

7-1-1963

The Interaction of Religion, Law, and Politics in Western Society: Its Historical Character and Influence

Simeon L. Guterman

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Jurisprudence Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Simeon L. Guterman, *The Interaction of Religion, Law, and Politics in Western Society: Its Historical Character and Influence*, 17 U. Miami L. Rev. 439 (1963)

Available at: <https://repository.law.miami.edu/umlr/vol17/iss4/1>

This Leading Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

UNIVERSITY OF MIAMI LAW REVIEW

VOLUME XVII

SUMMER, 1963

NUMBER 4

THE INTERACTION OF RELIGION, LAW, AND POLITICS IN WESTERN SOCIETY: ITS HISTORICAL CHARACTER AND INFLUENCE

SIMEON L. GUTERMAN*

I

This study is an attempt, from the point of view of the institutional historian, to characterize the nature and effects of the tie between the organized spiritual power and the civil government in Western society at various periods and in different countries. The relationship is viewed not only in its effects on the movements of religious and political liberty, but as the resultant of forces originating in opinion as well as in legislation.

The association between the churches and civil societies must be regarded as a changing, in fact an evolutionary one. If the latter undergo constant transformation as a result of their contact with the churches, no less can be said of the former. This is as true of the Roman Catholic as of the Protestant Churches, for, under the rule of hypothesis, the first of these recognizes arrangements and compromises forbidden under strict law or thesis. This is acknowledged in a striking passage of the Encyclical of Leo XIII, *Immortale Dei* (1885), when he declares under the caption, "No one form of government condemned, nor all toleration of error," that "The Church, indeed, deems it unlawful to place various forms of Divine Worship on the same footing as the true religion, but does not, on that account, condemn those rulers who for the sake of securing some great good, or of hindering some great evil, tolerate in practice that these various forms of religion have a place in the State."¹

If the American public, therefore, ever expected past tensions generated by religious controversy to subside with time, it has been sharply reminded by their revival in the recent dispute over proposals

* Professor of History and Chairman, Department of Social Science Education, Graduate School of Education, Yeshiva University.

1. EHRLER & MORRALL, *CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF ILLUSTRATIVE DOCUMENTS* 315 (1954).

for subventions to parochial schools that the past, mutable though it is, still exercises an influence over the present.

II

Law, which is functionally related to the state, and religion have, in fact, been intimately linked since primitive times. Like law, which in the tribal or pre-modern society is "personal" rather than territorial, religion is tribal rather than individual or universal in its early stages.² Though their mutual influence continues, law and religion in advanced societies sooner or later come to a parting of the ways. The explanation lies in the growth of the community and in the consequent diversification of religious affiliations, so that "it ultimately becomes necessary to find a common standard of justice among men who belong to different religions."³ But the recollection of an earlier order of things often continues to affect the relations of church and state under the new one. Above all, Judaism, Christianity and Islam laid claim to a universality which took political forms. In Christian society the claim of the church-state to exclusive salvation produced religious wars and persecutions. "Religious liberty in Christendom logically involved the secularization of the State," after severe struggles with the older religio-political conception based on the collaboration of the "two powers."⁴

It is not strange, therefore, that the relation of religion and politics constitutes one of the dynamic issues of history, especially of European and American history, for if there is one thing that distinguishes Western from non-Western societies it is precisely in the peculiar tension, as Christopher Dawson has put it, that has existed between the religious and secular powers.⁵ It is, of course, sometimes difficult to distinguish periods of conflict from those of equilibrium in European history. Yet a comparison with Oriental, Classical, and Islamic societies must bring out the unmistakable fact that rivalry, occasionally latent but always palpable, has marked the relations of the "two powers" throughout their joint history. If in addition Western history boasts achievements such as progress, liberty and science, it is also not unreasonable to treat them as incidents, if not results, of the distinctive historic interaction between religion and politics.⁶

The dynamism implicit in these relations has its counterpart within religion itself. Professor Albright discerns within the Judeo-Christian religious community a tension between "an institutionalized hierarchy of religious functionaries and an upsurge of charismatic spiritual leaders"

2. JENKS, *THE STATE AND THE NATION* 61 (1935).

3. *Id.* at 84.

4. 2 MOORE, *HISTORY OF RELIGIONS* VIII (1928).

5. DAWSON, *RELIGION AND THE RISE OF WESTERN CULTURE* 17 (1950). See generally DAWSON, *op. cit. supra*.

6. LATREILLE & SIEGFRIED, *LES FORCES RELIGIEUSES ET LA VIE POLITIQUE* 70 (1951).

productive of the "self-critical continuum of Judeo-Christianity."⁷ The opposition of prophets to priests in ancient Judaism, the checks and balances between hierarchy and orders in the Roman Catholic Church and the lay preachers replacing a priesthood in the Protestant Churches, are manifestations of this continuing dichotomy in Western spiritual life which parallel and perhaps explain the similar balancing of temporal and religious interests in society.⁸

Of the reality of this interaction during the formative period of European civilization and of its importance for the institutions that we regard as typically European, a few examples will have to suffice.

The connection of the church (either by way of example, or by convergence of effort, or even by reaction) with the growth of popular institutions in the Middle Ages seems certain.⁹ The assemblies or *placita* of the Frank period are often traced in their origin to church councils as well as to the popular assemblies of the *Germania*.¹⁰ Certainly it is as difficult to distinguish between the ecclesiastical and the temporal ordinances issued in these bodies as it is in the contemporary Anglo-Saxon assemblies.¹¹

Interesting as an illustration of the general dualism pervading medieval institutions is the persistent division of labor in the civil services between "literate 'clerks' and illiterate 'serjeants' or 'knights.'"¹² Even the Papal service, as Mr. Johnson points out, requires that the bulls or leaden seals on Papal letters be affixed by laymen who are "*ex officio* illiterate."¹³

A parallelism of development rather than a direct influence of the Dominican Convocation on English parliamentary representation is all that can be urged for church influence on this vital aspect of constitutional growth.¹⁴ But the continued rivalry between the crown and the church in England, no less than in France, had much to do with the development of representative institutions in both countries.¹⁵

7. William F. Albright, *Samuel and the Beginnings of the Prophetic Movement* 19-20, Goldenson Lecture, Hebrew Union College (1961).

8. *Ibid.*

9. 1 ESMEIN, *ELEMENTS DE DROIT CONSTITUTIONNEL FRANÇAIS ET COMPARÉ* 79 (7th ed. 1921).

10. DUMAS, *MANUEL D'HISTOIRE DU DROIT FRANÇAIS* 39 (1950); ESMEIN, *COURS ELEMENTAIRE D'HISTOIRE DU DROIT FRANÇAIS* 68 (15th ed. 1930).

11. MAKOWER, *THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND* 8 (Eng. trans. 1895).

12. Charles Johnson, *Royal Power and Administration*, in *LEGACY OF THE MIDDLE AGES* 493, 502-03 (1948).

13. *Id.* at 493.

14. McIlwain, *The Medieval Estates*, in 7 *CAMBRIDGE MEDIEVAL HISTORY* 670-71 (Tanner & others eds. 1958).

15. See BARKER, *DOMINICAN ORDER AND CONVOCATION* 53 (1913). For an exaggerated inference, see FORD, *REPRESENTATIVE GOVERNMENT* 103 (1924). See generally BARKER, *op. cit. supra*.

The entire state concept as developed by the French jurist Bodin can, in fact, only be understood as a response by advocates of absolute monarchy seeking to bolster the claims of the "king's estate" against those of the church. "The modern State concept was born of the Western Church concept."¹⁶

These examples, drawn mainly from the history of our political institutions, serve at least to underline the close reciprocal influence exerted between the constitutional orders of church and state throughout the Middle Ages. Their mutual influence in modern times has been the subject of an abundant literature, aspects of which will be examined below.

III

The problem raised by the relations of church and state has been viewed as a legal one. Ruffini in his classic study of "Religious Liberty" treated his subject as a legal rather than a theological or a philosophical inquiry. By this he meant that the most fruitful concept to be examined historically was one that viewed it in terms of juridical institutions rather than of ecclesiastical privilege or philosophical right.¹⁷ The legal ramifications stand out in other fundamental respects. Sir Henry Maine has described in several notable pages the influence of Roman jurisprudence, especially the law of contract, on Western ideas of free will and necessity, distinguishing it from the more purely metaphysical influence exerted by Greek philosophy on the theology of the Greek East.¹⁸

The legal spirit inherited from ancient Rome has in fact armed both parties to the conflict of church and state. Christian society has never been "Christian" in the sense that Islamic society has been "Islamic" and theocratic, because the Roman legal tradition has not only transmitted to Western nations the state concept but because "the written Revelation itself has been unable to take the place of the 'written reason' represented by the Law."¹⁹ Canon law was the pendant as well as the rival of the civil law during the Middle Ages, for it embodied like the sister system some part of the Roman tradition. It was this dual legacy that prevented the identification of law and religion in Western society, as it was the absence of a similar dualism that explains the opposite course pursued by Islamic history.²⁰ Christianity may have

16. C. J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 16 (1950).

17. RUFFINI, *RELIGIOUS LIBERTY* 4-5 (1912).

18. MAINE, *ANCIENT LAW* 294-303 (World's Classics ed. 1931).

19. BOUCHÉ-LECLERCQ, *L'INTOLÉRANCE RELIGIEUSE ET LA POLITIQUE* 346 (1924). It must be pointed out that the same spirit informs the common law which, whatever its substance, owes much on the side of *jurisprudence and political ideas* to Roman legal models as interpreted by Glanvill, Bracton and others. McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 57-61 (1959); MAITLAND, *SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO XIV* (Selden Society ed. 1895).

20. 2 BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 240-46 (1901).

been based on grace, not law originally,²¹ but Christian society since the 4th century is impossible to understand without taking account of the legal influences just described.

However, having paid our respects to legality, we must add that behind the forms stand social realities, especially public opinion, which constantly impinge on and transform legal arrangements no matter how strictly defined. The outlines of this interaction in 19th century England have been drawn by Dicey in a classic work.²² The links between the State and society, between law and opinion, are not always so clear as they might be. But in political parties as organized in liberal societies we do see a link between a "voluntary association within a social framework" and the constitutional order.²³ Such particularly are the political parties in France, Italy, Germany, Holland and Belgium which under various labels derive their social principles from the teachings of the Roman Catholic Church.

The distinction is clearly stated by Troeltsch:

In the current sense, the idea of the "social" means a definite, clearly defined section of the general sociological phenomena—that is, the sociological relations which are not regulated by the State, nor by political interest, save in so far as they are indirectly influenced by them. This sociological section is composed of the various questions which arise out of economic life, the sociological tension between various groups with different customs and aims, division of labor, class organization, and some other interests which cannot be directly characterized as political, but which actually have a great influence on the collective life of the State; since the development of the modern Constitutional State, however, these interests have definitely separated themselves from it. The social problem, therefore, really consists in the relation between the political community and these sociological phenomena which, although they are essentially non-political, are yet of outstanding importance from the political point of view.²⁴

But we must turn to history.

IV

The classical world knew no problem of church and state. Religion was a department of state in ancient Rome. Christianity, which sought

21. *Ibid.*

22. A. V. DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* (2d ed. 1914). For the history of ecclesiastical legislation, see *id.* at 311-60 (lecture X).

23. SCHIEDER, *THE STATE AND SOCIETY IN OUR TIMES: STUDIES IN THE HISTORY OF THE NINETEENTH AND TWENTIETH CENTURIES* 54, 55, 60, 61 (Sym transl. 1962).

24. 1 TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 28, (Gore transl. 1949).

at first to maintain itself as a distinct society, succeeded in rending the seamless web. By proclaiming a distinction between the duties due to God and those due to Caesar, Christianity initiated the greatest revolution in history.²⁵ The overthrow of the politico-religious system of the ancient city by Judeo-Christianity was also revolutionary in introducing into common thought other novel ideas and principles of action: the uniqueness of God, the idea of an alliance of people and God, a tendency toward theocracy, and a requirement of moral purity in members.²⁶ This exclusive heritage of Christianity from Judaism promoted, if it did not produce, a conflict with the Roman government, which had already launched a program of political integration through the Imperial Cult and other measures.²⁷

The ancient religions in the Graeco-Roman world possessed several characteristics that determined their relation to government. They were not only national and civic cults, they were ritualistic, polytheistic and anthropomorphic.²⁸ Unlike Christianity they lent themselves more or less readily to various types of syncretism.²⁹ Though Christianity was adopted by the Roman Empire and though it almost became a department of state, the distinction between state and religion which was laid down during the period of its persecution survived. The Emperor Constantine *linked* but did not merge the two. The result, according to Rousseau, has been ever since to prevent countries from pursuing a "bonne politique."³⁰

The linking of Christianity, which meant the Christian church, with the state raised the question of the precise relationship between them. In Islam the problem of the relations of the two powers was solved by bestowing them both on one person, the Caliph, who thus became, in certain respects, a combined Pope and Emperor.³¹

In European Christendom a theory was worked out concerning the church-state relation which with some modifications dominated Western thought to the time of the Reformation. According to this theory, which was first clearly expressed at the close of the 5th century by Pope Gelasius, society is ruled by two powers, the spiritual and the temporal, both equal in practice, though unequal in "importance," each distinct

25. FUSTEL DE COULANGES, *THE ANCIENT CITY* 390-93 (1956).

26. LATREILLE & SIEGFRIED, *op. cit. supra* note 6, at 18.

27. HOMO, *LES EMPÉREURS ROMAINS ET LE CHRISTIANISME* 35, 46, 85 (1931); GUTERMAN, *RELIGIOUS TOLERATION AND PERSECUTION IN ANCIENT ROME*, chs. 1, 7 (1951). See generally GUTERMAN, *op. cit. supra*.

28. LATREILLE & SIEGFRIED, *op. cit. supra* note 26, at 11.

29. HOMO, *op. cit. supra* note 27, at 85-118. HOMO, *DE LA ROME PAÏENNE A LA ROME CHRÉTIENNE*, *passim* (1950).

30. ROUSSEAU, *CONTRAT SOCIAL* IV, p. 8 (1826); ESMEIN, *op. cit. supra* note 10, at 141.

31. The caliph did not, however, undertake to interpret the sacred law, officially at least, 2 BRYCE, *op. cit. supra* note 20, at 240-41. Goeje, *Caliphate*, in 5 *ENCYCLOPAEDIA BRITANNICA* 23 (11th ed. 1911).

and yet joined in a common purpose.³² In a word, distinction and collaboration mark the relations of the two powers. This theory was more easily adumbrated than executed. The two powers, whatever the theory, were in conflict from the 11th century to the close of the Middle Ages.

Four relations were thereafter imaginable.³³ Theocracy, or the dominance of the church over the state, was sought and perhaps achieved in the period from the 11th to the 13th centuries that included Popes such as Gregory VII, Innocent III, Gregory IX and Innocent IV. The "direct power," which was claimed by these pontiffs and brought to a head by Boniface VIII, could not prevail for long. It yielded to the theory of the "indirect power" of the church over the state which emphasized the Christian responsibilities of the temporal ruler rather than his political subjection to the Pope.³⁴ Even this theory proved ineffective after the 16th century, and theocracy, even in its more limited application, became an anachronism. Under the rule of hypothesis, the official position or thesis was adapted to circumstances. Only in the Papal States until 1870 could a theocratic thesis survive in practice.³⁵

Caesaropapism, the subordination of the spiritual power to the temporal, was characteristic of the later Roman Empire and of its Byzantine continuation as well as of the empire of Charlemagne. In its more modern form following the Reformation, and under the name of Erastianism, it has stamped with its mark German Protestantism and Anglicanism.³⁶

The regime sought in modern times by the Roman Catholic Church and in theory by the established churches in the Protestant countries, is one of equality between church and state manifested in some form of jurisdictionalism. Unfortunately this also is more easily imagined than practiced, for a prime condition of its existence is lacking. The church is no longer in any modern state a legal power sharing sovereign authority with the temporal officials. In the Middle Ages *two* legal powers were the rule; modern sovereignty decrees *one* legal power, that of the State, and in a democratic system, regards religion as a matter of individual and voluntary choice and not of corporate privilege.³⁷

32. Original text in MIRBT, QUELLEN ZUR GESCHICHTE DES PAPSTUMS UND DES RÖMISCHEN KATHOLIZISMUS 85-88 (4th ed. 1924). English translation in EHLE & MORRALL, *op. cit. supra* note 1, at 11. 1 CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 184-93, 253-57 (circa 1903). For a recent statement of the problem raised in the Gelasian theory, see ULLMANN, PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES 57 (1961).

33. For the following see CHENON, LE RÔLE SOCIAL DE L'ÉGLISE 137-67 (1928).

34. *Id.* at 149-57.

35. BOUCHÉ-LECLERCQ, *op. cit. supra* note 19, at 347.

36. LATREILLE & SIEGFRIED, *op. cit. supra* note 6, at 180-98.

37. 2 ESMEIN, ÉLÉMENTS DE DROIT CONSTITUTIONNEL FRANÇAIS ET COMPARÉ 604 (7th ed. 1921).

The result is that the religious conflicts in the 16th and 17th centuries, which pitted opposing sectaries, Protestant and Roman Catholic, against one another, differed from the medieval conflicts between Popes and emperors. In one case the struggle was for the possession of the *one* sovereign power located in the state; in the other the conflict was between *two* legitimate claimants to power, each charging the other with aggression. We shall in due course examine other aspects and consequences of the theories of medieval dualism and modern sovereignty and individualism, particularly as they affect national history.

The "Great Secularization," as Professor Butterfield describes the transformation of European society after 1660, has brought an entirely new type of conflict in its train.³⁸ In the 19th century it arrayed the national state, with its concern for civic and *individual* rights against the Roman Catholic Church. In the 20th century it is the conflict between the totalitarian state and the Christian churches, both Catholic and Protestant, that has been the conspicuous feature of the age.³⁹

The fourth relationship is separation, which is practiced in the United States, France, Switzerland, Chile and other countries. Separation has different purposes in each of these countries. In the United States it was designed to prevent the dominance of any one sect, but it did not mean the extrusion of religion, conceived in broad Protestant terms, from state activities such as education.⁴⁰ In France separation involved the cutting of ties with the Roman Catholic Church and was carried through on a wave of anti-clericalism directed at the influence of the Church.

It has been demonstrated that religious liberty can and has coexisted with both separationist and jurisdictionalist systems,⁴¹ though coexistence is less easily imagined under theocracy or caesaropapism. In fact, the first formal avowal of the modern principle of religious liberty is contained in the Confession of the Socinian sect adopted at Rakau, which advocated a regime of religious establishment maintained by the state. It was only state control, in the view of the leaders of this Unitarian group, that would restrain fanaticism and protect minority religious rights.⁴²

It is one of the paradoxes of history that separation was first advocated by the most extreme of sectaries, the Anabaptists, whose ideas fell on fertile ground in Holland where they influenced the views of the Pilgrim Fathers.⁴³ What they advocated was theocracy or church rule

38. BUTTERFIELD, *CHRISTIANITY IN EUROPEAN HISTORY* 35-40 (1954).

39. EHRLER, *TWENTY CENTURIES OF CHURCH AND STATE* 109 (1957).

40. GREENE, *RELIGION AND THE STATE—THE MAKING AND TESTING OF AN AMERICAN TRADITION* 94 (1959).

41. RUFFINI, *RELIGIOUS LIBERTY* 510-22 (1912).

42. *Id.* at 86.

43. *Id.* at 101-05, 492.

with its consequence of persecution of dissenters. If unable to secure this, and only then as a *pis aller*, were they willing to accept separation of church and state.⁴⁴

Inconsistent though they may appear, statements in 19th century constitutions which give one church a privileged position and even a monopoly but extend religious liberty to others, are sincere. The French Charter of 1814, which declares in article V, "each one professes his religion with an equal liberty and obtains for his cult the same protection," says in article VI, "The Catholic religion, apostolic and Roman, is the religion of the State."⁴⁵ Religious liberty is more often a question of fact than of law or logic. No one system necessarily protects it everywhere, nor in the same way.

V

It is the effect of these events not merely on religious liberty but on what the English writer Figgis described as its offspring, political liberty, that deserves attention and of which an account must now be given.

The idea of liberty under law is a legacy of classical antiquity, but though law remained a ruling passion, liberty in its classical phase withered in the later Roman Empire.⁴⁶ Religion was a department of state, and there was little chance of its exercising a restraint on governmental power. The omnipotence of the ancient state was in fact implicit from the first, but was only fully realized in the last period of the Roman Empire.⁴⁷ "Born of authority the Roman Empire perished of etatism."⁴⁸

Liberalism in the sense of a concern with individual rights independently of the state was unknown to the classical world, at least in law. What is sometimes mistaken for liberalism is the extension of political rights to certain classes hitherto denied them and the extension of civil or legal rights to the mass of free inhabitants living in free communities. Also included is the restriction of the power of magistrates over citizens.⁴⁹ But the State had a complete claim on the life of the individual. His existence was unthinkable outside the sphere of political society; he was a political animal. Stoic notions of the priority of the individual to society were later to be reinforced by Christianity, but their influence in the pagan Empire was as yet theoretical.⁵⁰

44. *Id.* at 494.

45. 2 ESMEIN, *op. cit.* *supra* note 37 at 604.

46. ESMEIN, *COURS ELEMENTAIRE D'HISTOIRE DU DROIT FRANÇAIS* 1-3 (15th ed. 1930); McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 43 (1959).

47. HOMO, *NOUVELLE HISTOIRE ROMAINE* 557 (1941).

48. *Id.* at 558.

49. FUSTEL DE COULANGES, *THE ANCIENT CITY*, bk. III, ch. 17 (1956). 1 ESMEIN, *op. cit.* *supra* note 37, at 33.

50. 1 CARLYLE, *MEDIEVAL POLITICAL THEORY* 98, 126, 144 (1903); McILWAIN, *GROWTH OF POLITICAL THOUGHT IN THE WEST* 106, 149 (1932).

If the classical state contributed the conception of liberty under law or legal government, the Christian Middle Ages added that of liberties under custom and divine ordinance.⁵¹ A pluralistic society replaced the totalitarian state of the late Empire.⁵² Its principal feature was the partition of political power among a number of groups, secular and ecclesiastical.⁵³

While secular authority fell increasingly into the hands of royalty, especially in France and England, ecclesiastical power centered in the Papacy from the 11th and 12th centuries.⁵⁴ Hence, there existed a dualism which made any claims to sovereignty impossible during the Middle Ages;⁵⁵ there raged struggles for superiority between the temporal and the spiritual authorities; and, above all, there emerged the appeal of secular power to theories of popular government, as later to theories of direct divine sanction in support of its claims.⁵⁶

Out of these contending forces eventually emerged political responsibility of governments to wide electorates. But in the Middle Ages, as Professor McIlwain has rightly insisted, the only limitation, aside from the possibility of rebellion, was a legal one.⁵⁷ The dramatic events of King John's reign leading to the sealing of Magna Carta show the way in which the church could join in the imposition of restraints on a king bent on ignoring traditional rights.⁵⁸ But in general the Middle Ages only acknowledged legal responsibility on the part of a ruler and provided no sanctions other than revolutionary ones for abuses of authority. In the words of Bracton, "the King is under *no man*, but under God and the law."⁵⁹

Professor Kern demonstrates that the transformation, from elements already existing in the early Middle Ages, to cardinal principles of modern constitutional government including those of legal limitation and of popular representation and responsibility, is one of the most important

51. Guterman, *Social Democracy and the Traditions of Western Constitutionalism*, 6 N.Y.L.F. 121 (1960).

52. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES*, *passim* (1951); Maitland, *Introduction to GIERKE, op. cit. supra*; FIGGIS, *CHURCHES IN THE MODERN STATE* 54, 94-96 (1913).

53. ESMELN, *op. cit. supra* note 46, at 167-76.

54. 3 TURMEL, *HISTOIRE DES DOGMES: LA PAPAUTÉ* 277-334 (1933); ULLMANN, *THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES*, *passim* (1955).

55. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 506 (1931).

56. ACTON, *ESSAYS ON FREEDOM AND POWER* 62, 146 (1948). See ULLMANN, *PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES* 19-28 (1961), for a discussion of the "ascending and descending themes of government."

57. MCILWAIN, *GROWTH OF POLITICAL THOUGHT IN THE WEST* 363 (1932). The author distinguishes between *limitation*, present in the Middle Ages, and *control*, characteristic of modern times.

58. JOLLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 252 (2d ed. 1948). See the editor's introduction in McKECHNIE, *MAGNA CARTA* (2d ed. 1914).

59. BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE*, bk. I, c. 8, cited in STUBBS, *SELECT CHARTERS* 412 (9th ed. 1929) (Emphasis added).

developments in constitutional history.⁶⁰ "For better or for worse, the course of Western Civilization has been set by the Medieval ideal of legalistic dualism."⁶¹

The regime of the two powers characteristic of the Middle Ages casts its shadow in Roman Catholic and even in Protestant countries into the 18th century. This was so in France, although the process by which the royal authority subordinated the French Church to its own rule in the system of Gallicanism made continuous progress.⁶²

The Renaissance, the Reformation, the Reception of Roman law, and the Wars of Religion destroyed the basis of the Medieval dualism and hastened the advent of absolute government throughout Western Europe. But the absolutism thus promoted adhered to princes and kings, so-called national or pre-national rulers, and not to either of the universal powers hitherto dominant, emperor or Pope.⁶³

"Cuius regio, eius religio," which meant a uniform religion in a principality or kingdom and the domination of the church by territorial rulers, became the established rule in Europe. This signified the end of the Medieval dualism of church and state. The treaties of Augsburg, 1555,⁶⁴ and Westphalia, 1648,⁶⁵ like the Edict of Nantes, 1598,⁶⁶ set the seal on the tendency of the times to identify church membership with territorial sovereignty in the time honored formula, borrowed from antiquity, which identified religion with the city. A long time was to elapse before the rights of the territorial group were to yield to those of the individual.

Even England did not escape the effects of absolute theories of government following the advent of the Tudor dynasty and the establishment of a state-dominated church.⁶⁷ Two centuries of struggle were needed before the pretensions to absolute government of the Tudor and Stuart rulers were checked by a combination of Parliament, lawyers and Puritans.⁶⁸

It was an alliance of Law and Religion that scored the victory in the Glorious Revolution of 1688 at the very time when the Sun King was

60. KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* 181 (Eng. transl. 1948).

61. WATKINS, *POLITICAL TRADITION OF THE WEST* 61 (1948).

62. ESMEIN, *op. cit. supra* note 46, at 633.

63. 2 BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 82 (1901); FOLZ, *L'IDÉE D'EMPIRE EN OCCIDENT DU V^e AU XIV^e SIÈCLE* 160 (1953).

64. EHLE & MORRALL, *CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF ILLUSTRATIVE DOCUMENTS* 166, arts. 2, 3, 10 (1954).

65. *Id.* at 190, art. V, § 1.

66. *Id.* at 184, art. IX.

67. MCILWAIN, *op. cit. supra* note 46, at 95; McIlwain, *The English Common Law, Barrier Against Absolutism*, 49 *AMERICAN HISTORICAL REV.* 28-31 (1943).

68. MCILWAIN, *op. cit. supra* note 46, at 99.

declaring his will the major source of authority in church and state in France.⁶⁹

It was the French example, not the English, unfortunately, that exercised the greater influence in Europe after 1688, though Montesquieu and Voltaire soon began to sway opinion in favor of English institutions.⁷⁰ The only element that was added in this period by rulers in Prussia, Russia, Austria and Portugal was benevolence, thus creating the benevolent despotisms of the 18th century. This regime began to bear heavily on the churches in Prussia, Austria and France.⁷¹ In France, the Civil Constitution of the Clergy represented the culmination of these tendencies.⁷²

In the face of advancing absolutism, however, a new foundation for dualism was being laid. Accompanying and following the increasing secularization of society came the theory of natural law, which in the 17th and 18th centuries undertook to do what divine law had done in the Middle Ages, namely to provide a legal norm on which reasonable men could model the positive laws of kingdoms and states.⁷³ While the Dutch jurist Grotius employed natural law principles, which he disengaged from the mass of historical, especially Roman, precedents, in the international field, the German jurist Puffendorf applied them to the internal affairs of states, producing in the process an impressive doctrine of constitutionalism.⁷⁴

But the theory of natural law proved unable to halt absolutism or to take the place of the religious law of the Middle Ages. According to Watkins, the answer to this insufficiency was found in Parliament, which, following the English example, was supposed to represent that part of the community having interests independent of the state.⁷⁵

It is strange, however, that the advent of parliamentary rule in England soon brought the end of the doctrine of fundamental law to which Lord Coke had appealed.⁷⁶

Parliament, according to this view, replaced the Church as a potential means "of expressing the organized will of the community against the pretensions of princes."⁷⁷ But this reliance on Parliament

69. ESMEIN, *op. cit. supra* note 46, at 340; OLIVIER-MARTIN, *HISTOIRE DU DROIT FRANÇAIS* 337 (1951).

70. 1 ESMEIN, *ELEMENTS DE DROIT CONSTITUTIONNEL FRANÇAIS ET COMPARÉ* 69 (7th ed. 1921).

71. SOHM, *OUTLINES OF CHURCH HISTORY* 202 (1931).

72. 2 ESMEIN, *op. cit. supra* note 70, at 609.

73. 1 ESMEIN, *op. cit. supra* note 70, at 274; WATKINS, *POLITICAL TRADITION OF THE WEST* 62 (1948).

74. WATKINS, *op. cit. supra* at 65.

75. *Id.* at 82-83.

76. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 174 (1955).

77. WATKINS, *op. cit. supra* note 73, at 83.

was misplaced because in England, its home, it produced a tyrannical oligarchy in the 18th century.⁷⁸ It was impossible to mobilize the force of secular society against kings and oligarchies "till the advent of new classes to political power."⁷⁹ Only in the 19th century were parliamentary institutions revitalized so that Parliament became a makeweight "to the expanding power of modern bureaucracy."⁸⁰

When in the 19th century Dicey spoke of the rule of law or German publicists of the *rechtsstaat* they no doubt recognized the existence of a moral law as binding on their respective governments, but they really meant the rules laid down by positive enactments in their countries.⁸¹ The religious element in these enactments was not extensive though the indirect influence exerted by churches and religious thought on legislation may have been considerable.

Only in the United States, and to a lesser degree in France, did a fundamental law form the basis of ordinary legislation and at least in theory, limit the powers of government.⁸² But though these limitations could and can hardly be described as originating in religious conceptions, it nevertheless remains true that within the limits of the non-political order in which they operate, the associations called churches continue to exercise an influence on legislation and politics. This is as true of countries in which separation prevails as of those in which established churches of one kind or another exist.

But our discussion of the efforts made since the 17th century to find a substitute for the legalistic dualism of the Middle Ages has brought us to the 19th century, to the age of the national state in its two principal forms, liberal and democratic. We must now turn to the conflicts which occurred with the churches during the latter part of that century.

VI

The classic struggles of the 19th century are familiar to all historians. The conflict of the liberal state with the church in the later 19th century was produced by three events: the progress of secularized public education with its basis in the ideals of positivism and scientism; the growth in the power of the state which liberalism accepted at first reluctantly, but then in order to advance its own interests; and finally the Vatican's measures of defense in the Syllabus of Errors and the Council of 1870, which challenged the tenets of liberalism.⁸³

78. McIlwain, *The English Common Law*, *supra* note 67, at 30.

79. WATKINS, *op. cit. supra* note 73, at 89.

80. *Ibid.*

81. JONES, HISTORICAL INTRODUCTION TO THE THEORY OF LAW 87-97, 270 (1956).

82. For France, see DAVID & DE VRIES, THE FRENCH LEGAL SYSTEM 34 (1958).

83. Schieder, *Political and Social Developments in Europe*, in 11 NEW CAMBRIDGE MODERN HISTORY 266 (Hinsley ed. 1962).

In France it was a struggle of the new secular or lay forces rallied round the republic against the teaching congregations and finally against the authority of the papacy exercised over one side of French public life through the Concordat. In England the struggle was not between free thinkers and churchmen but between Protestant dissenters and Anglicans, and it revolved principally around education.⁸⁴ In Germany the *Kulturkampf* arrayed Bismark against the Catholic Church when the new German State undertook to impose restrictions on the Catholic Church and clergy following the Vatican Council.

It would not do to accept a definition of the liberal state derived from the papal encyclicals of the 19th century, for they single out features that may not be accepted by liberalism as sufficiently characteristic marks of its regime, just as representatives of modernism have refused to see in the encyclical *Pascendi Gregis* a correct statement of its position.⁸⁵

The liberal state was individualistic, perhaps bourgeois, though liberalism, which is separable from the liberal state, was compatible with a certain amount of collectivism.⁸⁶ It was based on "liberty-autonomy," to use the pregnant phrase of Burdeau. It was the exact meeting point in time of two forces, one designed to protect and promote the other, liberty-participation and liberty-autonomy.⁸⁷ It was a State of limited powers, of limited democracy, of "democratie gouvernée."⁸⁸

Yet it could be viewed through different spectacles depending on the aspect on which the observer chose to fix his gaze. Schieder, for example, emphasizes its adaptability to new conditions as well as certain of its basic features. "European liberalism's past great achievement had lain in creating and developing the liberal State, with its constitutionalism and rule of law, and in insisting on certain political guiding principles adopted later by all kinds of non-liberal movements and parties."⁸⁹

Ripert, on the other hand, turning his attention to a later age, finds an incompatibility between modern democracy, with its heritage from the Revolution of the lay state, and the principles of morality and belief, supernatural and Christian, entertained by the church.⁹⁰ "It is the conflict of one religion with another." The same author insists that in private law litigation the French laws of 1901, 1904 and 1905, as in-

84. HALÉVY, A HISTORY OF THE ENGLISH PEOPLE: EPILOGUE 1895-1905, 52-53 (1939).

85. VIDLER, THE MODERNIST MOVEMENT IN THE ROMAN CHURCH: ITS ORIGINS AND OUTCOME 1-4 (1934).

86. A. V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 211, 259 (2d ed. 1914); 5 BURDEAU, TRAITÉ DE SCIENCE POLITIQUE 15 (1953).

87. BURDEAU, *op. cit. supra* 12.

88. *Id.* at 43-55.

89. Schieder, *op. cit. supra* note 83, at 262.

90. RIPERT, LE RÉGIME DÉMOCRATIQUE ET LE DROIT CIVIL MODERNE 90 (1936).

terpreted in the name of laicity, ignored the rules of the civil law governing agreements and gifts.⁹¹ In other words, "democracy does not willingly tolerate rival powers."⁹² Ripert then says that "in France . . . one cannot conceive a democracy which would call itself Christian."⁹³

A similar attitude was expressed by McKechnie during the struggle over the Parliament Bill when he declared: "Democracy, far from embodying compromise, implies a monopoly of power by one-half of the people over the other half. Each party in turn is absolutely supreme, without let or hindrance. Sovereignty is no longer divided between King, Lords, and Commons, but is concentrated in the leaders of the party in power, on the one condition that they continue to lead."⁹⁴

Dicey, however, calls attention to the delusion that the democratic form of government always favors the same kind of legislation.⁹⁵ After noting⁹⁶ the danger of disestablishment and disendowment in 1832, he asks why this threat has been exorcised since. In other words, "What have been the conditions of opinion which, in the sphere of ecclesiastical legislation have prevented the dominant liberalism of the day from acting with anything like its full force and have in many instances rendered it subordinate to the strong cross-current of clerical or Church opinion?"⁹⁷ The answer is less important than the fact that Dicey is illustrating here, of cross-currents of opinion "deflecting the action of the reigning legislative faith."⁹⁸

The program of the liberal and democratic state did not, therefore, by itself, bring it into conflict with the churches. There can be no question regarding Protestantism, which was built around individualistic rather than hierarchical notions, for aside from certain intellectual conflicts, it was well adapted to the liberal milieu because of the changes it was undergoing in time and place.⁹⁹ Its involvement in the struggles over the questions of dogma and individual responsibility during the 16th century, its immersion in the rationalistic and emotional currents of the 18th century and in the scientific and social movements of the 19th and 20th centuries had prepared it for an important role in liberal and democratic society. This was true whether with the German it placed "the accent on the interior life while accepting the discipline of the exterior order," or with the Englishman it emphasized "the moral point

91. *Id.* at 88.

92. *Id.* at 89.

93. *Id.* at 90.

94. McKECHNIE, *THE NEW DEMOCRACY AND THE CONSTITUTION* 26 (1912).

95. DICEY, *op. cit. supra* note 86, at 55-61.

96. *Id.* at 312.

97. *Id.* at 317.

98. *Id.* at 40, 41, 312.

99. LATREILLE & SIEGFRIED, *LES FORCES RELIGIEUSES ET LA VIE POLITIQUE* 217 (1951).

of view and the rite charged with religious virtue," or with the American it was concerned "with the social duties of its members."¹⁰⁰

The Roman Catholic Church, on the other hand, had a well defined position concerning its relation to the liberal State that was less flexible. It regarded itself as a *societas perfecta*, a perfect society of supernatural origin. This was not merely a figure of speech. This society was visible, hierarchical and sovereign.¹⁰¹

The state in Roman Catholic doctrine also had and still has a distinct character and rights. It is limited in its authority, which it shares with the church, especially in certain areas such as matrimony, education and divorce.¹⁰² Opposition to the church in Roman Catholic countries has as a result taken the distinctive forms of anti-clericalism and religious indifference. The church advocates a Christian state, that is, one in which the church is recognized fully and exclusively by the state. It opposes separation, for in its eyes the human being is not composed of two separate elements. It opposes indifferentism in society as much as it does heresy or schism, as Leo XIII makes clear in the encyclical *Humanum Genus*.¹⁰³ The special position of the church as a sovereign body enables it also to negotiate Concordats. Yet the head of the church may compromise when he deems the interests of the church better served, as when Pius XI approved of the separation regime in Chile. Many of these propositions were stated in the Syllabus of Errors appended to the Encyclical *Quanta Cura* in 1864.¹⁰⁴

The Roman Catholic Church has elaborated its own principles concerning the economic and social organization of the Christian state.¹⁰⁵ These principles were eloquently affirmed in Leo XIII's *Rerum Novarum* in 1891, a part of which is based on the teachings of Saint Thomas Aquinas.¹⁰⁶ This encyclical determined the relation of the individual to the community and emphasized that the social order should be at the service of man. Nineteenth century liberalism placed too much emphasis on material enrichment, and socialism was denounced for its atheism as well as its materialism. The church is both anti-individualist and anti-collectivist.

100. *Ibid.*

101. *Id.* at 29-32; ROMMEN, *THE STATE IN CATHOLIC THOUGHT* 507 (1945).

102. LATREILLE & SIEGFRIED, *op. cit. supra* 32-41. ROMMEN, *op. cit. supra* 219.

103. For selections from this as well as other Encyclicals of Leo XIII, see MIRBT, *QUELLEN ZUR GESCHICHTE DES PAPSTTUMS UND DES RÖMISCHEN KATHOLIZISMUS* 474-502 (4th ed. 1924).

104. LATREILLE & SIEGFRIED, *op. cit. supra* note 99, at 41-46. The actual text of the Syllabus is in MIRBT, *op. cit. supra* at 450. Translation in EHLER & MORRALL, *CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF ILLUSTRATIVE DOCUMENTS* 281-85 (1954).

105. CHENON, *LE ROLE SOCIAL DE L'EGLISE* 225 (1928). LATREILLE & SIEGFRIED, *op. cit. supra* at 51; ROMMEN, *op. cit. supra* note 101, at 606.

106. See text at note 1 *supra*. The Encyclical is analyzed in CHENON, *op. cit. supra* 225-95.

Leo XIII also emphasized the importance of the family, of marriage and of its indissolubility. Marriage is not a contract; the family is a genuine society.¹⁰⁷ The Pope following Saint Thomas establishes the legitimacy of private property, using Biblical texts such as *Genesis* 1:29. But property carries with it responsibilities to others and to the poor in particular. Labor was held sacred, though its sanctity and role in society were neglected in the 17th and 18th centuries.

The role of the Roman Catholic Church in the past one hundred years has been determined by several factors. The personalities of a succession of Popes which included such striking figures as Pius IX, Leo XIII and Pius XI have played their part. Important events already noted in the history of the national churches, such as the *Kulturkampf* in Germany, the Separation Law in France, and the Lateran Treaty in Italy have profoundly influenced the church and the countries involved in the struggles and negotiations. Finally, international movements in the areas of thought and action such as socialism and totalitarianism in addition to liberalism and democracy, have profoundly influenced the relations of the church with governments in the 19th and 20th centuries.¹⁰⁸

VII

The conflicts of the Roman Catholic Church with the liberal state in France, Germany and Italy following 1870 may be regarded as historic incidents rather than ineluctable clashes. In one country after another, when statesmanship was applied on both sides, these conflicts proved soluble. This becomes clear if we review some of the main developments in the national histories of these countries.

A. Germany

In Germany the conflict with the Roman Catholic Church known as the *Kulturkampf* did not originate in ideological differences. It was due to the political leadership of Virchow and the Liberal party rather than to Bismarck that the use of the label to describe a conflict prompted by national rather than ideological interests became accepted.¹⁰⁹ For it was the danger to the newly won unity of the Empire represented by a possible alliance of Austria-Hungary and other Roman Catholic powers that made Bismarck turn against the Centre Party which, together with the Social Democrats, he regarded as "enemies of the Empire."^{109a}

107. LATREILLE & SIEGFRIED, *op. cit. supra* note 99, at 59; EHLE & MORRALL, *op. cit. supra* note 104, at 329.

108. EHLE, *TWENTY CENTURIES OF CHURCH AND STATE* 86, 109, 130 (1957). ROMMEN, *op. cit. supra* note 101, at 563, 580.

109. Conze, *The German Empire*, in 11 *NEW CAMBRIDGE MODERN HISTORY* 287 (Hinsley ed. 1962).

109a. *Id.* at 288.

This concern for national unity prompted the passing of the May Laws in 1873,^{109b} which attempted to subject the Roman Catholic Church to State authority in matters of clerical training, examination, appointment, and discipline as well as the institution of civil marriage.¹¹⁰

In the same way, it was the alleviation of this concern about foreign danger through the rapprochement with Austria-Hungary in 1879, that brought an end to the *Kulturkampf* between 1879 and 1887.¹¹¹ The accession of Leo XIII in 1878 undoubtedly assisted the process of accommodation, but it must not be forgotten that Bismarck himself was averse to continuing a struggle which he had never sought for ideological reasons.

The best evidence of the fact that the 19th century conflicts were due to historic circumstances and personalities as much as to any supposed incompatibility between the liberal state and the Roman Catholic Church lies in the paradoxical fact that while the *Kulturkampf* was being resolved in Protestant Germany, the struggle in Catholic France and Italy was pursuing an opposite course. Each of these countries requires a separate treatment.

B. France

The process by which the relations between the two powers were transformed and the principles of religious and political liberty accepted occupies the whole of French history to practically the 20th century.¹¹² Not until 1905 were church and state definitely separated and the conception of a single legal power in the state fully realized. Yet notwithstanding the lack of clarity in the conception of sovereignty, the principles of freedom of conscience and of religious worship have been gradually recognized, especially since the Revolution.

The church in the Middle Ages not only regulated a great part of the life of secular society, thus sharing with the state common subjects who had all received baptism; she also exercised an exclusive control over the clergy, justifying her claim to be a "perfect society" distinct, for this purpose, from secular societies. The French Church had its own government headed by the Pope, its own law, its own property and its own courts.¹¹³

The attempt of the church, on this basis, to emancipate itself from certain controls exercised by civil rulers, was the essence of the Investi-

109b. The text of these laws can be found in MIRBT, QUELLEN No. 613, at 471. English excerpts can be found in EHRLER & MORRALL, *op. cit. supra* note 104, at 291.

110. Conze, *op. cit. supra* note 109, at 287.

111. *Ibid.* Compare the treatment of these events by Oncken, *The German Empire*, in 12 CAMBRIDGE MODERN HISTORY 147-49 (Ward & others ed. 1910).

112. 2 ESMEIN, *ELEMENTS DE DROIT CONSTITUTIONNEL FRANÇAIS ET COMPARÉ* 601 (7th ed. 1921).

113. *Id.* at 605-06.

ture Controversy. This attempt was unsuccessful. The king gradually established his power over the church in France, a power over discipline and over appointment of clergy called "the rights, franchises and liberties of the Gallican Church."¹¹⁴ Some of this power the king shared with the Pope; thus the church in France enjoyed a certain consideration as a distinct society that still smacked of the theory of the two powers. The treaties negotiated by the kings with the Popes called Concordats, especially that of Bologna in 1516, added to the impression that in spite of the increasing emphasis on the legal power of the State a second power continued to exist.¹¹⁵

Liberty of conscience was extended to Protestants in 1787.¹¹⁶ From 1598 to 1685 a limited toleration of conscience and of worship had been accorded to Protestants. Since the French Revolution every French regime has acknowledged and extended this right in law and, to a large extent, in practice. It is true that the law of November, 1814, concerning the celebration of Sundays and holidays was, at the time, an infringement of the principle.¹¹⁷ No one could foresee then that the principle would be extended to include not only every kind of religious belief, but even disbelief, that public schools in France would be held to a strict neutrality in matters of faith, and that this freedom would be subject, like every other, only to limitations dictated by the needs of public order and of the state.

Up to the time of the Revolution, with the exception already noted of the Protestant Church from 1598 to 1685, it was the Roman Catholic Church that enjoyed liberty of worship, a liberty that was in fact a monopoly, as is clearly indicated in the Edict of Fontainebleau in 1685, which revoked the Edict of Nantes.¹¹⁸ Liberty of the cult conceived as an individual right and not as a group privilege, is one of the more recent conquests of political civilization—one not yet recognized in all countries of Europe.

Freedom of worship, or as Europeans call it, liberty of the cult, has presented in fact a much more difficult problem than freedom of conscience.¹¹⁹ For the public practice of religion was regarded almost up to the present century, as a matter of corporate, or group privilege. The French Revolution, realizing some of the conceptions of the lay state, first acknowledged this vital individual right in principle. Yet its application was unusual, to say the least. Examples of attempts to establish a civic religion in accord with the teachings of Rousseau¹²⁰

114. *Id.* at 607.

115. *Id.* at 609, 611.

116. *Id.* at 607-08.

117. *Id.* at 564, 602.

118. *Id.* at 607; ESMEIN, *COURS ELEMENTAIRE D'HISTOIRE DU DROIT FRANÇAIS* 645-47 (15th ed. 1930); EHLE & MORRALL, *op. cit. supra* note 104, at 208.

119. 2 ESMEIN, *op. cit. supra* note 112, at 603.

120. BURY, *A HISTORY OF FREEDOM OF THOUGHT* 110-13 (1947). See ROUSSEAU, *SOCIAL*

included the Civil Constitution of the Clergy which has been called the "bastard product of Gallicanism and 18th century philosophy,"¹²¹ and the Cult of the Supreme Being, which was the creation of the incorruptible Robespierre. Eventually the Revolution proceeded to the separation of church and state, which was a more realistic recognition of the lay principle. The Concordat of 1801, negotiated by Napoleon, put an end to this regime which, according to some authorities, represented the desires of a majority of the French people at the turn of the 19th century. It has taken over a century, according to this school of thought, for France to return to the proper system in which individual rights receive recognition formerly accorded to group privileges.¹²²

From the French Revolution to 1905 France hesitated between the two systems. One was based on the clear-cut conception of sovereignty elaborated by the jurist Bodin and by Rousseau, and involved the ideal of the lay state, as represented by the education laws of the French statesman Jules Ferry in the 1880's.¹²³ The other was based on the idea of the two powers inherited from the Middle Ages.¹²⁴ So far as the principles of individual conscience and of worship are concerned, it must be conceded that the regime of separation in France has fully realized them in most of their logical implications.

The events preceding, surrounding and following the passage of the Separation Law of 1905 are revealing not only of the interplay between law and public opinion, but of the influence exerted by leadership independently of the shifting party policies of the Third Republic.

The *Dreyfus* case had brought republican opinion into sharp conflict with Roman Catholic and military circles. Pope Leo XIII, the sponsor of the ill-fated policy of *Ralliement*, died on July 20, 1903 and his successor, Pius X, lacked his political finesse.¹²⁵ Combes, as President of the French Council, had already begun the battle with the Vatican over the interpretation and application of several provisions of the Concordat, especially the *nobis nominavit*, and over his action in appointing three Bishops without prior consultation and approval of the Vatican.¹²⁶ At this point a dispute arose between the French government and the Pope

CONTRACT (1762). It has been said about Rousseau that he "inflamed everything and solved nothing" through his democratic teachings.

121. 2 ESMEIN, *op. cit. supra* note 112, at 609.

122. *Id.* at 115.

123. Néré, *The French Republic*, in 11 NEW CAMBRIDGE MODERN HISTORY 304-05 (Hinsley ed. 1962).

124. 2 ESMEIN, *op. cit. supra* note 112, at 609. The principal legislative acts concerning the relations of church and state under the Third Republic will be found conveniently assembled in the appendices to 2 DEBIDOUR, *L'EGLISE CATHOLIQUE ET L'ETAT SOUS LA TROISIÈME RÉPUBLIQUE 1870-1906* (1909).

125. BOURGIN, *LA TROISIÈME RÉPUBLIQUE* 165 (1956); LEPOINTE, *HISTOIRE DES INSTITUTIONS DU DROIT PUBLIC FRANÇAIS AU XIX^e SIÈCLE 1789-1914*, at 627 (1952).

126. BOURGIN, *op. cit. supra*; 2 ESMEIN, *op. cit. supra* note 112, at 614.

concerning the disciplining by the latter of two French bishops. When added to the misunderstandings already caused by the Pope's protest against the visit of President Loubet to the King of Italy, the effect was a severe hardening of political opinion, especially among the radicals and the parties of the Left.

Waldeck-Rousseau had already protested against the manner in which his successor, Combes, insisted on applying the Association Law of 1901, which the former had initiated. This law embodied not only a "general text of public law but an offensive measure against the Church."¹²⁷ Now it was Combes who proceeded to carry through the separation of church and state by the Law of December 9, 1905,^{127a} though his tenure as President of the Council had ceased and his influence was exerted only in the Senate through his leadership of the democratic Left in that chamber.¹²⁸

This law, as originally conceived by its rapporteur Briand (the French socialist turned moderate), assisted by Mejan (the future Director of the Cults), was not aimed at a complete revocation of the Concordat of 1801. The recent study by Mejan's daughter of the early stages of this legislation indicates that what began as a reasonable move in favor of a revision of the Concordat, ended under the influence of the ex-seminarian, Combes, in an extreme measure.¹²⁹

The Concordat had been interpreted as a bilateral agreement, or treaty, by the Papacy, but was treated as a unilateral concession by the sovereign French State in the legislation of 1905. The exact character of a Concordat had, for several centuries, been a matter of dispute between advocates of church authority and those of state sovereignty.¹³⁰ Naturally, the former insisted that a Concordat was an act, principally, of papal grace, while the latter regarded it as a concession of state power taking the form of regular legislation, particularly inasmuch as it dealt with the internal affairs of a country.

The Law of 1905 raised numerous questions that could only be solved in time. The free exercise of religious worship extended to all persons meant more than it had under the previous legal and constitutional arrangements. Article two, which stated that the Republic does not recognize, salary or support any cult, led to difficulties of application. What was to be done with the property of the churches, and how was its administration to be handled? The government sought to turn the

127. BOURGIN, *op. cit. supra* at 160-61.

127a. Original in 2 DEBIDOUR, *L'EGLISE CATHOLIQUE ET L'ETAT EN FRANCE SOUS LA TROISIÈME RÉPUBLIQUE 1870-1906*, at 577 (1909), reproducing *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* (Dec. 9, 1905).

128. BOURGIN, *op. cit. supra* note 125, at 128. English text in EHRLER & MORRALL, *op. cit. supra* note 104, at 355.

129. MÉJAN, *LA SÉPARATION DES EGLISES ET DE L'ETAT* 135 (1959).

130. 2 ESMEIN, *op. cit. supra* note 112, at 607, 610.

property over to associations of the cult, but, though Protestant and Jewish bodies complied, this was not acceptable to authorities of the Roman Catholic Church.¹³¹ The care of the property of the churches and of the church edifices was eventually entrusted to the Catholic authorities by permitting the latter to utilize the general rights of association without recourse to *associations cultuelles*.¹³² Public feeling on both sides gradually subsided, and it was possible to secure a more reasonable application of the Law of Separation. The names of Briand and Clemenceau figured largely in these moves.¹³³

The post-World War I era brought a general improvement of relations between the French Republic and the Vatican. Beginning with the reestablishment of diplomatic ties and with a move by Briand in 1921 to recognize "diocesan associations" as fulfilling the requirements of the 1905 legislation¹³⁴ and continuing with Mejan's intervention in the Senate in 1926 in support of the extension of this principle, the new current of opinion produced the laws of 1942 and 1945-1946, which brought a *modus vivendi* with the Roman Catholic Church on the basis of the Separation Law.¹³⁵

The development of new types of legal relations between church and state in France since 1905 teaches some important lessons. Behind the purely legal aspects of these changes stands a public opinion that overtly or otherwise is constantly altering constitutional and juristic arrangements. If the Separation Law was conceived by Combes in an anticlerical spirit the effects of the law have been far other than expected. The church has been able to adapt herself marvelously to the new situation, but the parties of the Left have been placed in the paradoxical position of regretting the absence of a concordat with the Pope that would enable the state to exercise greater control over the French Church.¹³⁶ The Gallican tendencies of the French Church have been more or less effectively arrested and papal control tremendously reinforced. Owing to the peculiar circumstances in the post-World War II era in France, as in Italy, which have placed anywhere from twenty to thirty per cent of the electorate in the Communist Party and thus fostered government party alliances on the center and right, certain political questions have received solutions other than those expected when the left played a greater role in government.¹³⁷ This is particularly true of the "School Question," which has been resolved in recent legislation in a manner

131. LEPOINTE, *L'EGLISE ET L'ETAT EN FRANCE* 111 (1960).

132. BOURGIN, *op. cit. supra* note 125, at 173.

133. *Id.* at 167-73.

134. LEPOINTE, *op. cit. supra* note 131, at 122.

135. *Id.* at 123; MÉJAN, *op. cit. supra* note 129, at 511, 512.

136. LEPOINTE, *op. cit. supra* note 131, at 125.

137. SETON-WATSON, *NEITHER WAR NOR PEACE* 34 (1960). Readers will note, however, recent significant changes in Italy in this respect. The French situation is more difficult to define.

favorable to the claims of parochial schools for state financial support. This legislation, the Law of December, 1959,^{137a} was carried in the two houses respectively by 427 votes to 71, and 173 votes to 99.¹³⁸ The same current enabled the *Mouvement Républicain Populaire*, a party alignment inspired by principles of the Roman Catholic Church, to play a considerable role in the post-World War II era.¹³⁹

C. Italy

In Italy nothing less than the existence of the new Italian Kingdom was involved after 1870. The Pope refused to recognize the occupation of the papal territories, especially of Rome, rejected the Law of Guarantees offered in expiation by the new Italian parliament in May, 1871, forbade Italian Catholics to participate in political life, and encouraged, overtly or otherwise, foreign intervention in behalf of the Papacy's claims to the lost temporal domain.¹⁴⁰ Not until 1929 were the relations between Italy and the Papacy normalized.

The experience of Italy in recent times shows sharp differences and even discrepancies between law and practice. The Lateran Pacts of February, 1929,^{140a} included a treaty between the Holy See and the Italian government regarding the territorial status of the Papal State, a Concordat governing the status of the Roman Catholic Church in Italy, and a financial convention renewing and modernizing some of the provisions of the Law of Papal Guarantees.¹⁴¹ Provisions such as the reaffirmation of the Statute of 1848,^{141a} establishing the Roman Catholic Church as the exclusive state religion, appear in the Treaty and not where they would ordinarily be sought, in the Concordat.¹⁴² The price paid by the Pope for the Lateran Pacts was the suppression of the Popular Party and its able leader, Don Sturzo.¹⁴³ The Church acquired a vested interest in the Fascist regime through the Italian bonds in which compensation was made by the State.¹⁴⁴

Contrary to expectations, the fall of Fascism did not bring a breach

137a. Law No. 59-1557, Dec. 31, 1959, concerning *Les rapports de l'état avec l'enseignement privé*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE.

138. LEPOINTE, *op. cit. supra* note 131, at 138; MÉGRINE, LA QUESTION SCOLAIRE EN FRANCE 65-69 (1960).

139. WILLIAMS, POLITICS IN POST-WAR FRANCE: PARTIES AND THE CONSTITUTION IN THE FOURTH REPUBLIC 16, 17, 24-25, 41, 240, 396, 398 (2d ed. 1958); EINAUDI & GOGUEL, CHRISTIAN DEMOCRACY IN ITALY AND FRANCE 109 (1952).

140. SMITH, ITALY: A MODERN HISTORY 191, 222-26, 275 (1959).

140a. Original in ACTA APOSTOLICAE SEDIS 209 (1929).

141. SMITH, *op. cit. supra* note 140, at 440-43; BINCHY, CHURCH AND STATE IN FASCIST ITALY 17-18 & *passim* (1941). English text in EHRLER & MORRALL, *op. cit. supra* note 104, at 382.

141a. Original statute 1848-1849 in CONTUZZI, DIRITTO COSTITUZIONALE (1907); French translation in 1 DARESTE, LES CONSTITUTIONS MODERNES 674 (1910).

142. WEBB, CHURCH AND STATE IN ITALY 1947-1957, at 6 (1958).

143. *Id.* at 4.

144. BINCHY, *op. cit. supra* note 141, at 314.

between the new Italian government and the Papacy. Rather it produced a renewal of the Lateran Pacts in spite of the inconsistencies with the new Constitution which these documents embody. Even the Communists supported the renewal of the 1929 agreements. Later, it is true, their attitude changed, for reasons of internal politics.¹⁴⁵ Christian democracy in Italy, which profited from these changes, has brought with it an important change of emphasis in the relations of church and state. In opposition to the liberal and secularist tradition of the *Risorgimento*, it has tended to downgrade state sovereignty and, as an unforeseen effect, to promote European unity.¹⁴⁶

Though the articles of the Constitution expressly recognize freedom of religion and of religious worship, which, as has been suggested above, directly contradict some of the provisions of the Lateran Pacts, there is a further breach between theory and practice in the fact that Protestant groups do not feel that they have enjoyed the freedom to which the Constitution entitles them. Apologists for the system have sought to rationalize the special treatment accorded to Protestants by suggesting that equality is impossible to achieve between a large organization like the Roman Catholic Church and small sects which lack stability or permanence.¹⁴⁷ It also has been argued, with varying degrees of subtlety, that the sects involved in harassment by the authorities belong to the eccentric fringe of Protestantism.

The history of the constitutional court set up under the Constitution and the resignation in 1957 of its chief justice, De Nicola, cannot be properly assessed as yet. Undoubtedly problems of church-state relations have had something to do with the curtailment of the tribunal's activities.¹⁴⁸

The relations of the Christian Democratic Party with the Roman Catholic Church cannot be clearly defined. In theory it is an autonomous party. In practice, much of its ideological orientation is Catholic and presumably church-inspired.¹⁴⁹

The picture of present day Italy drawn by the foremost student of Italian church-state relations, Jemolo, may indeed be "somber," but it deserves restating. He depicts a transformation of Italian life that has turned the new Italy into a "confessional State." The only thing that explains this change in public opinion is the decay of the liberal state, which is due to at least two causes. First is the absence of strong

145. WEBB, *op. cit. supra* note 142, at 20-22, 31. For the English text of the Constitution adopted Dec. 22, 1947 and effective Jan. 1, 1948, see 2 PEASLEE, CONSTITUTIONS OF NATIONS 482-505 (1956).

146. EINAUDI & GOGUEL, *op. cit. supra* note 139, at 96; WEBB, *op. cit. supra* note 142, at VII-X; JEMOLO, CHURCH AND STATE IN ITALY 1850-1950, at 336-37 (Moore transl. 1960).

147. WEBB, *op. cit. supra* note 142, at 27-28; JEMOLO, *op. cit. supra* 309.

148. WEBB, *op. cit. supra* note 142, at 30-41.

149. *Id.* at 46-48.

religious minorities in Italy. Then, he recalls, in the 19th and early 20th centuries liberals and later Socialists were opposed to church attempts to control civil society. "But the situation has changed radically since the exhaustion of liberalism and the growth of the sharp contrast between Socialist parties not clearly aligned against Communism and other parties."¹⁵⁰

In support of his claim that Italy is a confessional state, the author marshals an array of arguments, all emphasizing that "the State has fulfilled all its obligations towards the Roman Catholic Church but not toward other communions."¹⁵¹ The penal code prescribes penalties for vilification of the Catholic religion but not of others. It bans Malthusian propaganda.¹⁵² Property inherited from Fascist organizations is often reserved for use by religious bodies.¹⁵³ Italian and Papal flags can often be seen flying together.¹⁵⁴ There is no anti-Semitism, yet no Jew has held a political position of importance and "it is inconceivable that a Jew should be mayor of a big town."¹⁵⁵ The authorities restrict the influence of Waldensians, Pentecostals and other Protestant bodies.¹⁵⁶ "A conversion of a Catholic to Protestantism today would be regarded as a challenge to the existing order."¹⁵⁷ The contrast with the French Catholic left with its tradition of independence inherited from the author Montalembert and the priest Lacordaire is striking.¹⁵⁸ In explanation, the author points out that we are now living in the "economic" age and that non-economic matters arouse little interest; that this is also the age of the group, of the "vast social unit," as well as an age of "feeling rather than of reason."¹⁵⁹

Jemolo discerns, in fact, as others have done, an anti-*Risorgimento* tradition taking over, and cites De Gasperi as representative of this attitude.¹⁶⁰ He concludes, "A hundred years. The passions of three, perhaps of four generations; the triumph and eclipse of the doctrines of liberalism, the unexpected realization of a Guelph State a century after the collapse of neo-Guelph hopes."¹⁶¹

However we are to regard this thesis—and it is not unchallenged—it goes far to confirm the observation of Dicey in England that the

150. JEMOLO, *op. cit. supra* note 146, at V-VI.

151. *Id.* at 309.

152. *Id.* at 310.

153. *Id.* at 311.

154. *Ibid.*

155. *Id.* at 315.

156. *Ibid.*

157. *Id.* at 316.

158. *Id.* at 326.

159. *Id.* at 330-31.

160. *Id.* at 336.

161. *Id.* at 339.

movement of legislation cannot be understood without reference to currents of opinion other than the main one, *i.e.*, to the historic process.

The 20th century, while it witnessed an improvement in relations between the Roman Catholic Church and the national State in Italy, France and Germany, at least in the period immediately following World War I, also saw a new threat to all Christian churches in the rise of the totalitarian State especially in Germany and in Russia. This threat transformed the Roman Catholic Church in Western Europe from a defender of traditional non-liberal regimes, as in the 19th century, into a more frequent supporter of democratic and liberal political systems.¹⁶² The same threat has driven home to members of Orthodox and Protestant as well as Catholic groups a sense of common danger.

Since the Second World War, Roman Catholic Action and Christian Democracy have, as a consequence, increasingly affected and sometimes dominated political life in Holland, Belgium, Italy, Germany and France.¹⁶³ That this has taken place in countries of Teutonic as well as Latin culture and under varying regimes of jurisdiction as well as separation is a tribute, not only to the renewed vigor of the Roman Catholic Church, but to the benefits conferred on the Church by the voluntary status of religion in general in the liberal-democratic state.

VIII

In the United States, as in the European countries, the problem of the relations of church and state has undergone transformation in response to the developing world situation as well as to internal changes involving religion. These internal changes hinge on three forces which mold the social and inevitably the political life of this country. The first of these, and the traditional one, is Protestantism, bearing with it the leaven of Puritanism. Protestantism itself has shown three tendencies of varying potency: fundamentalism, liberalism and religious inventiveness. It has embraced in great measure the social gospel, which, in the words of the late Professor Siegfried, "when combined with humanism, produced a particular social idealism founded on the conviction that religion does not accomplish its mission if it does not socially ameliorate the individual."¹⁶⁴ American Protestantism, in spite of its seeming variety, possessed a common ethos, and attained a consensus on a number of vital questions having a legislative impact, such as Sunday observance and restraints on gambling and other activities broadly described as vice. Above all was this revealed in the peculiar position of the American public school, Christian but not denominational, capable of providing an

162. ENSOR, *Political Institutions in Europe*, in 12 NEW CAMBRIDGE MODERN HISTORY 95-96 (Thomson ed. 1960).

163. FOGARTY, *CHRISTIAN DEMOCRACY IN WESTERN EUROPE 1820-1953*, at 294, 318, 340, 377 (1957).

164. LATREILLE & SIEGFRIED, *LES FORCES RELIGIEUSES ET LA VIE POLITIQUE* 205 (1951).

education acceptable in terms of a broad Protestantism. This consensus also outlawed subventions to religiously sponsored schools.

The term separation describes a legal relationship in the United States but hardly covers the manifold ties that otherwise exist between the political power and the churches in accord with the Protestant-American ethos. To de Tocqueville, organized religion and democracy, antagonists on the European scene, worked harmoniously together in the United States, and he found the explanation of this anomaly in the principle of the separation of church and state.¹⁶⁵ Still, Harriet Martineau was certain that social pressures were inimical to the practice of full religious freedom, notwithstanding the voluntary basis of religious affiliation.¹⁶⁶

If the abandonment of religious tests for office and the disqualification of clergy for public office are examples of separation, how are we to characterize a catalogue of continuing religious activities and state interventions? It would be out of place to list, let alone describe or analyze, all the anomalies that remain in the application of the legal principle of separation. The continuance of religious exercises in state-sponsored establishments; the penalties still existing for blasphemy; much social legislation dealing with labor and education which shows the influence of religious groups; the imposition of social attitudes by various churches in such cases as prohibition, divorce, and even pacifism, all these and more show the continued interaction of law and religious opinion and belie both the spirit and the letter of much separationist legislation.¹⁶⁷

A few particulars concerning sundry legal problems may be noted. Some states allow churches to incorporate and carry on secular activities related to religious purposes, but no limits have been placed on the latter, thus giving unfair advantage to religious corporations over private business "in that the former do not share the legal burdens and responsibilities of the latter."¹⁶⁸ The legal relation of an individual member to a religious society is not clear in many states. "In five states, where the relation is considered contractual a member may invoke the power of a civil court."¹⁶⁹ Torpey bemoans the exemption of church property from taxation, which places heavier burdens on non-exempt

165. 1 DE TOCQUEVILLE, *DEMOCRATIE EN AMÉRIQUE* 18 (1864); 2 DE TOCQUEVILLE, *supra* 208-11, 221-32.

166. 2 MARTINEAU, *SOCIETY IN AMERICA*, pt. IV, at 335 (1837), cited by GREENE, *RELIGION AND THE STATE—THE MAKING AND TESTING OF AN AMERICAN TRADITION* 100 (1959).

167. GREENE, *op. cit. supra* 94-118.

168. TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 327 (1948); GREENE, *op. cit. supra* note 166, at 106; HOWE, *CASES ON CHURCH AND STATE IN THE UNITED STATES* 94-152 (1952).

169. TORPEY, *op. cit. supra* 327.

property.¹⁷⁰ Eight states in 1950 required a witness to "believe in divine punishment, or in the existence of a Supreme Being, in order to be competent to testify."¹⁷¹

The fact is also that considerations of public order must qualify and therefore circumscribe the religious liberty guaranteed in the laws. The history of the relations of the state with Mormons, Witnesses of Jehovah and other groups illustrates this theme.¹⁷²

Professor Greene's conclusion that "religion and politics cannot be kept in watertight compartments" is one that no conservative student would question.¹⁷³ "Cooperative Separation" is the felicitous formula used by a recent writer to describe what is essentially a mutual rather than a unilateral flow of influence.¹⁷⁴ The effect of recent legislation and court decisions, to be sure, has been to enlarge the area of liberty—especially liberty *from* religion—considerably.¹⁷⁵ But whether this is a result of rules governing relations of church and state or is an effect of enlightened public opinion and growing secularism it is difficult to say.

The second of the forces working in this country is the Roman Catholic Church. The growth in the number of its followers and the rise in its influence have had in recent years, and will have, a powerful impact upon legislation. For the Roman Catholic Church, more so than the Protestant, has a systematic position on political questions and on the social and economic organization of a community. This is not the occasion to enter into a description of these teachings so far as they affect the Church in the United States, but there is one area of public life on which official Catholic pronouncements differ radically from the mass of public and Protestant opinion, namely, education. The control by the parent and by the Church of the child's education is a cardinal tenet of the Catholic faith reiterated in several provisions of the *Codex Juris Canonici* (Canons 1372, 1373, 1374, 1381, 1382).¹⁷⁶ This principle has not only arrayed the Roman Catholic Church against legislation such as statutes which would mandate attendance at public schools, but has led the Bishops of the Church to demand financial aid for parochial schools.

In the United States the voluntary principle has enabled the Roman Catholic Church to secure favorable treatment from legislatures, as in

170. *Id.* at 328.

171. *Id.* at 330.

172. GREENE, *op. cit.* *supra* note 166, at 98-99, 114-15.

173. *Id.* at 118.

174. KAUPER, *CIVIL LIBERTIES AND THE CONSTITUTION* 3 (1962).

175. *Id.* at 5-51. See the recent United States Supreme Court decision, *Engle v. Vitale*, 370 U.S. 421 (1962), concerning the New York Regents School Prayer, as well as other pending cases in state and federal courts.

176. Extracts from the *Codex* can be found in MIRBT, *QUELLEN ZUR GESCHICHTE DES PAPSTTUMS UND DES RÖMISCHEN KATHOLIZISMUS* 534 (4th ed. 1924).

the New York State Law of 1895 and its amendments^{176a} governing religious corporations, which became models for this kind of legislation.¹⁷⁷ If the Roman Catholic Church thus exerts influence on political action in the United States, the same cannot be said, to any extent, of the reaction of political authority to the Church. This is the penalty the secularized State pays for the absence of an ecclesiastical policy. The political left in France, as already indicated, has become aware of this unexpected result of separation. One is reminded of the dilemma posed to government by the growth of trusts in the 1880's. Public policy toward small and large business was in theory the same, and was based on a *laissez faire* philosophy of government. But when this original equality of treatment seemed to promote concentrations of wealth and business power at the expense of small business, the policy of *laissez faire* had to be abandoned in favor of discriminatory legislation. There seems little likelihood of the adoption of a regulatory policy toward churches in the United States, as has been undertaken in the past by European countries. Instead, public opinion will operate in the private rather than the public sector, making use of the press and other media to favor or oppose specific measures and policies advocated by one church or another.

The third influence working in the United States is more difficult to define, though its effects are palpable and demonstrable in the large. This is the tendency, already noted, towards secularism, which has challenged traditional attitudes and institutions, such as Bible reading in the public schools and provisions in state laws regulating or forbidding birth control measures. Its strength has been waxing in recent years.

The changes taking place in the relative distribution of these forces among the population spell new challenges as well as problems for American democracy. The historic role of church-state conflict in Western civilization, in the words of Ruggiero, has been to promote individual liberty.¹⁷⁸ The existence of countervailing forces capable of impeding governmental despotism offers a promise of the continued survival of liberal values in this country. It is assumed that the threat of a theocratic despotism once posed to Western societies is now a chimera. If, as some contend, it is not, then the state will have to continue to balance and even restrain the pretensions of the church. In either case the development will be in keeping with the "genius of American politics" which is itself the product of the dualism inherent in the

176a. N.Y. Sess. Laws 1895, ch. 723 (General Laws ch. XLII). For the modifications of this law, see 6 WHITE, CORPORATIONS OF THE STATE OF NEW YORK: RELIGIOUS CORPORATIONS LAW 3-145, 227-30 (Clark 12th ed. 1950).

177. DIGNAN, A HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES, ch. VIII, at 268 (1935); GREENE, *op. cit. supra* note 166, at 107; RUFFINI, RELIGIOUS LIBERTY 514-15 (1912). See HOWE, *op. cit. supra* note 168, at 96, for a Pennsylvania case of 1911.

178. RUGGIERO, THE HISTORY OF EUROPEAN LIBERALISM 398 (1927).

Western political tradition—a dualism that, it must be repeated, is rooted in legal ideas and institutions.

As to the world scene, it would be premature to say that religion has ceased to interact with politics or to exert its influence on the scales of war and peace. Marxist dialectic and modern communism, like the positive faiths, have elements proper to a religious system, namely, faith, hope, the desire to belong, and the need to worship. The conflict of our day, according to Professor Zaehner, is, therefore, one between two opposing religious systems, one theistic, the other atheistic and materialistic. "It is the doubtful privilege of the present generation to take part in this second major installment of the wars of religion."¹⁷⁹ The author may be guilty of exaggeration, but his statement calls attention to a profound truth. It is that political concepts in our day, such as nationalism, democracy and communism, like the doctrinal ones of a former age, will, or must, take the form of religious absolutes in order to survive in conflicts with their rivals. "New Presbyter is but Old Priest writ large."¹⁸⁰

179. ZAEHNER, *NEW OUTLINE OF MODERN KNOWLEDGE* 85 (Pryce-Jones ed. 1956).

180. Milton, *Sonnet 19, On the New Forces of Conscience under the Long Parliament*.