

*Louisiana State Board of Education*,<sup>24</sup> which unanimously held that a state can appropriate money to furnish text books to pupils in private as well as in public schools, "concedes greater rights to the state" than *Meyer v. Nebraska*, and *Pierce v. Society of Sisters*.

Some of these same errors appeared in the earlier edition, published in 1934 under the title of *The Legal Status of Church-State Relationships in the United States*. We could wish that the earlier title—which avoids confusion between catchwords and principles—had been retained.

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FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT. By Alexander Meiklejohn. New York: Harper Bros., 1948. Pp. xiv, 107. \$2.00.

Whenever an intelligent layman discusses the law, the result is often like that of the child in the fairy tale who sees that the emperor has been wearing no clothes. This book gives such a fresh outlook and revaluation to material often taken for granted.

Professor Meiklejohn starts with the concept that the Bill of Rights is an integral part of self-government and that the First Amendment means what it says. He therefore takes the position that Congress may not enact *any* law which abridges freedom of speech. Nevertheless he concedes that under certain circumstances speech can be prohibited. He attempts to resolve this apparent paradox by distinguishing between "public" and "private" speech, a distinction which, however, he does not adequately develop.

Thus Professor Meiklejohn insists that no policy may be denied a hearing and no persons barred because "their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. . . ."<sup>1</sup> It is this mutilation of the thinking process against which the First Amendment to the Constitution is directed. On the other hand, he points out that liberty of speech may be curtailed, provided the procedures are proper, under the Fifth Amendment when the speech is private, like that of a merchant advertising his wares or a paid lobbyist. These simple instances, however, do not exhaust the category of private speech which the author believes can, under some circumstances, be prohibited. Professor Meiklejohn does not, for instance, meet the issue of whether the advocacy of the overthrow of the government by force may be punished; for he says only:

Third, the theory fails to recognize that, under the Constitution, the freedom of advocacy or incitement to action *by the government* may never be abridged. It is only advocacy or incitement to action by individuals or nonpolitical groups which is open to regulation.<sup>2</sup>

Professor Meiklejohn's main thesis is that the courts have ignored the distinction he believes to be essential and reduced the area of freedom. He particularly criticizes Justice Holmes' formulation of the "clear and present danger" rule, saying:

Mr. Holmes and the Supreme Court have ventured to annul the First Amendment because they have believed that the due process clause of the Fifth Amendment could take its place.<sup>3</sup>

Professor Meiklejohn rejects the Holmes distinction between speech as action and

<sup>24</sup> 281 U. S. 370 (1930).

<sup>1</sup> P. 26.

<sup>2</sup> P. 90.

<sup>3</sup> Pp. 39-40.

speech as thought, but he agrees with Holmes (as stated in his dissent in the *Abrams* case)<sup>4</sup> that incitement cannot be the dividing line either, pointing out:

He [Holmes] demands freedom not merely for idle contemplation, but for the vigorous thinking and deciding which determine public action.<sup>5</sup>

The author suggests that the clear and present danger test has really been modified by subsequent decisions which permit punishment only where the circumstances indicate "extreme gravity." He quotes with approval from Justice Brandeis' elaboration (in the *Whitney* case)<sup>6</sup> of the meaning of the element "present" contained in the test:

. . . no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for free discussion.<sup>7</sup>

Professor Meiklejohn interprets this modification of the rule as forbidding interference with speech while "the civil processes of discussion and education are available."<sup>8</sup> He suggests that only when ordinary life has broken down can discussion be stopped, and then *all* discussion must be stopped, not merely that of one group alone, saying:

When the roof falls in, a moderator may, without violating the First Amendment, declare the meeting adjourned.<sup>9</sup>

Professor Meiklejohn criticizes not only the courts but writers on the law as well. He disagrees with Professor Chafee,<sup>10</sup> who also has stressed the individual and social interest in free speech, because Chafee apparently considered that both interests were alike guaranteed by the First Amendment. According to Meiklejohn, the public interest is guaranteed by the First Amendment and is absolute. The private interest, he says, is protected only by the Fifth Amendment and can, therefore, under proper conditions, be regulated. In the course of this discussion he points out the need for freedom to listen to all kinds of ideas:

Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.<sup>11</sup>

The book closes with a disquisition on the general ideas of Justice Holmes, whom the author criticizes as too individualistic. He particularly takes issue with Holmes's statement in the *Abrams* case that freedom of expression is guaranteed because of the need to test the truth of ideas in competition with others. This, says Professor Meiklejohn, is but a partial reason. In his view the basic reason is that for man to be self-governing he must have access to all ideas, both true and false:

<sup>4</sup> *Abrams v. United States*, 250 U. S. 616, 624 (1919).

<sup>5</sup> P. 45.

<sup>6</sup> *Whitney v. California*, 274 U. S. 357, 377 (1926).

<sup>7</sup> P. 53.

<sup>8</sup> P. 54.

<sup>9</sup> P. 55.

<sup>10</sup> ZECCHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941).

<sup>11</sup> Pp. 65-66.

The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.<sup>12</sup>

On the other hand, Professor Meiklejohn considers the possibility that under modern conditions there may have to be some restriction on the freedom of scientists because of the development of atomic and bacteriological warfare:

Under present circumstances it is criminally stupid to describe the inquiries of scholarship as merely "the disinterested pursuit of knowledge for its own sake." Both public and private interests are clearly involved. They subsidize much of our scholarship. And the clashes among them may bring irretrievable disaster to mankind. It may be, therefore, that the time has come when the guarding of human welfare requires that we shall abridge the private desire of the scholar—or of those who subsidize him—to study whatever he may please. It may be that the freedom of the "pursuit of truth" must, in that sense, be abridged.<sup>13</sup>

He also suggests that the radio is not entitled to the protection of the First Amendment because, as now conducted, it is merely a business enterprise. This, of course, flies in the face of the many decisions which have guaranteed freedom to newspapers despite the fact that they also are business enterprises.

The sum and substance of the matter is that Professor Meiklejohn, while he has written a provocative book, has not thought his ideas through and has left his subject in almost as much confusion as he found it.

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<sup>12</sup> P. 88.

<sup>13</sup> Pp. 99-100.

