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Meiklejohn: *Political Freedom*

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POLITICAL FREEDOM. By *Alexander Meiklejohn*. New York: Harper & Brothers. 1960. Pp. xxv, 166. \$3.50.

Mr. Meiklejohn's book, *Free Speech and Its Relation to Self-Government*, appeared in 1948. His latest volume incorporates the 1948 text as Part I and includes in addition under Part II, entitled "The Freedom of the Electorate," a new chapter on the limitations of congressional authority, the transcript of testimony given by him before the Senate Subcommittee on Constitutional Rights on "The Meaning of the First Amendment," the text of several previously published articles dealing with the freedom of scholars and teachers, a letter to the *Harvard Crimson* and a petition addressed to him by Congress, both dealing with legislative investigation of political beliefs and associations.

The earlier treatment of free speech in its relation to self-government is the most substantial part of the new book, for in it the author states his basic conceptions of the function of free speech in a self-governing society. Those who did not read the earlier volume should welcome this further opportunity to become acquainted with what some have described as a classic treatment of the subject. This is not to belittle the significance of the materials found in Part II, with its discussion of academic freedom and integrity, prompted by the actions of some universities in requiring professors to take oaths relating to political beliefs, and of the critical issues raised by congressional investigations into political affiliations. These discussions reveal the same stimulating qualities of style and thought that distinguish the earlier chapters on free speech. The basic premises, however, for the treatment of these questions are established in Part I.

It should be observed at the outset that Mr. Meiklejohn is a master of clear, direct and persuasive prose. The fine quality of his writing reflects the clarity of thinking and incisiveness of analysis that impart such a convincing quality to his arguments. In turn, his reasoning stems from premises based on solid and mature thought. Here we have intellectual and moral integrity of a high order, and any reader can understand why the author's former students, like Professor Malcolm Sharp, who wrote the very interesting Foreword, should speak with respect and affection for a teacher whose clear thinking and high sense of values must have been a stimulating classroom force.

The basic premise upon which Mr. Meiklejohn proceeds is that the people of the United States are their own rulers, that by means of the Constitution they have entered into a compact whereby they retain their position as rulers in a self-governing society, that freedom of discussion is a means of arriving at informed judgment on matters of public concern, and that in view of the centrality of free speech in the discussion and decision-making process, this freedom may not be limited except under very narrowly prescribed circumstances when speech becomes irrelevant or is identified with overt criminal conduct. In short, he argues that the First Amendment when it says that Congress shall make no law abridging

freedom of speech means just that. The position he takes, at least so far as it pertains to speech in the area of public affairs, is essentially the same position as that taken by Justice Brandeis in his famous concurring opinion in the *Whitney* case,¹ by Justices Black and Douglas of the present-day Court,² and also at times expressed by Justice Holmes,³ although Mr. Meiklejohn feels that Justice Holmes, in formulating the clear-and-present-danger test in the *Schenck* case,⁴ laid the foundations for an interpretation of the First Amendment which has done much to impair its vitality.

In developing his thesis, Mr. Meiklejohn, as part of his first chapter, presents the picture of the New England town meeting where each interested citizen has not only his own voice to speak in respect to the subject but joins with others in a process of mutual hearing and discussion, or what Meiklejohn calls the process of sharing the truth, to the end that a decision based on an awareness of all the relevant considerations may be made. Free speech thus serves an indispensable political function. In the town meeting no one's views may be denied because he may be expressing unpopular opinions. It is only when the roof caves in on the town meeting that speech becomes futile and it is only then that the moderator may call the meeting off. For Mr. Meiklejohn the town meeting puts in miniature the whole process of public discussion and truth-sharing which gives meaning to free speech on the national level.

In asserting that the First Amendment should be literally construed to deny to Congress any power to abridge the freedom which the people have retained as the rulers in our system of self-government, Mr. Meiklejohn comes close to what may be described as an absolutist interpretation of the First Amendment. Discussion that falls short of incitement to an overt criminal act cannot be limited. The following passage is taken from his book at page 123:

"An incitement, I take it, is an utterance so related to a specific overt act that it may be regarded and treated as a part of the doing of the act itself, if the act is done. Its control, therefore, falls within the jurisdiction of the legislature. An advocacy, on the other hand, even up to the limit of arguing and planning for the violent overthrow of the existing form of government, is one of those opinion-forming, judgment-making expressions which free men need to utter and to hear as citizens responsible for the governing of the nation. If men are not free to ask and to answer the question, 'Shall the present form of our government be maintained or changed?'; if, when that question is asked, the two sides of the issue are not equally open for consideration, for advocacy, and for adoption, then it is impossible to speak of our government as established by the free choice of a self-governing people."

¹ *Whitney v. California*, 274 U.S. 357 (1927).

² See their dissenting opinions in *Dennis v. United States*, 341 U.S. 494 (1951).

³ See his dissenting opinions in *Abrams v. United States*, 250 U.S. 616 (1919), and *Gitlow v. New York*, 268 U.S. 652 (1925).

⁴ *Schenck v. United States*, 249 U.S. 47 (1919).

The interpretation of the First Amendment, epitomized by the foregoing passage, explains why Mr. Meiklejohn objects to the "clear-and-present-danger" test as a means of determining the validity of legislative restrictions on free speech. He argues the the later use of this formula in cases dealing with free speech issues has had a disastrous effect upon our understanding of self-government and has led to annulment rather than interpretation of the First Amendment. Under this formula the expression of a minority opinion may be denied the protection of the First Amendment whenever it involves clear and present danger to the public safety. Mr. Meiklejohn characterizes the clear-and-present-danger language as "a peculiarly inept and unsuccessful attempt to formulate an exception to the principle of the freedom of speech." (p. 45)

Since Justice Holmes was associated with this test and first enunciated it in the *Schenck* case, Mr. Meiklejohn takes occasion to examine the Holmesian philosophy in respect to law and the social order. Holmes, according to the author, was an individualist and this view colored all his thinking. Pointing out that Holmes did not attach much meaning to the idea of the dignity of man, did not share the view of our political society as a self-governing community seeking to achieve common ends in the pursuit of the general welfare, but instead looked upon government and law as a means of reconciling and accommodating competing private interests, and was more likely to think of the "bad man" as an influential factor in the shaping of law, the author concludes that Holmes did not fully appreciate the place of good men in the community and their concern for the common welfare rising above selfish group and private interests and that for this reason did not fully appreciate the meaning of free speech as a means to truth-sharing in the pursuit of the common good of the politically-organized community.

Moreover, Meiklejohn feels that Holmes, in formulating clear and present danger in his interpretation of the First Amendment, confused two basically different ideas—freedom of public speech under the First Amendment, which cannot be abridged, and the liberty of private speech which is protected under the due process clause of the Fifth Amendment. This distinction between the unbridgeable freedom of the people to arrive at decisions on public policy questions by the process of mutual discussion and the qualified liberty under the due process clause to speak on matters of private interest is fundamental to Meiklejohn's thesis and must be fully understood in order to appreciate his interpretation of the First Amendment. Legislation restrictive of the liberty protected by the Fifth Amendment is valid when measured by the standard of reasonableness. Whenever citizens are using speech to advance their own interests, they are asserting at most a liberty that may reasonably be curtailed. This obviously affords wide range for judicial interpretation and weighing of interests. Thus libel and slander laws fit into this category. But this liberty should not be con-

fused with the First Amendment's "freedom" to speak on matters of public concern. This sharp distinction makes clear that Mr. Meiklejohn rejects the idea that the function of government is simply to reconcile and accommodate conflicting private interests. This is a part of it, as he admits, but its more important function is to develop in a positive way the policies that promote the great purposes for which the people joined together in choosing and ordaining this government. It is because of his emphasis on free speech in the determination of public policy that Mr. Meiklejohn entitled his new volume "Political Freedom" and that in the first section of the new Part II he emphasizes the importance of the electoral process in the system of self-government. His emphasis then is on free speech as the central ingredient of political freedom.

As this reviewer pointed out above, Mr. Meiklejohn writes and argues persuasively. No reader can fail to be impressed by the intellectual force and moral earnestness of its arguments. He makes out a convincing case for the priority of free speech in a democratic society, and his whole treatment tends to give support to the Supreme Court's declarations in recent years that the First Amendment's freedoms are preferred freedoms just because they are the lifeblood of a democratic society.⁵ In the presentation of this point Mr. Meiklejohn has rendered a notable service, and the book deserves wide reading by all citizens to recall for them the first principles with respect to our government.

One may share many of the writer's conclusions without accepting all of his premises. Mr. Meiklejohn, in advancing his thesis, does not rest his case on natural right or even on abstract considerations relating to the function of free speech in a democratic society. Instead, he develops the compact theory of our Constitution, as resting on the consent of the governed and on the retention by the people of the power to make their own decisions including, necessarily, the freedom to speak, the freedom to hear, and the freedom to share truth, all indispensable to the making of these decisions. To some it may appear that characterization of the politically organized society in terms of a compact stretches the concept of contract beyond meaningful significance.

The most vulnerable part in Mr. Meiklejohn's thesis, however (at least it would so appear to lawyers), is the sharp distinction he makes between speech on matters of public interest and speech in assertion of private interest. When the author states that the first type of speech is protected by the First Amendment and the latter by the due process clause of the Fifth Amendment, he is weaving whole cloth so far as legal doctrine is concerned. Certainly the Supreme Court has recognized no such distinction, except insofar as some members of the court have distinguished between freedom of the First Amendment as a restriction on Congress and the same freedoms treated as part of the fundamental liberties protected under the due process

⁵ See McKay, "The Preference for Freedom," 34 N.Y. UNIV. L. REV. 1182 (1959).

clause of the Fourteenth Amendment.⁶ The attempt to classify by reference to these distinctions creates difficulties that Mr. Meiklejohn does not attempt to resolve, although he does suggest that it would be appropriate to bring within the private interest category the speech activities by "lobbyists for special interests, by advertisers in press or radio, by picketing labor unions, by Jehovah's Witnesses, by the distributors of hand bills on city streets, by preachers of racial intolerance, and many others." (p. 83)

The suggestion that persons preaching race hatred are serving private interests and cannot claim the protection of due process illustrates the difficulty of classification. To be sure, the majority in the *Beauharnais* case⁷ characterized the Illinois anti-hate statute as an extension of libel, and probably Mr. Meiklejohn would concur in this result. Yet Justices Black and Douglas dissented because they viewed this actually as an exercise of the right to petition since the defendants were trying to influence local governmental policy. Or consider the validity of legislation directed against obscene literature. In the *Roth* and *Alberts* cases,⁸ the Court answered the First Amendment argument by saying that obscenity did not come within the free speech guarantee. Mr. Meiklejohn (in the event he agreed with this result, and the reviewer is not so sure he would) would have to say that the First Amendment was irrelevant since the distributors of these books were engaged in a business enterprise for their own profit and were thereby advancing their own interest, and that at most, therefore, they could claim a restricted liberty under the due process clause of the Fifth Amendment. Yet dissenters in these cases objected that the First Amendment was designed to protect against the kind of thought control they found present in the statutes. To mention cases like these is to suggest the problem of classification if we are to follow Mr. Meiklejohn's categories. Moreover, as he recognizes, the real importance of free speech under the First Amendment is not to be defined so much in terms of the right of the speaker but rather in terms of the right of a community to hear and to make a decision after all views have become known. If this is so, then certainly

⁶ See Justice Jackson's dissent in *Beauharnais v. Illinois*, 343 U.S. 250 at 288 (1952), and Justice Harlan's separate opinion in *Roth v. United States*, 354 U.S. 476 at 500-508 (1957).

So far as the Fourteenth Amendment and the restrictions on state power are concerned, the author (pp. 52-54) suggests the argument that the privileges and immunities clause should be employed to protect freedom of political speech against abridgment by the states, to parallel the First Amendment restriction on Congress, and that the due process clause should be used to protect private speech against unreasonable restriction by the states. However, since the Supreme Court in application of the fundamental rights interpretation has said that the First Amendment freedoms are incorporated into the Fourteenth Amendment via the due process clause, the application of Mr. Meiklejohn's theory which distinguishes between speech on matters of public concern and speech in promotion of private interests leads to the result that two basically different kinds of speech are recognized as part of the "liberty" protected by the due process clause of the Fourteenth Amendment.

⁷ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁸ *Roth v. United States*, *Alberts v. California*, 354 U.S. 476 (1957).

many forms of speech based on the assertion of private interest become matters of public concern insofar as they become the basis of political decisions. Lobbying and dissemination of propaganda by private interests surely play a part in the shaping of legislative policy on important public questions. Perhaps it is not too much to say that the Communist Party in advocating overthrow of government in order to advance its own power is asserting a selfish interest which, however, is rescued from the lower liberties secured by the due process clause because it is relevant to the people's final decision on the question whether they want a change of government. In any event it is difficult to see why the Communist Party's advocacy of violent overthrow of government stands on a higher level than a labor union's advocacy of repeal by the usual legislative process of the Taft-Hartley Act or a natural gas company's advocacy of repeal of federal legislation providing for federal control of the price charge by a producer of natural gas.

Notwithstanding the difficulties, there is a practical merit in Mr. Meiklejohn's position which appears to be recognized by the Supreme Court decisions as evidenced by the *Beauharnais* and *Roth* cases, neither of which spoke in terms of clear and present danger, and which rested on the exercise of the police power to protect appropriate public interests. On the other hand, the decisions in the cases dealing with internal security legislation,⁹ whatever one may say about the outcome of these decisions, do indicate that the Court regards speech when related to freedom of political action as rising to a higher level.

This leaves for discussion Mr. Meiklejohn's criticism of the clear-and-present-danger test, which he regards as inimical to the freedom that the First Amendment requires in respect to speech as a concomitant of political freedom. The use of this test may be criticized quite apart from the basic considerations advanced by Meiklejohn against it. It is an illusion to treat the phrase as a test. Even before its dilution in the *Dennis* case,¹⁰ it did not convey the precise and certain meaning that we may expect of any so-called "test." And certainly the substitution of "clear and probable danger" in the *Dennis* case further impaired the significance of this language. Moreover, the attempt to make it a universal standard in all cases dealing with the various facets of freedom of expression was bound to fail. The words do, however, have value as symbolizing the high and unique place of free speech in our society. Also, the weighing and the balancing-of-interest process which is implicit in the clear-and-present-danger formula does point to the function that the Court has assumed in deciding First Amendment issues. It is here, of course, that Mr. Meiklejohn objects. According to him, there is nothing to weigh against free speech in the discussion of public affairs. Free speech may be limited only when there is no longer opportunity for discussion because the nature of the emergency has made recourse

⁹ See *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382 (1950); *Dennis v. United States*, 341 U.S. 494 (1951); *Yates v. United States*, 354 U.S. 298 (1957).

¹⁰ *Dennis v. United States*, 341 U.S. 494 (1951).

to rational argument meaningless, and it may be punished only when it operates as an incitement to overt criminal conduct. An advocacy of action, even of violent action, not amounting to an incitement to overt criminal conduct, cannot be punished since the people should have an opportunity to pass upon the issues presented by such advocacy. At this point, it appears to the reviewer that Mr. Meiklejohn deviates from the compact theory on which he lays so much stress. The Constitution, which he declares is the basic agreement for self-government to which we are all a party, includes as one of the terms of the contract provisions for amendment and change to be achieved in an orderly and peaceful way. That the people have a right to decide whether to change the government by peaceful means consistent with the terms of the contract is clear. Advocacy of change by violence is not, however, within the terms of the compact. It appears to be a non sequitur that those advocating change by violence must be heard in order that the people may make a decision on whether to change their government.

Since the Supreme Court has not allocated the several facets of free speech to the First and Fifth Amendments, respectively, depending on whether the speech is identified with political freedom or with the assertion of private interest, as advocated by Mr. Meiklejohn, it is fair to predict that the Court will continue to use the pragmatic process of resolving First Amendment questions by balancing the various interests at stake in the cases that come before it. Indeed, this pragmatic method is characteristic of the whole process of constitutional adjudication as it has developed in recent years. Nor is this process necessarily as inimical to freedom as one might gather from Mr. Meiklejohn's criticism. In asserting that the liberty to speak in support of private interest stands on a lower level and in recognizing that even speech in relation to matters of public concern may be limited when it operates as incitement to overt conduct, Mr. Meiklejohn also engages in the balancing process and is telling us what is important in determining where the lines are to be drawn. Free speech must be subordinated to the interest of the public in preventing and punishing criminal conduct. Mr. Meiklejohn reaches his result by saying that speech closely related to certain criminal conduct is outside the First Amendment. The Supreme Court, on the other hand, reaches its result by saying that in this case the public interest in safety and security outweighs the interest of free speech. Mr. Meiklejohn draws the line at the point where speech is identified with overt conduct. The Supreme Court draws it at a point where speech is identified with advocacy directed at promoting unlawful action.¹¹ Whether the Supreme Court in applying its balancing process should draw the line at the same point that Mr. Meiklejohn does is a matter of judgment. When Mr. Meiklejohn says that the First Amendment protects advocacy of conduct that stops short of incitement but does not protect

¹¹ See *Yates v. United States*, 354 U.S. 298 at 318 (1957).

advocacy that actually incites to overt conduct, this too is a matter of judgment.

The point is that the interpretation of the First Amendment in the context of a concrete case requires judgment in the identification and appraisal of the competing interests at stake, regardless of whether the Court approaches its task by a definitional process whereby it labels a certain type of speech as either protected or non-protected under the First Amendment or by a process that weighs the kind of speech involved as against the kind of competing public interest protected by the restrictive legislation. There is nothing inherent in the balancing technique or even in the test of reasonableness that precludes the Court from saying, in line with Mr. Meiklejohn's thesis, that restriction on political speech activities may not be permitted unless the speech is identified with unlawful action. The merit of the balancing technique is that it warrants consideration of all the relevant factors. At this point it may be observed that Mr. Meiklejohn's thesis apparently disregards the whole concept of conspiracy to advance unlawful ends—a concept well recognized in the law and which led Justice Jackson to say in the *Dennis* case that the clear-and-present-danger test and the assumptions underlying it were irrelevant in view of the problem presented there. Surely the conspiracy factor must be taken into account in any appraisal of the total situation. Mention may also be made of the problem presented when the imposition of civil disabilities results in indirect abridgment of First Amendment freedoms, as in the cases where persons are made ineligible for continued public employment if they take part in political activities or fail to disclaim membership in organizations advocating overthrow of the government by force, or where officers of labor unions must sign non-Communist affidavits as a condition of the unions' continued enjoyment of the privileges granted by the National Labor Relations Act. Here again the Court has employed the balancing process and weighed competing interests in arriving at its results.¹² It is not clear whether in Mr. Meiklejohn's analysis these cases should be treated the same as direct abridgments of the kind of free speech he finds protected under the First Amendment or whether he would resolve them by reference to the due process analysis.¹³

¹² See *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947) (prohibition on political activities by federal employees under the Hatch Act); *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716 (1951) (oath required of municipal employees); *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382 (1950) (non-Communist affidavit required of labor union officers under the Taft-Hartley Act).

¹³ Mr. Meiklejohn does make clear that in his opinion a person called before a legislative investigating committee should not be compelled under pain of criminal prosecution to answer questions relating to his political beliefs and affiliations. (pp. 148-164) The First and Fifth Amendments taken together should be construed to give an absolute right to refuse disclosures of this kind. The Supreme Court in applying the balancing process upheld the right of non-disclosure in *NAACP v. Alabama*, 357 U.S. 449 (1958), but rejected the claim in *Barenblatt v. United States*, 360 U.S. 109 (1959), and *Uphaus v. Wyman*, 360 U.S. 72 (1959). Likewise, the Court has sustained a state's power to compel

It is important that the Court, in applying the balancing technique, adequately identify the various public and private interests which are involved and their relative importance.¹⁴ Otherwise the balancing process can easily become a method for rationalizing the dilution of important freedoms. Certainly the function of free speech as a truth-sharing medium to enable a wise decision by the community on matters of public concern gives it the highest priority in the identification and evaluation of interests. Secondly, it is important that the Court, operating within the framework of the identifiable and competing interests at stake, make its own determination on the basis of the record before it to see whether the speech activities in issue were privileged under the First Amendment. It appears to this reviewer that the Court's greatest contribution with respect to free speech is not found in its determinations respecting the constitutionality of statutes but rather in its review of the concrete cases that come before it where speech restrictions are involved. The decision in the *Dennis* case¹⁵ was unsatisfactory since the Court limited itself to an adjudication of the constitutionality of the statute. More meaningful in a good many ways was the later opinion in the *Yates* case¹⁶ where the Court looked at the record to determine whether or not there was evidence that would warrant a jury's finding that the defendants had conspired to advocate overthrow of the government. As one goes back over the earlier cases also,¹⁷ including the *Abrams* case where Justice Holmes wrote his eloquent dissent, it is clear that Justices Holmes and Brandeis in dissent were less concerned with the abstract question of the constitutionality of the statute than they were with the validity of its concrete application by reference to what the defendants had said and any possible public danger that may have grown out of it.

One final point may be made here with respect to Mr. Meiklejohn's book. He accepts implicitly the Supreme Court's position as final interpreter of the Constitution, and rightly attributes a good deal of influence to the Court in the shaping of basic ideas in our constitutional tradition. The question may be raised, however, whether or not Mr. Meiklejohn overestimates the total role of the Supreme Court. One may, for instance, question his statement that the decline in importance of free speech in the past forty years is attributable largely to the Supreme Court. (pp. 79, 106) In the end, the importance of free speech in our society and the sense of concern about its full protection must rest on the understanding of the people.

disclosure of affiliation as a condition of continued public employment. See *Lerner v. Casey*, 357 U.S. 468 (1958), and *Beilan v. Board of Public Education*, 357 U.S. 399 (1958).

¹⁴ See Justice Black's dissenting opinion in *Barenblatt v. United States*, 360 U.S. 109 at 141-145 (1959), where he criticizes the majority opinion for what he regarded as its mistake in determining the proper factors to be weighed. Also see McKay, "The Preference for Freedom," 34 N.Y. UNIV. L. REV. 1182 at 1193-1203 (1959).

¹⁵ *Dennis v. United States*, 341 U.S. 494 (1951).

¹⁶ *Yates v. United States*, 354 U.S. 298 (1957).

¹⁷ See *Abrams v. United States*, 250 U.S. 616 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927).

Congress and the executive must also share this concern. The Supreme Court can lead, and undoubtedly it exercises a teaching function, but as our history has demonstrated, the Supreme Court will over the long run be responsive to and reflect preponderant public sentiments and opinion. The greater need, therefore, as Mr. Meiklejohn also recognizes, is to educate the citizens in respect to the function of free speech in our society and to create that sense of public responsibility essential to the buttressing and defense of this freedom. Mr. Meiklejohn's superb and illuminating treatment is a notable contribution to the subject and is precisely the kind of book that will promote public understanding and appreciation of free speech at its highest level. It deserves a wide reading.

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