the celebration of the feast of the dedication of a church or of the feast of Christmas in a military barracks; the building and furnishing of convents, churches and ecclesiastical institutions become subject to no restrictions other than those governing construction and sanitation generally; church property becomes no concern of the civil authorities but only of the civil courts should conflicts arise.

But in France this result of separation—namely, the granting of full freedom to the Church with her disestablishment in the State—has not been carried out in all sincerity; despite the new system there is no will to break with Gallican traditions. Hence the strict norms of control which the law provides for associations for religious worship; hence too, the establishment of police who supervise worship and have the authority not only to be present at services in their official capacity but also to break up the assembly if they see fit; hence, the broad arbitrary power granted to local police and mayors to forbid processions and other acts of public worship should they deem it necessary in the interests of public peace! France may be characterized as a "laicized" or "secularized" State. But, however out of balance is the separation of Church and State in countries like France, the most radical type of separation is, of course, not found in such countries as France but in states which are under Communist domination.

World War I (1914-1918) brought about a new situation in Church-State relations in France. During the war Catholics gave splendid proof of their patriotism, 20,000

priests having served under the French flag and 3273 priests having laid down their lives for France. The bishops of France took an active part in the Sacred Union, and won the respect of their associates of every creed. The State could no longer ignore the Church. There was evidence of a desire on the part of the government to be more generous and just in its dealings with the Church. Its attitude became conciliatory and many Frenchmen began to realize the mistakes committed by the rabid anti-clericals of the Left. The sentiment of France was that national interests required the resumption of diplomatic relations with the Vatican, so that French diplomacy might have its official share in discussing questions involving French interests. The Peace Treaty of Versailles presented problems that must be solved with the help of the Holy See: for example, in regard to the application of the old Concordat in Alsace-Lorraine, whether to denounce the Concordat of the German government regulating its religious policy, now that Alsace-Lorraine had been given over to France in the fall of 1918, or of recognizing it and assuming its obligations; the fate of the former German missions in Tagoland, Kamerun, and elsewhere; and also the safeguarding of the Catholic religion in Morocco. And so, on March 14, 1920, diplomatic relations between the Vatican and the French government, which had been broken in 1904, were resumed. In May, 1921, M. Charles Jonnart, Senator, was appointed Ambassador Extraordinary and Minister Plenipotentiary to represent France at the Vatican.

Another significant change has reference to the associations for religious worship established by the Law of 1905. The law of 1907 made the exercise of worship possible; nevertheless the situation remained strained and alarming for the Church in France. To lead a normal existence, the Church needs possessions. In default of a legal statute, it was necessary for the Church to resort to means necessarily imperfect, onerous and complicated since they were not adapted to her needs and remained artificial. In 1919, Bishop Chapon of Nice wrote an essay that had for its purpose the formation of a new form of association for religious worship for his diocese, but this association was to restrict its efforts solely to the material interests of the Church. This essay of the Bishop remained a local effort, but it was written at a time when the question of resuming diplomatic relations with the Vatican was being

actively discussed. After long and complicated debates and conversations, the constitution of 1924 was adopted, which permitted the formation of *associations cultuelles diocésaines* (diocesan associations for religious worship).[8] These associations were allowed to possess property, and intended eventually to become legal owners of premises, buildings, and various properties serving ecclesiastical uses. Pope Pius XI, in his Encyclical *Maximam gravissimamque,* authorized the French bishops to found *associations cultuelles diocésaines,* and urged that their establishment be given a trial.[9] Pius XI made it clear that he had withheld his approval until the objectionable features contained in the *associations cultuelles* (which Pius X had refused to accept) had been removed. The basic rules for the new associations were the following: (1)There can be only one such association in a diocese; (2) The bishop must be the head of such association, and it is composed of such membership as to give assurance that due respect will be given the Catholic hierarchy; (3) it has for its exclusive object to provide for the cost and maintenance of worship under the authority of the bishop, in communion with the Holy See and in conformity with canon law; more specifically, to regulate the acquisition, hiring and administration of edifices for the public exercise of Catholic worship in the diocese, for the use of the bishop, pastors and assistants, also for aged or sick priests, the temporal administration of seminaries (major and minor) and chapels of ease.

Since 1924 there have been added several laws regarding these associations and confirming them. Auguste Rivet gives a summary of the principal laws touching religious interests that have been issued down to 1943.[10]

Several times, a general ruling on the status of the Church in France has been discussed, notably in 1928, 1929,1935, and 1939. The question is still undecided. In the absence of a general rule, several agreements have been reached on the question of *associations diocésaines,* on the question of missionary congregations of French origin, and, above all, concerning the appointment of French bishops. Now the Pope alone appoints bishops. Before the

[8] See Auguste Rivet, *Traité du Culte Catholique et Det Loh Chiles D'Ordre Relitiexx,* Vol .1, *Historique de la Législation 1789* d *1947 (Rutu:* Edition Spes, 1947), 177-197 ; Vol. II, *Legislation et Jurisprudence au 1er Juin 1950* (Langres: Bureau de l'Ami du Clerrf 1950), 217-268. 5

[9] Encyclical *Maximam gravissimamque,* January 18, 1924, to the bishops, clergy and people of France, in *AAS,* XVI, 5-11. The statutes governing Diocesan Associations are appended to the French version of the Encyclical.

[10] *Op. tit.,* I, 198-200,

appointment is made public, the name of the candidate is sent to the Minister of Foreign Affairs who has the right to present objections from a political point of view. But Rome is under no obligation and can ignore these criticisms without being accused of unfriendliness. Except for a few local conflicts, there are no obstacles to the practice of the Catholic religion in France. Religious congregations, except those having a special authorization, are forbidden in principle, yet can ignore the ban with impunity; no one thinks of expelling them. Catholic Action has never known in France, even during the days of the Popular Front (1926), any of the annoyances, even persecutions, borne in some countries where a Concordat exists, writes E. Jarry.[11]

B. The best example of the *milder,* benevolent plan of separation is that offered by the United States of America. The American plan involves the severing of all legal ties between Church and State, and complete freedom for all religious bodies. This means that all churches are equal in the sight of the State and that the State does not recognize any specific form of religion. "All religions are permissible," Anson Phelps Stokes writes, "provided that they do not advocate or indulge in polygamy or some other practice that is entirely inconsistent with the ethical code which the English speaking people have derived from their Jewish-Christian ethical background, and that they do not distrub the public peace or otherwise threaten the welfare of the State."[14]

In the American system of separation, the Church is not recognized as a perfect society having her own laws. The canon laws regulating marriage, for example, are considered legally non-existent. Civil (public) law does not regard the Catholic Church as a world-wide religion, nor does it recognize the totality of adherents of the Catholic Faith within the confines of the State as forming a corporation of public law, but only as constituting individual societies established to promote Catholic worship in various localities where there are Catholics, with the same juridical status as businesses or similar societies. The civil power has contact only with these associations and that exclusively on the basis of private law (that law, that is, which governs the sphere of individual initiative and the self-

u "France, *Catholic Encyclopedia,* Second Section, Supplement II to Vol. XVIII (New York, N. Y.: The Gilmary Society, 1951), no page number given.
» *Church and State in the United State/,* III, 370.

ruled activities of groups of individuals). Civil law offers to religious societies the legal forms that must be complied with to obtain recognition as juridical persons. "The existence of the Church is thus not endangered," says Rommen, "yet her character as a perfect society with original authority of legislation and jurisdiction, with disciplinary and penal law, is disregarded. Thus the Church may simply admonish, advise, and influence the faithful, and this only so far as these latter voluntarily accept it. Theoretically this practice of the State denies the nature of this divine society and treats it like any other free association of citizens in the State."[13]

Separation in the United States is, however, in striking contrast with the unsympathetic and antagonistic separation of Church and State to be found in some other countries. Anson Phelps Stokes points out, "The tenure of church property in the United States is secure. Confiscation is legally impossible.... In general, churches are not incorporated by special act of the legislature but under general laws which have to do with various charitable, literary, and religious corporations. . . . Such corporations are constituted in different ways in different states, and indeed the same state frequently provides for several methods acceptable to different ecclesiastical organizations."[14]

The Roman Catholic Church does not incline toward the American custom of tenure of church property by lay trustees, preferring to have the property vest in the hierarchy. As Stokes tells us, "This difference between the American custom [which at first was adopted by many Catholic churches in this country] and the tradition of the Church —and both have been somewhat modified to meet the situation in America—sometimes resulted, especially in the early days, in disputes between the ecclesiastical authorities on the one hand, who wished to observe strictly the canon law, and lay trustees on the other, resulting in appeals by the trustees to the courts . . . New York provides for a 'corporation aggregate' or membership corporation. This implies that the church members as a whole are the incorporators, as distinct from the trustees; and the latter fill the role of business managers of the corporation, the officers being like the directors of a banking establishment. The bishop, the vicar general, and the pastor are the ex-officio members [of the corporation], and they appoint two additional lay members. Furthermore, the laws of the state provide that no acts of the trustees are valid without the consent of the bishop or archbishop. This incorporates in essence the *fabrique* system of Europe, in which proprietary rights cannot be claimed in opposition to ecclesiastical authority ... This model was approved by the decrees of the Sacred Congregation of the Council in 1911 ... It has been applied, with slight modifications, by other states, such as Connecticut and Wisconsin, while Oregon, New Jersey, Minnesota, and Nebraska have similarly provided in substance for the establishment of a corporation including the bishop or archbishop of a diocese, the vicar general, the chancellor ex officio, and two others. Several other states, such as Alabama, New Hampshire, and South Carolina, provide for the incorporation of a Catholic bishop as a corporation sole. The archbishop of Baltimore is granted the same privilege. This form and that of 'corporation aggregate,' consisting of the bishop, the vicar general, and the pastor, are the plans favored by Rome."[15] In disputes about property rights within a religious corporation or in the case of disputes about property between the religious corporations, it is the civil court that decides the case.

Many of the major issues between Church and State in the United States have centered around the field of education. General education in the United States is a matter reserved to the states. As Stokes reminds us, "American public schools are conducted *not* by Washington, but by thousands of towns and villages scattered throughout the country under general constitutional and statutatory provisions of their respective states. These are and, of course must continue to be, consistent with the provisions regarding freedom in the Federal Constitution."[18] The public school, intended for pupils of all religious groups, is a secular institution. This, however, does not and should not imply that it is irreligious, and a people with the background which Americans have should not permit their public schools to become irreligious. The general absence of religion in the curriculum of our public schools is more serious than most people realize. Stokes submits that, "It is the result of our transfer from Church to State during the past

[13] *The State in Catholic Thought, 60ii.*
[14] *Op. tit., III,* p. 405.

[15] *Ibid.,* III, p. 404f. For a discussion of mortmain statutes, trusts for religious purposes, bequests, provision for supporting Masses for the dead, see Stokes, *op. cit.,* HI, pp. 454-441.
[18] Stokes, *op. cit.,* II, p. 489.

century and a half of the major task of molding the minds and characters of our children, and of the belief of many that this transfer involves not only public neutrality in the field of religion, but also public indifference."[17] Many educators deplore this grave situation. The late Nicholas Murray Butler (1862-1947), president of Columbia University, said: "The school child ... is entitled to receive . . . that particular form of religious instruction and training which the parents and natural guardians hold dear. This cannot be done if the program of the tax-supported schools is arranged on the theory that religion is to be excluded from the educational process or treated merely incidentally as an element of home life."[18]

Two general plans have been proposed for making the fundamental doctrines of religion known to public-school pupils during school hours. One plan would offer voluntary religious instruction of an undenominational character generally within the public-school buildings as a part of the school curriculum, often with credit attached for successful examinations. Five different ways of carrying out this plan have been proposed and attempted.[19] The second plan would provide religious instruction by the churches for pupils desiring it; generally the instruction would be given outside public-school buildings, but with the moral support of the school authorities, and on a voluntry basis. This latter plan involves "dismissed"—or "released"—time features. "Dismissed-time" means that pupils will be let out perhaps an hour earlier than usual on some one day of the week to attend religious instruction as their parents may wish. "Released-time" means that they will be similarly released at some time during the regular school hours.[20]

Some of these proposals have apparently been ruled out, at least for the present, by the decision (1948) of the United States Supreme Court in the Champaign, Illinois, Case. Mrs. Vashti McCollum, an atheist parent in Champaign, Illinois, brought the case to the court on the grounds that the plan adopted in Champaign at the request of the schoolchildren's parents violated the First Amendment of the Constitution. The plan provided a weekly forty-five minute class in religious instruction during school hours in the school building. Anyone who did not desire instruction

"*IH4.,* II, p. 495.
18 *Report of the President of Columbia University* (1934), 21-22.
M Stokes, *op. cit.,* II, pp. 495-515.
*>*Ibid.,* pp. 525-535.

was given a study period instead. The classes were considered an "extra-curricular activity." Teachers for eight-hundred Protestants and Catholics were supplied by the respective religious groups; materials were likewise paid for by the same. The Supreme Court decision ruled out all instruction in religion by the churches in public-school buildings even though of an optional character; and, incidentally, the use of "public-school machinery" for helping to carry out "released-time" programs during school hours even outside school buildings.[21] This decision does not necessarily interfere with such instruction during "dismissed-time"—that is, at the close of the school day.

It is interesting to note that an appeal was filed by two Brooklyn mothers, Mrs. Tessin Zorach and Mrs. Esta Gluck, with the Supreme Court of the United States, attacking the "released-time" program as conducted in New York state. The program provides that children may be released from classes for one hour each week to receive religious instruction away from school property. The Supreme Court in a six to three decision (April 28, 1952) upheld the New York "released-time" program for giving religious instruction to public school children according to each individual's preference off school property. The parents' request is always considered prerequisite before students are released for religious instruction. Justice Douglas said that the McCollum case could not be extended to cover the New York program "unless separation of Church and State means that public institutions can make no adjustments in their schedule to accommodate the religious needs of the people." Justice Robert H. Jackson added: "The day that this country ceases to be free for irréligion it will cease to be free for religion—except for the sect that can win political power."

In few public school systems of this country is religion wholly absent. In 1952 the American Council on Education sent out a questionnaire to 47 chief state school officers, 213 superintendents of schools in cities over 50,000, and almost 1000 college presidents and deans in its quest for material to serve as a basis for planning a religious education program. The findings of this survey indicated that most public schools in the United States follow one of two ways of integrating religion with the curriculum: (1) Planned religious activities, such as prayer, Bible reading,

pp. 515-521.

ethical lectures, etc.; (2) factual religious study (visits to churches, a study of the influence of religion on our government and society, etc.). Common to both the religious program and the factual study systems seems to be the teaching of the existence of a personal God as the source of all rights and morality. Although, the report says, deliberate avoidance of religion is rare in the American tax-supported school, none of the schools is doing all that it can to teach this subject. The authors of this study think no one religious policy or practise can suit all schools, and that the problem of religious instruction will not be solved easily or soon. But that it will be solved they are hopeful.[22]

The question of religious freedom, especially the right of parents to select their own schools, has often been raised by extremists who fear that Catholic parochial schools may prove inimical to democracy by educating a group apart. The courts have in general decided that it is not the policy of the State to require public school attendance of all the children in the State.[23] The question was definitely decided by the unanimous decision of the United States Supreme Court in 1924 in the famous Oregon case. The state of Oregon adopted a law requiring parents and guardians to send all children between the ages of eight and sixteen, except those in a few categories, "to a public school," a failure to comply being punishable as a misdemeanor. The court took the position that the carrying out of the Oregon law would practically force the closing of most private schools, and supported the lower court in holding that the act was contrary to the Fourteenth Amendment. Important are these words of the Supreme Court: "The fundamental theory of liberty, upon which all governments in this Union repose, excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[24] Thus religious instruction and training may be, and are, imparted, without State interference, in parochial and other private schools, but the upkeep of these schools must be paid for from private funds. The State has the right to insist that such

" *The Function of the Public Schools in Dealing with Religion* (Washington, D. C.: American Council on Education. Committee on Religion and Education, 1953).
B Stokes, *ob. cit.,* II, pp. 737-741.
14 See Stokes, *op. cit,,* II, p. 736.

schools maintain certain standards and meet certain requirements which the State imposes.

Church-State separation in the Unitéd Statës'has~hïs^ torically very little European secularism about it. "Our federal and state constitutions forbid the legal establishment of any form of religion, thereby ensuring the separation of Church and State, and apparently making inevitable a policy of neutrality or indifference," write John A. Ryan and Francis Boland. "Nevertheless, our federal and state governments have never adopted such a policy. Their attitude has been one of a postive friendliness toward religion."[28] Evidences of this policy are: The appointment of an anuual day of public thanksgiving by the President and the Governors of the States;[26] the employment of chaplains to open with prayer the sessions of the national and state legislatures;[27] the providing of Army and Navy chaplains, who receive annual stipends for their services;[28] the appointment of federal chaplains for penal institutions, old soldiers' homes, and hospitals under the Veterans' Administration;[29] the exemption from taxation of churches, church schools,[30] and certain other forms of church property, such as burial grounds;[31] certain exemptions and special privileges for clergymen;[32] the fact that "under state laws certain types of business, which might be demoralizing or annoying to worshippers, such as liquor saloons, theaters, fire-engine houses, and garages, are generally excluded within specified distances of churches, or permitted only with church approval."[33] In a word, the general policy has been the promoting of the interests of religion. Thus the United States truly serves as an example of the milder, more benevolent type of separation of Church and State.

THE EFFECTS OF SEPARATION ON THE INDIVIDUAL CITIZEN

Such is the attitude of the State in regard to ecclesiastical affairs in a country where separation is the policy. Next we must present a picture of the effects of separation on the individual citizen. If the religious (theocratic) State requires its citizens to be qualified members of the

M Catholic Principles in Politics. Revised Edition of *The State and the Church.* (New York: Macmillan, 1941), 312f.
*· Stokes, *op. cit.,* III, pp. 179-200. ν *Ibid.,* HI, pp. 129-138.
**Ibid.,, 11,* pp. 110-129- . III, pp. 140-143.
Ibid., III, pp. 418-428. California's Proposition 3—which exempts parochial and other non-profit, non-public schools from taxation—was carried by a plurality of 77,477 votes in the referendum of November, 1952. This victory puts California in line with the other 47 states in the Union. It has been the only state where such tax was in effect.
« *Ibid.,* III. p. 417f. » *Ibid.,* III, pp. 428-432. « *Ibid.,* III, p. 369.

one Church recognized by the State, the antithesis of the religious State—that is, the State that insists that all public juridical relations with the churches be ended—must eliminate from its laws everything that could compel the individual citizen to maintain relations with a definite religious body. It must therefore put freedom of religious profession more consistently into effect than does the parity State. And in this respect the first question that arises has to do with marriage, a sphere in which even in a parity State it is still possible to see the necessity of enlisting the service of the Church. All states in which the civil marriage ceremony is obligatory for the legality of the marriage union, have already completely dissociated themselves from the Church, since they not only enable their citizens to contract a legally valid marriage without an ecclesiastical ceremony, but flatly declare that, so far as they are concerned, no union of man and woman claiming the name marriage merits consideration except civil marriage. Here again the United States offers a happy exception; for in America civil marriage is merely one of the ways in which marriage may be contracted.

Another sphere in which separation does violence to the rights of the citizen is public education; for, as noted above, under separation religious instruction is banned from all public schools. In our own country the laws of all the states forbid denominational instruction in the public schools, although some of them permit, and some require, Bible reading without comment at the opening exercises. But this is opposed by some groups who fear that it may be an opening wedge for sectarian influence, and by others because of the difficulty of agreeing upon an accepted translation. The repeating of the Lord's Prayer at the opening exercises is very common, and generally speaking there is in most states little legal or other objection against this practice, although the custom has been occasionally criticized by Roman Catholics on the ground that the prayer as translated in the King James version of the Bible is generally used rather than that of a recognized Catholic translation. Catholics have also protested, frequently with success, against the practice of reading the Bible "without written note or moral comment,"[34] because such a proce-

[34] For example, in the famous Wisconsin Bible Case involving the right of the District Board of Education of Edgerton, Wisconsin, to have the King James version of the Bible read in the public schools which were attended by Catholic pupils. See *State ex rel. Weiss v. District Board* (1890), Wis. 177, 44 N. W. 967.

dure infringes upon freedom of conscience. According to canon law, Catholics are permitted to use only approved translations of the Bible.[35] "Most state supreme court decisions," says Anson Phelps Stokes, "upheld the reading of the Bible as permitted in the absence of a statute to the contrary, and most states by legislative or board of education enactment, or by court decision, have permitted such reading at school exercises when this is desired by the local authority, and have taken the ground that the Bible is not a 'sectarian' book."[36]

Two New Jersey parents, Donald R. Doremus, a New Jersey taxpayer, and Mrs. Anna E. Klein, mother of a public school pupil, filed an appeal with the Supreme Court of the United States, attacking two New Jersey statutes. One New Jersey law requires that five verses of the Old Testament be read without comment each day in the public schools, while the other permits, but does not require, recitation of the Lord's Prayer. It was pointed out in the arguments on the case, that any pupil who does not wish to participate in the Bible readings may leave the classroom. The court as of March 3, 1952, settled the New Jersey case in a six to three decision in which it refused to assume jurisdiction in the matter. This allows the New Jersey laws to remain on the statute books. There are thirty-four other states which have either compulsory or optional Bible reading in the public schools.

In 1952 the New York State Board of Regents, governing body of that State's educational system, proposed that a daily prayer be recited by public school pupils. It was suggested that at the commencement of each school day the pledge of allegiance to the flag[37] be joined with this act of reverence to God: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country." A resolution supporting the proposal was made by the board of directors of the New York State School Boards Association (312 school boards, 98% of those in the state, are affiliated with the association). Opposition to the regents' proposal was registered by the delegates of the United Parents' Association, who maintained (under Jewish influence) that

[35] *Code of Canon Law*, canon 1391.
[36] *Op. cit.*, II, p. 564f.
[37] The words "under God" after the words "one nation" in the Pledge of Allegiance to the Flag became law on Flag Day, June 14, 1954, by action of Congress. An already existing law, enacted June, 1942, relating to "rules and customs pertaining to the display and use of the flag," was amended by the new act.

daily prayer in public schools "would bring into public schools outward manifestation of religious differences." The New York Board of Rabbis opposed the measure on the basis that it would give rise to sectarian practices. As a substitute for the prayer suggested by the Board of Regents, the New York Board of Education voted unanimously to have all public schoools in New York City open each day's class by singing the fourth stanza of "America" as an act of reverence aimed at strengthening moral and spiritual values. The fourth stanza of this patriotic hymn reads as follows:

Our father's God, to Thee,
Author of Liberty,
To Thee we sing:
Long may our land be bright
With freedom's holy light;
Protect us by Thy might,
Great God, our King.

Another inherent difficulty in the matter of public-school teaching has to do with incidental references to religion in text-books. The difficulty is even greater in connection with social and economic references and attitudes. As a result, there have been complaints from time to time from Protestant, Catholic, and Jewish sources, as well as from agnostic groups.[38]

Interments and cemeteries constitute another sphere that is affected by separation of Church and State. Even though in France associations for religious worship have a legal right to establish their own cemeteries, the law does not recognize distinctions of religious beliefs in the case of *public* cemeteries. The law of December 28, 1904, Article 2, laicized the business of funeral-arrangement, assigning its exclusive control to the communes, which were obliged to make available for burial and funeral processions draperies and other pertinent objects. These latter had to be adaptable for use in all various religious as well as non-religious burials,[39] so that henceforth no one would be obliged to borrow burial requirements from a church *fabrique* (vestry board). No such annoying restrictions and interference exist in the American plan of separation.[40]

A further consequence of separation is the doing away

[38] Stokes, *op. cit.,* II, pp. 572-584.
See Rothenbücher, *op. cit.,* p. *266.*
[39] See Stokes, *op. cit.,* III, pp. 417f.

with the obligation of stating one's religion before a registrar, the police, a judge, or others. Accordingly, it would seem, the compulsory taking of an oath must also be abrogated. For even though the act of calling upon God to witness the truth of a statement is not in itself an expression of a definite religious profession, yet the way one reacts to swearing can connote profession of an ecclesiastical belief. For there are sects which in good faith reject swearing as immoral. It is remarkable that the French government did not draw this inference. In taking an oath prescribed by French law God's name is invoked even by freethinkers and atheists. United States legislation, on the contrary, allows persons, whose religion forbids oaths, for example, Mennonites and Quakers, to "affirm" the truth of their statements and accepts this affirmation in lieu of an oath. The question of the required taking of oaths by government officials, jurors, court witnesses, and certain other persons, has occasionally caused trouble between Church and State. The rules governing the taking of oaths vary in different states.[41] The constitution of New York State, which has been extensively copied, provides that no person should be rendered incompetent to be a witness on account of his religious belief. Moreover, as Stokes reminds us, "New York statutes, in keeping with this constitutional provision, are particularly broad, even going so far to meet the conscientious scruples of Mohammedans and Confucians. In general the newer states have avoided all restrictions, specifically providing the jurors and witnesses should be exempt from all religious tests."[42] Similar far-reaching considerations are accorded religious convictions, for example, persons whose religious beliefs forbid the bearing of arms are given choice of service in non-combative positions.[43]

If, according to the principle of separation, every kind of coercion must be removed in the civil juridical sphere which would compel a citizen to act or to take a stand in conformity with this or that religious denomination, then too everyone must be given full freedom so to regulate his religious life, within the framework of the general laws of the State, as may seem good to him and to seek salvation in his own way. It is brutal injustice for a State where

« See William George Torpey. *Judicial Doctrines of Religious Rights its America* (Chapel Hili: The University of North Carolina, 1948>, chap. X.
a *OP. cit.*. Ill, p. 146.
"*Ibid.*. Hl, pp. 264-280.

separation is the policy to forbid persons to join with one another in an Order or Congregation taking religious vows. If a number of states that have introduced separation from the Church, France and Mexico, for example, have made this absurdity a reality, they have simply departed from the genuine concept of separation under pressure of their anti-Catholic tendencies. It is even more absurd to attempt to characterize such violations of freedom of conscience as right and lawful in the very name of freedom of conscience, as has been done, for example, in Mexico. Article 5 of the Mexican Constitution states: "The State cannot allow any contract, pact, or agreement to go into effect that has for its object the impairment, loss or irrevocable sacrifice of man's liberty, whatever the cause may be: work, education, or religious vow. Consequently the law does not recognize monastic Orders, nor can it permit their establishment, whatever be their designation or object."

There is a final effect of separation which is peculiar to certain European countries. In a State that has disestablished the Church there is no need for legal ordinances concerning change of religious affiliation and withdrawal from a church—such laws were formerly necessary in order to determine how these actions were to be accomplished if they were to be effective in the civil juridical sphere. Such ordinances have meaning only where the church membership involves civil effects, for example, the obligation to pay church taxes. But in states where contributions for religious worship are purely voluntary gifts and there is no civil apparatus compelling the collection of church taxes, membership in a denomination or withdrawal therefrom has no bearing on civil juridical life.[44]

TWO DIVERGENT POLITICAL TRADITIONS

Father John Courtney Murray, S. J., observes that the differences between the American and the Continental types of separation of Church and State derive from a fundamental divergence of political traditions. He writes: "The American political tradition, whose parentage was English rather than Continental, has remained substantially untouched by the two radical vices which ruined the medieval heritage on the Continent."[48] The first of these

** For a survey of Catholic education in present-day Europe within the frame-work of Church-State relations, see the informative article of Erik von Kuehnelt-Leddihn, "Catholic Education in Europe," in *Columbia* (New Haven, Connecticut), April, 1954, 2, 20-22.

45 "Leo XIII: Separation of Church and State," *Theological Studies,* XIV (June, 1953), 151.

vices was *royal absolutism.* "Under its influence," says Father Murray "the whole of society including the Church, was drawn inside the growing state and gradually surrounded by the developing armature of civil law. Society became the particular nations; the nation was identified with the State; and the nation-state itself became identically the Great Society. The political result of this development was the 'society-state,' the one all-embracing, omnipotent form of human association. ... In these conditions, characterized by the omnipotence of the society-state, the separation of the State from the Church inevitably involved an apostasy from the Catholic Church. Being separate from the State, the Church could have no existence within the society, except such as the sovereign power chose to grant it."[46] The second vice that ruined the medieval heritage of the Continent was the *secularization of politics* or the modern religion of laicism, the religion of self-salvation, wherein man becomes God and society becomes the Church. Continental separation of Church and State was an essential aspect of this movement toward the elevation of this society-state to the level of a quasi-religious form of life, wherein the ultimate good, "salvation," is to be achieved. Because of this quasi-religious character, Father Murray prefers to call this movement the *sacralization* (rather than the secularization) of politics.[47]

The American people repudiated the Continental concept of the omnipotent society-state. "The consequence is," Father Murray reminds us, "that the State remains interior to society, not outside of it, as it were, surrounding it. The State is an aspect of the life of society—a pervasive aspect (as modern law is pervasive) but not an all-embracing, or omni-competent aspect. The State stands in the service of society and is subordinate to its purposes. It is limited even in its office of ministry—limited by the whole structure of personal and social rights not of its own creation, and limited too by the principle of consent. . . . And in the sense that the spiritual is located in society, not in the State, the principle of the primacy of the spiritual over the political holds sway. . . . Within this structure of politics the American concept of separation of Church and State finds place. It is a consequence of the fact that society, the people, has made to the government only a limited grant of powers." Father Murray concedes that the dis-

[46] *Ibid.*, p. 149. [47] *Ibid.*, p. 150.

tinction between Church and State is exaggerated in the American policy. But he goes on to say that "it is one thing to exaggerate distinction into separation, as in the American case; it is quite another thing to obliterate the distinction in a false unification, as in the Continental case. In the American case the essential lines of the medieval structure of politics are still somehow visible; in the Continental case they are destroyed utterly."[48]

Secondly, Father Murray points out that "American separation of Church and State, unlike the Continental brand, neither implies nor effects any secularization of politics. The First Amendment has no religious overtones whatever; that is, it does not imply any ultimate vision! of the nature of man and society.... It does not imply that there is any virtue in society whereby it can save itself^ become a good society, in separation from religion. Its purpose is not to separate religion from society, but only from the order of law. It implies no denial of the sovereignty of God over both society and state, no negation of the social necessity and value of religion, no assertion that the affairs of society are to be conducted in disregard of the natural or divine law, or even of the ecclesiastical laws. It is not a political transcription of the religion of lajcism. ... It does not make the State a church, nor does it establish a political religion. ... It simply imposes restrictions on the legal activity of the State. ... It confines laws and government to secular purposes (which are understood to include the moral purposes of freedom, justice, peace, and the general welfare). The American concept therefore does not derive from the Continental movement toward a redivinization of the society-state. It stands more directly in continuity with the central Christian civilizational tradition—the tradition of revolt against the secularization of the political order, and insistence on its status as secular."[49]

There is another important difference between the American and the Continental separation of Church and State which, Father Murray submits, is commonly overlooked by canonists: "The First Amendment to the Constitution of the United States is not by any means the same kind of juridical provision as the Continental *jus commune.* The difference derives from the fundamental divergence of the political theories that are respectively the premises of each."[50] The difference is clear. As Father Murray tells us,

[48] *Ibid.,* p. 151f. [49] *Ibid.,* p. 152-153- [50] *Ibid.,* p. 167.

"The Continental 'separate' society-state presumed to have all power in the field of religion. The American republic declares itself to have no power in that field. The Continental jus *commune* supposed that the political sovereignty, as the source of all rights, is likewise the source of whatever rights religion or the Church might have. The First Amendment supposes that the rights of religion and of the Church are primary and original; they are neither granted by the State nor may they be limited by the State. Religion is part of the life of the 'Great Society,' which is distinct from the State; as such, it is not under the control of the State. The only function which the people have committed to the State in regard to religion is the protection of its freedom." Accordingly, "the manner in which the Catholic Church exists in American society is not the same as the maimer of its existence under the Continental /ws *commune.* In the latter case the Church is legally free to be only what the sovereign society-state legally and authoritatively declared her to be, namely, a voluntary association owing its corporate existence to civil law. In the American case, the Church is completely free to be whatever she is. The law does not presume to make any declaration about her nature, nor does she owe her existence within the society to any legal statute. In a word, the Continental *jus commune* denied to the Church the right to declare her own nature; the First Amendment denies to the State the right to declare the nature of the Church. The American denial was made by the whole people in a constitutional act of consent."[51] The statist postulate (that is, the notion of state sovereignty over religion) is the foundation of the Continental *jus commune*; it is not at all the premise of the United States First Amendment.[52] There is not simply a difference of degree between American separation and other kinds; there is a difference in kind and in principle; because the United States is in principle a different kind of polity than the Continental or Latin-American "separate" society-state with their monist, totalitarianizing tendencies. "It is inexact to say," states Father Murray, "that the First Amendment 'grants' freedom to the Church; this is again to interpret the American system in terms of the Continental *jus commune,* which is irrelevant to the American case. The American Bill of Rights does not grant rights; it guarantees them, as existent prior to, and inde-

[51] *Ibid.,* p. 168f. [52] *Ibid.,* footnote 32, p. 167.

pendent of, any government grant. ... The Church in the United States is free with her own freedom, not a freedom granted by the State. It is not Cavour's 'libera Chiesa in libero Stato.' "[63]

Father Murray concludes that, after full consent has been given to Leo XIII's condemnation of separation of Church and State, "there is still room for an unprejudiced examination of the American concept of separation, because this latter concept is different in point of political principle from the concept condemned. The inquiry into the American concept should not be clouded by a confusion of it with the distinctly different Continental concept, which was born of a fundamentally divergent political tradition. American separation requires examination on its own principles, its own intentions, its own merits and defects."[64]

There is, however, a disturbing development in the theorization of the American way of life going on at the present time which may not be overlooked, Father Murray points out. Secularism is shaping a theory of separation of Church and State in the United States which begins to resemble nineteenth-century Continental theories. In point of fact, however, it represents a departure from the original principles of American constitutionalism.[66] We shall discuss this development in the next chapter of our study.

B. SECULARISM AND AMERICAN SEPARATION OF CHURCH AND STATE

The United States, which pioneered the practice of separation of Church and State, today is grappling anew with the problems involved in separation. A wave of controversy has arisen about the concept of separation. The problem has stirred discord among religious and other groups. Some charge that the traditional "Church-State separation" is being challenged; others, that religion has been relegated to an inferior position.

The American tradition, as history most certainly testifies, has been a spiritual tradition no less than a political one; the recognized bases of our personal freedom and of our public order are religious bases.[1] This tradition is now being challenged by a militant group among us who prefer irreligious nineteenth-century European laicism, or secu-

[63] *Ibid.*, footnote 33, p. 169.
[64] *Ibid.*, p. 185.
[66] *Ibid.*, footnote 6, p. 151.
[1] See Stokes, *Church and State in the United States*, III, 500-626.

larism.[2] They wish the government to give no encouragement or countenance to religion. "Laicism," says Gerald Groveland Walsh, S.J., "is not really a doctrine of separation of Church and State. It is, first a *dogma* of the irrelevance of God in human affairs; and it is, second, a design for the elimination of all religion from cultural life. Radically, it is a denial of the dual nature of man—as a citizen and a creature of God. And, at least by the logic of its system, it ends in totalitarianism and State monoply. It wants only irreligious schools. It wants a State monopoly of education. It wants no place for religious conscience in the face of political power."[3]

Militant secularists have already gained three major victories in the campaign to keep religion within the four walls of the church building. Two of these victories were Supreme Court decisions, the Everson and the McCollum cases. The complainant in the former case was Arch R. Everson of Ewing Township, New Jersey, who contended that reimbursement to parents of bus fares for the children attending non-profit private schools was unconstitutional. In this instance the children were Catholic parochial school students. The New Jersey bus law of 1941 authorized boards of education of school districts to provide transportation to public school children living far from any schoolhouse, and to school children in such districts in going to and from school other than a public school. Mr. Everson contended that the statute, and the resolution of the school board passed pursuant to it, violated both the state and the Federal constitutions. The statute and the resolution forced the inhabitants to pay taxes to help support and maintain church schools and so violated the First Amendment's prohibition against "the establishment of religion

* Paul Blanshard, militant spokesman of the organization Protestants and Other Americans United for the Separation of Church and State, in his book, *American Freedom and Catholic Power* (Boston, Mass.: Beacon Press, 1949) champions totalitarianism as his philosophy of life. He (with others) would make it the exclusive and compulsory American philosophy of life and, indeed the official, established American religion. This means, among other things, the supreme power of the democratic social welfare state over all aspects of secular life—with no other power standing outside it, beside it, much less over it. See John Courtney Murray, S.J., "Paul Blanshard and the New Nativism," *The Month* (London: Longmans, Green and Co.), CXCI, New Series (April 1951), 214-225. Professor James M. O'Neill, *Catholiciim and American Freedom* (New York, N. Y.: Harper, 1952), has presented a devastating and unanswerable study of Blanshard's book.

[2] *Church and State in the United States* (New York, N. Y.: Paulist Press, n. d.), 261. This pamphlet in its original form comprises an address delivered by Father Walsh at the annual *meeting of the United States* Catholic Historical Society, Hotel Commodore, October 22. 1947.

by law." The Supreme Court, in a decision split five to four, said that the Constitution did not agree with Mr. Everson.[4]

"The Everson *decision,"* writes James M. O'Neill, "was consistent with the language and purpose of the First Amendment, and with all prior American history and practice. The *opinions,* however, both majority and minority, in that case contained many errors. The majority arrived strangely at the *right decision* after indulging in inaccurate history, language, law, and logic."[5] Erroneous especially is Justice Hugo Black's majority opinion that the "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government "can pass laws which aid one religion, aid all religions, or prefer one religion over another."[6] The phrase of this majority opinion that is seriously questionable is the one that rules out laws to "aid all religions." Professor emeritus, Edward S. Corwin, the Constitutional authority of Princeton University, takes the same stand on the paragraph in the opinion on the establishment of religion. He writes: "Ignoring the ambiguous first clause of the statement, my own conclusion is that historical data support its last clause, but rule out its middle. In short, what the 'establishment of religion' provision of Amendment I does, *and all that it does, is to rule out any preference or discrimination which is based on religious grounds.* . . . The historical record shows clearly that the core idea of an 'establishment of religion' comprises the idea of *preference;* and that any act of public authority favorable to religion in general, cannot, without falsification of history, be brought under the ban of that phrase."[7] Anson Phelps Stokes points out if this principle that rules out laws to "aid all religions" is logically carried out, it would mean the abandonment of such established provisions as exemptions of taxation for churches, Army and Navy chaplaincies, Thanksgiving Day proclamations, etc.[8]

Erroneous, too, is the *dissenting* opinion written by the late Justice Wiley Rutledge and concurred in by Justices Frankfurter, Jackson, and Burton. Justice Rutledge en-

[4] *Everson vs. Board of Education,* 330 U. S. 1 (February 10, 1947). See also Stokes *op. cit.,* 702-716.
[5] *Catholicism and American Freedom,* 37. For a detailed and documented substantiation on the Everson case, see O'Neill's *Religion and Education Under the Constitution* (New York, N. Y.: Haroer, 1949), 189-218.
[6] *Everson vs. Board of Education,* 330 U. S. 1, 15.
[7] "The Supreme Court as National School Board," *Thought,* XXIII (December, 1948), 669. 681.
[8] *Op. cit.,* II, p. 705.

dorses "a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[9] This opinion indicates a radical departure from established tradition in interpreting the Constitution. The American tradition has always been a friendly attitude toward the churches by encouragement of religion. In view of the general court tradition in this respect,[10] it does not seem unlikely that the Rutledge doctrine outlawing every form of public aid or support for religion may be omitted in future statements by the court in defining the scope of the First Amendment. Professor O'Neill, after a careful and comprehensive study of the *purpose* of the First Amendment, does not hesitate to state that "the Rutledge dissenting opinion has little relation to the realities of language, history, biography, or law."[11]

In his decision Justice Rutledge attaches excessive importance to James Madison's *Memorial and Remonstrance* of 1785, which was directed against a proposal then pending in the Virginia Assembly to level taxes for the benefit of "teachers of the Christian religion." Madison opposed the measure and the bill was defeated. The *Memorial* had no relation to the First Amendment—namely, the problem of avoiding a national establishment of religion or the establishment of a National Church—and should not be utilized in interpreting the First Amendment. Professor Corwin points out that the *Memorial* antedated the framing of the Amendment by four years; that Madison himself never proffered it as an interpretation of the Amendment; that Madison was not the author of the Amendment in the form in which it was proposed to the State legislatures for ratification; and finally, that Madison asserted repeatedly that, as to the Constitution as a whole, "the legitimate meaning of the Instrument must be derived from the text itself"; but where there is discrepancy between the body that proposed the Constitution and the opinion of the bodies which ratified it, preference must always be given the latter.[12] Justice Rutledge does not cite the actual first draft of the Amendment as it came from the pen of Madison, as he ought to have done. *"That,"* says Father Walsh, "is the

[9] 330 U. S. 1, 32. [10] See Stokes, *op. cit.,* III, pp. 562-582.

[11] *Catholicism and American freedom,* 42. For O'Neill's arguments, see *Religion and Education Under the Constitution,* 201-211.

[12] "The Supreme Court as National School Board, footnote, *612. Professor* Corwin points to Madison's *Letters and Writings,* 4 vols. (Philadelphia, Pa.: Lippincott, 1865-1867). III, 228, 552.

only document which history is interested in."[13] He suggests that Justice Rutledge's preoccupation with the *Memorial* leaves the impression "that what was foremost in Madison's mind at the time of the First Amendment was the matter of 'assessments' or, more in general, of the use of State funds for religious purposes. ... If Madison had been thinking of State money for religious purposes and not of the danger of an exclusive establishment of religion he would, in all logic, have protested such abuses as giving State support for the chaplains in the House and the Senate. Actually when that system was set up, Madison was a member of the Committee which saw it through. By mixing up money with the simple issue of religious liberty, Mr. Justice Rutledge's 'history' will long remain grist to many a bigot's mill."[14]

In spite of the favorable decision concerning pupil transportation in the Everson Bus Case, the unprecedented interpretation of the First Amendment that the government *cannot aid religion,* even in general, gave the secularists ammunition for their second victory.

The second victory came a year later, in 1948. This time an eight to one majority held that the religious instruction plan of Champaign, Illinois (the McCollum case), was unconstitutional. As noted above,[16] the plan provided for a weekly forty-five minute class in religious instruction, not at public expense, on a voluntary basis, on school time and in the school building. The Supreme Court held that "this is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith, and it falls squarely under the ban of the First Amendment (made applicable to the states by the Fourteenth) as we interpreted it in the *Everson vs. Board of Education,* 330 U. S. 1."[ie] Thus, "This *decision* (the first in Supreme Court history so to treat the First Amendment, one hundred and fifty-seven years after it became part of the Constitution)," remarks James O'Neill, "is now the official expression of the Rutledge doctrine. . . . Four Justices, *dissenting,* in the Everson case ennunciated the Rutledge doctrine and eight accepted it in the McCollum case."[17] The positions of the Justices in

[13] *Op. cit.,* p. 23. [14] *Ibid.,* p. 22f. [16] See above, p. 154f.
[ie] *McCollum vs. Board of Education,* 333 U. S. 203.
[17] *Catholicism and American Freedom, 42f. For* a detailed and documented discussion of the McCollum case, see O'Neill, *Religion and Education Under the Constitution,*

the Everson and McCollum cases were based in the wholly unwarranted assumption that the *purpose* of the First Amendment is to uproot all relationships between government and religion. "Anyone who knows the most elementary facts of relevant American history," comments O'Neill, "knows that the First Amendment was not designed to, *and did not,* uproot any establishment of religion anywhere, or *prevent* the constant use of Federal funds to aid religion on a non-discriminatory basis from 1791 to the present day."[18] Justice Stanley Reed filed a dissenting opinion in which he stated, according to Stokes, that "he felt that the decision went beyond the separation which Madison and Jefferson contemplated, and beyond the Constitutional prohibition of 'an establishment of religion.' "[19]

Most of the discussion in the McCollum and Everson cases hinged on the principle of separation of Church and State. Actually, this phrase does not appear in the Constitution. Professor Corwin remarks: "This omission from the Constitution, however, of a phrase which was current in 1791, is now explained, inferentially, by the proposition that the ban which Amendment I puts on an establishment of religion accomplished the very result which specific invocation of the principle of separation would have accomplished. The more precise phrase was elbowed aside for a circumlocution."[20] In other words, the actual wording of the Constitution was shelved, its history ignored, and a metaphor coming originally from Thomas Jefferson—"a wall of separation between Church and State"—was substituted for it. This was the third and perhaps greatest victory of the secularists. Gleefully they can now point to Justice Hugo Black's words: "The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable"; [21] and to the statement of Justice Frankfurter; "we renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' *Everson vs Board of Education,* 330 U. S. at 59. If nowhere else, in the relation between Church and State, 'good fences make good neighbors.' "[22] For two reasons this metaphor is popular

[18] *Catholicism and American Freedom,* p. 43.
[19] *cit.,* II. p. 521.
[20] "The Supreme Court as National School Board/' 668.
[21] *Everson vs. Board of Education,* 330 U. S. 16.
[22] *McCollum vs. Board of Education,* 333 U. S. 20.

with those opposing any sort of government aid to religion. First of all, writes Jeffrey Keefe, O.F.M. Conv., this metaphor originated with Thomas Jefferson; and although he was in no way antagonistic to religion, as we shall presently show, the secularists take advantage of his patriotism to deny aid to religion and to hinder the practice of religion. "A second reason," says Father Keefe, "is that this slogan like all metaphors, does not have a clear-cut meaning. . . . A figure of speech means largely what its users want it to mean. Irresponsible and uninformed writers and speakers have repeated again and again that the Founding Fathers built 'the wall' high and impregnable. True American separation, they say, is absolute; it forbids any and all co-operation between Church and State."[23] Secularists would do well to remember the wisdom of Supreme Court Justice Reed's trenchant but ignored advice: "A rule of law should not be drawn from a figure of speech."[24]

There is no doubt that the Founding Fathers made it fundamental to our national plan that Church and State should be separated. They expressed their idea of separation in the First Amendment to the Constitution of the United States in these words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This sentence is the yardstick for measuring United States separation of Church and State.

THE FIRST AMENDMENT

What did the framers of the First Amendment mean when they wrote that principle into the Constitution? They wrote it to ensure that no single religion could be made the official national sect. They desired equality of all religions in the eyes of the Federal government. Preference and discrimination toward a single religion was outlawed. Congress was prevented from passing *any* law, either for or against establishing an official church. The Federal Congress could not set up an establishment; it could not disestablish an official Church which a particular state already had. "An established religion," says Father Keefe, "is a single Church supported by the government. It is the official religion of a state or nation. The upkeep of its clergy and places of worship is provided by public taxes. The Anglican

n American Separation of Church and State: Vbo Stretched the Principle? (New York, N. Y.: Paulist Press, 1951), 11..
* *McCollum vs. Board of Education,* 333 U. S. 203. 247.

Church in England, the Presbyterian Church in Scotland, and the Roman Catholic Church in Italy are 'established.' Establishment of religion does not necessarily mean that other churches are not allowed. It does mean that only one is tax-supported."[29] It will come as a surprise to many to learn that nine of the original states had established churches when the Revolution broke out. When the Constitution was being drafted, five states—Massachusetts, New Hampshire, Connecticut, Maryland, and South Carolina—tenaciously retained their established churches. Massachusetts kept something of an established religion until 1833—forty years after the First Amendment was ratified. The basic idea, the purpose, of the First Amendment was simply to make explicit what was implicit in the constitutional situation expressed in the original Constitution as written and signed in Philadelphia in 1787; namely, that the federal government had no authority in this area; that the state government, and not the federal government, should have exclusive government authority in the area of what Jefferson called "their domestic concerns," such as religion and education.[26]

Secularists credit James Madison and Thomas Jefferson with drafting a separation rule which forbids "every form of public aid or support for religion." Nothing could be further from the truth. Both believed in God but considered organized religion a human invention. Both certainly realized the great service religion renders to the nation by promoting morality among the citizenry.

James Madison (an Episcopalian) was the great promoter of the First Amendment. He led the fight to disestablish the Episcopal Church in his native Virginia. As noted above, what Madison consistently fought was not equal aid to all religions, but any preferred status for a single sect or particular group of sects. "Who does not see," he submits in *A Memorial and Remonstrance,* his polemic against the proposed bill in the Virginia Legislature, "that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"[27] Madison objected to the bill because it contained the principle of establishment—*pref-*

» *Op. cif.,* p. 12f.
'•O'Neill, *Catholicism and American Freedom,* 46.
« The full text of Madison's *Memorial and Remonstrance* is printed in O'Neill's *Religion and Education Vnder the Constitution,* Appendix C, 278-283.

erence for one sect or groups of sects, *discrimination* in its "exclusion of all other religions." Since the bill proposed exclusive support of Christianity it was in effect an establishment.

The Virginia bill, however, was a state affair. The First Amendment is a Federal issue. Did Madison believe in the same principle for a Federal law as he did for his home state? He took the lead in framing what today is known as the Bill of Rights of the Constitution of the United States, which comprises the first ten Amendments. What did he intend by the First Amendment? As originally formulated by Madison, what became the First Amendment read as follows: "The civil rights of none shall be abridged on account of religious beliefs or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[28] Later he elucidated these words, according to an unidentified writer in *Annals of Congress.* This commentator tells us Madison said: ' ... he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their consciences. ... If the word *national* was inserted for religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.'[28]

Professor Corwin points out that "In his later years Madison carried the principle of Separation of Church and State to pedantic lengths, just as he did the principle of Separation of Powers. In his essay on 'Monopolies,' which was written after he left the Presidency, probably long after, he put himself on record as opposed to the exemption of houses of worship from taxation, against the incorporation of ecclesiastical bodies with the faculty of acquiring property, against the houses of Congress having the right to choose chaplains to be paid out of national taxes, which, said he, 'is a palpable violation of constitutional

[e] Gales & Seaton, *The Debates and Proceedings in the Congress of the United States. . . .* commonly referred to as *Annals of Congress,* I, *c.* .451. Washington, D. C., 1934. *Annals of Congress* is the former name *tor The Congressional Record.*

[*] *Ibid.,* cc. 758-759.

principles,' also against chaplains in the Army and Navy. He states, indeed, that as President he was averse to issuing proclamations for days of Thanksgiving or prayer but was in some instances prevailed upon to affix his name to the proclamations of this character at the request of the houses of Congress. In all these respects, of course, Madison has been steadily overruled by the verdict of practice under the Constitution, as the data assembled by Justice Reed in his dissenting opinion show."[30]

Secular propaganda attempts to make another Founding Father, Thomas Jefferson (nominally an Episcopalian, but a Unitarian in belief) an advocate of absolute separation in the modern sense. As proof, secularists quote certain passages of his *Bill for Establishing Religious Freedom in Virginia* and quote them out of context. If anyone reads the entire Bill,[31] he will find it concerned with compulsion, restraint, and censorship in religious matters, all of which often follow establishment in the historical sense of the word. The *Bill* is a protest against making any one religion official. The whole tone of the preamble is one of denunciation of the establishment of one religion as official, and against the solitary support of any single sect. Jefferson's *Bill,* first submitted to the Legislature of Virginia in 1779 and passed in 1786, enacts four things: In Virginia no man shall (1) be compelled by the government to attend or support any religious worship, place, or ministry whatsoever, nor (2) be punished or interfered with by the government on account of his religious opinions or beliefs, but (on the contrary) all men shall be free (so far as the government is concerned) (3) to profess and argue for his religious opinions and beliefs, and (4) such activity shall in no way affect his civil capacities. "There are probably few if any literate Americans who do not endorse all provisions of the Virginia law for religious freedom," remarks O'Neill. "I do not know of one. Nor can I recall having read any published statements by an American of any church or party advocating any measure inconsistent with these principles."[32]

The official acts of Jefferson consistently contradict any attempt of secularists to make him an advocate of absolute

w "The Supreme Court as National School Board," 67 If. See also, *Villiam and Mary Quarterly,* 3rd Series, III, (October, 1946), 551-562.
« The hill text of the *Bill for Establishing Religious Freedom tn Virginia is* printed in O'Neill's *Religion and Education Under the Constitution,* Appendix B, 275-277.
u *Religion and Education Under tie Constitution,* 74.

separation of Church and State in America, or specifically a bitter enemy of the use of public funds in impartial support of religion. The Third President approved the use of tax money for chaplains in the army, navy, and Congress, without contrary recommendation or countermanding order as Commander-in Chief. He sent to the Senate a treaty with the Kaskasia Indians which provided for government erection of a church, and payment of a seven-year salary toward the support of a Catholic priest.[33]

After he left the Presidency, Jefferson became the rector of the University of Virginia, a quasi-state institution. Anson Phelps Stokes[34] tells us that "Jefferson secured works on the evidence of Christianity for the library, and in planning the buildings of the university he provided in the rotunda for a special room 'for religious worship,'[35] and gave his support to a proposal to invite the four major religious denominations of the state to establish independent theological schools in the immediate neighborhood of the university, with the idea that their clerical professors would be invited from time to time to preach there.[36] This project did not materialize, but it is interesting to note that Jefferson himself acknowledged that 'the want of instruction in the various creeds of religious faith among the citizens' was a 'chasm'[37] at the new institution."

Ignoring these plain facts of history, secularists continue to exploit a single metaphor of Jefferson's, to impose their own meaning on it, and claim it to be Jeffersonian doctrine, even though it contradicts his entire writings and practice. The metaphor is found in his courtesy letter in reply to an address from a committee of the Danbury Baptist Association of Connecticut (January 1, 1802)

> contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State."[38]

What is even more startling is the fact that secular propagandists

[33] See Stokes, *op. cit.,* I, p. 704. [34] *Op. cit.,* I, p. 337f.
[35] See Philip Alexander Bruce, *History of the University of Virginia, 1818-1919, y vols.* (New York, N. Y.t Macmillan, 1920-1922), II, 366, 369.
[36] *Ibid.,* II, pp. 367-369.
[37] *Ibid.,* II. p. 366. The text of Jefferson's *Freedom of Religion at the University of Virgina* (1822) is printed in O'Neill's *Religion and Education Under the Constitution,* Appendix D, 284-285.
[38] *Writings of Jefferson,* Monticello Edition, 20 vols. (Washington, D. Q: Thomas Jefferson Memorial Association, 1903-1904), XVI, 281. The text of Jefferson's Reply to the Baptists of Danbury is printed in O'Neill's *Religion and Education Under the Constitution,* Appendix E, 286.

have succeeded in introducing that metaphor into opinions of Supreme Court Justices. Thus, as Professor O'Neill points out, "in the McCollum opinions the Justices did not even *discuss* the language of the First Amendment, or explain how they could apply the 'wall-of-separation metaphor' (Justice Frankfurter's words, 333 U. S. 203), instead of the clause of the Constitution that was under dispute." Professor O'Neill continues: "If they were justified in preferring to 'apply' a figure of speech from a polite correspondence of Thomas Jefferson, why cannot their successors pick out a phrase they like from the letters of Franklin Roosevelt, Herbert Hoover, Woodrow Wilson, or Warren Harding, and be guided by that, instead of the language that has been ratified by the American people as part of the Constitution?"[39]

Professor Corwin sums up Madison's and Jefferson's attitude thus: "not as demanding that public-supported education should be exclusively secular and admitting no religious elements; *but that no public authority should give a preference to any religion or denomination.* Preference, special advantage, for this, or that or the other religion or denomination, was what they wished to rule out and what they thought had been ruled out by the First Amendment."[40]

To discover the really traditional American principle of separation of Church and State, we have studied what the first Congress meant when it wrote that principle into the Constitution. We have seen that the framers of the First Amendment wrote it to ensure that no single religion be made the official national sect. A second method of discovering the traditional principle of separation is to study how Presidents, Congresses, and Supreme Courts have reflected the meaning of separation as they made tradition during the first one hundred sixty years. More precisely, how have the hundred and sixty years of practice reflected the First Amendment? The answer is clear: *United States history reveals a sixteen-decade period of government co-operation with religion.* That co-operation includes appointment of chaplains in Congress, the armed forces, hospitals and prisons, proclamations on national days of prayer and thanksgiving, government-built and government-purchased furnishings according to the re-

» *Catholicism and American Freedom,* Slf.
*°''The Supreme Court as National School Board/ 673.

quirements of each sect, the GI Bill of Rights, providing eligible veterans with training in the ministry of any sect, and numerous other practices. All could be classified as "forms of support for religion," which Justice Rutledge alleges are opposed to the First Amendment. Such practices likewise "aid all religions" and are thereby illegal according to Justice Black's opinion in the Everson and McCollum cases.[41]

Perhaps the most devastating argument against the new and historically unsupported meaning of "an establishment of religion" is this: Professor Corwin points out that in the McCollum case "Justice Frankfurter quotes President Grant's 'famous remarks' in 1875 to a convention of the Army of Tennessee, and his message to Congress of the same year, asking for a constitutional amendment which, among other things, would forbid the use of public funds for sectarian education, and attacking the exemption of church property from taxation. Acting on these suggestions James G. Blaine introduced a resolution providing that 'no State shall make any law respecting an establishment of religion,' and prohibiting any appropriation of public school money by any State to sectarian schools. That proposal was adopted by the House overwhelmingly, but was lost in the Senate. It has been reintroduced some twenty times, without result."[42]

Professor O'Neill is right when he states: "There is in Congressional history no evidence whatever that the people of the United States have ever changed their belief in the doctrine of the First Amendment as it was written by the First Congress, providing that governmental control in such domestic concerns as religion and education shall be the responsibility of the individual states."[43]

THE FOURTEENTH AMENDMENT

The First Amendment only forbids *Congress* to make a law respecting an establishment of religion. In the intention of the Founding Fathers, an established church was a possibility in any of the thirteen original states if the people wished to provide for it in their constitutions and statutes. Now the argument is that the "establishment of religion" clause applies to *the states* through the Four-

[41] Keefe, *op. cit.,* p. 18.
[43] "The Supreme Court as National School Board, 675» See also, M. A. Musmanno, *Proposed Amendments to the Constitution,* seventieth Congress, Third Session, H. D. No. 551, p. 182.
[43] *Religion and Education Under the Constitution,* 124.

teenth Amendment. This amendment was ratified in 1868 and adopted in connection with the abolition of slavery at the close of the Civil War. Its first section—the only part that concerns us here—is especially important in that it extends to the states the Federal Constitutional guarantees, contained in Amendment V of the Bill of Rights, against deprivation "of life, liberty, or property, without due process of law." This first section of the Fourteenth Amendment reads in full: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Before discussing the problem of the application of the Bill of Rights through the Fourteenth Amendment as a restriction upon the power of the individual states, a few words with regard to the history of the Amendment are in order. "This amendment," writes Professor O'Neill, "was conceived in passion, partisanship, and revenge, and has been the happy hunting ground of pressure groups and special pleaders throughout its history. It was the basis of more litigation than all the rest of the Constitution combined. It is the only part of the Constitution which has the blemish of the presuasions of force rather than reason on its right and title to a place in our fundamental law. In addition to this it has probably the unique distinction of being in the Constitution as the result of a strictly party vote."[44] C. G. Haines supports this view, saying: "By counting the reconstructed states, forcibly put under Republican control, the amendment was finally declared adopted with its meaning and intent very much in doubt. In the controversy over the adoption very little consideration was given to the significance of Section One, the only portion which has had any noticeable effect upon the relations of the federal and state governments."[45] Professor O'Neill submits that "Horace Flack's careful step by step account of the adoption[40] of the Fourteenth Amendment

[44] *Hid.*, 154f.

[45] "The History of Due Process After the Civil War." Reprinted in *Selected Essays,* I, 273. 3 *Texas Law Review,* I, Austin, Texos, 1924.

[40] *The Adoption of the Fourteenth Amendment* (Baltimore, Md.r The Johns Hopkins Press, 1908).

contains no reference to the first clause of the First Amendment. In all of the discussion in Congress apparently no one had in mind a change that would have any effect at all on any question of religion or religious education."[47] "Strangely enough," writes Anson Phelps Stokes, "the Fourteenth Amendment was in force over half a century before it began to be made use of by the Supreme Court through a prevailing opinion to guarantee to the citizens of the individual states the fundamental provisions of the Bill of Rights regarding religious freedom. . . . For nearly a quarter of a century, that is, through 1896, the majority of the Supreme Court seemed to consider that the Fourteenth Amendment was concerned with slavery and economic rights alone and did not otherwise affect the interpretation of the Bill of Rights."[48] Indeed, in James O'Neill's judgment, "The problem of the application of the Bill of Rights by the Fourteenth Amendment as a restriction upon the power of the individual states, is still a matter of speculation, clouded by confusion and conflict in the separate opinions of the Justices and in the Supreme Court decisions. The decisions not only conflict directly with each other; there are conflicting theories in regard to the authority of the Supreme Court in this matter and also in regard to the proper limitations to be observed in applying to the several states through the Fourteenth Amendment *any* of the restrictions on Congress in the United States Constitution."[49] The problem is not yet solved—eighty years after the ratification of the Amendment. In O'Neill's opinion, "No one in the United States from the Chief Justice down to the youngest law school freshman knows today just *what parts of* the Bill of Rights are now through the Fourteenth Amendment restrictions on state legislatures, or to *what extent* any part is such a restriction."[80]

The two parts of the Fourteenth Amendment which bear directly upon our problem are the phrases concerning "the privileges or immunities of citizens of the United States" and "due process of law."

Secularists claim that the "privileges or immunities" clause of the Fourteenth Amendment furnishes the basis for granting legal force and effect to their slogan "separation of Church and State." This is wholly unfounded. The

47 *Religion and Education Under the Constitution,* 160.
48 *Op., cit,,* I, pp. 580f, 591.
49 *Religion and Education Under the Constitution,* 153f.
80 *Ibid.,* p. 156.

"privileges and immunities" protected by the Fourteenth Amendment are those of *national,* not state, citizenship. This principle has been consistently held by the Supreme Court almost without exception from 1873 (in the Slaughterhouse cases, the first instance in which the Court considered the Fourth Amendment) to 1948 in the McCollum case, as well as by recognized scholars in constitutional law.51 The privileges and immunities clause of the Fourteenth Amendment, therefore, furnishes no basis for the slogan of the secularists.

"It is obviously impossible to show," writes Professor O'Neill, "that the objectives pursued by the devotees of this slogan are privileges and immunities of *national citizenship.* Neither freedom from an established religion nor freedom of worship in this country were ever privileges of *national* as distinct from *state* citizenship. Freedom of worship in the First Amendment had no qualifications on it. It was endorsed. Congress could not 'restrict it.' Invasions of freedom of religion were condemned. But 'an establishment of religion' was not condemned. The only 'establishments' this country had ever known, state establishments, were left untouched and some of them went on for years. The First Amendment made a national establishment impossible and so protected the people of a state against a national establishment only. If it is argued, therefore, that there is a privilege or immunity here that is an aspect of national citizenship, it is clearly and inevitably only an immunity from a *national* establishment of religion, and cannot be applied to protect the people of Illinois (in the McCollum case) from a *state* establishment of religion. This should be sufficiently clear from the simple and specific language of the clause itself, according to the meaning of the words in eighteenth-century America and the constitutional situation in which the clause was framed. . . . When the Fourteenth Amendment, therefore, is held to channel the First Amendment to the several states in such a way as to deprive them of their freedom to do as they please in regard to a state establishment of religion *through state constitutions and state laws, each applicable only in the individual states concerned,* it takes away from the people of the several states the precise freedom which the First Amendment was explicitly designed to preserve. The pres-

nilid., p. 156f.

ervation of this precise freedom has been specifically defended by Congress many times."[62]

The attempts of the propagandists for secularism in the earlier period of our history (between 1870 and 1888) to reduce state freedom in the area of the relations of government to religion and education, were carried on according to the democratic tradition and the Constitutional provisions, by seeking an amendment to the Constitution to put their new doctrine into the fundamental law of the nation. Congress rejected all of such attempts. But their modern counterparts—such as "Protestants and Other Americans United for Separation of Church and State"—seek to avoid the democratic process of amendment, and to circumvent the will of the American people, by knocking out the First Amendment by an edict of the Supreme Court. And yet, these people keep on proclaiming that this doctrine of absolute, complete and unqualified separation of Church and State is a *great constitutional principle,* and is endorsed by the American people.[63]

The Court's decision in the McCollum case (March 8, 1948), in Professor O'Neill's judgment, "in spite of history, the English language, and the doctrine of *stare decisis,*[84] reversed the total record of the court up to date. This great reversal was accomplished under the theory that the Fourteenth Amendment channeled the doctrine of complete separation of Church and State from the First Amendment to the Constitution and laws of the several states. It was done with little attempted justification except in the erroneous *dicta* in the Everson case and the Justices' 'zeal' and 'prepossessions' in the realms of religion and education."[66]

Turning next to the phrase "due process of law" (found in the Fifth and Fourteenth Amendment) which has a bearing upon our present subject, we find it necessary to stress that this phrase has undergone a change of meaning from its century-old significance (clearly the only meaning it had to those who wrote and ratified the Constitution and the Bill of Rights). Originally, "due process of law" meant

83/W., p. 163f. See also, p. 124.
***n Ibid.*, p. 165f.**
MThe maxim, *stare decisis et non quieta movere,*—to stand by precedents and not to disturb what is settled ___ is founded on the principle that stability and certainty in the law are of first importance. When a point of law is once clearly decided by a court of final jurisdiction, it becomes a fixed rule of law to govern future action ____ It *is* better to have a bad law with certainty of its meaning than a good law whose scope of operation is undefinable and unknown. (C. W. Collins, *The Fourteenth Amendment and the States* (Boston: Little, Brown and Company, 1912), 110.
***a Religion and Education Under the Constitution,* 167.**

roughly "according to law," or "through proper legal procedure." In other words, the government could not imprison or execute a person or take away his property without proceeding against him according to the laws and procedure which were known and applicable in question. Now "due process of law" is interpreted as involving reasonable procedure and reasonable law; that is to say, what a majority of the Supreme Court find to be *reasonable* in one or another sense of that extremely elastic term. In effect, it means *the approval of the Supreme Court.*[66] "This is the new *substantive* theory of law (as against the ancient *procedural* meaning of the phrase) : That the substance or content of the law, the law itself, must be reasonable in order to be Constitutional," says Anson Phelps Stokes.[67]

According to outstanding legal scholars generally the changing of the meaning of "due process" phrase was brought about by the Supreme Court Justices. In the period from about 1870 to 1925, they were concerned about the protection of the property of American corporations from the attacks of State legislatures seeking to make effective social legislation on such subjects as taxes, minimum wages, rates charged by public service corporations, maximum hours of labor, and conditions of labor for women and children. Professor O'Neill writes: "In order to make possible such protection of the 'property' of the corporations in spite of the provisions of the Constitution and the laws of the several states, the Supreme Court did violence to both history and language in taking the following two positions. *First,* the Court in 1886,[68] announced that a corporation was a 'person' within the meaning of the Fourteenth Amendment, and that therefore the corporation as a person could not have its life, liberty or property (especially property) taken from it without 'due process of law' ... In this way the property of the corporation (person) could not be taken from him by a new social legislation of the individual states unless the Supreme Court approved of the new laws as *reasonable* measures. . . . *Second,* the Court in further bending the law and language in defense of corporation property, played havoc with the word 'liberty' in the due process clause of the Fifth and Fourteenth Amendments."[69] Charles Warren in discussing the Supreme

[66] See Edward S. Corwin, *The Constitution and Wbat It Means Today.* 9th edition (Princeton, N. J.: Princeton University Press, 1947), 155-156.
[67] *Op. cit.,* I, p. 577.
[68] *Santa Clara County ns. Southern R. R.,* 118 U. S. 394 (1886).
[69] *Religion and Education Under the Constitution,* 170f.

Court's juggling with the word "liberty" says: "That the single word 'liberty' will have become a tremendous engine for attack on state legislation—an engine which could not have been conceived possible by the framers of the first ten amendments or by the framers of the Fourteenth Amendment."[60]

Before the adoption of the Fourteenth Amendment in 1868, the literal language of the First Amendment was accepted as meaning exactly what it said and the Bill of Rights in the Federal Constitution was consistently held to impose no restrictions on the individual states. "Following the adoption of the Fourteenth Amendment," writes O'Neill "the question was raised from time to time as to whether or not the Fourteenth Amendment transferred as restriction upon state legislatures the various items in the First Amendment: freedom of speech, religion, press, etc. From 1868 to 1925 the Court many times and without a single exception refused to recognize that any part of the First Amendment had made a restriction on the legislative powers of the states."[61] Since 1925 the Court simply assumed that certain fundamental rights and liberties "of the very essence of ordered liberty" (which were also mentioned in the First Amendments as restrictions on Congress) had been made restrictions on the states by the due process clause of the Fourteenth Amendment.[62] "To do this, says O'Neill, "the Justices gave to the word 'liberty' a meaning which it could not possibly have had to the authors of the Fifth Amendment, and therefore could not properly be the sense of the word in the phrase of the Fourteenth Amendment. This phrase was *copied from the Fifth* (and so stated by Representative John A. Bingham of Ohio, the chief author and sponsor of the first section of the Fourteenth Amendment, speaking in Congress on February 26, 1866, when that amendment was under debate)."[63] O'Neill continues, "I submit that a logical and literate person has to grant that this juggling with the word 'liberty' in the Fourteenth Amendment either (a) so reads the Fifth Amendment in the Bill of Rights as to make the First Amendment redundant and ridiculous, or

- "The New Liberty under the 14th Amendment." *39 Harvard Law Review,* 431 (19261 Reprinted in Selected Essays, Vol. II, 263-264. 1
n Religion and Education Under the Constitution, 172.
e The first case in which the Supreme Court considered religious freedom as one of the personal liberties protected from state violation by the Fourteenth Amendment was *Hamilton vs. University of California,* 293, U. S. 245 (1934) See O'Neill, *op. cit.,* 177-178.
* *Congressional Globe,* Thirty-ninth Congress, Washington Congressional Globe Office 1866, Part 2, 813f.

(b) make necessary the belief the *identical words* copied from the Fifth into the Fourteenth Amendment mean one thing in the Fifth and something else in the Fourteenth."[64] And all this in spite of the fact that "the Supreme Court has more than once said that the due process clause of the Fourteenth Amendment has the same scope as the similar clause in the Fifth Amendment."[65]

A study of the case history of the Court, writes O'Neill, will show "the casual, almost absent-minded way in which the Justices of the Supreme Court have let fall from time to time a few phrases which mark their wanderings from 1920 to 1948. They have moved backwards and forwards, and in circles, sometimes arriving at a position held earlier, then abandoned, and then arrived at again. It is a clear case of 'Now you see it, and now you don't.' At no time is there any explanation, argument, or defense of any sort of the new doctrine, or even any evidence that the Justices realize that a long established position is being abandoned and a new one being assumed—or later that the new one is being given up and the old one reoccupied."[66] The basic purpose of the Fourteenth Amendment, O'Neill continues, "to create and protect the citizenship of the Negroes, has been almost wholly neglected. Its loose, vague language gives free scope to that appetite for dictatorial powers which seems to be latent in many members of the human race. Some men who carry the germ of this disease apparently sometimes get on the Supreme Bench. If the specific provisions of the other parts of the Constitution are all by the Fourteenth Amendment essentially rendered subject to the discretion of the Justices, this makes the Constitution only an interesting historical document illustrating the futile aspirations of those who thought constitutional democracy could be made to work."[67]

The McCollum case is a shining example of the absurdities and inaccuracies of the Supreme Court opinions. The paragraphs solemnly "interpreting" the fantastic "interpretations" of an imaginary amendment to the Constitution are, or well may be, tragic.[68] Professor Corwin submits that, properly speaking, the only question before the Court was this: If the 'released time' program involved amounted to an invasion of anybody's freedom of religion it was

[64] *Religion and Education Under the Constitution,* 174.
[65] Charles Warren, *op. cit.,* p. 244.
[66] *Religion and Education Under the Constitution,* 175. See also, 175-184.
[67] *Ibid.. P- 187.* [68] *Ibid., p.* 250.

unconstitutional; and the talk about "an establishment of religion" was entirely beside the point *"unless the 'released time' program of the Champain schools involved an establishment of religion of such a nature as to deprive the plaintiff in the case of freedom of religion.* In other words, the Fourteenth Amendment does not authorize the Court to substitute the word 'State' for 'Congress' in the ban imposed by the First Amendment on laws 'respecting an establishment of religion.' *So far as the Fourteenth Amendment is concerned, States are entirely free to establish religions, provided that they do not deprive anybody of religious liberty.* It is only *liberty* that the Fourteenth Amendment protects."[69]

In Father Keefe's judgment it is a frightening omen that "after a hundred and sixty years, during which a constitutional amendment has meant one specific thing, we now find it suddenly enlarged. Who extended it? Congress did not propose any change. In a democracy the legislature represents the people. As their representative, Congress has rejected twenty-one proposals to alter the First Amendment. The new strategy is to promote new laws through the Supreme Court. When the Court says the First Amendment forbids public aid or support for religion, that strategy seems victorious. Can five men—five make a Court majority—change the Constitution?"[70] Professor O'Neill calls questions like that of bus rides for parochial school children or "released time" for religious education in Illinois or elsewhere of trifling importance compared to the question of "whether the Justices of the Supreme Court shall pass on constitutional questions in the light of the language and meaning of the Constitution or in the light of their private philosophies of religion and education."[71]

Not only Catholics but other intelligent citizens have appraised the new First Amendment interpretation. *The Journal of the American Bar Association* censured the McCollum decision and warned that the McCollum case may be one of those fateful decisions which is ignored at the time but regretted in the future. It deserves consideration now.[72] Leading Protestants, too, have spoken against the misinterpretation of traditional separation of Church

[69] "The Supreme Court as National School Board, 677f.
[70] *Op. cit.,* p. 22.
[71] *Religion and Education Under the Constitution,* Preface, xi.
[72] Editorial, "No Law But Our Own Presuppositions?" in *American Bar Association Journal,* XXXIV, No. 6 (June, 1948), 482-484/

and State in phrases that are almost identical with the statement, *The Christian in Action,* issued by all the Catholic bishops in the United States.[73] The complete-statement-of these Protestant leaders was widely reported in the press.[74] In the majority opinion of the Supreme Court (1952) which upholds the "released-time" program of New York State, Justice Douglas pointed out that the Constitution "does not say in every and all respects there shall be a separation of Church and State." He added, "Rather, it studiously defines the manner, the specific ways in which there shall be no concert or union or dependency of one on the other. This is the common sense of the matter."

The First Amendment of the Constitution expresses the American brand of separation of Church and State. The First Amendment does not outlaw co-operation. Nor does it legalize discrimination. American Catholics favor separation of Church and State in the true American sense. "Spokesmen for the last fifty years, from Cardinal Gibbons[76] to Archbishop McNicholas,"[73] writes Father Keefe, "have repeated that Catholics have no design on changing the First Amendment. Actually those preaching the new separation gospel are the ones trying to change the Constitution. And these 'patriots' are circumventing the proper democratic process to do it."[77] It behooves Catholics to remember that liberty is the price of eternal vigilance.

C. REJECTION OF THE PRINCIPLE OF SEPARATION BY THE CHURCH

In a former chapter we utilized the empirico-logical method to ascertain the proper concept and nature of the separation of Church and State. We also found that absolute, rigid, complete separation is indeed not yet a reality anywhere in the world; not even in countries under Communist domination, although it is the avowed aim and the relentless endeavor of Boshevistic Communism ultimately to separate mankind not only from the Church but also from the very idea of God. We will now discuss the question: How is the principle of separation to be judged and evaluated from the Catholic point of view?

n Washington, D. C., National Catholic Welfare Conference, November, 1948.
'< The press release was introduced by a statement, signed by the initials of Dr. J. G Bennett, discussing "The New Conception of 'Separation,' " *Christianity and Crith (New* York, 1948). O'Neill quotes the text in *Catholicism ana American Freedom,* 55-57.
" See John Tracy Ellis, *The Life of James Cardinal Gibbons, Archbishop of Baltimore. 1834-1921. 2* vols. (Milwaukee, Wisconsin: Bruce, 1951), I, 308f., 321f.
'· "The Catholic Church in. American Democracy," Press release, January 26, 1948, N. C. W. C. Quoted in part tn O'Neill, *Catholicism and American Freedom,* 34f.
w *Ob. ch.,* p. 22.

DIVERGENT OPINIONS

It is a remarkable fact that often an inclination—at times even an enthusiasm—for the policy of separation has appeared in Catholic circles. The enticing feature of separation is the full freedom it promises to the Church; set free from the crushing tutelage of the State, the Church, it is thought, will be able to develop and act unrestrained. Thus Félicité de Lamennais, in his struggle against the State-controlled Church of France (1829), called upon the clergy to break the bonds that tied them to the State and its payroll; to seize the right to communicate with the pope; to enjoy freedom of instruction and worship; to become no more subject to the laws of the State than any other group of citizens. Such complete independence would be possible only by foregoing all remuneration from the State treasury.[1] At a congress of Catholics in Belgium in 1863, in two rousing speeches Count de Montalembert developed his thoughts about separation and coined the alluring catch word "a free Church in a free State."[2]

It was not enthusiasm for separation but rather the misery and distress of the Kulturkampf that for a time aroused the statesman Ludwig Windthorst, leader of the Centre Party and German Catholics, to champion separation. "I am not of the opinion that separation of Church and State is in itself desirable," he said; "rather do I hold that only an amicable co-operation is suitable for establishing the happiness of peoples, but... I am beginning to believe that conditions are gradually so shaping throughout the world, by virtue of the development which the spirit of man is undergoing, with unchristian ideas gaining the ascendancy, that such a co-operation can no longer be maintained in the long run. Thus it will become a matter of our attempting this temporary or lasting separation calmly and with due consideration of all the circumstances."[3]

At a later date the Bishop of Cremona in Italy, Geremia Bonomelli, in his volume The Church[4] and in his Lenten pastoral of 1905, spoke out at great length—hypothetically, it is true, but nevertheless optimistically—in favor of separation. He looked upon it under current conditions as the

[1] See Antoine Degert, "Félicité de Lamennais," *Catholic Encyclopedia,* VIII. 762ff. See also, Raymond Corrigan, S.J., *The Church and the Nineteenth Century,* 129-133.
[2] George Goyau, "Count de Montalembert," *Catholic Encyclopedia,* X, 515.
[3] Speech in the Prussian Chamber of Deputies on June 22, 1883; stenographic records, p. 2127.
[4] *The Church* is the third volume in Bonomelli's series entitled *Seguiamo la raggione,* 3 vols. (Milan, 1898-1899).

lesser evil and therefore as the relatively higher good. He writes: "I have unbounded confidence in the might of reason, and it seems to me that when the Church possesses full and certain freedom under the shadow of the common law and is able to count only on herself she will double her zeal to do what she now cannot do. . . . Having come into being without monarchs and republics, yes, under their scourge and in opposition to their laws, the Church, made strong only by the love of peoples and of the common law, will be able to grow and flourish also under lack of sympathy (from the same monarchs and republics). This is the new period of history that opens before us, into which we must and will enter bravely."[6]

From the polemic viewpoint the attitude of non-Catholics might seem to oifer an indirect argument in favor of separation. For many non-Catholic voices are raised in urgent warning against the experiment of separation of Church and State since by separation the Catholic Church might be able to gain more power and elbowroom. We have already called attention to such objections to separation in the Introduction to this study.

Two Berlin professors of canon law who are commonly regarded as authorities in this branch of jurisprudence have often spoken out against separation as a policy that will actually redound to the prestige of the Catholic Church. It would be short-sighted and unrealistic politics, remarks Paul Hinschius, were the State to treat the Catholic Church as a private society; for by so doing it would only be closing its eyes to the real phenomena of life and would set free the greatest and most dangerous enemy in its own midst, an enemy trained for hundreds of years in the art of politics; an enemy which knows how to utilize the freedom of the modern State and political life for the one purpose it has at the present time, namely, the spread and vindication of the Catholic philosophy of life; and which at the same time with its marvelous tact and skill knows how to enlist in its service the current actualities of internal and external politics in the individual states.® Wilhelm Kahl develops these thoughts more fully. If the State were to surrender its sovereign rights over the Church, by degrading her to the status of a private society, such action

[5] Translated from the German edition, *Dit Kirche,* by Valentine Holzer (Munich, 1903), 393f.
[6] "Staat und Kirche, in Marquardsen, *Handbuch dtj ofientlhchen Rechfs,* 265.

would menace the most vital interests of the State itself. The Catholic Church would only seem to be the loser; in reality she would gain proportionately all the more, by an enlargement of her competence, because all matters of the "mixed forum," where the Church and State both feel they have juridical competence, would cease to exist; and secondly, also by the cessation of all State control and supervision. The freedom thus obtained would gradually be used by the Church for a renewal of Church control over the State, Kahl holds. To this end the Church would know how to use two means in particular to recapture control over the State: first, constitutionalism, for she knows how to gain influence in parliaments; and secondly, her own independent status as a society after separation. All this would lead to a situation that could be designated as a free Church in an unfree State, as the example of Belgium already shows. In North America, thanks to democratic constitutionalism and the right of universal suffrage, Catholicism dominates the Federal and state governments to such a degree that the transition to some other ecclesiastico-political system can only be a question of time, Kahl believes.[7]

Many others agree with these appraisals. Then, too, the point is stressed that in the event of separation the Catholic Church, by reason of her independent juridical organization that relies in no way on State support, holds a position more favorable than that of any other denomination. For the Evangelical church, Paul Drew remarks,[8] separation spells ruin. In short, there is fear that the catch phrase "a free Church in a free State" would be changed by the advantage of the Catholic Church into the slogan "a free pike in a free (or open) carp-pool," as the Protestant theologian Ernst Troeltsch once phrased it.[9]

THE CHURCH'S ATTITUDE

Despite such optismistic judgments, the Catholic Church refuses to give her approval to the system of separation. Rome's rejection of Félicité de Lammenais' theory[10] is evidence enough in this respect, and the unfavorable treatment accorded Bonomelli's proposal at the hands of Pius X leaves no further doubt as to the Church's stand. When

7 *Lehtsystem des Kirchenrechts und det Kircbenpolitik,* I, 305f.
8 *Zeitschrift fût Théologie und Kitche,* XVI (1906), 80.
9 *Die Trennung von Stoat und Kitche* (Tubingen, 1907), 36.
10 Encyclical *Mirari vos,* August 15, 1832, in *ASS,* IV (1868), *541S. See Also,* Denzfager *Enchiridion,* nos. 1615.

the bishops of Lombardy expressed to the pope their regret with regard to the indiscreet utterances of their episcopal colleague, he assured them that he too regarded the publication as deplorable, since it was calculated to make propaganda for modern liberalism. The fine distinctions and reservations in the proposal, he believed, would remain unnoticed by the masses and the only impression Bonomelli's writings would create would be astonishment that a person of such authority championed such views.[11] When Bishop Bonomelli visited Rome to plead his cause, he was refused an audience.

The principle of separation was officially condemned by Pius IX in the *Syllabus* (thesis fifty-five): "The Church should be separated from the State, and the State from the Church."[12] A simple application of the rules governing the correct interpretation of propositions rejected in the *Syllabus,* shows that the Church does not condemn the separation of Church and State absolutely and under all circumstances, but merely does not approve of it in principle. We are dealing with the *principle* of the thesis, which is that, normally, Church and State belong together and should not be torn asunder. Monsignor Joseph Pohle puts it in these words: "As it is unnatural for a married couple to live separated, although separation may be defended in particular instances as the better or less harmful arrangement in view of quarrels which have arisen, so also the ideal relation between Church and State is to be found, not in the separation of the two, but in their harmonious cooperation."[13]

Six weeks after the *Syllabus* was published, Felix Antoine Dupanloup, Bishop of Orléans, France, published a commentary which removed all misunderstanding regarding the meaning of the condemnation of the theses in the *Syllabus.* "His famous distinction between *la thèse* and *l'hypothèse,"* says Father Corrigan, "satisfied all well-meaning objectors and received, moreover, the warm approbation of Pius IX and six hundred and thirty bishops. It had, in fact, been anticipated by the ultraconservative *Civiltà Cattolica* in its issue for October 2, 1863."[14] An anonymous writer, discussing the Congress of Malines,

[11] J. Sâgmûller, *Dit Trennunç ton Kircbe und Stoat* (Mainz, 1907), 20.
[12] See also. Allocution of Pius IX, *Acerbissimum,* September 27, 1852; Leo XIII, Encyclicals, *Arcanum,* February 10, 1880; *Immortale Dei,* November 1, 1885; *Ubertas,* January 20, 1888.
[13] "Religious Toleration," *Catholic Encylopedia,* XIV, 771.
[14] *The Church and the Nineteenth Century,* 182.

Belgium, and Modern Liberalism, insists on the distinction between *tesi* and *ipotesi.* He writes: "These liberties, stated as a thesis—that is, as principles of universal application to human nature and the divine plan—should be and have been condemned absolutely by the Roman Pontiffs, particularly by Pius VI, Pius VII and Pius IX (in 1852). But in the form of hypothesis—that is, as an arrangement suitable to special conditions in this or that nation, they may well be legitimate. As such Catholics may cherish and defend them. . . . "[15] Thus, as the historian Father Corrigan remarks, "Bishop Dupanloup placed all the anthemas of the *Syllabus,* including the one against separation of Church and State, in their proper context, showing that they held for the Christian society which should exist, but that in the unfortunate conditions then prevalent, in which insistence upon the ideal would be futile, the Church might be content with less."[16]

Accordingly, the Church cannot fairly be accused of inconsistency if in a country where she has been oppressed and obstructed, perhaps even persecuted, she seeks by separation to make her status more tolerable. For example, the Catholics of Geneva, Switzerland, joined with the radicals and socialists in presenting a resolution for separation which by plebiscite on June 30, 1907, became law. But actually ever since 1873 the Church had been denied recognition as a society sanctioned by public law, a status she had previous to that date enjoyed on a par with the Protestant church on the basis of solemn international agreements. The Geneva Kulturkampf aroused indignation among Catholics against the injustice meted out to them because the "Old Catholics," who yielded obedience to the anti-Catholic law of the State, were regarded as the national Catholic Church, whereas Catholics loyal to the pope and the Roman Catholic Church were robbed of their churches, parsonages and their share of public monetary support for divine worship, and were obliged to organize as private associations. At the same time, Catholics were compelled to contribute to the budget of the Protestant church, and to that of the Old Catholic Church as the juridically recognized "Catholic" Church, while for their own religious needs they received not even the smallest pecuniary aid from the treasury. The Protestants, on the other

« *CMlti Catlolica,* III (Rome, 186Î), Sirie V. 149.
χ *Op. cit.,* p. 298. See also, Maurice Bévenot, S.J., "Thesis and Hypothesis," *Theological Studies,* XV. (September, 1954), No. 440-446.

hand, had been favored, for to them a lump sum of 800,000 francs (about $160,000) had been paid at the outset.[17] In consequence of the law of separation in Geneva all denominations are now placed on a par to the extent that none of them any longer receives funds from the State or communal treasuries, and so they have all become free churches.

The conduct of the Geneva Catholics is in perfect accord with the view expressed by Leo XIII much earlier in a letter to the bishops, clergy and faithful of France. The pope said that in certain countries where there is separation, "It is a condition, which, if it has numerous serious inconveniences, also offers some advantages—above all, when, by a fortunate inconsistency, the legislator is inspired by Christian principles—and, though these advantages cannot justify the false principle of separation nor authorize its defense, they nevertheless render worthy of toleration a situation which, in practice, might be worse." Then he added: "But in France, a nation Catholic by her traditions and by the present faith of the great majority of her sons, the Church should not be placed in the precarious position to which she must submit among other peoples."[18]

What are the reasons that make it impossible for the Church to approve in principle the policy of separation? For clarity's sake they can perhaps be epitomized in two propositions: (1) The State may not separate itself from the Church; and (2) the State cannot and does not desire to divorce itself from the Church.

(1) The State may not effect a separation from the Church, for such action is irreconcilable with the will of God; separation, as we shall presently see, leads almost of necessity to separation from religion. An irreligious State or a State that puts Judaism, Mohammendanism and paganism on a par with the Christian religion is also incompatible with the Christian faith. The Church has condemned the doctrine that "the best political system and civil progress absolutely demand that human society be organized and ruled without regard to religion, as if religion did not exist, or at least without discrimination between true and false religions."[19] Every man is in duty obliged to serve

ir See Gregor Reinhold, "Diocese of Lausanne and Geneva," *Catholic Encyclopedia,* IX, 42.
M Encyclical *Au milieu des solicitudes,* February 16, 1892, in *Leonis XIII Pontificis Maximi Acta* (Rome, 1893), XII, 39. English translation from *The Great Encyclical Letters of Pope Leo KiII,* 262.
» Encyclical of Pius IX, *Quanta cura,* December 8, 1864, in *ASS,* III, (1867), 162. See also, Denzinger's *Enchiridion,* no. 1689.

God, not only as an individual, but also as a member of society; therefore the State, being the most perfect of purely mundane institutions, cannot get along without religion. In other words, the State too has its religious obligations. The objection that the State is not a physical person and hence cannot have religious duties is superficial, even though this objection is at the present time exploited anew in academic and juridical quarters. "The idea of 'the reason of the State' as something beyond morality," says H. Eommen, "is irreconcilable with the Christian idea of the end of the State, because it ignores the service character of the end of the State. The genuine Christian contribution to the philosophy of the State has been the doctrine of this service character of the State."[20] For the State represents the community, and the community must on its part look after the interests that are essential to the temporal welfare of individuals and of society, and among such interests is religion. If the citizens no longer agree in religious profession, the State must, as long as the majority of its citizens still hold firmly to Christianity, make the heritage of Christian ideas which is the common possession of the great Christian confessions the basis of its institutions and its actions. Pius X, speaking of the French law of separation, states that "It contains the notorious denial of the supernatural. It restricts State action to the striving for temporal welfare, which indeed is the proximate end of civil society; it leaves altogether out of consideration the ultimate purpose of existence, eternal happiness, promised to men after this short life, as if it does not concern the State in any way. And yet the State has the duty not to place any obstacle in the way of, but rather to promote the attainment of, this highest and absolute good, to which the entire order of perishable things is directed here on earth."[21]

There are, it is true, states where separation holds in which separation from ecclesiastical affairs does not in any way signify a surrender of solicitude for religion and Christianity on the part of the State. This is especially true of the oldest type of separation, that of the United States of America, where the Christian religion holds a very important place not merely as a matter of fact, but also on the basis of legal maxims and arrangements. The consti-

* *The State in Catholic Thought,* 309.
« Encyclical *Vehementer nos,* February 11, 1906, in *ASS,* XXXIX, 5; English translation from *American Catholic Quarterly Review,* XXXI, (April, 1906), 211.

tutions of most of the states in the union emphasize the importance of religion for public life. The sessions of Congress and of practically all the state legislatures are opened with prayer, special chaplains being appointed and paid for such service; and the President of the United States, as well as the governors of the individual states, has by prescriptive right the authority to appoint days of thanksgiving and prayer. We have already mentioned that in state institutions, as well as in the army and navy, chaplains of various denominations are appointed by the state and supported from the public treasury. "There is no Federal legislation in the United States on the observance of Sunday," writes Father Thomas Slater, S.J., "but all the states of the Union have statutes tending to suppress unnecessary labor and to restrain the liquor traffic. In other respects the legislation of the different states exhibits considerable variety."[22] Then too, in the United States we find many penal statutes against blasphemy which have been declared constitutional as not subverting freedom of speech or liberty of the press.[23] In the article on American Decisions (recorded in the *American and English Encyclopedia of Law,* Vol. V, 335) we read that "Christianity being recognized by the law, therefore blasphemy against God and profane ridicule of Christ or the Holy Scriptures are punishable at common law."[24] Gatherings for religious worship are protected under criminal law. Marriage is recognized as valid even when contracted only according to forms prescribed by Church law.

It is precisely conditions so favorable to religious and Christian life in the United States that have largely brought the policy of separation into such good repute. The American type of separation, so unlike that in many European countries, is not the product of hostility to religion and the Church, rather, it resulted by political necessity from conditions existing at the founding of our republic. The juridical basis of separation was there and it was expressed in the First Amendment to the Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting a free exercise thereof." But a

[22] See article "Sunday," *Catholic Encyclopedia,* XIV, 336. See also, Stokes, *op. cit.,* III, pp. 153-176.
[23] *American and English Encyclopedia of Law* (1900), IV, 582. See also, Stokes, *op. cit,,* III, pp. 149-153.
[24] Cited by John Webster Melody, "Blasphemy," *Catholic Encyclopedia,* II, 596. See also, William George Torpey, *Judicial Doctrines of Religions Rights in America* (Cherry Hill, N. ramtina: The University of North Carolina Press, 1948), 58-60.

separation was not effected after the manner of separation in most European countries, for there never had been an established national or State church in the United States. About one hundred seventy years ago, the thirteen original states harboring members of various religious sects willed to combine to form one great commonwealth based on a new social order, and therefore the only practical procedure was for the new republic to be indifferent as to the arrangement and administration of church affairs, although it always manifested numerous evidences of a definite desire to encourage religion as a basic factor among the people.

It has been asserted that American Catholics condemn the type of separation of Church and State which is expressed in the First Amendment to the Constitution. Nothing can be further from the truth, as we have already shown.[25] Competent non-Catholic scholars have recognized the participation of leading Catholic laymen in the writing, ratification, and the support of the original Constitution and the Bill of Rights. The position of the American hierarchy has been open, emphatic, unequivocal, and consistent, from John Carroll down to the present.[26]

On the other hand, in nations where formerly the State recognized the privileged position of the Church and, tiring of living with her, then gave her, so to speak, a bill of divorce, the State almost of necessity presses on to the renunciation of religion too. The neutrality which the State in such cases desires to assume with respect to the various religious denominations easily develops into an avowed endeavor to expel religion from public life or, as the saying goes, to "laicize" the State itself. This is clearly manifest in the case of France. The bonds which had existed betwen Church and State were, one after the other, torn asunder with bitter *logical* consistency. Public prayer at the opening of the Chamber had already been abolished in 1884; in 1904 by order of the Minister of Justice crucifixes and religious symbols were removed from courtrooms; a decree in 1907 did away with the inscription *Dieu protège la France* on coins. In the law of separation itself it was henceforth forbidden to affix a religious symbol to public buildings, or to display it in public places, except on buildings of religious worship, in cemeteries, museums and

[25] See above, p. *186f.*
[26] For a detailed proof, see James M. O'Neill, *Catholicism and American Freedom,* 17-36.

exhibition. How conscientiously this legal enactment was carried out even to the point of absurdity is evidenced by the fact that, on the occasion of the repairing of the famous clock on the Palace of Justice in Paris, the words *Anno Domini* in the memorial tablet that recorded previous repairs were stricken out and the simple inscription substituted: "*R. P. restituit* 1909."[27] "The Years of the Lord" have vanished in France!

The only thing still wanting was that priests should be forbidden to wear the clerical garb, as had been several times (in 1905 and 1909) proposed in the Chamber. According to the statement of Aristide Briand, minister of public instruction and worship in France (1906-1908), the Commission on recommendations for the new law of separation had fully considered this point, too, but in the end had dropped it so as not to risk the semblance in intolerance or the danger of absurdity. The mania for portraying the ideal of the irreligious State in terms of so-called culture leads to deeds devoid of tact and even of inhumanity. Thus, official France kept its representatives from the ecclesiastical burial service commemorating the victims of a national disaster and made the President of the Republic in his speech at the open graves of the victims scrupulously refrain from any mention of the hereafter. Pius X did not therefore exaggerate when he wrote to the Catholics of France: "You know the aim of the impious sects which are placing your heads under their yoke, for they themselves have proclaimed with cynical boldness that they are determined to 'decatholicize' France. They want to root out of your hearts the last vestige of the faith which covered your fathers with glory."[28]

It is obvious that the Church cannot in principle admit as just and defensible a system of separation which, if carried out fully and with absolute consistency, leads to such a situation. For it must be granted that the ideal of the French rulers, the laicization or secularization of public life, is only a further development of the concept of separation. Separation from the Church is on the high road to separation from religion. This can be shown by the following consideration: If we ignore ecclesiastical affairs, the net result is the equality of religious denominations and the

[27] *Kölnische Volkrzeitung* (1909), n. 206.
[28] Encyclical *Vehementer nos,* in *ASS,* XXXIX, 15; *American Catholic Quarterly Review* translation, 219.

fact that none enjoys preference over the others. If we wish to make freedom of conscience a full reality, we must grant full parity to the individual citizen's theological and philosophical view of life and give no preference to a Catholic's or a Protestant's philosophy as opposed to that of a Jew, a positivist, a freethinker, or an atheist. Very illuminating in this respect is the argument presented by Deputy Chabert in the resolution he offered forbidding the wearing of the clerical garb. The garb, he argues, makes the priest stand out unduly from the mass of other citizens, as though he were a being of a higher order; it awakens in many a one who sees it hostile and painful feelings; on the other hand, it also prejudices its wearer with respect to the enjoyment of freedom, for it subjects him to continuous supervision by his superiors and the public; a gesture, a word, even his entrance into a house often suffices to expose him to suspicion. Chabert then concludes his cynical remarks with the statement: "Forbid the soutane and the priest will disappear among the masses; free him from his superiors and that monstrous tyranny (i. e. of universal controls) which weighs on him every moment, and he will hasten into the arms of the world, of ideas, of life!"[28]

(2) If in purely natural and Christian thought it is the duty of the State to support and promote religion for religion's sake, the same duty devolves on the State too from the viewpoint of the State's own interest, especially if the State is historically united with the Church by countless ties. The State which separates from the Church creates for itself the gravest difficulties because thereby it exposes the finest roots of its power to destruction; and the most efficacious protection with which religion surrounds and nourishes these roots then vanishes or is weakened. But the deepest, yes, really the only root of the State's power is the obedience of its citizens. "Looking at the matter more closely," says Jellinek, "the entire power of the State rests on the obedience of its subjects; all the State's activity is transmuted obedience. That power can fulfill its functions only by the real and personal achievement of individuals and associations. Only through these can it exist, will, and carry out what has been willed. This holds true for every State; only in proportion to the meas-

" *Rerae da clergi français (LX1),* 238ff. Obviously discussion of the deHeal garb *is* of value in countries where by long custom the soutane has been worn in public. It has little bearing on conditions in our country.

ure of obedience and the performance of duty by its members can the State achieve the fullness of its power and strength."[30] Now it is the Church, above all the Catholic Church as the principle of authority, that establishes obedience religiously and morally and thus engraves a consciousness of the sense of duty in the depths of the human heart as on a rock foundation. "Hence it is that the Church," Leo XIII teaches, "the guardian of the truest and highest ideas of political sovereignty—since she has derived it from God—has always condemned men who rebelled against legitimate authority, and disapproved their doctrines. And that, too, at the very time when the custodians of power used it against her, thereby depriving themselves of the strongest support given their authority and of efficacious means of obtaining from the people obedience to their laws."[31]

So it is; for every other foundation for supporting the sense of authority is exposed to fluctuation and collapse. What if I look upon the State as the product of evolution? What has come into being by historical factors can become obsolete and fall into decay and as a citizen I can arrive at the conviction that the State is no longer worthy of preservation and forbearance. What if I regard the law of the land as merely an expression of the will of society or of the majority of the people? The fact that the great majority would have it so cannot convince me that what has been so willed is good and just. Consequently it is precisely the modern State that has every reason for guarding and promoting belief in God.

Modern France has chosen the school in particular as the field for scientific experimentation to try out "laicization," that is, the dechristianization of the State. And it has done so with telling success, as statistics irrefutably demonstrate. In a report submitted for a bill proposing legislation against crime, Deputy Raiberti announced that the number of crimes and misdemeanors committed by minors up to sixteen years of age in 1907 (the second year of separation of Church and State in France) had increased by 1892 cases as compared with the previous year; in 1908 once more by 992 cases. Among youths from sixteen to twenty years of age, the corresponding increase

*>*Das Recbt des modemen Staates,* I, 412.
n Encyclical *Au milieu des solicitudes;* English translation from *The Great Encyclical Letters of Pope Leo XIII,* 256.

amounted to 1580 cases. The number of persons accused under military law increased 50% ; the number of military personel accused of crime against the common law increased by 39%.

Gradually even French radicalism and its press were horrified at the Mane-Thecel-Phares inscription which the hand of statistics had written on the wall of the nation's public schools, now "purged" of crucifixes. But in seeking the ultimate reason for all this mischief, radicalism is still groping in the dark. If it were really sincere, it would have to ask itself, as *Figaro,* popular French newspaper, advises it to do, "whether it acted wisely when it banished religious instruction from the schools and all those traditional dogmas which had produced the education that once was the pride of France. Radicalism would also have to ask itself what had supplanted that education in the lay schools. Then it would have to confess that no substitute at all was provided for the old religious and moral education and that here is the fountain head of all the evil."[32] What the great Bishop von Ketteler recognized as the most serious danger of his age,[33] presents itself today to the mind of even a casual observer of the signs of the times; namely, that it is the spirit of denial of authority that now seethes in the bosom of mankind, that breaks forth in individual events, now here, now there, like a devastating stream of fire to gnaw at the foundations of human society secretly, as a worm at the roots of a mighty tree.

There is another foundation and source of national strength and political power that needs today, perhaps even more urgently than at any time in the past, the protection of the Church's unhampered action. Marriage, under the aspect of the purity and sacredness of sexual life, is so seriously threatened by countless dangers too well known to require further explanation, that the distinguished philosopher and pedagogue Friedrich Paulsen, was roundly applauded when, shortly before his death, he wrote the words: "If we permit (these dangers) to go on spreading like wildfire, it will be said of the life of the German people, too, that the ax is laid to the roots of the tree." He too candidly admits that the "old" Church has earned lasting merit for her work of imparting a moral tone and a spiritual character to our life in that she made it her

[32] Alfred Beunier in *Figaro.* August 16, 1910.
[33] *n Freiheit, Autoritat und Kirfbe,* 1862), 65.

business to educate the will especially, and in the persons of the saints had educated heroes of self-denial. Then he adds: "That even today we find life and nourishment in that heritage is to me beyond doubt. Actually the greatest danger for us is that we are wasting it carelessly, that we allow it to be wasted by perverse theories."[34] For this reason, also, the modern State ought not to seek separation from the Church; on the contrary, it ought to address an earnest entreaty to the Church, in whose actions streams of divine power are always stirring: "Save us! We are perishing!"[35]

D. DIFFICULTIES IN THE APPLICATION OF SEPARATION

In the preceding chapter we pointed out the reason why the State should not separate from the Church. For the sake of religion, as well as for its own good, it should not do so. Moreover, the State cannot divorce itself from the Church. It actually does not wish to do so, and it will be increasingly reluctant to apply the system of separation concretely or formally; that is, to carry through strictly and inexorably the consequences of separation in a manner just and fair to both parties.

The reason for the great difficulty—indeed, the moral impossibility of absolute separation—as Pius X shows, lies in the fact that separation "upsets the order providentially established by God in the world, which demands a harmonious agreement between the two societies, the civil and the religious, although each exercises its authority in its own sphere. It follows necessarily that there are things belonging to them in common, regarding which the two societies must have relations with one another."[1] There are many such points of contact and a community of interests, and because of the commanding position which has come to the Church in the course of history she exerts her influence in the most varied spheres of public life. The efficacy of any other society, however widespread in the State, however zealous and versatile its activity, cannot be compared at all with the activity of the Church, with the depth and amplitude of her influence on the life of

[34] *Die Woche* (The Week), 1907, n. 48; quoted above according to the report given in *Allgemeine Rundschau,* 1907, n. 49, 708.
[35] See *Matt.* 8:25.
[1] Encyclical *Vehementer nos,* February 11, 1906, in *ASS,* XXXIX, 5; English translation in *Amertcan Catholic Quarterly Review* (1906), 211.

peoples. Therefore it is impossible for the State to show in practice the same indifference to the Church as it manifests toward any other society. The Church and Christianity are the most public affair in existence. Hence the Church by its very nature cannot be treated as if it were identical with a private society, a joint-stock company, a scientific organization, an amusement association, or a political party.[2]

Italy offers a famous, indeed a unique, example of the difficulties that result from separation of Church and State. After the capture of Rome on September 20, 1870, when plans were being made to carry out Count Cavour's ideal of separation, the so-called *chiesa libera in libero stato* (a free Church in a free State), the old difficulty that had been recognized as early as 1860 emerged once more: what stand to take with respect to the pope. Despite separation, it was not feasible to classify Pius IX merely as Count Mastai-Ferretti, one of Italy's citizens. To do so the Italian statesman Marco Minghetti believed, would have been possible if separation had been introduced outside Italy also, in all the states of Europe. But as long as the Catholic hierarchy was still recognized in the public law of any European state, as long as relations with the pope as a sovereign continued in force, there would have been energetic opposition were Italy to treat him as a subject. Had it been possible to carry out that plan, anti-Catholic statesmen argued, Italy's prestige would have been able to make religious interests, and papal influence over the whole world, subservient to secular purposes. But if all the states were to protest against the abasement of the pope to the position of Grand Chaplain and Almoner of the king of Italy, that would, on the other hand, be dangerous for Italy; the pope then leaving Italy and traversing the various states of Europe, would become the greatest threat to peace. Thus, compelled by necessity, the State had to safeguard the pope's sovereignty with the Law of Guarantees.[3]

At the beginning of the present century, the influence and significance of the papacy as head of the Catholic Church throughout the world moved another State also, where separation is the law, to break through the barriers

[2] W. Kahl, *Lebrsystem, I, 305,*

[3] *M.* Minghetti, *Stato e Chiesa* (Milan, 1878); here translated from the German editon, *Staat una Kirche* (Gotha, 1881), 241ff. See also, U. Benigni, "Law of Guarantees," *Catholic Encyclopedia,* VII, 48f.

of its constitutional principle, in a single instance, for political reasons. This was the United State of America. As noted previously, so far as the United States government is concerned, the hierarchy and its head have no existence. But there did exist in the newly acquired Philippine Islands ecclesiastico-political difficulties which the United States could hardly settle without direct negotiations with Rome. And so it was decided in 1902 to appoint the Honorable William H. Taft chairman of a special mission to the Vatican to adjust various difficulties. His colleagues on this mission were Associate Justice James F. Smith, of the Supreme Court of the Philippines, the Most Reverend Thomas O'Gorman, Bishop of Sioux Falls, and a representative of the Judge Advocate's Department of the U. S. A. The most difficult question the commission had to settle was that of the ownership of the friars' lands, these being the lands held by Spanish priests and Brothers of the Dominican, and Augustine Orders, and the Recollects and Friars Minor, two branches of the Franciscans. In order to cover at least formally the infringement of the principle of separation of Church and State, in the instructions to the members of the commission from the Secretary of War, the Honorable Elihu Root, it was stated that the mission "will not be in any sense or degree diplomatic in its nature, but will be purely a business matter of negotiation."[4]

The cases just mentioned had indeed to do with somewhat isolated, casual difficulties involved in the logical application of the system of separation. But there is another difficulty that must recur in some form or other in every State where separation is the policy. If in private associations established for the maintenance of worship, difficulties arise as to doctrine and discipline, and appeal is made to public courts, such tribunals, in order to be competent to award the society's property to one or the other party in a congregation where one sector has lapsed into schism, require a precedent (a previous legal decision) as to which of the litigating parties represents the orthodox viewpoint as regards doctrine and discipline. This precedent can only come from either an ecclesiastical or a civil court. But in either case the principle of separation is violated. For a State that does not recognize the hierarchy

♦See Anson Phleps Stokes, *op. cit.,* II. pp. 315-320; John Tracy Ellis. *The Ufe of fames Cardinal Gibbons,* II, 103-116.

cannot empower it to make juridical decisions, and on the other hand a State where separation holds cannot on its part intervene juridically in the sphere of religious doctrine and discipline which it has freely surrendered and ignored. Hence in practice a choice must be made between these two illogical procedures.

Under the American system of separation, churches, though not *of* the State are *in* it. "In general," says Anson Phelps Stokes, "the position of the courts toward the Roman Catholic Church is precisely what it is toward other religious bodies, and they refuse to pass on theological or ecclesiastical matters unless the case at issue has some relation to civil or property rights."[5] The civil courts recognize the authority of ecclesiastical courts in all matters of religious faith and practice when it is shown that the latter have competent jurisdiction and that procedure has been regular. But there are times when one of the parties in a church dispute is dissatisfied with the ecclesiastical decision and strives for redress in the civil courts. Cases before the civil courts involving discipline are relatively few, but those regarding the ownership and administration of property and breaches of trust are many.[6]

In the United States, in awarding church property to a party in cases of schism where the Roman Catholic Church is concerned, the courts generally take cognizance of the decision of the archbishop or bishop, as head of the parish organization, who decides which of the parties involved has retained the correct doctrine and norms. Under the French Law of Separation, on the contrary, it was left to the discretion of the Council of State to decide which of the several associations for religious worship laying claim to the same aggregate of church property is the genuinely Catholic association.[7]

[5] *Op. cit.,* II, p. 393.

[6] "Among the types of cases involving the Church which have come before the courts in this country are: the power of the archbishop *to appoint* directors of a corporation; the relations between bishop and priest; the rights of pew owners; the relative powers of the bishop and the congregation in appropriating church property; the liability of bishops on contracts and on the manner of a priest's salary; the question of land title in cemeteries; the determination whether a person is a Catholic; the exclusion of non-Catholics from Catholic cemeteries; the powers of independent Catholic corporations; the legal status of the Jesuit Society; the rights of the minority membership of a congregation; the admissibility of parish registers in evidence; the question of the legality of a priest's expulsion; the removal of a priest without notice; excommunication for slander; the liability of a church for a sexton's salary, etc." (Stokes, *ob. cit.,* III, p. 593)

[7] See above, p. *66f.*

In the Philippines at the beginning of the present century, a few priests, tiring of celibacy, joined with the politico-revolutionary party headed by the schismatic and insurgent general Gregorio Aglipay, to form the so-called Philippine National Church. The schismatic parish organized by the Philippine National Church in Tambobong, in the province of Rigal, brought action against the Catholic Church in an effort to obtain surrender of the building and property belonging to the original Catholic parish. Sèveral other churches also belonging to the original catholic body were seized by the schismatics. "In an effort to settle these troubles," says Father John Tracy Ellis, "the American government in Manila in July, 1905, empowered the supreme court of the Philippines to render the final judgment concerning the ownership of the properties. After a long delay, the court finally gave its decision in November, 1906, in favor of the right of the Catholic Church to the ecclesiastical edifices constructed originally for the use of its communicants, and a short time thereafter the Aglipayan clergy were compelled to turn over the churches which provided a tremendous blow to the schismatic cause."[8]

A similar difficulty may arise when perchance a priest, because of an unorthodox faith or some crime not punishable by civil law, is disciplined by ecclesiastical authority and deprived of his income. Ought then the State to whose courts the disciplined cleric appeals against the ecclesiastical judgment, to decide whether there was an offense against doctrine or clerical discipline on the part of the accused cleric?[9] The problem remains.

So far as Germany is concerned, a settlement of property rights necessarily resulting from separation of Church and State involves an almost insurmountable obstacle. On the occasion of secularization in 1803, the German states took over, in Article 35 of the Resolutions of the Deputation of the Empire, the international obligation of providing for the expenses of public worship, school instruction for children, and the founding of useful institutions within the areas of their respective governments. This promise was honored very belatedly, and only in part, in concordats and bulls of circuminscription in which the maximum sum to be regularly paid by the states for public

[8] *The Life of James Cardinal Gibbonst* II, 101f.
[9] See Stokes, *op. cit.,* III. 391-395,

worship was fixed.[10] Now on the supposition of separation of Church and State, how was this point to be adjusted? The modern State, Kahl admits, cannot shirk a conscientious and involved settlement of its obligations without denying its own moral character. Either a return of confiscated property or a cancellation of its obligations would be impossible; the states can satisfy their obligations only by small but steady payments from their funds for public worship. But as long as this procedure continues, separation cannot be taken seriously.[11]

France was in a similar juridical situation with respect to the Church. In the Concordat of 1801 it had assumed the obligation of providing bishops and pastors with a suitable salary.[12] This was a very modest return (modest, especially, in its execution) for the concession of the pope which was equivalent to an express surrender of the church possessions which had been confiscated during the Revolution. The settlement of the property problem on the occasion of separation (1905) was certainly not difficult for the French State; it had divorced itself from a legitimate marriage with Church, just as Abraham had divorced the bondswoman whom he dismissed, early in the morning giving her bread and putting a bottle of water on her shoulder as he sent her away into the desert of Bersabee.[13] The thought that it had some duty or other to make restitution for the church property that had been placed at the disposal of the nation did not suggest itself to the French State; practically all the non-confiscated church property the State had restored after the Concordat also reverted to the State; all donations that had been made to the Church for charitable purposes were transferred to State or communal public institutions; the donors and their heirs in the direct line could reclaim what had been donated in the form of foundations for purposes of public worship. Whatever remained after these requirements had been fulfilled

[10] See Heinrich Bruck, *History of the Catholic Church,* translated by E. Pruente (3rd revised edition, New York, hi. Y: Benziger Bros., 1885), II, 342ff.

[11] *Lehrsystem,* I, 307.

[12] "When the French government assumed in the Concordat (1801) the obligation of supplying the clergy with a revenue sufficient for their subsistence (Article 14) and for the requirements of public worship, it was an obligation assumed by the State to make restitution, at least m part, to the Church, whose property had been confiscated during the first Revolution. On the other hand, when the Roman Pontiff in this same Concordât bound himself and his successors, for the sake of peace, not to disturb the possessors of property taken from the Church, he did so on one condition; that the French government should bind itself in perpetuity to endow the clergy suitably and to provide for the expenses of Divine worship/' (Encyclical *Vehementer nos;* English translation, 216).

[13] *Genesis* 21:14,

was left to the Church's determination, on condition that associations for religious worship (such as the law prescribes) be established with the funds. Since the pope declared that such associations could not be permitted, because they contravene the Divine constitution of the Church, the residue of the Church's property also reverted to communal institutions for the care of the poor and for other charitable purposes.

Accordingly, the French government showed that it did not desire an honorable separation at all. This is likewise evident from other peculiarities of its policy of separation. This policy provides for a strict police supervision of public worship,[14] by means of which the State sought in a roundabout way to recover what had of necessity to be surrendered by the abrogation of the State-controlled Church with its traditions of political Gallicanism: namely, limitations of freedom of worship under police restriction and despotism. The law of Separation, lamented Pius X, subjects the associations for public worship "to a whole series of prescriptions not contained in common law, rendering their formation difficult and their continued existence more difficult still, when, after proclaiming the liberty of public worship, (the law) proceeds to restrict its exercise by numerous exceptions; when it despoils the Church of the internal regulation of the churches in order to invest the State with its functions; when it thwarts the preaching of Catholic faith and morals, and sets up a severe and exceptional penal code for clerics. When it sanctions all these provisions and many others of the same kind in which wide scope is left to arbitrary ruling, does it not place the Church in a position of humiliating subjection and, under the pretext of protecting public order, deprive peaceable citizens, who still constitute the vast majority of Frenchmen, of the sacred right of practicing their *religion?*"[15] The allusion to "a severe and exceptional penal code for clerics," certainly means, above all, the famous pulpit paragraph of the Law of Separation (Article 35), according to which a priest is punishable with a prison term of two years, if by sermon, poster, or the distribution of writings he urges resistance to the execution of the laws, or, if his sermon, etc., is merely aimed at causing citizens to resist.

[14] See above, *p.* 148.
[15] Encyclical *Vehementer nos;* English translation cited, 215. See also, A. Rivet, *Trail/da Celle Catholique et des Lois Civiles d*Ordre Religieux, II, 292'32$.*

It is easy to see to what injustice this latter provision can lead in the administration of justice. Moreover, this paragraph in the penal code is materially offensive to the foundation stone of the civil law of the French Republic, namely, to the doctrine of human rights as formulated by the Revolution, which declares that a revolt on the part of the people is a most sacred right and an indispensable duty if the government violates the rights of the people (Article 34).[16]

The impossibility of absolute separation appears most clearly and omninously in the sphere of public education. The matter is not settled merely by excluding sectarian instruction from the public schools. Indeed it is utterly impossible to conceive education as a whole separated from every definite concept of life, whether religious or philosophical. Religion is of vital importance in any complete education. Especially is the elimination of religion the more serious in view of the psychological effect upon students of this noticeable omission. And this is indeed the most perplexing, the weakest point also in the American system of separation. "In general, Americans are almost equally concerned about two things—" says Anson Phelp Stokes, "that sectarianism in every form shall be kept out of our public schools; and that the schools shall not de dominated by secularism, which would be out of keeping with the best American tradition."[17] The solution of the problem has not yet been arrived at.

In France there was a definite awareness of the fact that complete elimination of religion from public life, strict neutrality with regard to the various concepts of life, was impossible, particularly in the sphere of the school. M. Payot, whose two manuals of ethical instruction the French bishops had forbidden for the use of Catholic school children, frankly acknowledged that fact: "We wish to uproot the error which the founders of laicized instruction have allowed to arise and spread when, in order not to frighten their opponents, they introduced the concept of neutrality, which in practice will prove to be an impossibility. It is

[16] See Rothenbucher, *Die Trtnnung von Kircbe ttnJ Stoat,* 310.

[17] *Op, cit,,* II, p. 497.

not possible to teach history, civics and morality without taking a definite stand. . . . One does not translate and explain a single page of Demosthenes, Tacitus and Pascal without taking sides. There is no neutrality in respect to truth and falsehood."[18]

And the parties in control of French affairs did make a choice. They suppressed the Catholic view of life—which from time immemorial had been the prevailing concept and had been protected by law—in favor of their own view of life—which rejects all problems beyond sensible perception as matters inaccessible to human knowledge; and, with their cult of the fatherland and of humanity, with their irreligious, or, more correctly, their anti-religious instruction, they regarded themselves as called upon to pioneer a systematic and rational education based on a purely scientific foundation.

Just how this neutral ethical education operated (and still operates) in practice can be gleaned from the summary published in Catholic newspapers and periodicals on the occasion of the protest of the Catholic bishops against a number of textbooks (1909) ;[19] and also from the discussion of "principles" which the speaker on the budget for education presented to the Chamber: "We do not carry the battle of religion into the school; we do not attack the assertions of the Catholic Faith, but it goes without saying that we will not submit to its contradictions and challenges. We will go wherever our path may lead us.... We will seek to teach in every branch whatever an impartial and conscientious method shall assure us is true. We care little if this truth at times touches harshly on dogma. That cannot be helped."[20] This "freedom from all presuppositions" on the part of public school instruction appears in its true guise in the instance of courts punishing Catholic priests because in their catechism instruction they had opposed the errors, insults and calumnies against the Catholic Faith and the Church set forth in the textbooks and in

M Rerue du Clergf français, LXI (1910), 62 ff; see also, 617.
"Ce qu'on enseigne aux enfants dans nos écoles publiques," *du Cltrgi français, LX* (1909), *6865.;* LXI (1910), 27ff., 167ff.
» *Revue du Clergi français,* LXI (1910)· 212.

the schools. For by so doing they were said to have unduly intervened in a sphere reserved to the school.[21]

If the State cannot observe a real, sincere and honorable separation, a French publicist rightly remarked, if it cannot instruct without injuring Catholics, it ought at least to desist from playing the master in the school. Freethinkers are permitted to build and support, at their own expense, schools where they can mutilate dogma at their pleasure, but Catholic private schools are not allowed to operate with such independence. State support ought to be granted to both private and non-sectarian public schools in proportion to the number of poor children instructed. Only under such an arrangement is it possible to speak of freedom, equality and religious peace.[22] But instead, by a resolution adopted in the Chamber on February 11, 1910, Catholic free schools were taken from their already precarious position into one which was equivalent to strangulation. The schools were to enjoy freedom in all respects—as regards curriculum and teaching methods, except that both were to be cut to the pattern of the public schools; with respect to the choice of textbooks, except that whoever held the office of Minister of Education was authorized at any time to inspect the books to determine whether they might offend against the public order and morality as he understood them; as regards the planning and arrangement of the school buildings, except that the schools were to be subject to the danger of being closed if they did not comply

[21] *Kolnische Volkszeitung,* 1910, n. 609. In 1910 between a quarter and a half of France's pupils were in Catholic schools. These schools found it increasingly difficult to continue operation and demanded that the State help defray at least part of the educational expenses *of* Catholic pupils. In 1951, over the bitter opposition of Communist and Socialist deputies, the French National Assembly passed the first of a series of compromise measures designed to extend government aid to France's hard pressed Catholic schools. By a clear majority of 370 to 238, indirect relief was authorized for Catholic secondary schools, that is, an annual expenditure of 850,000,000 francs (about $2,500,000) to provide scholarships for needy high school students, which may be used either in public or Catholic schools (about 309,000 secondary students attend Catholic institutions in France). A bill, amending a 1951 law, approved by the National Assembly provides allowances up to 1500 francs annually for every student finishing the sixth grade of school, whether in Catholic or public school. This represents about a $2,000,000 increase in State aid to primary schools. The school law gives money, not to the schools, not even to parents as individuals, but to associations of parents. Thus, at long last, despite the fact that France is a "secular State," the ever-present conflict over education shows hopeful signs of yielding at least to the exigencies of practical life. (See Eric von Kuehne]t-Leddhin, "How Pagan Europe," *Catholic World* (September, 1953), 441; see also his article, "Catholic Education in Europe," *Columbia* (April, 1954), 4.

[22] *Rtrne du Clergl francair, IXI (1910), 212.*

with regulations of health and comfort; with respect to the choice of teachers, except that, despite their certificates of qualification from the State, they might be denied by the State actual authorization to teach. And so a French newspaper was indeed right when it remarked that a fourfold halter had been put around the neck of the "free" schools and placed in the hands of the government, which could draw the end tightly whenever it chose to do so.[23]

The same absence of just neutrality is apparent also in other spheres of public life. We have already alluded to the legal ordinances that prohibit the display of religious tokens and symbols on public buildings and property under the French Law of Separation. But there is no prohibition against affixing all sorts of symbols that glorify non-religious, and even free-thought, philosophies of life. And yet such symbols can cause offense or scandal just as readily to a religious-minded citizen as a religious symbol can to a freethinker,[24] especially if the intention to offend is as apparent as in the case of the marble statue erected on the slope of the Montmatre, at the foot of the Sacred Heart church, to honor the memory of Chevalier de la Barre, a man who a century and a half ago was executed for heaping insults on the Catholic Church.

While it is true, says Dean Stokes, that in the United States "there has been no such rigid separation between Church and State as so often developed in some European countries," but rather "mutual sympathy and understanding,"[25] there are nevertheless many questions—*for* example, those concerning education, marriage, and divorce (questions which canonists call *res mixtae,* that is, matters of the "mixed forum")—which are bound to lead to conflicts.[26] He lists as serious difficulties at the present time, "the question of the support of parochial schools; the civil laws and regulations regarding marriage and divorce; and the problem of legislation regarding the giving of birth-control information by licensed practitioners."[27] He repeatedly speaks of the necessity of "adjustments" in Church-State relations.

What we have illustrated by pertinent examples in the case of France and the United States, all other countries

[22] *L'Unirerj,* quoted in *Der Ebassor,* 1910, n. 79.
[23] See Rothenbucher, *op. cit.,* p. 208.
[24] *Op. cit.,* III, p. 649.
[25] *Ibid.*
[26] *Ibid.*
[27] HI, p. 639.

where separation has been introduced help to confirm; namely, the tremendous difficulty, indeed impossibility, of applying the principle of separation in its formal and complete connotation. Infringements of the principle of separation may assert themselves even when the spirit that motivated the introduction of the system was a friendly, peaceful one, or amicable relationships have been consistently preserved in general, as in the case of the United States especially and Belgium and Brazil. More serious infringements (or even, a blatant disregard for the basic rights of the Church as a society) occur in countries where separation has been motivated by a radical or militantly hostile policy toward the Church, as in France, Mexico, Guatemala and other Central-American countries, or by a blatantly anti-religious attitude, as in countries under *Communist* domination.

S. fî/œ Pteikm & anJ Pe/iqbus fîtesJsm in fyiïteni ^ai/iû/ic fîZsuç/it

Today the perennial question of democracy and religious freedom is being debated anew in contemporary Catholic periodicals. Victor R. Yanitelli, S. J., points out that the occasion of this controversy is the awareness of freedom in political and economic life that is stirring the remote corners of the still free world. The modern democratic system, which seems to be founded on the order of nature, apparently demands, by virtue of its own internal structure, that *civil liberty* be extended also to religious liberty—that is, *freedom of the Church,* in the sense that all religions be considered equal in such a regime and all enjoy a free play of propaganda, since any exception to the rule or any preference for one religion over another would necessarily destroy that system. Hence if such *freedom of the Church* can prevail in a democratic regime, then the State-Church, or the confessional State, is not a necessary and permanent exigency of Catholic principles.[1] This theory is being challenged by those Catholic writers who insist that the State must profess Catholicism in a country where society is mainly Catholic. They claim that this teaching enjoys all but universal acceptance in Catholic circles. In other words, restricting the study solely to the American political arrangement, these writers hold that freedom of religion in terms of its usual meaning in discussions of Church-State relations would seem to be irreconcilable with American democracy.

Despite the fact that United States Catholics, because of their religious affiliation, have from time to time through the centuries, been accused of being disloyal citizens by some of their fellow countrymen, it is beyond controversy that actually they have never experienced any conflict in conscience between duty to the Church and loyalty to country. And they rightly resent all implications to the contrary.

1 "A Church-State Controversy,"· *Thought,* Fordham University Quarterly» XXVI (Autumn, 195I)» 444.

ATTEMPTS TO CLARIFY THE CATHOLIC POSITION

In spite of this patent fact, today an attack from without has been centered on what is purported to be the official Catholic teaching on the relationship between Church and State. Professional propagandists such as Paul Blanshard have contended that the Church is a danger to democracy because of her official teaching on freedom of worship. The emphasis in this attack, it is important to observe, is not on the *actions* of Catholics in the present-day democratic setup but on the *logicality* of the Church's attitude in the U. S., in view of her official stand, as Gustav Weigel, S. J., points out.[2]

As a result of this attack theologians have been reexamining the Catholic doctrine on Church and State. This is not because they are wondering if Blanshard and his school are right and they are wrong, but because they want to make unmistakably clear the authentic position of the Church in this matter.

The first consequence of this research has unfortunately been a theological controversy. This controversy centers about the proper formulation of the perennial doctrine of Church and State, in order to determine its compatibility with the American democratic system. There is nowhere any intention of watering down Catholic doctrine, which Catholic theologians always revere in its integrity.[3]

THE DYNAMIC EXPOSITORS

There is a group of Catholic theologians which is engaged in presenting a fresh formulation of the Catholic position. They are called the dynamic expositors. So far this group has done no more than ask questions and make observations—its members clearly state that they have not proposed a conclusive theory. Among these dynamic expositors, John Courtney Murray, S. J., is best known, having lectured and written on his subject.[4] He resents any reference to a "Murray theory," however, saying that there is no such thing. There is, Father Murray emphasizes, no question of a new doctrine. He does not speak for others, and others in the group do not speak for him.

[2] "The Church And The Democratic State," *Thoagbt,* XXVII (Summer, 1952), 167f. A condensation of this article is found in *Thtology Digest* (Kansas City, Missouri), I. (Autumn 1953). 169-175.
[3] Weigel, *op. cit.,* p. 168.
[4] Father Murray's articles are listed in "A Church-State Anthology, the Work of Father Murray," edited by Victor R. Yanitelli, S.J., *Thought,* XXVII (Spring, 1952), 7,

THE STATIC EXPOSITORS

The opposing trend is to be found in another group of able theologians (called by Father Weigel the static expositors). They feel that the statement of the Church-State question in current treatises cannot be substantially improved upon and that to attempt to do so is dangerous, needless, and misleading. They concur, rather, in a clear statement of extant formulations. Much of the thought of members of this group has been published in the *American Ecclesiastical Review.*[6] Dr. George W. Shea of the Darlington (N. J.) seminary and Monsignor Joseph C. Fenton and Francis J. Connell, C.SS.R. , the two latter of the Catholic University of America staff, are among the leaders of this group.

DIFFERENCES OF THE TWO SCHOOLS

The dynamic expositors and the static expositors hold opposite views of the harmony that is required between Church and State. More specifically, the static expositors believe that the State has the objective obligation of recognizing the Catholic Church as the true religion. The State, therefore, has an obligation to defend the Church to the point of suppressing, when necessary, freedom of speech. Moreover, the State must legislate according to Catholic doctrine and not merely according to the natural law. It must even profess the Catholic religion and perform acts of cult according to the requirements of the Church, although it is not permitted to force non-Catholics into the Church.®

The static expositors in laying down these norms do, however, admit that these are objective obligations, and that subjectively, by reason of their ignorance of an obligation, legislators and governors can be freed of these duties. The circumstances which make for such conditions must be tolerated but, the static expositors insist, there must be recognition of the fact that the restriction in the Constitution whereby governors as such are deprived of the power to profess and defend the Catholic religion, is an error. Even so, the static expositors hold that Catholics can remain loyal to the Constitution with no problem of

■The principal articles of this group are noted in *Theology Digeit, I* (Autumn. 1953), 173-175. See also, A. Messîneo, S.J., "Democrazia e liberta religiosa," *Civiltj Caitohea,* CII, Vol. II, (1951), 126-137; Democrazia e la/cirmo dello Stato," *ibid.,* 586-596.
« weigei, *op. crf.t* p. 170f.

conscience. Non-Catholics, if they be unprejudiced, will easily see the logic and reasonableness of this version of the Catholic position.[7]

The theory of the static expositors follows along the lines set down more than thirty years ago by Doctor John A. Ryan. Ultimately, however, its source is the Encyclicals of Leo XIII. Leo knew the American State, and it has not changed fundamentally since his time. Hence any new formulation in this matter, they maintain, would serve as an implication that Leo XIII was in error or ignorance—tenets that are theologically unsound.

To the dynamic expositors the position of the static expositors would place the American Catholic in an ambiguous and therefore disturbing situation. For in the face of an objective obligation of the State to profess the Catholic religion the Catholic would have the duty to see that this obligation is carried out as soon as it would be possible to correct the conditions he must now tolerate. And if an obligation to alter the Constitution exists, can the Catholic be honest with his non-Catholic neighbor if he remains silent on this matter? Even if prudence dictates that he do nothing now to remedy the situation, in view of the turmoil which would be created, his position is an anomalous one.[8]

THE POPES AND THE AMERICAN GOVERNMENT

In the light of history the dynamic expositors challenge and deny the existence of an obligation to change the norms of American civic life. They point out that the Popes have never spoken of this objective obligation when praising the progress and vitality of American Catholicism. The dynamic expositors have accordingly re-examined the propositions by which the static theologians have arrived at their conclusions. To do this, they have carefully reconsidered the teachings of Leo XIII, the source of the static expositors' theory, and have especially examined them in the light of the further teachings of later Popes, among them the reigning Pontiff, Pius XII. Studying the precise meaning of the Leonine teachings they have kept in mind the concrete situation of Leo's time, just as the static expositors have examined the pronouncements of Popes Gelasius and Boniface VIII in view of their history of Church and State during the period in which these latter lived.

[7] *Ibid.*, p. 171.
[8] p. 172.

THE HISTORICAL BACKGROUND OF LEO'S PRONOUNCEMENTS

A study of the background against which Leo XIII made his pronouncements shows that his was an era of political liberalism and that the liberals of his time justified their actions on the basis of naturalistic principles and a rationalistic philosophy. Leo denied the theory of the absolutely autonomous state, showing that the State is, on the contrary, obliged to truth and religion because its citizens are not mere creatures of reason but rational beings redeemed by Christ. He disproved that the end of governmental action is the well-being of man in a materialistic sense, pointing out that man is God's creature.

From Leo's doctrine the dynamic expositors also derive the principle that the *concrete pursuit* of the common good can objectively, and not merely subjectively, dispense legislators, under certain circumstances, from following the true theory of government. A distinction must be made between the philosophic theory of government and the pragmatic task of governing. Prudence will dictate when the pursuit of the common good justifies such a dispensation.[8] But as long as the true theory of government is not denied, the dispensation is possible.

CAN THE STATE WORSHIP?

Leo states unequivocally that not merely the individual but the State also must worship God according to the divinely ordained cult (by which he means Catholic worship alone). Therefore he meant what he stated explicitly at other times: The State must be Catholic.

The word *State* is capable of a variety of interpretations. If by *State* we mean the commonwealth made up of individuals, then Pope Leo is laying down the principle that men *as citizens* must render acts of worship according to Catholic rites (although by the law of the Church non-Catholics could not actively participate). If by *State* we mean the abstract principle of governmental organization, the constitutional form of the commonwealth, then the State is incapable of worship, since human acts are essential to worship. If the legal institutions of government are meant by the State, there can be no worship since these institutions are not human beings. If, however, by State is

[8] *Ibid.*, 173f. See also Encyclical *Libertas, praestantissimum*, June 20, 1888; English translation in *The Great Encyclical Letters of Pope Leo XIII*, 157.

meant the governors and legislators, then worship is, of course, possible. Therefore it is clear that Leo XIII, supposing Catholic citizens and Catholic governors, declared that these as citizens and governors must take part in worship as one of the acts of the commonwealth.

Father Weigel observes that this doctrine is not immediately pertinent to the American governmental situation, for Leo's doctrine is in the realm of the ideal order and does not concern the pragmatic task of governing. The American Constitution is based on a prudential program for pragmatic action.[10]

CORRECT UNDERSTANDING OF LEO'S DOCTRINE

As a result Leo's doctrine is not to be interpreted as critical of the American Constitution, which is a practical instrument for the common good; Leo's doctrine, an abstract theory of government, is indeed on a different plane from the objectives of the American Constitution, and the two do not conflict.

Indeed the principles that Leo laid down for *the concrete task of governing* are carried out in the Constitution, and an examination of the document bears this out. The true ideal of society is not denied in our commonwealth. And the theory of government that the Catholic must accept (that the State must be Catholic according to the ideal which we are now prevented from realizing because of the effects of original sin) does not hamper the Catholic's acceptance of the practical arrangement of the Constitution. In a country like the United States tolerance is the only condition which makes possible collaboration and co-operation among all citizens. Thus Pope Leo made it clear that a dispensation from the theoretical ideal is, under certain circumstances, valid; it is this that we have in the American arrangement, for the purpose of the prudent pursuit of the common good of society.

Leo's teachings resolve the question of worship by the American State. Only a *person* can render worship to God —an abstraction cannot. Where government is so organized that the individual in power can say, "L'état, c'est moi," there is an obligation for the State, in that individual, to worship God. Such is also the case where one man is the symbol of the nation. But neither of these conditions

MIM., pp. 175-177.

holds for the United States. In the American State all power is reserved to the people as a whole. Though instruments have been established whereby this power is exercised, the men who make these instruments work are not personally vested with power. They remain simple citizens.

The President of the United States is essentially an organ and not a person, though by a figure of speech we call the man who fills the office the President. To Americans the term *President* may mean either the office or the man. As an office it is the executive branch of the governing devices set up by the Constitution. As a person the President is a simple citizen who actually has no other title than "Mister," and who is rightfully open to criticism for the manner in which he makes an instrument of the people function. Therefore the lack of "State" worship in the United States government involves no problem. In the Leonine ideal of civil society such worship is necessary, but in the concrete situation of the American people, considering their history and culture, it is legitimately dispensed with. This is the only arrangement that will achieve the end of the American Commonwealth—the peace and prosperity of American citizens.

The static expositors base their claims to the objective obligation of worship on the part of the government, on Leo's theory of civil society; but they neglect the distinction made by Leo. *In abstracto,* the obligation is universal, but *in concreto* an objective situation may cancel out the obligation here and now. The theory is of obligation only when its application is not *de facto* detrimental to the end of society—the peace and prosperity of the commonwealth. When it is detrimental, the obligation disappears.[11] This seems to be the express doctrine of Leo XIII when he explained the flourishing condition of the Church in America.[12] That our generic kind of governmental arrangement is good and could be used expediently elsewhere is stated strongly by the present Pope, Pius XII.[13]

11 Weigel, *ob. cit.,* pp. 177-180.

12 See Encyclical *Longinqua Oceani, January 6, 1895;* English translation in *The Great Encyclical Letters of Pope Leo XIII,* 323.

13 "Il sesto Natale/ December 24, 1944. AAS, XXXVII *(1945),* I, 13: "By reason of the extent and nature of the sacrifices demanded of all citizens, in our time when the activity of the State is so vast and decisive, the democratic *form of* government seems to *many as* a *natural* postulate imposed by reason itself. Yet the cry: 'more and better democracy' is a demand which can have no other meaning than to place the citizen more and more in a condition that permits him to have his own personal opinion, to express it and make it effective in a manner compatible with the common good."

CONCLUSION TO BE DRAWN

The dynamic expositors, in Father Weigel's opinion have received no demolishing objections to the question that they have proposed and answered. By papal teaching, in the concrete setting of the United States, neither citizen nor governor has an objective obligation to change the American way of life and government; on the contrary, he has the obj'ective obligation to defend it and thank God for it. Further, from the writings of Gelasius, Boniface VIII, Pius IX, Leo XIII, and Pius XII, as Father Murray has shown, they have garnered the following principles in regard to Church-State relations: Father Weigel cites them thus: "(1) The Church as a supernatural society is superior to the State and free from its jurisdiction; (2) The arrangements of the commonwealth must be prudently dictated by the truth applied to, and tempered by, a concrete situation so that it can effectively promote the common good in terms of peace and prosperity of the citizen-body; (3) The Church and the State must collaborate, since both are for the same human person."[14] The Church is always the same, but the State takes on different forms of organization in different circumstances.

The static expositors have made an important contribution in the controversy by stressing what the dynamic expositors have taken for granted: that the Church has authoritatively pronounced upon the ideal structure of the commonwealth and the Catholics may not be indifferent to this pronouncement. But the static expositors have overlooked the principle that the Catholic philosophy of government is not a pragmatic norm for government in the concrete, and that therefore the immediate obligation—the concrete good of peace and prosperity— can under certain circumstances dispense citizens and governors from the theoretical ideal. In our country tolerance is necessary for the common good, and as Leo XIII conceded our method of government has worked admirably.

The final result of the controversy, Father Weigel concludes, has been a clarification of many points of doctrine, among which are the following: (1) That no conflict between his loyalty to State and loyalty to God exists for the Catholic; (2) That one aspect of Catholic thought has not been thoroughly covered and investigated heretofore by the

[14] *Op. cit.,* pp. 180-182.

manuals on Church and State—that is, the practical aspect; (3) That Catholic philosophy concerns the ideal government, which as a result of original sin, has perhaps never existed anywhere; that a dispensation from the theoretical ideal is to be allowed when the common good demands it, though this is not to say that a false concept can ever be embraced nor the ideal itself rejected.[15]

CARDINAL OTTAVIANI'S DISCOURSE

The static expositors point to a recent clarification of Church-State principles which in part at least seems to confirm their view in the present controversy. It is the discourse delivered by Cardinal Alfredo Ottaviani March 2, 1953, before the Lateran Academy, Rome, on the occasion of the celebration of the fourteenth anniversary of Pius XII's pontificate.[16] Cardinal Ottaviani's address reproves the well-intentioned effort of certain Catholic writers (no names are mentioned) to disarm the opposition by attempting to attenuate the Church's teaching on her place in civil society. He criticized especially what he calls the "pendulum" theory, according to which the Pope's encyclicals say one thing to the people of one age, and then, in accordance with changed conditions, reverse their directions. The Cardinal submits that, on the contrary: it is certain "that no one can prove that there has been any kind of change, in the matter of these principles, between the *Summi pontificatus of* Pius XII and the encyclicals of Pius XI, *Divini Redemptoris* against Communism, *Mit brennender Sorge* against Nazism, and *Non abbiamo bisogno* against the state monoply of fascism, on the one hand; and the earlier encyclicals of Leo XIII, *Immortale Dei, Libertas,* and *Sapientiae christianae,* on the other."[17]

PRINCIPLES FOR CATHOLIC STATES

Answering the charges of an unnamed Catholic writer who contended that the State as such cannot perform an act of religion, and that even a Catholic State has no obligation to profess Catholicism, Cardinal Ottaviani replied: "If there is any certain and indisputable truth to be found

** *Op. cit.,* pp. *182-184.* See also. Monsignor Joseph Fenton's reply to Father Weigel's article, "Toleration and the Church-State Controversy," *American Eccleriaaical Review,* Vol. CXXX (May. 1954), 330-343.

Parts of the address were reported in *Ossereatore Romano.* The May, 1953, issue of *American Ecclesiastical Renew,* Vol. CXXVIII, 321-334, prints the whole text, as translated from the Italian by Monsignor Joseph G Fenton, editor, under the *caption* "Church and State: Some Present Problems *in* the Light of the Teaching of Pope Pios XII."

« Fenton, *op. cit.,* p. 328f-

among the general principles of public ecclesiastical law, it is the truth that the rulers in a state composed almost entirely of Catholics and consequently and consistently governed by Catholics, have the duty to influence the legislation of that state in a Catholic sense." This duty involves three consequences: "(1) The *social,* and not merely the *private* profession of the religion of the people; (2) the Christian inspiration of legislation; (3) the defense of the religious patrimony of the people against every assault which seeks to deprive them of the treasure of their faith and of their religious peace."[18]

Cardinal Ottaviani then shows these three principles as espoused in papal documents. (1) Leo XIII, in *Immortale Dei,* declared: As it was not licit for any individual to fail in his duty to God and religion, in the same way, "states cannot, without serious moral offense *(citra scelus)* conduct themselves as if God were non-existent or cast off the care of religion as something foreign to themselves or of little moment."[19] Pius XII, in *Summi pontificatus,* condemns the errors that absolve "civil authority from all dependence upon the Supreme Being . . . and that concede to civil authority an unlimited power of action, a power left to the ever changing wave of whims or to the sole restraints of contingent historical exigencies and of relative interests."[20] (2) Against the moral and religious agnosticism of the modern secularized State and of its laws, Pius XII held up the concept of the Christian State in his letter of October 19, 1945, for the nineteenth Social Week of the Italian Catholics, during which, precisely, the problem of the New Constitution was to be studied. The question which before every other ought now to attract the Catholic's attention and stir up his activity, "is that of assuring for this and for future generations the benefit of a fundamental law of the State which is not opposed to sound religious and moral principles, but which rather draws vigorous inspiration from them and proclaims and wisely pursues their lofty purposes."[21] On this point, the Supreme Pontiff has not failed to refer to "the praise due to the wisdom of those rulers who either always have favored or wished and knew how to honor, in the best interests of the people, the values of Christian civilization in the happy relations between

[18] *Ibid., p.* 325.
[19] *Leonis XIII Pontificis Maximi Acta,* V. (1886). 123.
[20] *AAS,* XXXI, *466.*
[21] *AAS, XXXVII, 274.*

Church and State, in safeguarding the sanctity of marriage, and in the religious education of youth."[22] (3) The Encyclicals of Leo XIII uphold the duty of the Catholic State to protect against everything that would undermine the religious unity of the people, who unanimously know that they are secure in the possessions of religious truth. In condemning the religious indifferentism of the secularized State, Leo XIII, in the Encyclical *Immortale Dei,* appealed to the divine law. Rulers "are obliged to follow, in the matter of divine worship, those laws and those means by which God Himself has shown that He wills to be honored: quo coli se Deus ipse demonstravit velle."[23] And in the Encyclical *Libertas,* Leo appealed also to the principles of justice and reason: "Justice and reason forbid a state to be atheistic or to be what comes to the same thing as being atheistic, to have the same attitude towards various, so-called 'religions' and indifferently to grant the same rights to all of them."[24] Cardinal Ottaviani submits that "these principles are firm and immovable. They were valid in the times of Innocent III and Boniface VIII. They are valid in the days of Leo XIII and of Pius XII, who has reaffirmed them in more than one of his documents."[25]

THE RIGHTS OF TRUTH

Catholics are often called "inconsistent." In a Catholic country they uphold the idea of a confessional State, with a duty of exclusive protection for the Catholic religion. On the other hand, where they constitute a minority, they claim the right to tolerance or frankly to the equality of cults. Hence for them there are two standards or norms of action, their critics state. Cardinal Ottaviani notes that this is begging the question.

"Men who perceive themselves to be in sure possession of the truth and of justice are not going to compromise. They demand full respect for their rights. How, on the other hand, can those who do not perceive themselves secure in the possession of truth claim to hold the field alone, without giving a share to the man who claims respect for his own rights on the basis of some other principle?" The Cardinal pointed out that: "It ought not to be considered strange that the Church appeals at least to the rights of[28]

[22] From the Holy Father's 1941 Christmas Radio Message, *AAS,* XXXIV, 15.
[23] *Leonis XIII Pontificis Mixisni Acta,* V, 123.
[24] *lbi<L,* VIII, 231.
[25] Fenton, *ofi. cit.,* 328.

man, when the rights of God are not recognized." Against those who say that rights inhere in neither truth nor error but in persons only, Cardinal Ottaviani observes: "It seems to me, on the contrary, that the fundamental truth consists rather in this: that the rights in question have very well as their subjects those individuals who find themselves in possession of the truth; and that other individuals cannot demand the same rights by title of the error they profess. And, in the encyclicals we have cited, it appears that the first Subject of these rights is God Himself. From this it follows that only they who obey His commands and who possess His truth and His justice have true rights."[26] In other words, it follows that there can be no objective right to act against God's justice and truth.

The Cardinal referred to a letter of the Sacred Congregation of Seminaries and Universities to the Bishops of Brazil, on March 7, 1950. This letter, which refers continually to the teachings of Pius XII, warns against the errors of renascent Catholic liberalism, which "admits and encourages the separation of the two powers. It denies to the Church any sort of direct power over mixed affairs. It affirms that the State must show itself indifferent on the subject of religion . . . and recognizes the same freedom for truth and for error. To the Church belong no privileges, favors, and rights superior to those recognized as belonging to other religious confessions in Catholic countries . . . "[27]

The Cardinal deplored the inconsistency of those who cry out when Catholic states in Europe conduct themselves in accordance with Catholic principles, and yet have small resentment for the Soviet war on religion. Against the secularist school that accuses the Church of mixing in politics when it claims the right to lay down principles guiding conduct, the Cardinal quoted Pius XII's Lenten sermon to the parish priests and the Lenten preachers of Rome in 1946: "The Catholic Church will never allow itself to be shut up within the four walls of the temple. The separation between religion and life, between the Church and the world, is contrary to the Christian life and Catholic idea."[28]

[26] ZW., pp. 529-331.
[27] *Ibid.*, p. 331.
[28] XXXVHI, 187.

FATHER MURRAY'S REJOINER

In response to a request from the New York *Times* for clarification of its position, the Vatican said on July 20, 1953, that an address made by Cardinal Alfredo Ottaviani was "not official or semi-official but was nevertheless 'unexceptional.' "[29] In a statement made to the *Times* following the Vatican pronouncement, Father John Courtney Murray, S. J., respectfully declined to consider the matter settled by the Cardinal's address. He states: "Cardinal Ottaviani was speaking only in his purely personal capacity. His statement was neither an official nor a semi-official utterance. It was just a statement of a private theologian—one of very considerable reputation, of course,—speaking on his own authority. It is still entirely possible and legitimate for Catholics to doubt or dispute whether Cardinal Ottaviani's discourse represents the full, adequate and balanced doctrine of the Church."

And so the controversy continues. Perhaps an authoritative pronouncement, a second *Humani Generis,* will one day appear, closing the discussion of this question.

[29] See Monsignor Fenton, "Catholic Polemic and Doctrinal Accuracy," *American Reeledasiical Review,* CXXXII, No. 2 (February, 1955), pp. 107-117.