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The Passing of Nonsectarianism--Some Reflections on the School Prayer Case

Robert E. Rodes
Notre Dame Law School

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THE PASSING OF NONSECTARIANISM — SOME REFLECTIONS ON THE SCHOOL PRAYER CASE

*Robert E. Rodes, Jr.**

In the hearts of many Americans there recurs a wistful hope that somehow reasonable men can agree on a common denominator of religion detached from its manifestations in any organized church. History is not encouraging to them.

— Arthur E. Sutherland, Jr.

I

Engel v. Vitale[1] seems to constitute the end of the road for the attempt to formulate an American national religious commitment in "nonsectarian" terms for purposes of dissemination in the public schools. There remain only a few remnants of the traditional practice of Bible reading — which we may expect to be disposed of by the Supreme Court this term[2] — and the words "under God" in the Flag Salute — which may hold a precarious position under the protection of the doctrine of *de minimis*, unless Justice Douglas can persuade his brethren to repudiate that doctrine.[3]

This denouement, if tragic, seems inevitable. Each successive change in

* Associate Professor of Law, Notre Dame Law School. Member of the Massachusetts and Indiana Bars; A.B., Brown, 1947, LL.B., Harvard, 1952.

1 370 U.S. 421 (1962).

2 School District v. Schempp, 201 F. Supp. 815 (E.D. Pa. 1962), *prob. juris. noted*, 31 U.S. L. WEEK 3116 (U.S. Oct. 8, 1962); Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962), *cert. granted*, 31 U.S.L. WEEK 3116 (U.S. Oct. 8, 1962).

3 Douglas' opinion in *Engel* seems to rest on the view that religious activities under government auspices are to be regarded as *financially* supported by government. Why the doctrine of *de minimis* does not make this ground unavailing is difficult to see, and Douglas does nothing to enlighten us. *De minimis* has also been advanced against the majority opinion in *Engel;* see, *e.g.*, Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962); but here it does not seem as apposite. Black's attack on the practice complained of seems to regard it as a moral, not as a financial, support of religion, in which capacity it cannot fairly be regarded as trifling.

the religious make-up of our population has brought with it a controversy, often long and acrimonious, over religion in the public schools, and has ended in something being characterized as sectarian which had been considered nonsectarian before.[4] The history has been set forth often enough,[5] and there is no need to take it up in detail here. Now, we find that the process has advanced so far that there remains among our traditional forms of religious expression not one so trivial as to meet the test of nonsectarianism, so that the school authorities must needs set out to compose a new one.

Here, they run afoul of a venerable principle indeed. They are doing what the English Parliaments and Convocations did when they set up the original "establishment of religion" in the sixteenth and seventeenth centuries; they are devising a religious observance calculated to take up the varying religious commitments of the citizens into a single national observance expressing the unity of the national community before God.

The majority opinion, striking down the practice for this reason, disposes at least implicitly of the distinction that the prayer adopted by the school authorities is supplementary to, rather than in lieu of, other forms of religious observance. This, says Mr. Justice Black, would be relevant if the "free exercise" clause were in issue, but not where the case invokes the "no establishment" clause. The distinction most strenuously urged by the proponents of the practice, however, was that the prayer they had composed was "nondenominational." In other words, it is nonsense to say that what is nonsectarian is itself a sect. Black for the majority does not take the obvious way out of pointing to someone for whom the practice is unacceptable on religious lines, and thereby showing that the attempt to be nonsectarian has failed. In fact, Black does not meet the nondenominational argument at all. In assuming, however, that the prayer

4 CREMIN, THE AMERICAN COMMON SCHOOL 197 (1951), quotes an editorial outburst that sets the tone of the controversy over nonsectarianism as it has taken shape for different protagonists in different generations. The occasion is the successful campaign of Horace Mann during the late '30's and early '40's of the nineteenth century to exclude from the nonsectarian content of public school instruction material that favored "orthodox" Protestantism over the various forms of "liberal" Protestantism (notably, Unitarianism) that were growing up in the period. The editorialist is an Episcopalian:

> Universalism, Millerism, Mormonism, and other "comeoutisms," have sprung up since, and must the liberality of our fathers be interpreted, so as to give place to heresies, which concern the very vitals of Christianity? Presently the papist will give us his interpretation of the word "sectarian," as he does in the "Catholic Herald," to the Philadelphians, "Catholics only ask liberty of Conscience. The Bible may be read in the schools; provided Catholics be not forced to read a *sectarian* version." No; readers — give not to every individual schismatic, comeouter, and infidel, unlimited use of the word "sectarian." They will employ it to rob you of the gospel of Jesus Christ, the good news, that "we who were afar off, alienated from God by wicked works, are made nigh by the blood of Christ."

Generally speaking, Mann's version of nonsectarianism, the version attacked in the above quotation, consisted of the King James Bible. The response of the papists to this version was just what the editorial predicted, and the controversy they stirred up by their position was if anything more vigorous than that stirred up by Mann. PFEFFER, CHURCH, STATE, AND FREEDOM, 374-79 (1953) [hereinafter cited as PFEFFER]. In recent years, comparable difficulties have been raised by Jews over the celebration of Christian holy days in the schools. *Id.* at 399-408.

5 For the early history, up to 1850, see CREMIN, *op. cit. supra* note 4, at 181-218. PFEFFER at 274-90, 374-83 has succinct treatments of the more important aspects, taken down to the present time.

composed by the New York Regents constitutes "one particular form of religion"[6] he seems to be suggesting not only that this prayer cannot be considered nonsectarian, but that no other prayer can be.

If, then, as both reason and authority would seem to indicate, nonsectarianism must go,[7] what are we offered to take its place in our national life generally, and our public schools in particular? Thus far, two alternatives have presented themselves — secularism and religious pluralism. Secularism is a confinement of the values endorsed by the state — and hence by the public school — to those having to do with this world, or those not having to do with God.[8] It commends itself to those who hold no religion, to those whose religion is not much concerned with a corporate expression in the social order, and to those who suppose that their own particular religion will be overlooked when the others are being accommodated by the state. Prominent in the last category are certain Jewish groups ably represented by Mr. Leo Pfeffer, for whom nonsectarianism is Christianity[9] and religious pluralism is antisemitism.[10] The

6 370 U.S. at 431.

7 Sutherland, *supra* note 3, seems to see some hope for the continued vitality of nonsectarianism in an attenuated form either not inconsistent with *Engel* or protected by the doctrine of *de minimis* against the application of *Engel*. Pfeffer, on the other hand, seems to regard *Engel* as a complete victory for the uncompromising position he has long been urging. *Court, Constitution and Prayer,* 17 RUTGERS L. REV. ___ (1963). However the situation may work out in practice, it seems doubtful that the survivals of nonsectarianism will be sufficient to satisfy the aspirations of its proponents. Sutherland, *supra* at 50-51, describes a number of attempts to revive the principle of nonsectarianism by constitutional amendment. He does not seem to take them very seriously, and the prospect of the adoption of any of them seems remote.

8 Pfeffer, *supra* note 7, gives a lucid account of the doctrine which he earlier elaborated in more detail in his book, CHURCH, STATE AND FREEDOM. He holds:

> the first amendment, which merely makes explicit what is implicit in the Constitution itself, requires government in the United States to be secular. Its ends must be exclusively secular, and in achieving them, it may use only secular means.

In making his case for this position, he does not address himself to the possibility that government may pursue religious, or at least supernatural, ends by secular means — a possibility that seems implicit in his great stress on the value for religion itself of the strictly secular approach he advocates.

9 PFEFFER 395:

> The courts that have held the Bible to be nonsectarian have had no difficulty in so holding the Lord's Prayer [citing Doremus v. Board of Education, 5 N.J. 435, 75 A.2d 880 (1950)]. Aside from the differences between the Protestant and Catholic versions of the Lord's Prayer, it would seem that characterizing the Lord's Prayer as nonsectarian constitutes a cavalier disregard of the conviction of adherents of the Jewish faith. As far as is known, no recognized Jewish religious authority agrees with that characterization. The prayer itself is preceded by the injunction — hardly acceptable to pious Jews whose religion requires them to pray in synagogues — that: "And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men (Matthew 6:5)." Even more important, designating as the "Lord" any human being violates a basic article of Jewish faith.

See also *Id.* at 399-408 on the singing of Christmas carols.

10 *Id.* at 357, quoting from an affidavit taken in connection with the proceedings in Zorach v. Clauson, 343 U.S. 306 (1952):

> Following the introduction of released time at P.S. 163, Brooklyn, I began to notice that I was ostracized by the other children in after-school activities. I was not permitted to share in their play and they made unflattering remarks about my not going to the church center because I was Jewish. As a result of arguments about my non-participation in released time, my classmates called me such names as "Christ killer" and "dirty Jew."

position of Mr. Pfeffer and his followers is entitled to a good deal of respect; much bitter experience has gone into its formation.[11]

Secularism has powerful opponents who feel — despite the pious disclaimer of Mr. Justice Black[12] — that the inevitable outcome is an active godlessness as offensive to the believer as religious observance would be to the agnostic.[13] Thus far, however, they have not been able to match Pfeffer's concrete examples of outrages to the individual conscience.[14]

Religious pluralism, the other alternative, is the solution that developed on the Continent of Europe out of the seventeenth-century stalemate between Protestant and Catholic forces.[15] It conceives of a division of society into separate religious "communities," each of which is recognized by the state as representing its adherents in all matters religious or related to religion. To the extent that this system prevails, the state, if it wishes to venture into the field of education, must do so through the school systems of the different religious communities. This conception of religious pluralism formed the basis for the plan of religious instruction invalidated in the *McCollum* case,[16] and furnishes the rationale for most of those who seek state support for parochial schools.

Quite apart from the support it lends to projects such as these, religious pluralism has a certain affinity for prevailing concepts of Catholic ecclesiology that the other alternatives lack; this has led Catholics to favor it from the outset. This tendency has been reinforced by the experience of Catholicism on the Continent of Europe, where pluralistic arrangements have been the only peaceful forms of adjustment between Catholics and non-Catholics living in the

11 In addition to the material cited *supra* notes 9 and 10, see *Id.* at 344-45, 337-38, 356-67, 399-408, and *passim.* If I lay great stress on this aspect of Pfeffer's teaching — perhaps more than he himself would do — it is because I find it the most persuasive aspect.

12 Engel v. Vitale, 370 U.S. 421, 433-35 (1962).

13 PFEFFER at 301-02 compiles a number of cogent statements to this effect. The theory has been further elaborated recently by a line of Catholic argumentation to the effect that there are in America four basic faiths, Catholicism, Protestantism, Judaism, and Secularism, and that a policy of religious neutrality forbids government to favor Secularism just as it forbids government to favor any of the other three faiths. See Whalen, *Secularism, the Fourth Faith,* Our Sunday Visitor, Nov. 11, 1962, Magazine Section, p. 1. This seems to suggest that the advocates of secularism as a political and juridical approach to church-state problems are motivated by a personal conviction that man's salvation is to be looked for in this world. In fact, there is no evidence that more than a handful of them are so motivated.

14 It does not stand to reason that a man's conscience is violated by listening to something he considers superficial as it would be by listening to something he disagrees with. As atheism and agnosticism are somewhat lacking in musical and ceremonial expression, it is difficult to invent a hypothetical situation that would impose on believers in general the indignities of which Pfeffer complains; PFEFFER 399-408. Perhaps a pageant representing Nietzsche announcing to a group of local goatherds that God is dead, with a little Catholic boy chosen to play the part of Nietzsche would present an appropriate analogy. To pursue the matter a little farther, is it conceivable that if the objections of Catholics to the secularized public schools extended — as do those of certain Amish groups — to the point of holding it a matter of conscience not to attend them under any circumstances, some mitigation of the secularist position would not be forthcoming? See my *Religious Education and the Historical Method of Constitutional Construction*, 9 RUTGERS L. REV. 682, 688-92 (1955). In fact, there is no major religious denomination, however much it would prefer denominational schools, that will refuse to send children to public schools if its own denominational schools are not available.

15 The German, Dutch and Belgian solutions, as described in PFEFFER 50-52 are typical.

16 Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948).

same society. By the same token, the opposition to pluralistic solutions has never been free from anti-Catholic bias.[17]

The only full-fledged pluralistic approach we have had in this country, however, was not under Catholic auspices at all, but was an intermediate stage in the liquidation of the Massachusetts Congregational establishment — a liquidation completed before the time of the great Catholic immigrations.[18] The Massachusetts Constitution of 1780 had made a general provision for the raising of funds by local government for the teaching of religion, subject to a provision allowing any taxpayer to have his own taxes directed to the support of teachers of his own denomination "provided there be any on whose instructions he attends; otherwise it may be paid toward the support of the teacher or teachers of the parish or precinct in which the said moneys are raised."[19]

This arrangement, besides being limited in its benefits to Protestants,[20] contained a number of loopholes attributable to the inherent incapacity of legislative foresight to keep up with the proliferation of American religious bodies.[21] It seems likely that despair of the possibility of being fair to everyone contributed as much as anything else to the abandonment of a pluralistic establishment in Massachusetts and other states that took their lead from her. Significantly enough, this event took place just before the flood of Catholic immigration presented the American school authorities with the Catholic demand for pluralistic support of education.

In general, then, experience has shown that a system of pluralistic support is extremely difficult of operation in a fully open society. The pluralistic societies of Europe are characterized by a small number of recognized groups, and a splinter group has as much difficulty in tapping the sources of public support as it would in a state with a single established religion.[22] Pfeffer's description of the problems of educating Jewish children in the pluralistic system of Quebec Province provides a telling example close to home.[23] It is also significant that the advocates of pluralism in our country have begun by oversimplifying our religious make-up into the familiar Protestant-Catholic-Jew triad.[24] In the system of pluralistic religious instruction stricken down in *McCollum,* both the Jehovah's Witnesses and the Lutherans had attempted to set up programs separate from the general Protestant program, and had not been allowed to do so.[25]

But the most important ground of opposition to pluralistic structures, particularly in education, has been the "divisiveness" inherent in them.[26] The

17 For early examples, see the Nast cartoons reproduced in 2 STOKES, CHURCH AND STATE IN THE UNITED STATES figs. 32-35 (1950) [hereinafter cited as STOKES]. Paul Blanchard, of course, presents a well-known contemporary example. AMERICAN FREEDOM AND CATHOLIC POWER 286 and *passim* (1949).

18 1 STOKES 418-27.

19 MASS. CONST. art. III (1780).

20 *Ibid.*

21 *E.g.,* Barnes v. First Parish, 6 Mass. 401 (1810).

22 See, *e.g.,* PILGERT, THE WEST GERMAN EDUCATIONAL SYSTEM 43-44 (1953).

23 PFEFFER 43-45.

24 HERBERG, PROTESTANT — CATHOLIC — JEW 53-54 (1955) [hereinafter cited as HERBERG].

25 PFEFFER 347.

26 PFEFFER at 437 summarizes the arguments that have been made along these lines in recent years.

aspiration to unity which was felt by our society from the beginning was regarded as inconsistent with a breakdown into rigorously defined and cohesive groups — a view which seems to have a good deal of merit when we consider the European model to which the advocates of pluralism look. It is this aspiration to unity that seems to have been uppermost in the minds of the Common Council of New York in 1841, when they rejected the Catholics' first major bid for state support of their parochial schools:

> However much we may lament the consequences, we are not disposed to question the right of our Catholic fellow citizens to keep their children separated from intercourse with other children, but we do not think the Common Council would be justified in *facilitating* such an object. . . .[27]

This continues to be the theme of some of the most vigorous opposition to pluralistic solutions, particularly in the schools.[28]

The national unity to which we thus aspire, relied on by the dominant forces in our country to assimilate the immigrant and attach him to our institutions,[29] relied on by the immigrant to secure him a place in the national life that his group membership cannot command,[30] is yet by no means encompassed within these practical objects. National unity has affinities for the Christian understanding of human brotherhood, and the Founding Fathers were not unaware of those affinities. Madison, writing in 1785 against a proposed pluralistic establishment in Virginia that would have required every citizen to contribute to the support of the church of his choice, points out that "The very appearance of the Bill has transformed that 'Christian forbearance, love and charity' which of late mutually prevailed into animosities and jealousies which may not soon be appeased."[31] This religious understanding of national unity has a historical basis to which we shall turn in a moment.

Meanwhile, let us note that it is unfair to suggest, as Black does,[32] and many others before him,[33] that the desire for public recognition of religion betrays a lack of confidence on the part of the religionist that his principles can prevail on their own merits. Rather, it is a desire to see expressed in appropriate symbols a profound conviction about our society — that the free, democratic, and fraternal society to which we are committed as a people is rooted in a religious commitment;[34] that equality and brotherhood as we adhere to them are rooted in the equality and brotherhood of all men before the judgment seat of God.

Judged by this standard, the alternatives of pluralism and secularism are open to the same objection. They conceive of the common bond uniting the citizens of our society as relating only to their secular concerns, and therefore, for any religiously committed person, as superficial. This is not the tradition

27 Quoted in CREMIN, *op. cit. supra* note 4, at 168. (Emphasis in original.)
28 See, *e.g.*, THAYER, RELIGION IN PUBLIC EDUCATION 125-51 (1947).
29 CREMIN, *op. cit. supra* note 4, at 44-47.
30 *Id.* at 33-44.
31 MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, quoted at PFEFFER 100.
32 Engel v. Vitale, 370 U.S. 421, 431 (1962).
33 *E.g.*, MADISON, *op. cit. supra* note 31.
34 GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 14-19, 26-38 (1940) [hereinafter cited as GABRIEL].

we have received from the fathers of our republic, and, through them, from the ancient and undivided Christendom of the West. It is my purpose to explore the historical origins and present consequences of what I consider the authentic tradition, and its embodiment in the forms of nonsectarianism, and then to shed what light I can on the possible sources of a form of corporate expression to replace the now repudiated nonsectarian form without abandoning the tradition.

II[35]

The conception of social unity characteristic of medieval Christendom came through the Reformation more nearly intact in England than in any other major nation of Europe, because only in England did a commitment to such a conception of unity succeed in dominating both of the competing religious commitments. This peculiar state of affairs in England is attributable to a political and intellectual force that dominated the English Commons from the fourteenth century on, and passed into the centuries after the Reformation under the name of Erastianism.[36] It can perhaps best be described as medieval

35 The first part of this section is based on material I have gathered for a study of the legal history of the Anglican Establishment. Pending the appearance of this study, I would like to record here a first installment on my thanks to the Ford Foundation for the grant that made this research possible.

36 For the continuity of this tradition in English ecclesiology, compare the preamble to the Statute of Provisors of 1350, 25 Edw. 3, 6, language first adopted in Parliament in 1306, 1 Rot. Parl. 319a:

> Whereas the holy church of England was founded in the estate of prelacy by the king and his progenitors, and the earls, barons, and other nobles of his said realm, and their ancestors, to inform them and the people of the law of God, and to make hospitalities, alms, and other works of charity . . . .

with the preamble to the Act for the Restraint of Appeals, 1532, 24 Hen. 8, c. 12:

> Where by divers sundry old authentick histories and chronicles, it is manifestly declared and expressed, that this realm of England is an empire . . . governed by one supreme head and King . . . (2) unto whom a body politick, compact of all sorts and degrees of people, divided in terms, and by names of spiritualty and temporalty, been bounden and owen to bear, next to God, a natural and humble obedience; . . . (4) the body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and shewed by that part of the said body politick, called the spiritualty, now being usually called the English church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity and sufficiency of number, it hath been always thought, and is also at this hour, sufficient and meet of itself, without the inter-meddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties, as to their rooms, spiritual doth appertain; (5) for the due administration whereof, and to keep them from corruption and sinister affection, the King's most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said church, both with honour and possessions; (6) and the laws temporal . . . was and yet is administered, adjudged and executed by sundry judges and ministers of the other part of the said body politick, called the temporalty; (7) and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other.

Further, compare both of these with the general position of a middle-of-the-road Restoration divine such as Stillingfleet, who admits certain powers to inhere in a Christian ministry (*A Discourse Concerning the Power of Excommunication in a Christian Church,* 2 WORKS (1709)), but regards the particular institutional structure of the church as taking its origin from social convention (*Irenicum,* 2 WORKS), and in England from law (3 WORKS 742-61; *A Vindication of their Majesties Authority to Fill the Sees of the Deprived Bishops,* 3 WORKS 959). Finally, compare the position of a relatively modern jurist, LEWIS T. DIBDIN, CHURCH COURTS (1881), who holds that it is the business of the church to formulate its doctrine and of the

lay conservatism. This conservatism is characterized by an earnest (though perhaps not devout) commitment to Christianity and to the medieval understanding of a Christian society; at the same time, it is nationalist, resentful of clerical domination and still more so of clerical corruption, and resentful of the papacy as the embodiment of all the other objects of its disapproval.[37]

The religious commitment that characterizes this lay conservatism, while very real, does not extend to theological niceties, indeed, insofar as these niceties are the concern of the mistrusted clerical class, it tends to be impatient with them.[38] Rather, its primary concern is with a practical Christianity, expressed in the traditional institutional forms of medieval Christendom, and guarded against clerical corruption and encroachments by the power of organized society embodied in the person of the King.

The attributes of the English Establishment of the Church, as they emerge from the period of uncertainty following the Reformation, conformed to this lay conservative tradition, despite pressures from theological commitments on both sides. We may sum up these attributes as follows:

1. The state is committed to a conception of national unity derived from the medieval understanding of Christendom, and defined in terms of a religious consensus. This defining consensus is intended to transcend as far as possible the divergencies in the theological opinions entertained by the citizens.[39]
2. This religious consensus is to be embodied in a single institutional and

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state to enforce it. I am not sure Dibdin would admit to being an Erastian, but his opponents would certainly call him one, and, in my opinion, with good reason. See GEORGE, THE PROTESTANT MIND OF THE ENGLISH REFORMATION 181-210 (1961). The authors discern the same continuity I do in the tradition, although they are not willing to use the term "Erastianism" to describe it. This is because they regard the term as referring to a subordination of the Church to the secular purposes of the state, whereas I define it with reference to the tradition described in text.

37 These concerns appear over and over again in the Parliament Rolls, especially in the petitions of the Commons against papal provisions. Their greatest pre-Reformation statement, however, is probably in the works of Christopher St. Germain, a lawyer, evidently orthodox in his theology, who writes just at the time of Henry VIII's proceedings against the papacy. See especially A TREATYSE CONCERNING THE POWER OF THE CLERGYE AND THE LAWES OF THE REALME (no date).

38 Instructive in this regard is the attitude toward the theological controversies of the time taken by Bernard Gilpin, a country parson whose ministry began in Edward VI's time, and extended through Mary's to Elizabeth's. He shares with George Herbert the status of unofficial patron saint of the Anglican parish clergy, having become a distinguished man through his high pastoral zeal. He is impatient with the proliferation of doctrinal formulas as impeding the serious business of carrying on the ministry. CARLETON, THE LIFE OF MR. BERNARD GILPIN (London 1629). *Cf.*, LACEY, THE REFORMATION AND THE PEOPLE (1929).

39 That the authoritative doctrinal formularies of the Church of England were adopted to this end is rather a commonplace among those who address themselves to the subject. See, *e.g.*, TOTTLE, A CHARGE RELATIVE TO THE ARTICLES (1772). That is, these formularies are held not to be magisterial, as teaching doctrine to the faithful, but juridical, as setting the limits of accommodation among the divergent opinions in the way good legislation on other subjects sets the limits of accommodation among the competing interests in society. This approach is apparent in the opinion of the Judicial Committee of the Privy Council in the famous case of Gorham v. Bishop of Exeter (1850). This decision does not appear in any set of reports, having been printed in a separate volume by the then current reporter of Privy Council decisions. It is adequately described for our purposes in NIAS, GORHAM AND THE BISHOP OF EXETER 96-104 (1951). A comparison of the opinion with that of the lower court (which it reversed), 2 Rob. Eccl. 1, 163 Eng. Rep. 1221 (Arches 1849), will bring the approach into sharper relief. In my opinion, despite the resulting outcry, it is the Judicial Committee and not the Dean of the Arches that represents the authentic Anglican tradition.

liturgical form,[40] so drawn up as to be acceptable to all forms of theological opinion included within the national consensus.[41]

3. Those who accept the national consensus, but not the institutional and liturgical form in which it is embodied, are to be compromised with as much as possible through amending the forms in question.[42] To the extent they are irreconcilable, some abortive attempts at coercion are made, but ultimately toleration is hit upon as the proper solution.[43]
4. Those whose dissent is not from the form, but from the consensus itself, are to be proceeded against, not as heretics, but as enemies of the social order.[44] The persecution of Roman Catholics was rationalized along these lines,[45] as was that of Quakers.[46] There was a certain tendency under Charles I to regard Protestant dissenters in the same light,[47] but their status as dissenters from the form only, rather than from the underlying consensus, was solidly established in the course of the Restoration period.[48] Later, similar concessions were gradually extended to other religious groups.[49]

The Church of England was not entirely content with the role thus imposed upon it, and much of its history during the eighteenth and nineteenth centuries involves its attempt to recover its freedom of action, either by imposing further commitments upon the nation[50] or by escaping its role of embodying the national consensus.[51] These attempts need not concern us except to the extent of noting that they were by and large unsuccessful. The church-state relation in England was, and to a certain extent continues to be, governed by the four principles just set forth.

Due to the prominent role of English Protestant dissenters in the settlement of America, Establishment in the English sense did not gain a firm foothold on this side of the Atlantic. By the time the federal constitution was adopted,

40 The fullest statement of this view seems to be DAVIS, DE JURE UNIFORMITATE ECCLESIAE (1669).

41 Martin v. Machonochie, 5 Moore (NS) 500, 16 Eng. Rep. 603 (P.C. 1868), sets forth what is in my opinion the authentic Anglican tradition in this regard. See NEALE, ELIZABETH I AND HER PARLIAMENTS 52-84 (1953).

42 SYKES, FROM SHELDON TO SECKER ch. 3 (1959); JASPER, PRAYER BOOK REVISION IN ENGLAND 1800-1900 ch. 1 (1954).

43 SYKES, *op. cit. supra* note 42. It is noteworthy that the first Act of Toleration, 1 Wm. & Mary, c. 18 (1688), required a dissenting minister to subscribe all the Anglican Articles of Religion except those dealing with institutional and liturgical form.

44 JORDAN, DEVELOPMENT OF RELIGIOUS TOLERATION IN ENGLAND (1932-1940).

45 3 HUGHES, THE REFORMATION IN ENGLAND 335-96 (1954).

46 The Quakers were not persecuted as such, but their conscientious refusal to take oaths or pay tithes brought them under the penalties of general laws. See TILLOTSON, THE LAWFULNESS AND OBLIGATION OF OATHS (1681), quoted in ANGLICANISM 672-73 (More and Cross ed. 1951); 1 BURN, ECCLESIASTICAL LAW 517-26 (1763); BOHUN, THE LAW OF TITHES 444-45 (3d ed. 1744).

47 *E.g.*, R. v. Bastwick, Burton and Prynne, 13 St. Trials 711 (1637).

48 ANONYMOUS, A LETTER FROM A JUSTICE OF THE PEACE TO A COUNSELLOR AT LAW CONCERNING CONVENTICLES WITH THE COUNSELLOR'S REPLY, Bodleian Pamph. C. 148 (15) (no date — evidently written after the Restoration and before the Act of Toleration).

49 ADDISON, RELIGIOUS EQUALITY IN MODERN ENGLAND (1944).

50 See, *e.g.*, Jenkins v. Cook, 1 P.D. 80 (P.C. 1876); Banister v. Thompson, [1908] P. 362 (Arches), *prohibition denied sub nom.* R. v. Dibdin, [1910] P. 57 (K.B.D. and C.A. 1909), *aff'd sub nom.* Thompson v. Dibdin, [1912] A. C. 533 (H.L.).

51 EVERY, THE HIGH CHURCH PARTY, 1688-1718 ch. 8 (1956); Shipley, *Church and State*, Chambers, *Decay of Discipline*, Wood, *Ecclesiastical Suits*, all in ECCLESIASTICAL REFORM (Shipley ed. 1873).

such attempts as had been made in the direction of established churches had almost all given way to a principle of equality, at least among Protestant denominations.[52] On the other hand, most of the religious influences that went into the original make-up of American society were all represented in the English national consensus, albeit not in the same proportions. The only exceptions were the Quakers in Pennsylvania and the Roman Catholics in Maryland, and these by the time of the Revolution had been reduced to about the same positions they had in the other colonies and in the mother country.[53] Thus, the defining consensus of English society could be carried over into American society without significant alteration. The major groups that had come to America to avoid religious persecution were able to regard their troubles in England as occasioned solely by the existence of an officially established institutional and liturgical form they could not accept.[54]

This pragmatic experience of the nature of religious controversy, reinforced by certain trends in Protestant ecclesiology too complex to be gone into here, led to a general feeling that the harmony of the civil state would be adequately secured if it were to extricate itself from the differences between the alternative institutional and liturgical forms of religion — called sects or denominations.[55] This principle, after some abortive experiments already discussed with religious pluralism, worked itself out with almost universal acceptance in terms of the prevailing nonsectarianism. The federal government was committed to this nonsectarian approach from the outset, and all the states had followed suit by the middle of the nineteenth century.[56]

The American system of nonsectarianism, then, is the English system of establishment stripped of its commitment to a single institutional and liturgical form. We can describe it in terms of the following four principles, to be compared or contrasted with the four principles governing the Establishment in the mother country:

1. The defining consensus in American society is basically the same as that in English society. It shares with the latter, and with the original medieval understanding of Christendom, the aspiration to a fraternal union among the citizens,[57] and the conviction that certain principles of civil government are of divine origin.[58] The understanding of what these principles are departs from the English model, due to the influence of certain natural-right theories that have freer play in America

52 PFEFFER 106; 1 STOKES 358-446.
53 On the Roman Catholics, see 1 STOKES 784-87; on the Quakers, *Id.* at 755-57.
54 This is brought out rather well by the history of the successful resistance of the colonists to proposals for the introduction of an Anglican bishop on this side of the Atlantic. 1 STOKES 231-40.
55 There is an exhaustive treatment of this subject in Muzzy v. Wilkins, Smith 1 (N.H. 1803), interpreting a constitutional provision that "no subordination of one sect or denomination to another shall ever be established by law." The Court held that one sect was distinguished from another not by its doctrines but by its polity — that every sect had a number of different doctrines (Arminianism, Calvinism, Universalism and the like) current among its followers. See also the quotations, *id.* at 18 n.
56 1 STOKES 358-446.
57 *Cf.*, CREMIN, THE AMERICAN COMMON SCHOOL 33-44 (1951); DE TOCQUEVILLE, DEMOCRACY IN AMERICA pt. 2, bk. 2, ch. 4.
58 GABRIEL 12-25.

than in England where the weight of tradition is heavier. But the belief that the principles are of divine origin is the same. Concomitantly, certain theological views have less trouble gaining admittance to the national consensus in America than in England, where the political problems are more complex; especially is this true of Catholicism.[59]

2. The defining consensus in American society is not to be embodied in any particular institutional or liturgical form.[60] This is the purport of the "no-establishment" clause of the first amendment. Ultimately, this principle was interpreted to apply equally to a multiplicity of such forms, and the pluralistic establishments based on a contrary interpretation were abandoned.[61] Rudimentary ceremonial observances carried out under secular auspices, and expressing the commitment of civil society to the consensus itself, were not regarded as violating this principle.[62] The extent to which *Engel v. Vitale* has changed this aspect of the doctrine is a matter for speculation.
3. The citizens are to be free to give what institutional and liturgical form they choose to religious commitments not inconsistent with the defining

59 On the attitudes toward Catholicism during the early and middle nineteenth century, see GABRIEL 52-66. The attempt there described to found the American consensus on Catholicism — the work chiefly of Brownson and Hecker — was a failure. The eventual absorption of Catholicism into the American consensus was as a denomination of Christians. See, *e.g.*, 1 STOKES 698-99 on Andrew Jackson's attitude. See HERBERG 175-76:

> When the American hierarchy declares itself against "secularism" and "atheistic materialism" it is received and discussed by Americans as a general religious pronouncement rather than as a sectarian address. Fulton Sheen, though appareled in his bishop's cassock, is followed by a vast radio audience consisting of many non-Catholics as well as Catholics. The Christopher movement makes the same general appeal. This new kind of attention that the American people give to the Catholic Church does not mean either a lessening of the tensions between Catholics and non-Catholics (such tensions seem to have mounted in recent years) or any particular readiness of the American people to come over to Catholicism. It merely means that the Catholic Church is recognized as a genuinely American religious community, speaking to the American people not in terms of a unique treasure of revelation entrusted to it alone but in terms of those "ideals and values" which the American feels is [*sic*] at the bottom of all religion.

60 This seems to be the teaching of the crucial case of Vidal v. Girard's Executors, 43 U.S. (2 How.) 126 (1844), in which it was held that the foundation of a school from which all ministers of religion are excluded was not contrary to the national commitment to Christianity, since Christianity can be taught by laymen.

61 PFEFFER 133-59. The proponents of state support for religious schools have been saying lately that government aid to religion on any basis that treats all religions alike had been regarded as constitutional until the time of Everson v. Board of Education, 330 U.S. 1 (1947). Whatever may be the merits of state support for religious schools, the historical foundations of this assertion seem effectively demolished by Pfeffer's argument. In a sense it may be true that the state may provide moral support for all religions alike even though it may not provide financial support. But such moral support is rendered to religion as such, not to individual churches as such. The distinction is brought out in the quotation from HERBERG, *supra* note 59.

62 Doremus v. Board of Education, 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1952), is about the most recent of these cases. One of the most interesting is Hackett v. Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905), where, as in *Engel*, a nonsectarian prayer was especially composed for use in school. It was a good deal longer than the one involved in *Engel*, and ended with a recital that "These things we ask for Christ's sake. Amen." The court, being of the opinion that the local equivalents of the no-establishment clause were meant to exclude any connection between the state and the institutional church, found the fact that the prayer was not "promulgated, authorized, or used by any sect of religionists whatever" was a point in its favor, rather than the opposite.

consensus. This is the purport of the "free exercise" clause of the first amendment. It corresponds to the "toleration" accorded by the English system to dissenters — that is, to those who come within the defining consensus, but cannot accept its embodiment in the Established Church.[63]

4. As in the English system, religious commitments inconsistent with the defining consensus are pro tanto inconsistent with the social order. While they may be constitutionally protected as long as they are mere opinions, governmental interference with their overt manifestations runs afoul of no constitutional provision on the subject of religion.[64] This principle has led to the rejection of constitutional claims raised by polygamists,[65] by advocates of "black supremacy,"[66] by persons who work on Sunday,[67] and by parents who refuse to procure medical treatment for their children,[68] or to send them to school.[69] Pacifists, except insofar as they enjoy special concessions by statute, are treated in the same way.[70]

The continuity of the American system of nonsectarianism worked out in these four principles has been somewhat obscured by the periodic redefinition of the defining consensus it presupposes. Our national commitment was at one time conceived of as Protestant; later it was regarded as Christian in a sense that included Catholics as well as Protestants. Now we tend to call it Judaeo-Christian to reflect the increasingly articulate role of Jewish citizens in our national life. Some of us speak of our commitment, as did some of the Founding Fathers, in theistic but not specifically Christian terms. Herberg has

63 The legal affairs of religious bodies in this country are generally dealt with in the same manner as those of dissenting congregations in England, although the English tend to give less credence to the determinations of the officials of the church bodies in question, and more to the doctrines as laid down by their founders. See, *e.g.*, Attorney General v. Shore, 11 Sim. 591, 59 Eng. Rep. 1002 (Ch. 1843), 9 Cl. & Fin. 355, 8 Eng. Rep. 450 (H.L. 1843); Attorney General v. Clapham, 4 D.G.M. & G. 591, 43 Eng. Rep. 638 (Ch. 1855); 7-8 Vict., c. 45 (1844). Compare these with PFEFFER 241-57.

64 The usual formulation of this principle is that government may pursue bona fide secular objectives by bona fide secular means without regard to the religious scruples of the citizens. See, *e.g.*, Pfeffer, *supra* note 7. As a matter of logical necessity, this view must depend either on a conviction that the religious scruples to be disregarded do not accurately reflect the will of God, or on a belief that government may pursue its secular objectives without regard to the will of God. The latter alternative does not seem likely to commend itself either to the general public or to the courts, or, for that matter, to Mr. Pfeffer. To put it another way, even if it is theoretically possible to construct a set of secular values by philosophical constructions in which religion plays no part, we, as a people, have not done so. Our values, even if we call them secular, are a product of our historical experience as a religious people.

65 Reynolds v. United States, 98 U.S. 145 (1878). The religious presuppositions on which this holding rests are brought out more clearly in Mormon Church v. United States, 136 U.S. 1, 49 (1890): "The organization of a community for the spread and practice of polygamy . . . is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."

66 *In re* Ferguson, 55 Cal. 2d 663, 12 Cal. Rptr. 753, 361 P.2d 417 (1961). See discussion of this case, and others involving the same group, in *Church-State Survey 1960-62*, 37 NOTRE DAME LAWYER 649, 716-17 (1962).

67 Braunfeld v. Brown, 366 U.S. 599 (1961).

68 Craig v. State, 220 Md. 590, 155 A.2d 684 (1959); PFEFFER 572-77; *Church-State Survey 1960-62*, 37 NOTRE DAME LAWYER 649, 712-13 (1962).

69 PFEFFER 594-97.

70 United States v. Macintosh, 283 U.S. 605 (1931); PFEFFER 504-10.

found evidences of a belief in nothing more than belief itself.[71] But in one form or another, the American people by and large continue to aspire to a version of national unity understood as a fraternal union among the citizens, and continue to conceive of the basic principles of their government as responsive to no merely secular expediency, and indeed, to no merely human hope.

It is in the public expression of our defining consensus that our difficulties have come. Clearly enough, without some form of corporate expression it would not be in any meaningful sense a corporate consensus. It has been generally recognized that some such expression is required. As was just pointed out, rudimentary ceremonial observances under secular auspices, expressing our national commitment to the consensus as such, have up to now not been regarded as unconstitutional. Objections to such observances have been taken under the free exercise clause insofar as participation was compulsory or non-participation discouraged; otherwise under the no-establishment clause. In either event, the objections have been met by the courts with two arguments. First, the practices complained of are in aid of the social order, and, as such, secular; thus, the objector falls within the fourth of the rules enumerated above, and has no constitutional ground for complaint.[72] Second, the objector, being motivated by sectarian religious considerations, runs afoul of the second of the rules enumerated — he wishes to impose a sectarian veto on the expression of the national consensus, thereby impairing its pristine nonsectarianism.[73] The nearest the courts have come to a departure from this line of reasoning is in the second *Flag Salute Case*,[74] and it must not be forgotten that the relief there afforded was on the basis of free speech, not freedom of religion.

The impact of this constitutional principle on minority religious groups was at one time quite severe in the area of public ceremonial observances, as it still is in the area of police regulations. In general, however, its rigor has been mitigated by the good sense of the legislative and administrative authorities, who have seldom seen fit to override minority religious feelings to the full extent constitutionally permissible. Thus, the substitution of Bible reading for more specific religious teaching in the public schools, and the gradual watering-down or elimination of Bible reading itself have come in most jurisdictions a good deal in advance of the willingness of the courts to intervene on constitutional grounds.[75] Similarly, today such groups as pacifists and Christian Scientists enjoy by legislation immunities from police regulation to which they have thus far been given no constitutional claim.

It is this tendency to legislative and administrative accommodation that

71 HERBERG 97-98.

72 See note 62 *supra*.

73 Commonwealth *ex rel.* Wall v. Cooke, 7 Am. L. Reg. 417 (Mass. 1859) (quoted at PFEFFER 377-78); Donahoe v. Richards, 38 Me. 379 (1854); Church v. Bullock, 104 Tex. 1, 109 S.W. 115, 118 (1908) (Exclusion of "moral truths of the Bible" from school instruction "would be to starve the moral and spiritual natures of the many out of deference to the few."); Hackett v. Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905). The court in *Hackett* made the interesting observation that the Catholic hierarchy has from time to time opposed some of the political and scientific principles taught in the public schools as vigorously as it opposed the King James Bible.

74 Board of Educ. v. Barnette, 319 U.S. 624 (1943).

75 PFEFFER 374-91; 2 STOKES 549-72.

has brought about the result in *Engel v. Vitale*. The increased sensitivity to minority rights that has been felt in recent years not just in the Supreme Court, but throughout our society, has stepped up the tempo both of the development of this kind of accommodation and of the continuing redefinition, already referred to, of the consensus itself. Faced with this situation, the New York Regents did exactly what many an English Parliament had done before them — they gathered together all the elements represented in the consensus, and all the elements that seemed entitled to accommodation at their hands, and hammered out a compromise solution that would be acceptable to all, and yet express the national consensus as best it might. Community pressures, both legal and political, had left them so little maneuvering room that it seemed impossible to find a permissible expression in any other way. So it did to the English Parliaments of 1559 and 1662. Mr. Justice Black, in assimilating the Regents' effort to those of the Anglican Fathers, had more in his favor than his critics give him credit for.

III

The passing of the nonsectarian system I have been describing will not be all loss to us. Its witness to our aspiration to fraternal union in our society, and to our belief in the divine or more than societal origin of our free institutions has not been without a price, and the price has been the attenuation of the witness of organized religion to the fundamental human predicament and the means whereby we may be saved from it. De Tocqueville had already noticed the tendency of organized religion in America to take its lead from the national consensus:

> All American clergy know and respect the intellectual supremacy exercised by the majority; they never sustain any but necessary conflicts with it. They take no share in the altercations of parties, but they readily adopt the general opinions of their country and their age; and they allow themselves to be borne away without opposition in the current of feeling and opinion by which everything around them is carried along. They endeavor to amend their contemporaries, but they never quit fellowship with them. Public opinion is therefore never hostile to them; it rather supports and protects them; and their belief owes its authority at the same time to the strength which is its own, and to that which they borrow from the opinion of the majority.[76]

Herberg, writing in our own time, has discerned what seems to be basically the same phenomenon, although he is a good deal more critical of it than is de Tocqueville.[77]

The working out of this orientation in the relation to American society of any religious group included within the defining consensus tends to fall into a definite pattern, whereby the commitments of the group are divided into three categories.

The first such category is the set of commitments that the group shares with the generality of society — opposition to juvenile delinquency, for example.

76 DEMOCRACY IN AMERICA pt. II, bk. 1, ch. 5.
77 HERBERG, 94-97, 260-89, and *passim*.

Commitments of this kind are relied on by the group in question to earn it the respect, and sometimes the financial support, of the general community.[78]

In a second category of commitments of a given religious group fall those aspects of its teaching that it seeks to introduce into the scheme of values accepted by the general community, sometimes by persuasion, sometimes by political action. This seeking to influence the values of the general community is quite apart from the desire of the group to spread its own membership. Thus it is that certain religious groups are continually trying to keep all Americans of whatever religion from drinking liquor;[79] so the Catholic group is trying to keep them from using contraceptives;[80] other churches pursue still other objects in the same way.

Finally, there is a third category of commitment that a given religious group holds as that which distinguishes it from the rest of the community — its own peculiar doctrines and practices. These it makes no effort to impose on the community in general, but will maintain for its own members even in opposition to the community if it comes to that. This is the possibility that de Tocqueville alludes to when he says that the clergy never sustain any but *necessary* conflicts with the opinions of the majority. Examples of beliefs and practices peculiar in this way to particular religious groups are the Lutheran doctrine of justification by faith alone, the Catholic rule of Sunday Mass attendance, the pacifism of the Quakers, and the Baptist rejection of infant baptism.

In the context presented by our national consensus with its nonsectarian expression, those aspects of a given group's commitment that fall into the first of these three categories — that of commitments shared with the general community — tend to become central aspects, and in some measure to absorb the others. This in turn leads the whole commitment of the group to take on a good deal of the coloration imparted it by general community values, so that the national consensus continually tends to take the center of the stage away from the more religiously significant commitments that are peculiar to the particular religious group. Let us consider briefly the mechanics of this tendency.

In the first place, the cases in which the values of the community coincide with the commitments of this or that religious group tend in great part to come to the fore as a result of initiative from the general community rather than from the religious body.[81] This is quite natural, because the general community

78 As a random example, see the quote from J. Edgar Hoover, at 3 STOKES 107, beginning "The churches are in the front trenches of America's crime prevention crusade!" A number of arguments along these lines are assembled in PFEFFER 300-01. The most fully articulated theory of the secular advantage of religion is perhaps WARBURTON, THE ALLIANCE BETWEEN CHURCH AND STATE (1736). Warburton, beginning with a rigorous distinction between the functions of church and state, proceeds to set up the entire English Establishment on a basis of mutual advantage. Madison characterizes arguments of this kind as "an unhallowed perversion of the means of salvation." *Op. cit. supra* note 31. For my own part, I find this characterization hard to disagree with.

79 2 STOKES 328-44.

80 3 STOKES 67-78.

81 Marciniak, *The Catholic Church and Labor,* in THE CATHOLIC CHURCH, U.S.A. 255, 270 (Putz ed. 1956):

> A 1954 study by a Benedictine monk of the attitude of industrial workers in a Midwestern city revealed that while most of them supported the idea of a living family wage, the necessity of labor unions, the social obligations of private ownership, and so on, the *source* of these attitudes was not the

is more sensitive to the over-all necessities of our society than is any one religious group, and is more flexible in responding to them. Also, the general community can bring more pressure to bear on the religious group than the religious group can bring to bear on the general community. It would not be quite fair to say that American churches have not discovered their religious commitments on such issues as labor relations and racial equality until after the general community opinion had been formed. It seems entirely fair, however, to say that the formation of the consciences of our major religious groups on these issues has been concomitant with, and not in advance of, the formation of the general community conscience. Certainly, no major church has authoritatively derived from its theological commitments a position on these issues that had not already commanded a good deal of public support. It is also significant that popular religious pronouncements on these matters often display as much concern with earning the good opinion of the workers or the Negroes, as the case may be, as with following out the implications of revealed religion.[82]

Turning next to the second category — that of values which a given religious group would like to introduce among those of the general community, we find that the group is continually led to state these values in terms calculated to commend them to the general community, and therefore to play down their connection with the underlying theological principles of the particular group. This is apparent in many tracts of church origin concerning the evils of drink, and in much Catholic propaganda on the subject of contraception or divorce.[83]

Finally, when it comes to those beliefs and practices which are peculiar to a given religious group, the necessity of commending the group itself to the general community seems to lead to a description of these beliefs and practices in terms of apologetics, rather than in terms of systematic theology.

The foregoing analysis may serve to explain the intellectual fuzziness of which professional theologians are continually complaining in the current American religious revival. It may also suggest the affinity of American nonsectarianism for the English Erastianism that is its ideological ancestor — the doctrine that rejects the rigorous duality of church and state in favor of a unified religiously oriented society, whose religious orientation is the responsibility of its total institutional structure.[84] Like Erastianism, American nonsectar-

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Church — even though all of the men had attended a Catholic high school. Their opinions on vital social and economic and international questions were the result of exclusively secular influences, like the union, political party and public opinion.

82 A particularly flagrant example is Marciniak, *Catholics and Labor-Management Relations,* in THE AMERICAN APOSTOLATE 66 (Ward ed. 1952):

> It shall not happen here. This is the determination that has sparked the American Catholic social movement in industry. Europe's working classes have left the Church in large numbers. Catholic leaders are determined that this tragedy shall not happen on this side of the Atlantic.
>
> *Add to this determination* a desire to right wrongs done to workers under American capitalism, a periodic prodding of inactive Catholics by the popes and the graceful action of the Holy Spirit, and you have an insight into the dynamics of the Catholic social movement in the United States. (Emphasis added.)

83 See, *e.g.,* CONWAY, WHAT THEY ASK ABOUT MORALS 231-32 (1960).

84 The ideology I describe by the term Erastianism differs from the monism attacked by Father Murray in his *Are There Two or One?,* in WE HOLD THESE TRUTHS 197 (1960). Erastianism does not conceive of an omnicompetent social order, still less of an omnicom-

ianism has the advantage of directing the whole institutional structure of society toward the last end of man; like Erastianism, it has the disadvantage of putting religion at the service of the world.

Erastian forms commend themselves in general to those for whom the world is not such a bad place after all. English Erastianism was conceived in the heady atmosphere of Tudor times, and perfected in the moribund complacency of the Georgian period. So American nonsectarianism was the product of a people bemused with its own potential for secular achievement in the development of a new land. To a generation more impressed with the ultimate realities of the human condition — warfare, anxiety, loneliness, and death — the view that all religions teach basically the same truths is not likely to commend itself. Rather, it is the great questions of man's destiny and man's salvation that become the basic ones, and it is on just these questions that different religions give widely different answers.

IV

Herberg, commenting on *Engel v. Vitale,* points out what for him is crucial in the current controversy over public religious expression — if we do not in some way acknowledge the dependence of our free institutions on a divine mandate, we place them in the realm of social expediency, ready to be altered when our understanding of social expediency changes.[85] I could add to his concern another, based on the other aspect of the national consensus as I have been describing it: if we remove every religious underpinning from our conception of national unity, the goal of national unity will not continue to commend itself to a people increasingly concerned with religious solutions to the difficulties with which it is faced. As a matter of fact, however, we are still very far from abandoning the religious foundation of our social and political commitments. Rather, the problem presented us by the demise of the nonsectarian system is one of accurately expressing and adequately institutionalizing the defining national religious consensus we continue to feel we have.

For this problem I have no full-blown solution to offer; indeed, it is probably too early for anyone to have one. It seems, however, that there are two basic principles around which a solution can be constructed. These are freedom and dialogue. To show that they will serve the purpose, it must be shown, first, that they are in fact elements of our national consensus, second, that they are religious elements, and, third, that we may give institutional

petent state, for it subjects the state and the entire social order to goals dictated by revealed religion and not under the control of state or society. Nor is Erastian thought oblivious to the essential duality introduced into political life by the intervention of the revealed Word of God through the ministry of men. But for the Erastian that essential duality is not between the institutional church and the institutional state, but rather between *ecclesia discens* and *ecclesia docens,* two aspects of the church — the one conceived as receiving divine revelation, the other as promulgating it. The duality thus conceived is consistent with a wide variety of institutional forms, and neither excludes nor requires a close integration between *ecclesia discens* and the state.

85 13 NATIONAL REVIEW 145 (1962). Traditional natural law theories will not serve the purpose, as they encompass both moral and juridical elements, and tend to impose no limitation beyond that of expediency on the embodiment of moral principles in juridical form. See Murray, *Should There Be a Law?,* in WE HOLD THESE TRUTHS 155 (1960).

expression to them without infringing any recognized right of those who reject them. Let us see if such a showing can be made.

Turning first to the question of freedom, it is scarcely necessary to demonstrate that we have a national commitment that goes by that name. The serious question is whether it is a religious commitment. There was certainly a religious element in the early history of this commitment;[86] not only did the Founding Fathers call upon God to validate their positions, they also included religious considerations alongside social-contract philosophy among the serious arguments they advanced.[87] Jefferson is particularly eloquent in this regard:

> If the magistrate command me to bring my commodity to a public store house I bring it because he can indemnify me if he erred & I thereby lose it; but what indemnification can be given one for the kingdom of heaven?[88]

These arguments in their eighteenth-century form tend to look to a theology of personal responsibility that not all Christians could accept; yet, the idea that salvation cannot be imposed on a man from the outside would seem to have a broader scope, and to comport with most theological systems.

The nonreligious bases which the Founding Fathers found for the principle of freedom have not stood the test of time as well as the religious argument has. These bases seem to have been, on an ideological level, the theory of the social contract in one form or another, and, on a practical level, a well-founded belief in the capacity of free individuals for realizing the potentialities of our country for secular achievement. To see how our commitment to freedom is a religious commitment, we must consider these alternative formulations of it, and what has become of them.

First, the social contract theories of freedom have in common with religious theories that they stem from a limitation on the competence of government. Because of this common element, the two kinds of theories do not present a particularly incongruous appearance when we find them side by side in the works of the Founding Fathers. There is, however, an important distinction between them in that the religious limitation on the powers of government inheres in the nature of the case, whereas the social contract limitation is artificial. In one case, we say that the government cannot constrain me in matters of religion, because the reward of the religious man is salvation, and the government does not have salvation in its gift. In the other case, we say that the government cannot constrain me in matters of religion because no one has empowered it to do so.

This social contract interpretation constituted a serious moral abdication on the part of organized society, and began to be felt as such when its economic implications began to pinch in the nineteenth century. The *laissez faire* interpretations of freedom that prevailed in the Supreme Court in the late nineteenth and early twentieth centuries were the natural outgrowth of social contract thinking in that they conceived of the social order as a mere regulation of the inherent warfare between man and man over who was to impose his will on

86 1 STOKES 65-517 treats the early period exhaustively.
87 Madison, *op. cit. supra* note 31, presents a good example of this twofold approach.
88 Quoted at PFEFFER 94.

a given portion of the material world. The rejection of *laissez faire* conceptions entailed an interpretation of freedom as directed to a positive end, and as capable of being afforded to all through the positive intervention of government.[89] This meant a rather complete rejection of artificial limitations on government in favor of limitations inherent in the nature of what government was trying to accomplish.

Turning to the argument in favor of freedom as unlocking man's potential for secular achievement, we find that this continues to be among the arguments we advance in favor of freedom, but that the conviction with which we advance it is generally sapped by a certain disillusionment as to the efficacy of secular achievement. We, above all nations, are in a position to be aware that material prosperity does not dull the edge of loneliness or existential anxiety, does not mitigate the prospect of inevitable death. De Tocqueville discerned this awareness in us when he contrasted our condition with that of the hierarchical societies of Europe where the social order was an anodyne.[90] We can find the same awareness in ourselves when we contrast our condition today with that of the newly developing societies abroad where the social order is conceived as a panacea.[91] We become, then, increasingly insistent that it is not enough to say that freedom is good because it leads to secular achievement; we must show what secular achievement leads to.

Increasingly, then, we have understood our commitment to freedom as a recognition of a purpose in man that cannot be fulfilled through the means under the control of organized society — a purpose that entails the organization of society to leave man open to an enlightenment society cannot afford him. Rabbi Abraham Joshua Heschel states a view which could probably command a consensus of Americans in theory, despite our failure to live up to it in practice, when he says that freedom is "openness to transcendence," and that it is our responsibility to maintain "all these political, social and intellectual conditions which will enable every man to bring about the concrete actualization of freedom, which is the essential prerequisite of creative achievement."[92]

This view of freedom, therefore, fulfills the first two conditions I have laid down for acceptance as a principle of the national religious consensus. It is a religious view, and, as such, it is a national commitment. It also fulfills the third of my conditions in that its embodiment in the constitutional doctrine of the Supreme Court constitutes an institutional expression that is maintained to the exclusion of the claims of those who hold other interpretations of freedom. Thus, against those who hold for freedom as ancillary to social utility, the Court says in *Pierce v. Society of Sisters:* "The child is not the mere creature of the

89 See my *Due Process and Social Legislation in the Supreme Court,* 33 NOTRE DAME LAWYER 5 (1957).

90 DEMOCRACY IN AMERICA pt. II, b. 2, ch. 2, 13.

91 See Time, June 1, 1962, p. 48, reporting the findings of psychiatrist Viktor E. Frankl of the University of Vienna. Dr. Frankl defines a condition he calls "existential vacuum," which is the doubt that life has any meaning. In a survey of his own students, Dr. Frankl found that this condition had been felt by 40% of the Germans, Swiss, and Austrians among them, and by 81% of the Americans. He attributes this condition to industrialization, whereby modern man is cut off both from animal instinct and from social tradition.

92 Heschel, *The Religious Message,* in RELIGION IN AMERICA 244, 260-61 (Cogley ed. 1958).

State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him *for additional obligations.*"[93] By the same token, those who hold that freedom is limited by morality and those who hold that freedom imports the absolute autonomy of the will are alike refuted in the doctrine of the Court on the subject of free speech. Thus it is that of two passages offending alike against prevailing principles of sexual morality, one will be protected because it represents an effort at genuine literary communication, whereas the other may be suppressed because it represents no more than an appeal to prurient interest for the sake of financial gain.[94] Thus also, we may litter the streets with handbills extolling the most dangerous and immoral of philosophies, but not with handbills extolling the most innocuous of soaps.[95] In short, we do not limit a man's freedom to what is moral or socially expedient, nor do we extend it to whatever he wishes to do. If he seeks a goal within the gift of society, he must seek it along the lines society has laid down. But the reaching out to some elusive immortality, some mysterious communion with God or man — these society cannot give, and these society cannot take away.

Freedom, then, in our society, is an element of a national religious consensus in that it is conceived of as imposing on the efforts of organized society a limitation and a direction, both of which are derived from an essential insight into the spiritual nature of man. This essential insight is in some sense a religious one. It is at the same time one our society continues to maintain against anyone who would alter the direction or transcend the limitation society derives from it.

This brings us to the second element I have proposed for a national religious consensus — dialogue. The term "dialogue" as applied to the subject of religion refers to conversation among persons of different beliefs, having for its purpose mutual understanding and respect, rather than agreement. To this end, it stresses personal affirmation, and eschews both apologetics and compromise. It is not hard to show that dialogue as thus understood is a religious commitment. Its development is largely the work of theologians, perhaps the most influential among them being Martin Buber.[96] Also, its underlying presuppositions seem to be religious. Its aspiration to personal rapport among persons of different religions is born of the recognition of a common spiritual nature and a common spiritual predicament. Its hope for such rapport lies in the recognition that God is a Person. Unity among those who seek Him lies

93 268 U.S. 510, 535 (1925). (Emphasis added.)

94 Roth v. United States, 354 U.S. 476 (1957). This case is significant in that Judge Frank, in a concurring opinion below, had invited the Supreme Court to apply to material appealing to prurient interest the same clear and present danger test applied to material appealing to any other interest. United States v. Roth, 237 F.2d 796, 801 (2d Cir. 1956).

95 Valentine v. Chrestensen, 316 U.S. 52 (1942). The holding in this case that commercial advertising was not protected by the constitutional guarantees of free speech seems to have commanded general acceptance, although the Supreme Court advanced neither reason nor authority to support it. The majority opinion below did no better. 122 F.2d 511(2d Cir. 1941). The only attempt at a rationale was made by Judge Frank, dissenting below. 122 F.2d at 517. He based a preference for the ideological over the commercial on the requirements of communication in a democracy — which seems inconsistent with his position in *Roth*. But the democratic communication rationale will not cover all the interests presently given higher constitutional protection than is given to commercial advertising.

96 For a selection of Buber's works along these lines, see FOUR EXISTENTIALIST THEOLOGIANS 155-229 (Herberg ed. 1958).

not in describing Him, but in finding Him — not in reducing theological formulations to their lowest common denominator, but in pursuing every such formulation to the deepest knowledge of Him that it is capable of yielding.[97]

Dialogue, then, is a religious commitment. Is it a national commitment? Here the question is more difficult, but there is ground for saying that, at least implicitly, it is. In the first place, dialogue is founded on respect for conviction, and respect for conviction is among Americans a rather ingrained habit. If we were to set down the definition of dialogue as given above: "conversation among persons of different beliefs, having for its object mutual understanding and respect, rather than agreement," and poll a representative sample of Americans as to whether they approved of it, can there be any doubt as to the result?

Furthermore, dialogue has the same end of fraternal union that was served by the nonsectarian system with its "common core" approach. As the demise of that system becomes increasingly apparent, it seems likely that those who continue to value the aspiration to fraternal union will turn increasingly to dialogue, as the theologians have already done.

It is, then, as the successor to the nonsectarian tradition that I believe dialogue will take its place as a national commitment. To make this point, it is necessary to consider once more the claims of the two alternatives discussed above — secularism and religious pluralism — that have played in general a role of opposition during the ascendancy of nonsectarianism. Of these, secularism will be in no position to make a bid for acceptance as a national commitment unless it can overcome the disillusionment I have already described with the importance of secular achievement. The serious bid for acceptance is the one that will be made by religious pluralism.

As we have seen, the most telling objection to religious pluralism is that it is "divisive" — *i.e.*, that it is inconsistent with our national aspiration to fraternal union. The version of religious pluralism that comes nearest to meeting this objection is that ably structured by Father John Courtney Murray.[98] Father Murray has a place in his system for each of the four great traditions in American life — Catholicism, Protestantism, Judaism and secular humanism — and to govern relations among them he offers substitutes for the aspiration to fraternal union and for religious dialogue as I have been describing it. These substitutes are respectively civic amity and civic dialogue:

> Hence the climate of the City is . . . distinctive. It is not feral or familial but forensic. It is not hot and humid, like the climate of the animal kingdom. It lacks the cordial warmth of love and unreasoning loyalty that pervades the family. It is cool and dry, with the coolness and dryness that characterize good argument among informed and responsible men.[99]

Father Murray tends here, as he does generally, to see in American institutions a rational tradition where others, including myself, would see a religious tradi-

97 SKYDSGARD, ONE IN CHRIST ch. 1 (1957); EINHEIT IN CHRISTUS *passim* (Cullmann and Karrer ed. 1960). These deal with dialogue between Protestants and Catholics, and therefore stress the Person of Christ. But the Person of God the Father commands the adherence of Christians and Jews alike.

98 *The Civilization of the Pluralist Society*, in WE HOLD THESE TRUTHS 5 (1960).

99 *Id.* at 7.

tion.[100] While I am not prepared to offer a full-dress critique of Father Murray's approach, I do not think reason is capable of the task he sets it.[101] My own experience of the climate of the City is that it is not forensic but familial. Its discord is that of relatives throwing the family china at one another, and its concord is that of persons living together intimately — a concord based on a habit of reverence before the awful and impenetrable mystery of another human being. This habit of reverence may come from instinct, or it may come from revelation. I do not think it can come from reason.[102] In short, as against fraternal union and religious dialogue, Father Murray's substitute seems entirely too cool and dry to prevail.[103]

While the claim of religious dialogue to acceptance as a religious element in our national consensus shows every likelihood of prevailing in the long run, it has not yet been fully embodied in our institutional structure. Thus, only a tentative showing can be made that religious dialogue fulfills the third of the conditions I have laid down — that it can be given institutional expression without infringing the rights of those who object to it. I find such a tentative showing in the increasing reliance on dialogue in the more sophisticated of the arguments being put forward in support of the unitary public school system and the continuing denial of public funds for alternative educational efforts.[104] These arguments presuppose that the aim of the parochial school system is to withdraw Catholic students from dialogue with Americans of other religions; until the proponents of that system are able to meet this presupposition head-on, it is most unlikely that they will get a favorable hearing outside their own ranks for their claims to public support. To this extent, our commitment to dialogue may be expected to impinge coercively on the proponents of religious pluralism. By the same token, it seems not unlikely that a true dialogic pattern of religious practices in the public schools, if it could be developed, would be sustained against secularist objections.[105]

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100 This seems also to be GABRIEL's interpretation of the American consensus, which he characterizes over and over again as the democratic faith.

101 Murray seems aware of the difficulty of persuading Americans that they have a consensus based on reason. *Two Cases For the Public Consensus,* in WE HOLD THESE TRUTHS 79 (1960).

102 Murray seems to include both the sovereignty of God and the sacredness of man among the elements of the rational consensus he discerns. In view of the widespread rejection of natural theology among contemporary non-Catholic theologians, this seems an unwarranted imposition of Catholic thought patterns on the American consensus. A survey taken a few years ago reports that 83% of Americans believe the Bible to be the revealed word of God. Catholic Digest, May 1954, p. 21. Do anything like that number believe in natural theology?

103 It is perhaps symbolic that at the very gathering keynoted by the paper from which the above words are quoted, a gathering at which informed and responsible men had been assembled for just the purposes Father Murray describes, the subsequent meetings were neither cool nor dry. Rather, according to James O'Gara, writing shortly after the event, they passed from a stage of subsurface "suspicion, hostility, aggression" which gave rise to "an acrimonious debate" to a stage of religious dialogue in which "Christian spirit spoke to Christian spirit." 68 COMMONWEAL 227-29 (1958).

104 See Nichols, *Religion and Education in a Free Society,* in RELIGION IN AMERICA 148 (Cogley ed. 1958).

105 See Kahn, 77 COMMONWEAL 257, 258 (1962):

> The Court has by no means declared itself concerning the validity of spontaneous and voluntary religious activities within public institutions. Granted that judicial clarification concerning the manner in which such spontaneous activities can legitimately occur may be reserved for the future,

To sum up, the value of freedom and dialogue as the root principles in our national religious consensus lies in their conformity on the one hand to what is deepest and truest in our traditional aspirations as a people, and on the other hand to a recognition of those central mysteries of human existence to which the most important of religious affirmations are addressed.

It would be comforting to be able to derive from this formulation of principles some consequences of practical application to the church-state problems currently facing our schools and our society. But I see these principles less as furnishing a logical basis for solving problems of this kind than as conducing to an atmosphere in which they may be solved. The profoundest consequence of a national religious consensus worked out in terms of freedom and dialogue is that it becomes the concern of every citizen that every other citizen live out his own deepest commitments to the fullest possible extent. It is in the context of heightened spiritual awareness afforded by such a living out that we await the manifestation of divine power whereby freedom may be consummated in salvation, dialogue in unity. And it is in this concern for such a living out that we may hope for a solution to our immediate problems of church and state.

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there is no indication that inroads have been made on the religious tradition that is inseparably linked with the democratic ideal.

What is more likely is that the future will call for *new forms* of expression of this tradition which will safeguard the basic principle of public acknowledgment of religion while purifying itself of the remnants of *de facto* establishment in which this tradition has been previously embodied. Concretely, it is conceivable that the public schools could declare various and limited holidays throughout the year, in which the principal denominations in their own symbolic and esthetic forms express the spirit of devotion that permeates their lives. Even the agnostic humanist may have his day. It is not unthinkable that, with the growth of tolerance, Jewish and Christian students may recognize interiorally that even here an unknown God receives due praise.

It is also possible that what Murray proposes for the University, *Creeds at War Intelligibly*, in WE HOLD THESE TRUTHS 25 (1960), could be adapted in some form for the schools.