The Catholic Lawyer

Volume 1
Number 3 *Volume 1, July 1955, Number 3*

Article 9

The Problem of Pluralism in America

"Is Catholicism compatible with American democracy?"

Such a question inverts the order of values says Father Murray. He asks is American democracy compatible with Catholicism. No other manner of putting the question would be acceptable to anyone who places . . . conscience . . . above . . . human law and sentiment.

THE PROBLEM OF PLURALISM IN AMERICA*

JOHN COURTNEY MURRAY, S.J.†

THE FOUNDATION OF AMERICAN UNITY

"E PLURIBUS UNUM" is more than a motto. It is a fact. Protestant, Catholic, Jew, pagan, agnostic and atheist have learned by the lessons of our singular national history and the genius of our constitutional system to build social and political unity amid a discord of religious creeds.

While a full analysis of the American solution to this age-old problem cannot be attempted here, the following propositions seem basic and undeniable.

1. "There *are* truths and we hold them."

The life of man in society under government is founded on truth, on certain objective truths, universal in their import, accessible to man, definable, defensible. "We hold these truths to be self evident." If this assertion be denied, the American tradition of government is eviscerated at one stroke. It is indeed in many respects a pragmatic proposition; but as a whole it does not rest on the philosophy of pragmatism. For the pragmatist there are properly speaking no truths, only results. But the American proposition rests on the more traditional conviction that truths *are,* and that they *can be known.*

2. "We recognize the sovereignty of God over nations as well as over individual men."

This is the principle that radically distinguishes the conservative Christian tradition of America from the Jacobin laicist tradition of

---

*Digested and reprinted, with permission, from 29 Thought 165 (June 1954).

†M.A., Boston College; S.T.L., Woodstock College; S.T.D., Gregorian University (Rome). Professor of Theology, Woodstock College; Visiting Professor of Philosophy, Yale University (1951-52); Editor, Theological Studies.

Continental Europe. The Jacobin tradition proclaimed the autonomous reason of man to be the first and the sole principle of political organization. In contrast, the first article of the American political faith is that the political community, as a form of free and ordered human life, looks to the sovereignty of God as to the first principle of its organization. The United States has had, and still has, its share of agnostics and unbelievers. But it has never known organized militant atheism on the Jacobin, doctrinaire Socialist, or Communist model; it has rejected parties and theories which erect atheism into a political principle. In 1799, the year of the Napoleonic *coup d'état* which overthrew the Directory and established a dictatorship in France, President John Adams stated the first of all American first principles in his remarkable proclamation of March 6:

> . . . it is also most reasonable in itself that men who are capable of social acts and relations, who owe their improvements to the social state, and who derive their enjoyments from it, should, as a society, make acknowledgements of dependence and obligation to Him who hath endowed them with these capacities and elevated them in the scale of existence by these distinctions. . . .

President Lincoln on May 30, 1863, echoed the tradition in another proclamation:

> Whereas the Senate of the United States, devoutly recognizing the supreme authority and just government of Almighty God in all the affairs of men and nations, has by a resolution requested the President to designate set apart a day for national prayer and humiliation; And whereas it is the duty of nations as well as of men to own their dependence upon the overruling power of God, to confess their sins and trespasses in humble sorrow, yet with the assured hope that genuine repentance will lead to mercy and pardon. . . .

The authentic voice of America speaks in these words. And it is a testimony to the enduring vitality of this first principle – the sovereignty of God over society as well as over individual men – that President Eisenhower in June, 1952, quoted these words of Lincoln in a proclamation of similar intent. There is, of course, dissent from this principle, uttered by American secularism (which, at that, is a force far different in content and purpose from Continental laicism). But the secularist dissent is clearly a dissent; it illustrates the existence of the American affirmation. And it is continually challenged. For instance, as late as 1952 an opinion of the United States Supreme Court challenged it by asserting: "We are a religious people whose institutions presuppose a Supreme Being." Three times before in its history – in 1815, 1892, and 1931–the Court has formally espoused this same principle.

The affirmation in Lincoln's famous phrase, "this nation under God," sets the American proposition in fundamental continuity with the central political tradition of the West. But this continuity is more broadly and importantly visible in another, and related, respect. In 1884 the Third Plenary Council of Baltimore made this statement: "We consider the establishment of our country's independence, the shaping of its liberties and laws, as a work of special Providence, its framers 'building better than they knew,' the Almighty's hand guiding them." The providential aspect of the matter, and the reason for the better building, can be found in the fact that the American political community was organized in an era when the tradition of natural law and natural rights was still vigorous. Claiming no sanction other than its appeal to free minds, it still commanded universal accep-

tance. And it furnished the basic materials for the American consensus.

The American Republic was conceived in the tradition of the natural law.

3. "There is a law above kings and parliaments, above presidents and legislators."

To the early Americans government was not a phenomenon of force, as the later legal positivists would have it. Nor was it a "historical category," as Marx and his followers were to assert. Government did not mean simply the power to coerce, though this power was taken as integral to government. Government, properly speaking, was the right to command. It was authority. And its authority derived from law. By the same token its authority was limited by law. In his own way Tom Paine put the matter when he said, "In America Law is the King." But the matter had been better put by Henry of Bracton (d. 1268) when he said, "The king ought not to be under a man, but under God and under the law; because the law makes the king." This was the message of Magna Charta; this became the first structural rib of American constitutionalism.

Constitutionalism, the rule of law, the notion of sovereignty as purely political and therefore limited by law, the concept of government as an empire of laws and not of men – these were ancient ideas, deeply implanted in the British tradition at its origin in medieval times. The major American contribution to the tradition – a contribution that imposed itself on all subsequent political history in the Western world – was the written constitution. However, the American document was not the *constitution octroyée* of the nineteenth century Restorations – a constitution graciously granted by the King or Prince-President. Through the American techniques of the constitutional convention and of popular ratification, the American Constitution is explicitly the act of the people. It embodies their consensus as to the purposes of government, its structure, the extent of its powers and the limitations on them, etc. By the Constitution the people define the areas where authority is legitimate and the areas where liberty is lawful. The Constitution is therefore at once a charter of freedom and a plan for political order.

4. "Governments are instituted by men to secure the unalienable rights with which they have been endowed by their Creator. But governments derive their just powers from the consent of the governed."

The American plan of government includes a great act of faith in the capacity of the people to govern themselves. The faith of our Founding Fathers was not unrealistic. It was not supposed that everybody could master the technical aspects of government, even in a day when these aspects were far less complex than they now are. The supposition was that the people could understand the general objectives of governmental policy, the broad issues put to the decision of government, especially as these issues raised moral problems. The American consensus accepted the premise of medieval society, that there is a sense of justice inherent in the people, in virtue of which they are empowered, as the medieval phrase had it, to "judge, direct, and correct" the processes of government.

It was this political faith that compelled early American agreement to the institutions of a free speech and a free press. In

the American concept of them, these institutions do not rest on the thin theory proper to eighteenth-century individualistic rationalism, that a man has a right to say what he thinks merely because he thinks it. The American agreement was to reject political censorship of opinion as unrightful, because unwise, imprudent, not to say impossible. However, the proper premise of these freedoms lay in the fact that they were social necessities. "Colonial thinking about each of these rights had a strong social rather than individualistic bias," Rossiter says. They were regarded as conditions essential to the conduct of free, representative, and responsible government. People who are called upon to obey have the right first to be heard. People who are to bear burdens and make sacrifices have the right first to pronounce on the purposes which their sacrifices serve. People who are summoned to contribute to the common good have the right first to pass their own judgment on the question, whether the good proposed be truly a good, the people's good, the common good. Through the technique of majority opinion this popular judgment becomes binding on government.

5. "The state is distinct from society and limited in its offices to society."

Before it was cancelled out by the rise of the modern omnicompetent society-state, this principle had found expression in the distinction between the order of politics and the order of culture, or, in the language of the time, the distinction between *studium* and *imperium*. The whole order of ideas in general was autonomous in the face of government; it was immune from political discipline, which could only fall upon actions, not ideas. Even the medieval Inquisition respected this distinction of orders; it never recognized a crime of opinion, *crimen opinionis;* its competence extended only to the repression of organized conspiracy against public order and the common good. It was, if you will, a Committee on un-Christian Activities; it regarded activities, not ideas, as justiciable.

The American proposition, in reviving the distinction between society and state, which had perished under the advance of absolutism, likewise renewed the principle of the incompetence of government in the field of opinion. Government submits itself to judgment by the truth of society; it is not itself a judge of the truth in society. Freedom of the means of communication whereby ideas are circulated and criticized, and the freedom of the academy (understanding by the term the range of institutions organized for the pursuit of truth and the perpetuation of the intellectual heritage of society) are immune from legal inhibition or government control. This immunity is a civil right of the first order, essential to the American concept of a free people under a limited government.

6. "Only a virtuous people can be free."

"A free people" has a special sense in the American tradition of government. America has passionately pursued the ideal of freedom, expressed in a whole system of political and civil rights, to new lengths; but it has not pursued this ideal so madly as to rush over the edge of the abyss, into sheer libertarianism, into the chaos created by the nineteenth-century theory of the "outlaw conscience," *conscientia exlex,* the conscience that knows no law higher than its own subjective imperatives. Part of the inner architecture of the American ideal of freedom has been the profound conviction that only a virtuous people can be free.

It is not an American belief that free government is inevitable, only that it is possible, and that its possibility can be realized only when the people as a whole are inwardly governed by the recognized imperatives of the universal moral law.

The American experiment reposes on Acton's postulate, that freedom is the highest phase of civil society. But it also reposes on Acton's further postulate, that the elevation of a people to this highest phase of social life supposes, as its condition, that they understand the ethical nature of political freedom. They must understand, in Acton's phrase, that freedom is "not the power of doing what we like, but the right of being able to do what we ought." The people claim this right, in all its articulated forms, in the face of government; in the name of this right, multiple limitations are put upon the power of government. But the claim can be made with the full resonance of moral authority only to the extent that it issues from an inner sense of responsibility to a higher law. In any phase civil society demands order; in its highest phase of freedom it demands that order should not be imposed from the top down, as it were, but should spontaneously flower outward from free obedience to the restraints and imperatives that stem from inwardly possessed moral principle. In this sense democracy is more than a political experiment; it is a spiritual and moral enterprise. And its success depends upon the virtue of the people who undertake it. Men who would be politically free must discipline themselves. Likewise institutions which would pretend to be free with a human freedom must in their workings be governed from within and made to serve the ends of virtue. Political freedom is endangered in its foundations as soon as the universal moral values, upon whose shared possession the self-discipline of a free society depends, are no longer vigorous enough to restrain the passions and shatter the selfish inertia of men. The American ideal of freedom as ordered freedom, and therefore an ethical ideal, has traditionally reckoned with these truths, these truisms.

7. "The American Bill of Rights differs essentially from the Declaration of the Rights of Man in the France of 1789."

In considerable part the latter was a parchment-child of the Enlightenment, a top-of-the-brain concoction of a set of men who did not understand that a political community, like man himself, has roots in history and in nature. They believed that a state could be simply a work of art, a sort of absolute beginning, an artifact of which abstract human reason could be the sole artisan. Moreover, their exaggerated individualism had shut them off from a view of the organic nature of the human community; their social atomism would permit no institutions or associations intermediate between the individual and the state.

In contrast, the men who framed the American Bill of Rights understood history and tradition, and they understood nature in the light of both. They too were individualists, but not to the point of ignoring the social nature of man. They did their thinking within the tradition of freedom that was their heritage from England. Its roots were not in the top of anyone's brain but in history. Importantly, its roots were in the medieval notion of the *homo liber et legalis,* the man whose freedom rests on law, whose law was the age-old custom in which the nature of man expressed itself, and whose lawful freedoms were possessed

in association with his fellows. The rights for which the colonists contended against the English Crown were basically the rights of Englishmen. And these were substantially the rights written into the Bill of Rights.

Of freedom of religion there will be question later. For the rest, freedom of speech, assembly, association, and petition for the redress of grievances, security of person, home, and property – these were great historical as well as civil and natural rights. So too was the right to trial by jury, and all the procedural rights implied in the Fifth- and later in the Fourteenth-Amendment provision for "due process of law." The guarantee of these and other rights was new in that it was written, in that it envisioned these rights with an amplitude, and gave them a priority, that had not been known before in history. But the Bill of Rights was an effective instrument for the delimitation of governmental authority and social power, not because it was written on paper in 1789 or 1791, but because the rights it proclaims had already been engraved by history on the conscience of a people. The American Bill of Rights is not a piece of eighteenth-century rationalist theory; it is far more the product of Christian history. Behind it one can see, not the philosophy of the Enlightenment but the older philosophy that had been the matrix of the common law. The "man" whose rights are guaranteed in the face of law and government is, whether he knows it or not, the Christian man, who had learned to know his own personal dignity in the school of Christian faith.

THE AMERICAN PLAN OF GOVERNMENT TODAY

Does the philosophy of the Founding Fathers still endure? Professor Rossiter says it does:

> Perhaps Americans could achieve a larger measure of liberty and prosperity and build a more successful government if they were to abandon the language and assumptions of men who lived almost two centuries ago. Yet the feeling cannot be downed that rude rejection of the past, rather than level-headed respect for it, would be the huge mistake. Americans may eventually take the advice of their advanced philosophers and adopt a political theory that pays more attention to groups, classes, public opinion, power-élites, positive law, public administration, and other realities of twentieth-century America. Yet it seems safe to predict that the people, who occasionally prove themselves wiser than their philosophers, will go on thinking about the political community in terms of unalienable rights, popular sovereignty, consent, constitutionalism, separation of powers, morality, and limited government. The political theory of the American Revolution–a theory of ethical, ordered liberty – remains the political tradition of the American people.*

A second and corroborative answer is certainly valid of a not inconsiderable portion of the American people, the Catholic community. The men of learning in it acknowledge certain real contributions made by positive sociological analysis of the political community. But both they and their less learned fellows still adhere, with all the conviction of intelligence, to the tradition of natural law as the basis of free and ordered political life. Historically, this tradition has found, and still finds, its intellectual home within the Catholic Church.

Catholic participation in the American plan of government has been full and free, unreserved and unembarrassed, because the contents of this consensus – the ethical and political principles drawn from the tradition

*Rossiter, Seedtime of the Republic 449 (1953).

of natural law – approve themselves to the Catholic intelligence and conscience. Where this kind of language is talked, the Catholic joins the conversation with complete ease. It is his language. The ideas expressed are native to his own universe of discourse. Even the accent, being American, suits his tongue.

II

RELIGIOUS FREEDOM AND AMERICAN UNITY

In 1790 Edmund Burke published his *Reflections on the Revolution in France.* When he comes to his defense of English institutions ("an established Church, an established monarchy, an established aristocracy, and an established democracy"), he says: "First I beg leave to speak of our Church Establishment, which is the first of our prejudices – not a prejudice destitute of reason, but involving in it profound and extensive wisdom. I speak of it first. It is first, and last, and midst in our minds." In that same year the people of the states newly formed into the American Federal Republic were debating the ten amendments to the Constitution, submitted to them for ratification. The ratification was complete in 1791, and in that year the legal rule against any establishment of religion was on its way to becoming, where it had not already become, the first of our prejudices. There is a contrast here, a clash of prejudices, which still endures.

The subject might almost be left right here, if it could be generally admitted that the First Amendment expresses simply an American prejudice, in Burke's sense of the word. A prejudice is not necessarily an error; to be prejudiced is not necessarily to be unreasonable. Certain pre-judgments are wholesome. Normally, they are concrete judgments of value, not abstract judgments of truth. The American Catholic is entirely prepared to accept our constitutional concept of freedom of religion and the policy of no establishment as the first of our prejudices. He is also prepared to admit that other prejudices may obtain elsewhere – in England, in Sweden, in Spain. Their validity in their own context and against the background of the history that generated them does not disturb him in his conviction that his own prejudice, within his own context and against the background of his own history, has its own validity.

THEOLOGIES OF THE FIRST AMENDMENT

But, as it happens, one is not permitted thus simply to end the matter. I leave aside the practical issues that have arisen concerning the application of the First Amendment. The question here is one of theory, the theory of the First Amendment in itself and in its relation to Catholic theories of freedom of religion and the Church-State relation. It is customary to put to Catholics what is supposed to be an embarrassing question: Do you really believe in the first two provisions of the First Amendment? The question calls to mind one of the more famous among the multitudinous queries put by Boswell to Dr. Johnson, "whether it is necessary to believe all the Thirty-Nine Articles." And the Doctor's answer has an applicable point: "Why, sir, that is a question which has been much agitated. Some have held it necessary that they should all be believed. Others have considered them to be only articles of peace, that is to say, you are not to preach against them."

An analogous difference of interpretation seems to exist with regard to the first two articles of the First Amendment.

On the one hand there are those who

read into them certain ultimate tenets, certain specifically sectarian tenets with regard to the nature of religion, religious truth, the church, faith, conscience, divine revelation, human freedom, etc. In this view these articles are invested with a genuine sanctity, that derives from their religious content. They are dogmas, norms of orthodoxy, to which one must conform on pain of some manner of excommunication. They are true articles of faith. Hence it is necessary to believe them, to give them a religiously motivated assent.

On the other hand there are those who see in these articles only a law, not a dogma. These constitutional clauses have no religious content; they answer none of the eternal human questions with regard to the nature of truth and freedom or the manner in which the spiritual order of man's life is to be organized or not organized. Therefore they are not invested with the sanctity that attaches to dogma, but only with the rationality that attaches to law. In a word they are not articles of faith but articles of peace, that is to say, you may not act against them, because they are law and good law.

Those who dogmatize about these articles do not usually do so with all the clarity that dogmas require. Nor are they in agreement with one another. The main difference is between those who see in these articles certain Protestant religious tenets and those who see in them certain ultimate suppositions of secular liberalism.

The differences between those two groups tend to disappear in a third group, the secularizing Protestants, so called, who effect an identification of their Protestantism with American secular culture, consider the church to be true in proportion as its organization is commanded by the norms of secular democratic society, and bring about a coincidence of religious and secular-liberal concepts of freedom.

This is not the place to argue the question, whether and how far any of these views can be sustained as an historical thesis. What matters here is a different question, whether any of them can serve as a rule of interpretation of the First Amendment.

The questions all reduce themselves to two: Is the no-establishment clause a piece of ecclesiology, and is the free-exercise clause a piece of religious philosophy? The general Protestant tendency, visible at its extreme in the free-church tradition, especially among the Baptists, is to answer affirmatively to these questions. Freedom of religion and separation of church and state are to be, in the customary phrase, "rooted in religion itself." Their substance is to be conceived in terms of sectarian Protestant doctrine. They are therefore articles of faith; not to give them a religious assent is to fall into heterodoxy.

The secularist dissents from the Protestant theological and philosophical exegesis of the first of our prejudices. But it is to him likewise an article of faith (he might prefer to discard the word, "faith," and speak rather of ultimate presuppositions). Within this group also there are differences of opinion. Perhaps the most sharpened view is taken by those who in their pursuit of truth reject not only the traditional methods of Christian illumination, both Protestant and Catholic, but also the reflective methods of metaphysical inquiry. These men commit themselves singly to the method of scientific empiricism. There is therefore no eternal order of truth and

justice; there are no universal verities that require man's assent, no universal moral law that commands his obedience. Such an order of universals is not empirically demonstrable. Truth therefore is to be understood in a positivistic sense; its criteria are either those of science or those of practical life, i.e., the success of an opinion in getting itself accepted in the market place. With this view of truth there goes a corresponding view of freedom. The essence of freedom is "noncommittalism." The mind or will that is committed, absolutely and finally, is by definition not free. It has fallen from grace by violating its own nature. In the intellectual enterprise the search for truth, not truth itself or its possession, is the highest value. In the order of morals the norm for man is never reached by knowledge; it is only approximated by inspired guesses or by tentative practical rules that are the precipitate of experience, substantiated only by their utility.

This school of thought, which is of relatively recent growth in America, thrusts into the First Amendment its own ultimate views of truth, freedom and religion. Religion itself is not a value, except insofar as its ambiguous reassurances may have the emotional effect of reassuring. Roman Catholicism is a disvalue. Nevertheless, religious freedom, as a form of freedom, is a value. It has at least the negative value of an added emancipation, another sheer release. It may also have the positive value of another blow struck at the principle of authority in any of its forms; for in this school authority is regarded as absolutely antinomous to freedom.

Furthermore, this school usually reads into the First Amendment a more or less articulated political theory. Civil society is the highest societal form of human life; even the values that are called spiritual and moral are values by reason of their reference to society. Civil law is the highest form of law and it is not subject to judgment by prior ethical canons. Civil rights are the highest form of rights; for the dignity of the person, which grounds these rights, is only his civility; civility is humanity's highest perfection. The state is purely the instrumentality of the popular will, than which there is no higher sovereignty. Government is to the citizen what the cabdriver is to the passenger (to use Yves Simon's descriptive metaphor). And since the rule of the majority is the method whereby the popular will expresses itself, it is the highest governing principle of statecraft, from which there is no appeal. Finally, the ultimate value within society and state does not consist in any substantive ends that these societal forms may pursue; rather it consists in the process of their pursuit. That is to say, the ultimate value resides in the forms of the democratic process itself, because these forms embody the most ultimate of all values, freedom.

Given this political theory, the churches are inevitably englobed within the state, as private associations organized for particular purposes which possess their title to existence from positive law. Their right to freedom is a civil right, and it is respected as long as it is not understood to include any claim to independently sovereign authority. Such a claim must be disallowed on grounds of the final and indivisible sovereignty of the democratic process over all the associational aspects of human life. The notion that any church should acquire status in public life as a society in its own

right is per se absurd; for there is only one society, civil society, which may so exist. In this view, separation of church and state, as ultimately implying a subordination of church to state, follows from the very nature of the state and its law; just as religious freedom follows from the very nature of freedom and of truth.

The foregoing is a sort of anatomical description of two interpretations of the religion clauses of the First Amendment. The description is made anatomical in order to point the issue. If these clauses are made articles of faith in either of the described senses, there are immediately in this country some 30,000,000 dissenters, the Catholic community. Not being either a Protestant or a secularist, the Catholic rejects the religious position of Protestants with regard to the nature of the church, the meaning of faith, the absolute primacy of conscience, etc.; just as he rejects secularist views with regard to the nature of truth, freedom, and civil society as man's last end. He rejects these positions as demonstrably erroneous in themselves. What is more to the point here, he rejects the notion that any of these sectarian theses enter into the content or implications of the First Amendment in such wise as to demand the assent of all American citizens. If this were the case the very article that bars any establishment of religion would somehow establish one. (Given the controversy between Protestant and secularist, there would be the added difficulty that one could not know just what religion had been established.) If it be true that the First Amendment is to be given a theological interpretation and that therefore it must be "believed," made an object of religious faith, it would follow that a religious test has been thrust into the Constitution. The Federal Republic has suddenly become a voluntary fellowship of believers either in some sort of free-church Protestantism or in the tenets of a naturalistic humanism. The notion is preposterous. The United States is an awfully good place to live in; many have found it even a sort of secular sanctuary. But it is not a church, whether high, low, or broad. It is simply a civil community, whose unity is purely political, consisting in "agreement on the good of man at the level of performance without the necessity of agreement on ultimates" (to adopt a phrase from the 1945 Harvard Report on General Education in a Free Society). As regards important points of ultimate religious belief, the United States is pluralist. Any attempt at reducing this pluralism by law, through a process of reading certain sectarian tenets into the fundamental law of the land, is prima facie illegitimate and absurd.

Theologians of the First Amendment, whether Protestant or secularist, are accustomed to appeal to history. They stress the importance of ideological factors in the genesis of the American concept of freedom of religion and separation of church and state. However, these essays in theological history are never convincing. In the end it is always Roger Williams to whom appeal is made. Admittedly, he was the only man in pre-Federal America who had a consciously articulated theory. The difficulty is that the Williams who is appealed to is a Williams who never was. Prof. Perry Miller's recent book, *Roger Williams,* is useful in this respect. Its citations and analyses verify the author's statement: "I have long been persuaded that accounts written in the last century create a figure admirable by the canons of modern secular liberalism, but only distantly related to the

actual Williams." He was a seventeenth-century Calvinist who somehow had got hold of certain remarkably un-Calvinist ideas on the nature of the political order in its distinction from the church. He then exaggerated this distinction in consequence of his special concept of the discontinuity of the Old and New Testaments and of the utter transcendence of the church in the New Testament, which forbids it to maintain any contacts with the temporal order. In any event, Williams' premises and purposes were not those of the secular liberal democrat, any more than his rigidly orthodox Calvinist theology is that of his Baptist progeny.

However, this is not the place to explore Williams' ideas, ecclesiastical or political. The point is that his ideas, whatever their worth, had no genetic influence on the First Amendment. Professor Miller makes the point: "Hence, although Williams is celebrated as the prophet of religious freedom, he actually exerted little or no influence on institutional developments in America; only after the conception of liberty for all denominations had triumphed on wholly other grounds did Americans look back on Williams and invest him with his ill-fitting halo." Williams therefore is to be ruled out as the original theologian of the First Amendment. In fact, one must rule out the whole idea that any theologians stood at the origin of this piece of legislation. The truth of history happens to be more prosaic than the fancies of the secular liberals. In seeking an understanding of the first of our prejudices we have to abandon the poetry of those who would make a religion out of freedom of religion and a dogma out of separation of church and state. We have to talk prose, the prose of the Constitution itself, which is an ordinary legal prose having little to do with doctrinaire theories.

ARTICLES OF PEACE

From the standpoint both of history and of contemporary social reality the only tenable position is that the first two articles of the First Amendment are not articles of faith but articles of peace. Like the rest of the Constitution these provisions are the work of lawyers, not of theologians or even of political theorists. They are not true dogma but only good law; that is praise enough. This, I take it, is the Catholic view. But in thus qualifying it I am not marking it out as just another "sectarian" view. It is in fact the only view that a citizen with both historical sense and common sense can take.

That curiously clairvoyant statesman, John C. Calhoun, once observed that "this admirable federal constitution of ours is superior to the wisdom of any or all of the men by whose agency it was made. The force of circumstances and not foresight or wisdom induced them to adopt many of its wisest provisions." The observation is particularly pertinent to the religion clauses of the First Amendment. If history makes one thing clear it is that these clauses were the twin children of social necessity, the necessity of creating a social environment, protected by law, in which men of differing religious faiths might live together in peace.

It did indeed take some little time before the special American solution to the problem of religious pluralism worked itself out; but it is almost inconceivable that it should not have worked itself out as it did. One suspects that this would have been true even if there had been no Williamses and Penns, no Calverts and Madisons and Jeffersons. The theories of these men, what-

ever their merits, would probably have made only literature not history, had it not been for the special social context into which they were projected.

To say this is not of course to embrace a theory of historical or social determinism. It is only to say that the artisans of the American Republic and its Constitution were not radical theorists intent on constructing a society in accord with the *a priori* demands of a doctrinaire blueprint, under disregard for what was actually "given" in history. Fortunately they were, as I said, for the most part lawyers. And they had a strong sense of that primary criterion of good law which is its necessity or utility for the preservation of the public peace, under a given set of conditions. All law looks to the common good, which is normative for all law. And social peace, assured by equal justice in dealing with possibly conflicting groups, is the highest integrating element of the common good. This legal criterion is the first and most solid ground on which the validity of the First Amendment rests.

Religious liberty and separation of church and state in America came into being under the pressure of their necessity for the public peace. Four leading factors, contributed to this social necessity. First, there was the great mass of the unchurched. They were either people cut off from religion by the conditions of frontier life; or people careless of religion in consequence of preoccupation with the material concerns of this world; or people concerned with religion as indispensable to morality and therefore to ordered civil life, but unconcerned with, or even hostile toward, what is called organized religion. The fact may be embarrassing to the high-minded believer, but it is nevertheless a fact that the development of religious freedom in society bears a distinct relationship to the growth of unbelief and indifference. Our historical good fortune lay in the particular kind of unbelief that American society has known. It was not Continental laicism, superficially anticlerical, fundamentally antireligious, militant in its spirit, active in its purpose to destroy what it regarded as hateful. Unbelief in America has been rather easy-going, the product more of a naive materialism than of any conscious conviction.

The second factor was the multiplicity of denominations. This was Protestantism's decisive contribution to the cause of religious freedom – decisive because made at a time when the rapidly proliferating denominations were less disposed than they now are to live together in peace. The sheer fact of dissent and sectarian antagonisms was a particularly important motive of the Federal constitutional arrangements; for at that time four states still retained establishments of various kinds. One recalls John Adams' testy reluctance to hear any argument about disestablishment in Massachusetts.

Thirdly, the economic factor was by no means unimportant. It was present in the somewhat impenetrable thinking of the two Calverts. The merchants of New Jersey, New York, Virginia and the more southern colonies were as emphatically on the side of religious freedom as on the side of commercial profits. Persecution and discrimination were as bad for business affairs as they were for the affairs of the soul.

A fourth factor of lesser importance was the pressure, not indeed very great but real enough, exerted by the widening of religious freedom in England. This growth had been fostered by the same factors that

were operating more strongly in America. Anglicanism and Nonconformism were engaged in a struggle whose issue was already becoming clear. It was not to be disestablishment; Burke's prejudice, widely shared, would be too strong to permit that. But it would at least be religious freedom (except for Catholics), conjoined with establishment.

These four factors, taken as sociological complex, made it sufficiently clear to all reasonable men that under American conditions any other course but freedom of religion and separation of church and state would have been disruptive, imprudent, impractical, indeed impossible. Such a case does not appeal to mean-spirited expediency nor does it imply a reluctant concession to *force majeure*. In the science of law and the art of jurisprudence the appeal to social peace is an appeal to a high moral value. Behind the will to social peace there stands a divine and Christian imperative. This is the classic and Christian tradition.

Roger Williams was no partisan of the view that all religions ought to be equally free because, for all anybody knows, they may all be equally true, or false. He reckons with truth and falsity in honest fashion. Yet even in the case of a "false religion (unto which the civil magistrate dare not adjoin)" he recommends as the first duty of the civil magistrate "permission (for approbation he owes not what is evil) and this according to Matthew 13:30, for public peace and quiet's sake." The reference is the parable of the tares.

It is interesting that this same parable is referred to by Pius XII in his discourse to a group of Italian jurists on December 6, 1953. This discourse is the latest affirmation of the primacy of the principle of peace (or "union," which is the Pope's synonymous word) when it comes to dealing with the "difficulties and tendencies" which arise out of mankind's multiple pluralisms and dissensions. The "fundamental theoretical principle," says the Pope (and one should underscore the word "theoretical"; it is not a question of sheer pragmatism, much less of expediency in the low sense), is this: "within the limits of the possible and the lawful, to promote everything that facilitates union and makes it more effective; to remove everything that disturbs it; to tolerate at times that which it is impossible to correct but which on the other hand must not be permitted to make shipwreck of the community from which a higher good is looked for." This higher good, in the context of the whole discourse, is "the establishment of peace."

From this firm footing of traditional principle the Pope proceeds to reject the view of certain Catholic theorists who in a sort of cut-and-thrust manner would wish to "solve" the problem of religious pluralism on the ultimate basis of this doctrinaire argument: Religious and moral error have no rights and therefore must always be repressed when repression of them is possible. In contradiction of this view the Pope says, after quoting the parable of the tares: "The duty of repressing religious and moral error cannot therefore be an ultimate norm of action. It must be subordinated to higher and more general norms which in some circumstances permit, and even perhaps make it appear the better course of action, that error should not be impeded in order to promote a greater good." The Pope makes a clear distinction between the abstract order of ethics or theology, where it is a question of qualifying doctrines or practices as true or false, right or wrong,

and the concrete order of jurisprudence, where it is a question of using or not using the coercive instrument of law in favor of the true and good, against the false and wrong. In this latter order the highest and most general norm is the public peace, the common good in its various aspects. This is altogether a moral norm.

In fact, the Pope flatly states that "in certain circumstances God does not give men any mandate, does not impose any duty, and does not even communicate the right to impede or to repress what is erroneous and false."† The First Amendment is simply the legal enunciation of this papal statement. It does not say that there is no distinction between true and false religion, good and bad morality. But it does say that in American circumstances the conscience of the community, aware of its moral obligations to the peace of the community, and speaking therefore as the voice of God, does not give government any mandate, does not impose upon it any duty, and does not even communicate to it the right to repress religious opinions or practices, even though they are erroneous and false.

On these grounds it is easy to see why the Catholic conscience has always consented to the religion clauses of the Constitution. They conform to the highest criterion for all legal rulings in this delicate matter. The criterion is moral; therefore, the law that meets it is good, because it is for the common good. Therefore the consent given to the law is given on grounds of moral principle. To speak of expediency here is altogether to misunderstand the moral nature of the community and its collective moral obligation toward its own common good. The origins of our fundamental law are in moral principle; the obligations it imposes are moral obligations, binding in conscience. One may not, without moral fault, act against these articles of peace.

†*International Community and Religious Tolerance,* Address by Pope Pius XII to the Fifth National Convention of the Union of Italian Catholic Jurists, 1 The Pope Speaks 68 (1st Quarter 1954).

THE DISTINCTION OF CHURCH AND STATE

Another powerful historical force must be considered, namely, the dominant impulse toward self-government, government by the people in the most earnest sense of the word. Above all else the early Americans wanted political freedom. And the force of this impulse necessarily acted as a corrosive upon the illegitimate "unions" of church and state which the post-Reformation era had brought forth. The establishments of the time were, by and large, either theocratic, wherein the state was absorbed in the church, or Erastian, wherein the church was absorbed in the state. In both cases the result was some limitation upon freedom, either in the form of civil disabilities imposed in the name of the established religion, or in the form of religious disabilities imposed in the name of the civil law of the covenanted community. Men might share the fear of Roger Williams, that the state would corrupt the church, or the fear of Thomas Jefferson, that the church would corrupt the state. In either case their thought converged to the one important conclusion: an end had to be put to the current confusions of the religious and political orders; the ancient distinction between church and state had to be newly reaffirmed in a manner adapted to the American scene.

The distinction lay readily within the reach of the early American lawyers and

statesmen; for it was part of the English legal heritage, part of the patrimony of the common law. One can see it appearing, for instance, in Madison's famous *Memorial and Remonstrance,* where it is interpreted in a manner conformable to the anti-ecclesiasticism which he had in common with Jefferson. But the interesting figure here is again Roger Williams. Reading him, the Catholic theorist is inclined to agree with those "juditious persons" whose verdict was reluctantly and belatedly recorded by Cotton Mather. They "judged him," said Mather, "to have the root of the matter in him." In the present question the root of the matter is this distinction of the spiritual and temporal orders and their respective jurisdictions. One is tempted to think that he got hold of this root at least partly because of his early acquaintance with English law; he was for a time secretary to the great Sir Edward Coke and it is at least not unlikely that he continued his legal interests at Cambridge. In any event, this distinction was a key principle with Williams; he had his own special understanding of it, but at least he understood it.

Roger Williams was not a Father of the Federal Constitution; he is adduced here only as a witness, in his own way, to the genuine Western tradition of politics. The point is that the distinction of church and state, one of the central assertions of this tradition, found its way into the Constitution. There it received a special embodiment, adapted to the peculiar genius of American government and to the concrete conditions of American society.

The area of state – that is, legal – concern was limited to the pursuit of certain enumerated secular purposes (to say that the purposes are secular is not to deny that many of them are also moral; so for instance the establishment of justice and peace, the promotion of the general welfare, etc.). Thus made autonomous in its own sphere, government was denied all competence in the field of religion. In this field freedom was to be the rule and method; government was powerless to legislate respecting an establishment of religion and likewise powerless to prohibit the free exercise of religion. Its single office was to take the legal or judicial steps necessary on given occasions to make effective the guarantee of freedom.

We have not yet found an answer to the question whether government can make effective the primary intention of the First Amendment, the guarantee of freedom of religion, simply by attempting to make more and more "impregnable" what is called, in Rogers Williams' fateful metaphor, the "wall of separation" between church and state. However, what concerns us here is the root of the matter, the fact that the American Constitution embodies in a special way the traditional principle of the distinction between church and state. For Catholics this fact is of great and providential importance for one major reason: it serves sharply to set off our constitutional system from the system against which the Church waged its long-drawn-out fight in the nineteenth century, namely, Jacobinism, or (in Carlton Hayes's term) sectarian Liberalism, or (in the more definitive term used today) totalitarian democracy.

It is now coming to be recognized that the Church opposed the "separation of church and state" of the sectarian Liberals because in theory and in fact it did not mean separation at all but perhaps the most drastic unification of church and state which history had known. The Jacobin "free state" was as regalist as the *ancien*

régime, and even more so. Writing as a historian, de Tocqueville long ago made this plain. And the detailed descriptions which Leo XIII, writing as a theologian and political moralist, gave of the Church's "enemy" make the fact even more plain. Within this "free state" the so-called "free church" was subject to a political control more complete than the Tudor or Stuart or Bourbon monarchies dreamed of. The evidence stretches all the way from the Civil Constitution of the Clergy in 1790 to the Law of Separation in 1905. In the system sponsored by the sectarian Liberals, as has been well said, "The state pretends to ignore the Church; in reality it never took more cognizance of her." In the law of 1905, the climactic development, the Church was arrogantly assigned a juridical statute articulated in forty-four articles, whereby almost every aspect of her organization and action was minutely regulated. Moreover, this was done on principle – the principle of the primacy of the political, the principle of "everything within the state, nothing above the state." This was the cardinal thesis of sectarian Liberalism, whose full historical development is now being witnessed in the totalitarian "people's democracies" behind the Iron Curtain. As the Syllabus and its explicatory documents – as well as the multitudinous writings of Leo XIII – make entirely clear, it was this thesis of the juridical omnipotence and omnicompetence of the state which was the central object of the Church's condemnation of the Jacobin development. It was because freedom of religion and separation of church and state were predicated on this thesis that the Church refused to accept them *in thesi,* as the phrase has it.

This thesis was utterly rejected by the founders of the American Republic. The rejection was as warranted as it was providential, because this thesis is not only theologically heterodox, as denying the reality of the Church; it is also politically revolutionary, as denying the substance of the liberal tradition. The American thesis is that government is not juridically omnipotent; its powers are limited, and one of the principles of limitation is the distinction between state and church, in their purposes, methods, and manner of organization. The Jacobin thesis was basically philosophical; it derived from a sectarian concept of the autonomy of reason. It was also theological, as implying a sectarian concept of religion and of any way to supervise her exercise of authority in pursuit of her own distinct ends.

The juridical result of the American limitation of governmental powers is the guarantee to the Church of a stable condition of freedom as a matter of law and right. It should be added that this guarantee is made not only to the individual Catholic but to the Church as an organized society with its own law and jurisdiction.

Perhaps the root of the matter, as hitherto described, might be seen summed up in an incident of early American and Church history. This is Leo Pfeffer's account of it:

> In 1783 the papal nuncio at Paris addressed a note to Benjamin Franklin suggesting that, since it was no longer possible to maintain the previous status whereunder American Catholics were subject to the Vicar Apostolic at London, the Holy See proposed to Congress that a Catholic bishopric be established in one of the American cities. Franklin transmitted the note to the [Continental] Congress, which directed Franklin to notify the nuncio that "the subject of his application to Doctor Franklin being purely spiritual, it is without the jurisdiction and powers of Congress, who have no authority to permit or refuse it, these

powers being reserved to the several states individually." (Not many years later the several states would likewise declare themselves to "have no authority to permit or refuse" such a purely spiritual exercise of ecclesiastical jurisdiction.)

The good Nuncio must have been mightily surprised on receiving this communication. Not for centuries had the Holy See been free to erect a bishopric and appoint a bishop without the prior consent of government, without prior exercise of the governmental right of presentation, without all the legal formalities with which the so-called Catholic states had fettered the freedom of the Church. In the United States the freedom of the Church was completely unfettered; she could organize herself with the full independence which is her native right. This, it may be confidentially said, was a turning point in the long and complicated history of Church-State relations.

THE AMERICAN EXPERIENCE

One final ground for affirming the validity of the religion clauses of the First Amendment as good law must be briefly touched on. Holmes's famous dictum, "The life of the law is not logic but experience," has more truth in it than many other Holmesian dicta. When a law ceases to be supported by a continued experience of its goodness, it becomes a dead letter, an empty legal form. Although pure pragmatism cannot be made the philosophy of law, nonetheless the value of any given law is importantly pragmatic. The First Amendment surely passes this test of good law. In support of it one can adduce an American experience. One might well call it *the* American experience in the sense that it has been central in American history and also unique in the history of the world.

This experience has three facets, all interrelated. First, America has proved by experience that political unity and stability are possible without uniformity of religious belief and practice, without the necessity of any governmental restrictions on any religion.

The second American experience was that stable political unity, which means perduring agreement on the common good of man at the level of performance, is positively strengthened by the exclusion of religious differences from the area of concern allotted to government. In America we have been rescued from the disaster of ideological parties. They are a disaster because, where such parties exist, power becomes a special kind of prize: the struggle for power is a partisan struggle for the means whereby the opposing ideology may be destroyed. It has been remarked that only in a disintegrating society does politics become a controversy over ends; it should be simply a controversy over means to ends already agreed on with sufficient unanimity.

The third and most striking aspect of the American experience consists in the fact that religion itself, and not least the Catholic Church, has benefited by our free institutions, by the maintenance, even in exaggerated form, of the distinction between Church and state. Within the same span of history the experience of the Church elsewhere, especially in the Latin lands, has been alternatively an experience of privilege or persecution. The reason lay in a particular concept of government. It was alternatively the determination of government to ally itself either with the purposes of the Church or with the purposes of some sect or other (sectarian Liberalism, for instance) which made a similar, however erroneous, claim to possess the full and final truth. It would be difficult to say

which experience, privilege or persecution, proved in the end to be the more damaging or gainful to the Church.

In contrast, American government has not undertaken to represent transcendental truth in any of the versions of it current in American society. It does indeed represent the commonly shared moral values of the community. It also represents the supreme religious truth expressed in the motto on American coins: "In God we trust." For the rest, government represents the truth of society as it actually is; and the truth is that American society is religiously pluralist. The truth is lamentable; it is nonetheless true. Many of the beliefs entertained within society ought not to be believed, because they are false; nonetheless men believe them. It is not the function of government to resolve the dispute between conflicting truths, all of which claim the final validity of transcendence. As representative of a pluralist society, wherein religious faith is – as it must be – free, government undertakes to represent the principle of freedom.

In taking this course American government would seem to be on the course set by Pius XII for the religiously pluralist international community, of which America offers, as it were, a pattern in miniature. In the discourse already cited he distinguishes two questions: "The first concerns the objective truth and the obligation of conscience toward that which is objectively true and good." This question, he goes on, "can hardly be made the object of discussion and ruling among the individual states and their communities, especially in the case of a plurality of religious confessions within the same community." In other words, government is not a judge of religious truth; parliaments are not to play the theologian. In accord with this principle American government does not presume to discuss, much less rule upon, the objective truth or falsity of the various religious confessions within society. It puts to itself only Pius XII's second question, which concerns "the practical attitude" of government in the face of religious pluralism. It answers this question by asserting that in the given circumstances it has neither the mandate nor the duty nor the right to legislate either in favor of or against any of the religious confessions existent in American society, which in its totality government must represent. It will therefore only represent their freedom, in the face of civil law, to exist, since they do in fact exist. This is precisely the practical attitude which Pius XII recognizes as right, as the proper moral and political course.

CONCLUSION

In the final analysis any validation of the First Amendment as good law – no matter by whom undertaken, be he Protestant, Catholic, Jew, or secularist – must make appeal to the three arguments developed above: the demands of social necessity, the rightfulness within our own circumstances of the American manner of asserting the distinction between church and state, and the lessons of experience. Perhaps the last argument is the most powerful. It is also, I may add, the argument which best harmonizes with the general tone which arguments for our institutions are accustomed to adopt. In a curiously controlling way this tone was set by the *Federalist* papers. These essays were not political treatises after the manner of Hobbes and Hegel, Rousseau and Comte, or even John Locke. It has been remarked that in America no treatises of this kind

have been produced; and it is probably just as well. The authors of the *Federalist* papers were not engaged in broaching a political theory universal in scope and application, a plan for an Ideal Republic of Truth and Virtue. They were arguing for a particular Constitution, a special kind of governmental structure, a limited ensemble of concrete laws, all designed for application within a given society. They were in the tradition of the Revolutionary thinkers who led a colonial rebellion, not in the name of a set of flamboyant abstractions, but in the name of the sober laws of the British Constitution which they felt were being violated in their regard. It has been pointed out that the only real slogan the Revolution produced was: "No taxation without representation." It has not the ring of a trumpet; its sound is more like the dry rustle of a lawyer's sheaf of parchment.

It is in the tone of this tradition of American political writing that one should argue for the First Amendment. The arguments will tend to be convincing in proportion as their key of utterance approaches a dry rustle and not a wild ring. The arguments here presented are surely dry enough. Perhaps they will not satisfy the doctrinaire, the theologizer. But they do, I think, show that the first of our prejudices is "not a prejudice destitute of reason, but involving in it profound and extensive wisdom." This is all that need be shown; it is likewise all that can be shown.

The Catholic Church in America is committed to this prejudice by the totality of her experience in American history. As far as I know, the only ones who doubt the firmness, the depth, the principled nature of this commitment are not Catholics. They speak without knowledge and without authority; and the credence they command has its origins in emotion. If perhaps what troubles them is the fact that the commitment is limited, in the sense that it is not to the truth and sanctity of a dogma but only to the rationality and goodness of a law, they might recall the story of Pompey. After the capture of Jerusalem in 63 B.C. he went to the Temple and forced his way into the Holy of Holies. To his intense astonishment he found it empty. He should not have been astonished; for the emptiness was the symbol of the absence of idolatry. It symbolized the essential truth of Judaism, that One is the Lord. Professor Boorstin, who recounts the tale, adds: "Perhaps the same surprise awaits the student of American culture [or, I add, the American Constitution] if he finally manages to penetrate the arcanum of our belief. And for a similar reason. Far from being disappointed, we should be inspired that in an era of idolatry, when so many nations have filled their sanctuaries with ideological idols, we have had the courage to refuse to do so."

The American Catholic is on good ground when he refuses to make an ideological idol out of religious freedom and separation of church and state, when he refuses to "believe" in them as articles of faith. He takes the highest ground available in this matter of the relations between religion and government when he asserts that his commitment to the religion clauses of the Constitution is a moral commitment to them as articles of peace in a pluralist society.