issues. Others, such as the diagnostic methods employed by the more Freudulent psychologists,[39] and the increase in the amount of hide which motion picture actresses are expected to expose,[40] have more entertainment value than real importance. But all alike are treated in a manner which may charitably be described as sciolistic.[41]

All the same, I am glad that Mr. Packard picked these topics, and particularly the Bill of Rights, for the latest in his string of best sellers. If the gap between *The Naked Society* and the polemics of James Madison is as the Grand Canyon, be it remembered that Mr. Packard's useful and unpretentious volume is aimed at a mass audience which, if it lacks the wit and education to read and understand the prose of the founding fathers, is nonetheless allowed to vote, and on whose understanding depends the survival of our ancient liberties. The defense of the first ten amendments has been too often left to eggheads, while such masters of the popular style as the late Joe McCarthy systematically downgraded them to a point where millions of honest, if not overly bright, citizens regard as subversive contemporary advocacy of the ideas contained in the first, fourth, fifth and sixth amendments. If Mr. Packard can help to reverse that trend, he deserves well of the Republic.

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THE SUPREME COURT AND PUBLIC PRAYERS: THE NEED FOR RESTRAINT. By Charles E. Rice.* New York: Fordham University Press, 1964. 202 pp., $5.00.

RELIGION, THE COURTS, AND PUBLIC POLICY. By Robert F. Drinan, S.J.** New York: McGraw-Hill Book Co., Inc., 1963. 261 pp., $5.95.

Professor Rice's thesis is that government cannot remain neutral with respect to religion and that the Supreme Court's decisions in the school prayer cases[1] will merely substitute one religion, agnosticism, which entails "a perpetual suspension of judgment on the part of government as to the existence of God,"

39. See, *e.g.*, pp. 141-42, for a description of tests solemnly instituted to detect among school children Oral Eroticism, Anal Sadism, Oedipal Intensity, Penis Envy and other fearfully and wonderfully named specimens from the neo-Freudian bestiary.

40. Pp. 220-21.

41. One of Mr. Packard's bits of doubtfully relevant information is, however, worth the price of the book. Any transistor radio within a "few feet" can be put out of action by dialing your own set (silently) to a point 460 kilocycles below the wave length of the station broadcasting the offensive noises. P. 339.

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1. Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

for another, the theistic profession that "there is a God and . . . a divine law to which men and nations are subject."[2] To avoid the consequence of this, the moral disarming of the country in its struggle with materialistic Communism, he urges support for a constitutional amendment as a means of checking "the agnostic trend of the Court" and thereby reconsecrating the nation. This would enable us to "draw upon the religious wellsprings of our greatness [in order] to fulfill our national destiny," which is to preserve freedom against Communist tyranny.[3]

But Rice does not rest his case against the prayer decisions merely on this appeal to their possible consequences. He states at the outset that these cases were wrongly decided, and to prove it he turns to history: to the Declaration of Independence, the debates of the Constitutional Convention and to those of the first Congress, to the proclamations and inaugural addresses of various presidents, and to the constitutions of all fifty states, from all of which he amasses a host of references to God. Since the logic of the prayer cases would make all these official pronouncements unconstitutional, and since so many Americans, including the framers of the first amendment, obviously did not regard them as unconstitutional, it follows for him that the prayer cases were wrongly decided.

Of course, this history proves both too little and too much. It proves what everyone already knows, and it also proves that the original first amendment, by placing limits only on the national government, did not prevent and was not intended to prevent all kinds of state laws respecting an establishment of religion, including even laws prohibiting Roman Catholics from holding public office.[4] Surely we can all agree that the fourteenth amendment was intended so to incorporate the first amendment as to prevent at least that sort of thing; we begin to disagree when we consider what else it was intended to prevent, and the words of the amendment provide very little to guide us. Rice argues that the Court, following the *Palko* rule,[5] should permit state and local governments greater latitude and flexibility in dealing with religion than Congress enjoys,[6] but he fears that the Court, driven by its logic, will not permit this. In fact, he thinks it will now go right on to invalidate tax exemptions, both state and federal: ". . . the logic of the various opinions makes that result a probability," he says.[7] He may be right. It is not a difficult task to show that the principle of the prayer cases cannot logically be withheld from cases involving

2. Rice, pp. ix-x.

3. Rice, pp. xii-xiii.

4. The North Carolina Constitution of 1776, Article XXXIII, provided that only Protestants were eligible to hold public office in the state. This constitution remained in force for sixty years.

5. The fourteenth amendment applies to the states only those provisions of the Bill of Rights that are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937).

6. Rice, p. 135.

7. Rice, p. 102.

the constitutionality of tax exemptions or of certain public oaths, to mention another example; but it is no more difficult to show that the Court will be ill-advised to be guided only, or even primarily, by logic. This is not to suggest that decisions should not be "principled;" it is to insist that the Court, since it is now avowedly engaged in making political policy (and not only in religious cases), must be guided by the virtue that is supposed to govern politics, namely, prudence.

The prayer cases were not "wrongly decided" on the merits; they were "wrongly decided" because they were decided on the merits. They were not "wrongly decided" because they were "unprincipled," in Professor Wechsler's sense of that term; they were "wrongly decided" because the Court ignored the standing requirement and thereby reached the merits. Unfortunately, Rice does not make this argument as well as he could have. To have denied standing to the Unitarians of New Hyde Park, New York, or to Mrs. Murray, having granted it to Mrs. McCollum, might not have been consistent, but it would have avoided what the Court's actions threaten now to do, and what the first amendment was designed to prevent: the making of religion into a national political issue. As Professor Bickel has so persuasively argued, in addition to invalidating legislation as "inconsistent with principle," and validating legislation as consistent with principle, the Court may also do neither, and there are occasions when it best performs its function by doing neither — that is, by refusing to decide a case on the merits.[8] To do this may not "be principled in the sense in which we have a right to expect adjudications on the merits to be principled,"[9] but, I would insist, in the area of religion it would be wholly in the spirit of the Constitution. It is up to the Court and the commentators to learn to live with the illogicalities left unresolved.

Professor Rice subtitles his book, The Need for Restraint, an admonition addressed to the Court. Dean Drinan's temperate, and for this reason among others, praiseworthy book demonstrates that it is not only the Court that needs to learn restraint. He deals with every aspect of the contemporary religion-government controversy in this country, showing what is important and what is not, fairly setting forth the views of his antagonists as well as those of the Roman Catholic Church, which he supports — but not uncritically — analyzing the relevant case law, and because of all this, providing the reader with an understanding of what is involved and at stake in the controversy. He also shows us that learning to live with illogicalities means learning to live and let live, and it seems obvious from his account that too many of us, who have now been given access to the Supreme Court, are not willing to do this. He does not attribute bad motives to anyone, but the reader is left wondering whether it is really a concern for constitutional integrity that moves many of the participants in this controversy.

Is it a concern for the Constitution or is it something else that leads the Los Angeles chapter of the American Civil Liberties Union to seek to enjoin

8. BICKEL, THE LEAST DANGEROUS BRANCH 69 (1962).
9. *Id.* at 132.

the use of the words "under God" in the Pledge of Allegiance? (And even if the civil libertarians are morally outraged by being expected to recite these words, can they not be made to see the probable consequences of a Supreme Court decision in their favor — for example, the required number of signatures on Congressman Becker's discharge petition?)

And what difference does it really make to the New Jersey ACLU if chaplains are employed in the military services?

Is it a concern for the law or is it something else that leads local authorities to enforce Sunday closing laws against Jewish merchants? (And if it is a question of unfair competitive advantage, is it beyond the wit of nine men to devise a solution without telling Christians that Sunday closing laws have only a secular reason?[10])

Is it fidelity to the Constitution that accounts for the intense opposition among Protestants to public bus transportation for Catholic school children? Why should the Wisconsin Council of Churches object to a plan whereby children attending private schools would be granted free transportation on the *regular* school buses, not to the private schools they were attending, but to the public schools they were entitled to attend, a plan under which the children would be forbidden to leave such buses before they arrived at the public schools even though they passed directly in front of the private schools on their way?

Dean Drinan, who devotes much of his analysis to this church-related school question, says that the opponents of these schools are moved primarily by a certain view of democracy. This is suggested in a *New Republic* editorial, which he quotes, and which Rice might have quoted to support his charge that agnosticism will be the newly established national religion: "'. . . it is the mission of the state to discourage parochial schools . . . . [W]e misunderstand the scheme if we think of the state as neutral. It is neutral in that it must prefer none of our many religious and cultural strains. But it is itself committed to exerting a secular, unifying, equalitarian force.' "[11] He then quotes a Methodist bishop to the same effect: "'It cannot be argued . . . that a system of private and parochial schools could meet the basic requirements of democracy . . . . Such schools are designed primarily to serve denominational interests and to foster institutional control of the educational process. Certainly the values of democratic citizenship can be more fully realized by public education.' "[12] In his restrained fashion Dean Drinan asks: "Do not these two opinions assert, or at least imply, that the basic objection . . . to any form of Federal aid to nonpublic schools derives from the almost mystical powers which they attribute to the public schools?" Perhaps. But is it merely an attachment to the public schools that leads Max Lerner to argue that the Court "took the first step in breaking

10. Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

11. Drinan, p. 177.

12. *Ibid.*

down the separation of church and state when it 'decided [in *Pierce v. Society of Sisters*[13]] that a religious group could not be compelled to send its children to the public schools, and it could run its own schools at its own expense.' "[14] It is one thing to argue that nothing in the Constitution prevents a state from requiring all children to attend public schools, but it is something else — a doctrinaire liberalism or perhaps even an intolerance differing from Know-Nothingism only in the polite form it takes — to argue that the first amendment of the Constitution requires this compulsion, or at least, that the first amendment is violated unless a state be permitted to compel children in this manner.

In the beginning of his book Dean Drinan reminds us that we existed under the present Constitution for a century and a half "without a ruling from the nation's highest tribunal on the constitutional prohibition of an 'establishment' of religion."[15] We had an establishment of sorts: "We are a Christian people," Sutherland reiterated for the Court as recently as 1931.[16] Nominally Christian and Protestant, we were generally satisfied with what Drinan calls "an informally established 'pan-Protestantism;' " and those who were not satisfied, perhaps because they were neither Christian nor Protestant, either accommodated themselves or received short-shrift in the federal courts.[17] What may be said to distinguish the present from the past is not, as he suggests, that America is a "newly pluralistic land," by which he means that so many of us are now Roman Catholic and Jewish as well as Protestant; this is true enough, but there were Roman Catholics and Jews in this country from the beginning, and even non-believers, if the truth be told. What has happened is that the Supreme Court has provided a forum for the militant secularists who insist that this *informally* established "pan-Protestantism" be replaced by a formally established "agnosticism," as Rice puts it, or, in the words of the *New Republic*, a "secular, unifying" equalitarianism.[18] But the framers of the first amendment recognized that the nation was not united on religious matters, that it was a "house divided," and they knew that any attempt to unite us on either a religious or an anti-religious principle would succeed only in transforming religious passions into political passions. We have already seen the beginning of this, and we shall certainly see its culmination if the Court continues along the lines suggested by Douglas in his concurring opinion in *Engel v. Vitale*. Such judicial action would almost certainly be followed by political action, and to judge by what has already taken place in the House of Representatives, that political action will not take a principled form.

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13. 268 U.S. 510 (1925).
14. Drinan, p. 118.
15. Drinan, p. 4.
16. United States v. Macintosh, 283 U.S. 605, 625 (1931).
17. See, *e.g.*, Davis v. Beason, 133 U.S. 333 (1890).
18. Drinan, p. 177.

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