Concordia Theological Monthly

Volume 4 Article 36

4-1-1933

Separation of Church and State

Theo. Graebner
Concordia Seminary, St. Louis

Separation of Church and State.

American law regarding churches as presented in Professor Zollmann's revised edition of *American Civil Church Law* (now republished under the title *American Church Law**) is a wonderful accomplishment of jurisprudence. While America has borrowed much of her law from England, it seems that Europe must build upon our pattern of church relations the laws which will govern religious societies when the antiquated system of established, or state, churches has been abolished. Not only do the regulations of church-life, so far as civil law must concern itself with them, rest upon most acute logical reasoning, but they embody that spirit of tolerance which characterizes the democracy of our institutions. American law has much to say regarding the organization and conduct of churches, the duties of church officers, the duties and privileges of clergymen, the rules that govern the holding of property, the rights of the Church in the field of education, the legal bond established by the ministerial call, bequests and donations, tax exemptions, the privilege of confession, laws regarding cemeteries. All these matters are succinctly set forth by Professor Zollmann in *American Church Law*, and all of it is of great interest to the clergyman and theologian. We are chiefly interested, however, in the theory upon which all these laws have been constructed, namely, the theory of religious liberty and its related concept of separation of Church and State. A summary of what the American doctrine of religious liberty really means, as interpreted in American constitutions and court decisions, is necessary for the solution of practical problems that often arise in pastoral work. The question, What is the American concept of separation of Church and State? does not, of course, affect our theology. Legislatures and courts may agree on one definition where it is quite possible that the Church will have another. Courts will define Christianity as one thing while the Church has her own definite dogma, which it formulates and professes on the basis of Scripture alone. Even religion may be defined differently by the Church than it is defined by the State. Also the functions of the State, for instance, in education, may be conceived by the State in a manner not acceptable to the Church. But in spite of all this we have long since espoused the American doctrine of religious freedom, and it must therefore be not only of interest, but of paramount importance that we know just what is involved in the concept of separation of Church and State.

Two amendments of the Constitution have a bearing on religion. The famous First Amendment reads: "Congress shall make no law

* *American Church Law*, by Carl Zollmann. 675 pages, 6×9. St. Paul: West Publishing Co. 1933. Price, $4.00.

respecting an establishment of religion or prohibiting the free exercise thereof."

The Fourteenth Amendment "effectually prevents hostile and discriminating legislation by a State against persons of any class, *sect, creed,* or nation, in whatever form it may be expressed."

Let us trace the origin of these provisions. To begin with, all the thirteen original States except Rhode Island and Pennsylvania had an established Church. Not only that, but when the Federal Constitutional Convention assembled in Philadelphia in 1787, religious tests as a qualification for office were a part of the constitutions of many of the thirteen States. Some States went so far as to require an acknowledgment that both the Old and New Testaments are given by divine inspiration. The constitutions of Pennsylvania and Vermont in addition exacted a confession of a belief "in one God, the Creator and Governor of the universe, the Rewarder of the good and the Punisher of the wicked," while the Delaware fundamental law imposed a veritable confession of trinitarian faith professing "faith in God the Father and in Jesus Christ, His only Son, and in the Holy Ghost, one God, blessed forevermore."

When the Federal Constitution was adopted, it was at once perceived that no religious test satisfactory to the various States could be formulated. Devout religionists and violent antireligionists in the Convention therefore joined hands in opposing such a test. "Freethinkers on the one side and earnest believers on the other pointed out the dangers to the national Government from ecclesiastical ambition, intolerance of sects, and bigotry of spiritual pride, and reinforced their arguments by showing the practical impossibility of selecting a national state church from among the various denominational bodies willing to be considered for the honor. The result was the adoption of the famous First Amendment." After the Civil War the Fourteenth Amendment was adopted, which made the equality of all religions before the law a principle to be enforced hereafter by the individual States. Since the adoption of this amendment there is in the opinion of Mr. Zollmann "no country in which not only religious liberty in general, but the property of religious bodies in particular is as secure as it is in the United States. The United States Supreme Court therefore, in a decision passing favorably on the right of a parent to educate his children in a parochial school, says that the amendment denotes, among other things, the right of the individual to worship God according to the dictates of his own conscience." This was in the famous Nebraska case of 1923 which involved the privilege of teaching German in the parochial schools.

So far we are on familiar ground. But what of the interpretation of this maxim? Does it signify that the Church stands in a relation to Government only as a corporation performing certain public

acts or owning property? Or does the Government take some cognizance of the Church as a religious body? The wealth of material which Mr. Zollmann supplies to prove the affirmative of the last question will astonish many a reader who has assumed that separation of Church and State denotes a complete absence of relation between religion and American law. Tracing the history of the maxim that "Christianity is a part of the law of the land," Zollmann quotes the decisions of courts which aver that, since the great body of the American people is Christian in sentiment, the spirit of Christianity has infused itself into, and has humanized, our law, has been "interwoven with the web and woof of the State government," is regarded as "the parent of good government," "the sun which gives to government all its true light," and enters "in no small degree into the ascertainment of social duties." Christianity has been declared to be "the alpha and omega of our moral law" and "the power which directs the operation of our judicial system." It follows that certain acts which would be deemed to be indifferent, or even praiseworthy, in a pagan country are punished as crimes or misdemeanors in America. This is not done "for the purpose of propping up the Christian religion, but because those breaches are offenses against the laws of the State."

Should some one maintain that this situation is inconsistent with the great American doctrine concerning the separation of State and Church, the courts have pointed out "the distinction which must be made between a religion preferred by law and a religion preferred by the people without the coercion of the law, between a legal establishment and a religious creed freely chosen by the people themselves." Our nation and the States composing it "are Christian in policy to the extent of embracing and adopting the moral tenets of Christianity" as furnishing a sound basis upon which the moral obligations of the citizens to the State may be established. The law can raise no higher standard of morals for the government of the individual than society itself in the aggregate has attained. "The declaration that Christianity is part of the law of the land is a summary description of an existing and very obvious condition of our institutions. We are a Christian people in so far as we have entered into the spirit of Christian institutions and become imbued with the sentiments and principles of Christianity." In the words of the United States Supreme Court, Christianity is part of the common law in "this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." In other words, the law has adapted itself to the religion of the country as far as is necessary for the peace and safety of its civil institutions and takes cognizance of offenses against God

only when by their inevitable effects they become offenses against man and his temporal security. "Christianity is a part of the law in the same sense in which the almanac or parliamentary law are said to be part of it."

The recognition of religion in the State constitutions is to be accounted for on these grounds. Excepting only the constitutions of Delaware, New Hampshire, Oregon, Tennessee, Vermont, and West Virginia, all the other existing State constitutions in their preamble recognize God, some even expressing a reliance and dependence upon God for protection and guidance and acknowledging His providence and goodness. In further evidence of the principle that religion is recognized by the American Government, Zollmann points to the oath "administered daily throughout the length and breadth of the country to witnesses in and out of the courts of justice and to officers, from the President down to the merest town constable." Our national coins, from the humble Lincoln cent to the proud double eagle, contain the words "In God we trust." "The only flag that ever waves above the Stars and Stripes on board of the various units of our fleet is the church pennant with the cross in its center. The very colors of our flag are not a historical accident, but sink their roots deep into the ages." (Quoting Charles W. Stewart, Superintendent of Naval Records and Librarian of the United States Navy Department, who traces the American flag to the colors used in the Jewish Tabernacle.)

Accordingly, on the basis of hundreds of court decisions it is a principle in American law that the States and the nation "are not divorced from, but are actually founded on, the Christian religion." That this does not signify Christianity on its spiritual side (as the Gospel of salvation through the redemptive work of Jesus Christ applied to the believer through the means of grace, by faith) is self-evident. American law simply accepts the fact that, historically considered, Christianity lies at the foundation of the various State constitutions and that "many of the principles and usages constantly acknowledged and enforced in the courts" are directly traceable to the Christian religion. Indeed, we are compelled, in the opinion of Mr. Zollmann, to accept some kind of religious guarantees for the power of the State — a thought in perfect agreement with the teachings of Rom. 13. "A civil government which avails itself only of its own powers is extremely defective, and unless it derives assistance from some superior power whose laws extend to the temper and disposition of the human heart and before whom no offense is secret, the state of man under any civil constitution would be wretched indeed." Times without number the courts have recognized as of untold value the services of religion to the State. To it we are indebted for all social order and happiness. Civil and religious liberty

are due to it. Says the Minnesota court: "It cannot be successfully controverted that this Government was founded on the principles of Christianity by men either dominated by, or reared amidst, its influence."

What remains, then, of the principle of separation of Church and State? This, that the American citizen is by the Constitution guaranteed perfect toleration of religious sentiment and that he is protected against any molestation of his or her mode of religious worship. The State constitutions contain three outstanding prohibitions in which the lines of demarcation between State and Church are drawn, the prohibitions directed against 1) any preference of any Church over another; 2) any compulsory attendance on any religious worship; 3) any taxation in support of any religious organization.

Intimately related to the freedom of religion is the freedom of religious education. Zollmann traces the history of the public-school system to its beginning. He notes that in the early colonies, State and Church, town and parish, secular and religious matters, were not kept separate. The public school was a church-school. The secular public-school system arose during the twenty years preceding the Civil War. Now, since the States were committed to two important principles, 1) universal education and 2) religious liberty, the elimination of religious instruction in the public schools became an unavoidable consequence. However, although the early State-parish schools were taken over by the public authorities and merged with the public-school system, they were, for a time at least, conducted in very much the same manner in which they had been conducted before the change. It is only in the newer States admitted after the Civil War that the public school became entirely secular and that the reading of the Bible, the saying of prayers, and the singing of religious hymns was discontinued completely. Since that time American sentiment has supported the principle so emphatically stated by President Grant in 1875: "Encourage free schools and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor the nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common-school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the Church and State forever separate." Since that time State after State fell into line with provisions to prevent the appropriation of public school funds to the uses of sectarian schools.

The recognition of parochial schools by the State is based on the

theory that the religion which it teaches is useful to the State. Zollmann quotes the Missouri court: "This has always been a Christian country, and there is nothing to be found in either the letter or spirit of our law or in the spirit of our republican institutions that disapproves of educational institutions under the control of churches." It was, however, during the parochial-school struggle engendered by the World War that the United States Supreme Court upheld the right of the Church to maintain its own system of schools (Nebraska and Oregon cases).

Regarding religious exercises in the public schools a Connecticut court declared that our school laws are "believed to be based on the Christian religion as the foundation of their moral obligation." Accordingly, "the practise, continued from the time when present-day public schools were parochial schools, of reading the Bible, saying prayers, and singing hymns, has in most instances gone unchallenged." The court decisions on this subject, however, are conflicting. Zollmann lists the States which prohibit the reading of the Bible, those which permit it under certain restrictions, and those which permit it on the grounds that to prohibit reading of the Bible, offering prayer, and singing songs of a religious character in any public building of the Government "would produce a condition bordering upon moral anarchy and starve the moral and spiritual natures of the many out of deference to the few." Zollmann holds that the decisions which *permit* the practise are more in consonance with the general doctrines of religious liberty sponsored by the constitutions and echoed by the courts. "Whatever the feelings of the minority who oppose the practise may be, the practise has existed in the schools from the beginning of American school history, continues to a certain extent to the present day, and would seem to require specific statutes or constitutional provisions for the purpose of making it illegal."

As for the actual teaching of religion in the public schools, the separation of Church and State of course safeguards the schools against "sectarian," or denominational, use for religious instructions. Yet there is a great outcry from parents, educators, and State officials for some remedy to bring back religious training to the children of the country. Such a remedy is proposed by the establishment of religious day-schools (devoted exclusively to the teaching of religion) which cooperate with the public-school system. Judicial opinion has not yet been pronounced on the many practical questions connected with this venture, *e. g.*, as to whether or not the decisions which permit the practise are more in consonance with the general doctrines of religious liberty sponsored by the constitutions and echoed by the courts.

Mr. Carl Zollmann is professor of law in Marquette University in Milwaukee and is a Lutheran, a member of the Missouri Synod. In

summarizing the results of his study of the fundamental relations of Church and State in our country, we have quoted him simply as an authority on church law in its pronouncement upon this very complex question. The Church is guided by the Word of revelation alone. United States courts and constitutions cannot establish for the Church the concept summed up under the terms Church and State. However, on the questions, What is the American doctrine of religious freedom? What is the American principle of the separation of Church and State? we must go to the history of our national institutions and accept the verdict of the courts as set forth by Mr. Zollmann in these notable introductory chapters to his *American Church Law.* THEODORE GRAEBNER.

Luther oder Calvin?

1.

Dieser Artikel wurde veranlaßt durch verschiedene Bemerkungen in einer besonderen Nummer des bekannten theologischen Blattes *Christianity To-day*, der sogenannten "Westminster Seminary Number". Diese Nummer ist an alle Pastoren der Presbyterian Church in the U. S. A. geschickt worden als ein Zeugnis der bekannten Westminstergruppe von Presbyterianern gegen den heutigen Modernismus sowie gegen eine schriftwidrige Union, die gegenwärtig einige Gruppen von Presbyterianern zuwege bringen wollen. Der Hauptvertreter der Westminstergruppe ist der in Amerika und England wegen seines unerschrockenen Zeugenmuts rühmlich bekannte D. J. Gresham Machen, dem seine Kollegen am Westminster Seminary treu zur Seite stehen. Es sind dies die Professoren Woolley, Van Til, Allis, Stonehouse, Murray und MacRae. Der Austritt Machens und einiger Genossen aus dem Princeton Theological Seminary war ein Protest gegen den dort geduldeten Modernismus, ein Tatbekenntnis, wie es jetzt selten vorkommt. Das neue Seminar (gegründet 1929), das zuerst mit schier unüberwindlichen Schwierigkeiten zu kämpfen hatte, hat jetzt eine Frequenz von fünfundsiebzig Studenten, die allesamt fest auf dem Boden des Calvinismus, wie ihn das althergebrachte presbyterianische Bekenntnis *The Westminster Confession of Faith* vertritt, stehen.

Für uns ist diese Bewegung ein Zeichen unter vielen, daß die reformierten Sektenkreise unsers Landes des krassen Modernismus müde geworden sind und nun wieder rechts zur alten Orthodoxie zurückschwenken. Es findet sich wieder neues Leben; die Orthodoxie ist wieder aggressiv, und zwar erfolgreich aggressiv. *Christianity To-day* schreibt hierüber: *"That Westminster Seminary is meeting a real need in the life of the Church is indicated not only by the fact that its graduates have been quickly called to pastorates, but by the steady increase not only of its*

