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THE SUPREME COURT AND THE MEIKLEJOHN INTERPRETATION OF THE FIRST AMENDMENT †

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I ESPECIALLY prize the honor of the invitation to deliver the Alexander Meiklejohn Lecture. Dr. Meiklejohn's rich legacy to American education may be seen on virtually every college campus in this land. General acceptance of the educational ideas and practices of this militant champion of freedom may not have been won easily or very soon, but none will deny that his fight over nearly half a century brought substantial victory. None more richly deserved the Medal of Freedom, the nation's highest civilian honor, presented by President Johnson to Dr. Meiklejohn a year ago last December.

The interests of this scholar, philosopher, and man of learning ranged, of course, far beyond his own field of education. He was not a lawyer, yet his views on the first amendment are a significant contribution to the debate over the limits that great keystone of our freedom places on governmental regulation of expression. It is those views and their relevance to the Supreme Court's views of the first amendment that I have made the subject of this lecture.

I think, however, that before undertaking a discussion of Dr. Meiklejohn's views, and comparing his views with those to be found in Supreme Court opinions, some preliminary observations should be made. We must remember that the Supreme Court's concern with the true significance of the first amendment has been primarily confined to the last fifty years. That is not a long time in the history of constitutional interpretation, not long

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enough in any event to justify the assumption that the Court has yet spoken the final word. Why did the first amendment not become a lively issue until after 125 years of our 175 year history? I suggest that the answer is simply that it was only fifty years ago that a significant number of issues under the amendment were fashioned for courts to decide. It is the American habit, extraordinary to other democracies, to resolve many of our social, economic, philosophical, and political questions in lawsuits. In this way important aspects of the most fundamental issues confronting our democracy are ultimately presented to the Supreme Court for judicial determination. But in our frontier days not so much problems of individual liberty as problems of the respective domains of federal and state power incident to territorial expansion and economic growth came to the surface. Issues of individual liberty and the relationship of the citizen to his government waited in the wings pending the events of this century that brought them to the fore. When these problems took center stage the cases often called upon the Court to decide the scope of particular safeguards of the Bill of Rights; but in a nation where the citizen has two governments, federal and state, interpretation was sometimes limited to the question whether a particular safeguard protected the citizen against his state government as well as against the federal government.

As originally adopted, the Bill of Rights applied only against federal power. The great Chief Justice Marshall confirmed this in a case decided in 1833.[1] It was after the Civil War that the demand arose for national protection against abusive exercise of state power, and this demand led to the adoption of the fourteenth amendment with its prohibitions against state abridgment of the privileges or immunities of citizens of the United States, against state deprivation of life, liberty, or property without due process of law, and against denial to any person within its jurisdiction of the equal protection of the laws. In the ninety years since the fourteenth amendment was adopted, the Court has grappled in numerous cases with the question whether that amendment applied the Bill of Rights against state power. For forty years after its adoption, the prevailing view in the Court emphatically rejected the argument that the fourteenth amendment had that effect.[2] It was not until 1908 that a view emerged, not

[1] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[2] See Malloy v. Hogan, 378 U.S. 1, 4 & n.2 (1964).

that all of the Bill of Rights had been made applicable to the states by the fourteenth amendment, but that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."[3] Yet 14 years later, in 1922, the Court held that the first amendment did not meet this test.[4] It was 1925 before the Court came to the view that it did.[5] Since that time a series of decisions has held immune from state invasion every first amendment protection for the cherished rights of mind and spirit — the freedoms of speech, press, religion, assembly, association and petition for redress of grievances.[6] Similarly, decisions over the last fifteen years have held enforceable against the states the fourth amendment's protections against unreasonable searches and seizures,[7] the fifth amendment's exemption from compulsory self-incrimination,[8] the sixth amendment's provision of counsel in all criminal cases,[9] and the eighth amendment's ban on cruel and unusual punishments.[10]

At the same time the Court has debated whether a particular restriction, as applied to the federal government, has a different and more stringent meaning than the fourteenth amendment when it incorporates the standards of that specific in application to the states. The debate on this question still goes on, but the prevailing view is that a provision of the Bill of Rights that is enforced against the states under the fourteenth amendment is enforced according to the same standards as against federal encroach-

[3] Twining v. New Jersey, 211 U.S. 78, 99 (1908).

[4] Prudential Ins. Co. of America v. Cheek, 259 U.S. 530, 543 (1922).

[5] Gitlow v. New York, 268 U.S. 652 (1925).

[6] Gitlow v. New York, 268 U.S. 652 (1925) (speech and press); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) (press); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (assembly); Lovell v. City of Griffin, 303 U.S. 444, 450 (1937) (speech and press); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (religion); Staub v. City of Baxley, 355 U.S. 313, 321 (1957) (speech); Shelton v. Tucker, 364 U.S. 479, 485–86 (1960) (association); NAACP v. Button, 371 U.S. 415 (1963) (association and speech); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (speech and press); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964) (association).

[7] Mapp v. Ohio, 367 U.S. 643, 655 (1961); Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

[8] Malloy v. Hogan, 378 U.S. 1 (1964).

[9] Gideon v. Wainwright, 372 U.S. 335 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942).

[10] Robinson v. California, 370 U.S. 660 (1962).

ment.[11] This is most emphatically the case as to the first amendment.[12]

I now turn to a brief sketch of the views of the first amendment stated in Supreme Court opinions. Many forms of expression have presented questions under the first amendment. Those questions have been raised in cases involving sit-ins [13] and other forms of racial demonstrations, the picket line,[14] the motion picture,[15] the lawsuit when employed as political expression to seek legal redress for violation of civil rights,[16] the rights of workers or lawyers forced into unions or bar associations to complain that the dues they are compelled to pay are used to support candidates or political causes they oppose,[17] and many others. But the basic views of the scope of the first amendment that I shall mention were developed not so much in those cases as in cases involving attempted regulation of the spoken and written word, and it is those views that I shall particularly discuss.

The amendment has 45 words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The first view of the amendment I shall mention is one that has not yet commanded a majority within the Court. It is the so-called "absolute" view which holds that the amendment's words mean precisely what they say: "Congress shall make no law" absolutely prohibits Congress, and through the fourteenth amendment, the states, from making laws abridging the freedoms secured by the amendment. Probably Mr. Justice Black has been the most eloquent and persuasive proponent of this view. In his opinion, for example, since obscenity and libel are forms of speech, laws punishing either are unconstitutional.[18]

It must not be thought, however, that this "absolute" view of

[11] Malloy v. Hogan, 378 U.S. 1, 10–11 (1964).

[12] See Jacobellis v. Ohio, 378 U.S. 184, 191, 195 (1964).

[13] See, *e.g.*, Garner v. Louisiana, 368 U.S. 157, 162–163 (1961).

[14] See NLRB v. Fruit & Vegetable Packers Union, 377 U.S. 58 (1964).

[15] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[16] NAACP v. Button, 371 U.S. 415 (1963).

[17] International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Lathrop v. Donohue, 367 U.S. 820 (1961).

[18] See Roth v. United States, 354 U.S. 476, 514 (1957) (dissenting opinion of Douglas, J., in which Black, J., concurred). See also Black, *The Bill of Rights and the Federal Government*, in THE GREAT RIGHTS 43 (Cahn ed. 1963).

the first amendment denies government the power to regulate the manner and conditions under which speech protected by the first amendment is exercised. Mr. Justice Black has made the point: [19]

> The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes*. This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property . . . . Were the law otherwise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear.

I may say that whatever theory of the first amendment's scope is championed, all schools of thought, and I include Dr. Meiklejohn, are in substantial agreement with Mr. Justice Black that government has some power to regulate the "how" and "where" of the exercise of the freedom; government is not powerless to say that you cannot blare by loudspeaker the words of the first amendment in a residential neighborhood in the dead of night, or litter the streets with copies of the text.[20] In other words, though the speech itself be under the first amendment, the manner of its exercise or its collateral aspects may fall beyond the scope of the amendment. The disagreements are over whether and to what extent government may regulate or suppress speech at places where the speaker has a right to be.

As I said, the absolute view has not prevailed within the Court. A majority of the Justices from time to time have recognized some contexts in which government has power to curb speech as such. One view is that the first amendment renders immune from regulation only speech that has "redeeming social importance." [21] The stated ground of this view is that, although all ideas having even the slightest redeeming social value — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guarantees, implicit in the history of the first amendment is the rejection of speech

[19] Cox v. Louisiana, 379 U.S. 559, 578 (1964) (dissenting opinion) (emphasis in original).

[20] Kovacs v. Cooper, 336 U.S. 77 (1949); *cf.* Breard v. City of Alexandria, 341 U.S. 622 (1951).

[21] Roth v. United States, 354 U.S. 476, 484 (1957).

that is utterly without redeeming social importance. Thus, certain forms of speech — notably obscenity — deemed not to have redeeming social value, are not protected against laws that punish or suppress them. But this view confronts its proponents with problems the absolute school escapes. What is obscenity? Clearly enough, sex and obscenity are not synonymous. The portrayal of sex, for example, in art, literature, and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Thus the moral judgments made by theologians of what constitutes obscenity, if embodied in laws, might well transgress constitutional limits. In other words, the social norm is not necessarily congruent with a religiously held sexual ethic. If the complaint is made by theologians that the social norm provided by the law is too imprecise to constitute any effective check on the publication of obscene materials, it must in turn be admitted that theologians themselves have not provided a precise definition of obscenity even for their own purposes. In their recent comprehensive examination of obscenity and constitutional freedom Dean Slough and Father McAnany have observed that, "for centuries, theologians have worked in the realm of sexual morality, but relatively little has been done in terms of fashioning a working definition of obscenity." [22] True, they go on to suggest that some theologians — they mention particularly the Roman Catholic theologians — see no reason to fashion a definition: "To the theologian . . . there exists no compelling reason to search for a precise definition of the term, for he is primarily concerned with pointing out the dangers inherent in exposing one's self to the type of material one finds particularly stimulating to the sexual appetite." [23] But not all matter depicting or portraying sex is deprived of constitutional protection; therefore the judge may not rely, as may theologians, on the mere presence of sex in formulating a standard.

Judges have struggled for many decades to frame an adequate standard; the standard so far evolved withholds protection only from material that portrays sex in a way that justifies treating the material as utterly without redeeming social importance. The line between protected and unprotected portrayal is dim and uncertain, and judges do experience great difficulty in marking it.

[22] Slough & McAnany, *Obscenity and Constitutional Freedom — Part II,* 8 ST. LOUIS U.L.J. 449, 455 (1964).

[23] *Id.* at 455 n.320.

The standard against which challenged material must be measured is not perfect; perhaps the problem does not lend itself to precise standards. It is clear, however, that the thrust of the constitutional protection is to forbid government to suppress material that, although having sex as its subject, advocates ideas, or possesses literary or scientific or artistic value or any other form of social importance. Thus, the Court has insisted that noncriminal processes to suppress obscenity must embody procedural safeguards against suppressing or inhibiting the dissemination of material that is not obscene. In other words, "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." [24] The Court recently held that the procedural safeguards that must be built into any noncriminal process designed to suppress obscenity must include *first*, assigning to the state the burden of proving that the material is unprotected expression; *second*, deferring imposition of a final restraint pending a judicial determination, to be promptly made in a proceeding in which both sides are heard, that the material constitutes nonprotected expression.[25]

In addition the Court has recognized that it cannot treat an obscenity finding by a judge or a jury as a purely factual judgment to be upset by an appellate court only in exceptional circumstances.[26] The suggestion that a finding of obscenity be treated as a factual finding is appealing, since it would lift from the appellate court's shoulders a difficult, recurring, and unpleasant task. But to accept this suggestion would be to abnegate the responsibility, ultimately the responsibility of the United States Supreme Court, to uphold constitutional guarantees. In several other areas involving constitutional rights the Court has consistently recognized its duty to apply constitutional standards on the basis of an independent review of the facts of each case.[27] It is hard to see why the Court's duty should be

[24] Marcus v. Search Warrant of Property, 367 U.S. 717, 731 (1961).

[25] Freedman v. Maryland, 380 U.S. 51, 58–59 (1965).

[26] See Jacobellis v. Ohio, 378 U.S. 184, 188–90 (1964) (opinion of Brennan, J.).

[27] See Watts v. Indiana, 338 U.S. 49, 50–51 (1949); Norris v. Alabama, 294 U.S. 587, 590 (1935); for first amendment cases see Pennekamp v. Florida, 328 U.S. 331, 335 (1946). See also Haynes v. Washington, 373 U.S. 503, 515–16 (1963); Napue v. Illinois, 360 U.S. 264, 271 (1959); Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659 (1945); Ashcraft v. Tennessee, 322 U.S. 143, 147–48 (1944); Lisenba v. California, 314 U.S. 219, 237–38 (1941); Chambers v. Florida, 309 U.S. 227, 229 (1940); Fiske v. Kansas, 274 U.S. 380, 385–86 (1927).

different in an obscenity case. It is also hard to see why the Court's performance of this function in an obscenity case should be denigrated by such epithets as "censor" or "supercensor." Use of those opprobrious labels can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantees of the first and fourteenth amendments and, in doing so, to delineate the scope of constitutionally protected speech.

Another limiting test of the scope of the first amendment is expressed in Mr. Justice Holmes's words: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." [28] There are many who doubt that this test has much vitality today. Indeed, Dr. Meiklejohn said that Justice Holmes discarded it himself and that it "has confused and defeated the intention of the Court to confer reasonably about what the First Amendment means to say." [29] Be that as it may, the test has had its principal application in cases of speech found to be part of a pattern of subversive action believed to endanger the safety of the nation.[30] Judge Learned Hand rewrote it for the case involving the prosecution of the leaders of the Communist Party, *Dennis v. United States*, and the Supreme court adopted that modification: "In each case [courts] . . . must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." [31] The test has had another application, however — in the very troublesome area of punishment in criminal contempt for publications critical of courts and judges. The Court has held that the free press guarantee of the first amendment bars punishment in criminal contempt in the absence of a showing of a clear and present danger of the obstruction of justice.[32]

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[28] Schenck v. United States, 249 U.S. 47, 52 (1919).

[29] Meiklejohn, *The First Amendment Is an Absolute*, in 1961 SUPREME COURT REVIEW 245, 249 (Kurland ed.).

[30] *E.g.*, Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

[31] 183 F.2d 201, 212 (2d Cir.), *aff'd*, 341 U.S. 494, 510 (1951).

[32] Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

Still another limiting test is the so-called balancing test, whose articulate spokesman among my colleagues is Mr. Justice Harlan. Professor Emerson of Yale has defined it as follows: "The formula is that the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." [33] A case that challenged the validity of a state's refusal to admit an applicant to the practice of law will illustrate the test. The applicant, on first amendment grounds, refused to answer any question pertaining to membership in the Communist Party. There was no proof or suggestion that he was in fact a party member. In an opinion sustaining a state's refusal to admit him to practice law, Mr. Justice Harlan said this:[34]

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . . It is in the latter class of cases that this Court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of a valid governmental function. . . . Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved. . . . With more particular reference to the present context of a state decision as to character qualifications, it is difficult, indeed, to imagine a view of the constitutional protections of speech and association which would automatically and without consideration of the extent of the deterrence of speech and association and of the importance of the state function, exclude all reference to prior speech or association on such issues as character, purpose, credibility, or intent.

This completes the summary of the major views of the scope of the first amendment found in Supreme Court opinions handed down before the 1963 Term. I emphasize "before the 1963 Term" because during that Term the Court handed down the decision

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[33] Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912 (1963).

[34] Konigsberg v. State Bar, 366 U.S. 36, 50–51 (1961).

that reversed the judgment for 500,000 dollars rendered in the Alabama courts in favor of the Police Commissioner of Montgomery, Alabama, against the *New York Times* and four Negro clergymen.[35] The judgment was entered in a civil libel action that was based on allegedly defamatory statements in a full page advertisement critical of the Montgomery police's handling of civil rights demonstrators. At least one distinguished first amendment scholar, Professor Kalven of the University of Chicago Law School, senses in that opinion a departure from, if not the discard of, the "redeeming social value," "clear and present danger," and "balancing" tests in the area of criticism of government and the official conduct of public officials, and the adoption, not of Mr. Justice Black's "absolute" reading of the first amendment, but of a reading in substantial agreement with that which Dr. Meiklejohn has urged.[36] Of course, if Professor Kalven is right, this is an event of considerable importance. It has been well said that "a shift in the basic philosophy of law . . . results in an epoch-making difference in the way a concrete case is decided." [37] But a caveat is in order. Radical shifts in judicial doctrine are rare. They usually occur over long periods step-by-step in a series of decisions.[38] "The complex phenomenon which lawyers know as law is an always unfinished product. It may be compared to a tapestry the weaving of which is never done, which repeats many of the patterns of the past but is constantly adding new patterns and variations on old patterns." [39] What Mr. Justice Cardozo said in another context is apt here: [40]

> The range of free activity is relatively small. We may easily seem to exaggerate it through excess of emphasis . . . . Complete freedom — unfettered and undirected — there never is. A thousand limitations — the product some of statute, some of precedent, some of vague tradition or of an immemorial technique, — encompass and hedge us even when we think of ourselves as ranging

[35] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[36] Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"* in 1964 SUPREME COURT REVIEW 191 (Kurland ed.).

[37] Northrop, *Philosophical Issues in Contemporary Law*, 2 NATURAL L.F. 41, 48 (1957).

[38] *Compare, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963), *with* Betts v. Brady, 316 U.S. 455 (1942). *Compare also* Malloy v. Hogan, 378 U.S. 1 (1964), *with* Twining v. New Jersey, 211 U.S. 78 (1908).

[39] O'Meara, *The Notre Dame Program: Training Skilled Craftsmen and Leaders*, 43 A.B.A.J. 614, 670 (1957).

[40] CARDOZO, THE GROWTH OF THE LAW 60–61 (1924).

> freely and at large. The inscrutable force of professional opinion presses upon us like the atmosphere, though we are heedless of its weight. Narrow at best is any freedom that is allotted to us. How shall we make the most of it in service to mankind?

I shall discuss the *New York Times* case shortly, and also the opinion this Term in *Garrison v. Louisiana*, in which the Court applied the *Times* principle to reverse a conviction for criminal libel of the District Attorney of Orleans Parish, Louisiana, who impugned the official conduct of the judges of the Criminal District Court of the parish. First, let me give you my understanding of Dr. Meiklejohn's view. I open my remarks by repeating that only the so-far-rejected "absolute" view of the amendment embraces a flat denial of all governmental power to regulate speech as such. The "redeeming social value," "clear and present danger," and "balancing" tests recognize some governmental power to inhibit speech, but it must also be said that none of these limitations has been given an across-the-board application. Each has been primarily utilized to sustain governmental regulation in particular contexts: "the redeeming social value" test primarily in obscenity cases; the "clear and present danger" test primarily in regulation of subversive activity and of the publication of matter thought to obstruct justice; and the "balancing" test primarily in the case of regulations not intended directly to condemn the content of speech but incidentally limiting its exercise. But any test, like a stone thrown in a brook, will create ripples that extend far from the center, and the risk is always present that one or all of the tests may be employed more generally to sustain governmental regulation of speech. Dr. Meiklejohn would have none of them. He argued that the people created a form of government under which they granted only some powers to the federal and state instruments they established; they reserved very significant powers of government to themselves. This was because their basic decision was to govern themselves rather than to be governed by others. This was a fundamental departure from the English and other existing forms of government and was this country's great contribution to the science of government. The first amendment, in his view, is the repository of these self-governing powers that, because they are exclusively reserved to the people, are by force of that amendment immune from regulation by the agencies, federal and state, that are established as

the people's servants. These reserved powers, which he labeled powers of "governing importance," are concerned, not with a private right, but with a public power, a governmental responsibility. Freedom of expression in areas of public affairs is an absolute. "Public discussions of public issues," he said, "together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing, we have sovereign power." [41] It is fitting, I think, that Dr. Meiklejohn wrote this in a piece he published when almost ninety. In that piece he elaborated his view and I avoid any misstatement of it by quoting his own words: [42]

> Apart from the First Amendment itself, the passages of the Constitution which most directly clarify its meaning are the Preamble, the Tenth Amendment, and Section 2 of Article I. All four provisions must be considered in their historical setting, not only in relation to one another but, even more important, in relation to the intention and structure of the Constitution as a whole. Out of such consideration the following principles seem to emerge:
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> 1. All constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic. They are, it is true, "the governed." But they are also "the governors." Political freedom is not the absence of government. It is self-government.
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> 2. By means of the Constitution, the people establish subordinate agencies, such as the legislature, the executive, the judiciary, and delegate to each of them such specific and limited powers as are deemed necessary for the doing of its assigned governing. These agencies have no other powers.
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> 3. The people do not delegate all their sovereign powers. The Tenth Amendment speaks of powers that are reserved "to the people," as well as of powers "reserved to the States."
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> 4. Article I, § 2, speaks of a reserved power which the people have decided to exercise by their own direct activity: "The House of Representatives shall be composed of members chosen every second year by the people of the several States . . . ." Here is established the voting power through which the people, as an electorate, actively participate in governing both themselves, as subjects of the laws, and their agencies, as the makers, adminis-

[41] See Meiklejohn, *supra* note 29, at 257.

[42] *Id.* at 253–54.

trators, and interpreters of the laws. In today's government, the scope of direct electoral action is wider than the provisions made when Article I, § 2, was adopted, but the constitutional principle or intention is the same.

5. The revolutionary intent of the First Amendment is, then, to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people.

For the understanding of these principles it is essential to keep clear the crucial difference between "the rights" of the governed and "the powers" of the governors. And at this point, the title "Bill of Rights" is lamentably inaccurate as a designation of the first ten amendments. They are not a "Bill of Rights" but a "Bill of Powers and Rights." The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private "rights of the governed." The First and Tenth Amendments protect the governing "powers" of the people from abridgment by the agencies which are established as their servants. In the field of our "rights," each one of us can claim "due process of law." In the field of our governing "powers," the notion of "due process" is irrelevant.

Dr. Meiklejohn's view did not mean that the agencies of government had no role and that the first amendment protected a freedom to speak at any time and place. He found no fault with laws and ordinances that required the speaker to conform to the necessities of the community with respect to time, place, circumstance, and manner of procedure, as long as these were not mere covers for attempts to suppress speech he classified as having "governing importance." It is these activities of "governing importance" in all their diversity that fall within the scope of the first amendment, and for such activities the amendment gives unqualified protection. Among those activities he put first the freedom to vote; this is the concrete activity by which self-governing men express their judgments on issues of public policy. He also included the vast range of forms of thought and expression by which the voter might equip himself to exercise a proper judgment in casting his ballot. Education in all its phases, the achievements of philosophy and the sciences, literature and the arts, all fall within the subjects of "governing importance" that the first amendment absolutely protects from abridgment.

Dr. Meiklejohn's views would have decided against the government many if not most of the cases applying the "clear and present danger" and "balancing" tests. It might well have produced differ-

ent results in the obscenity cases. Although he equated "social importance" with "governing importance" and believed that only novels that were creations of literature and the arts had "social importance" and should be protected, he seemed to reject out of hand any suggestion that government single out those works without social importance.[43] But Dr. Meiklejohn's position, unlike Justice Black's absolute view, would have allowed distinctions among libel laws by virtue of the principle of "governing importance." He said: [44]

> The principle here at stake can be seen in our libel laws. In cases of private defamation, one individual does damage to another by tongue or pen; the person so injured in reputation or property may sue for damages. But, in that case, the First Amendment gives no protection to the person sued. His verbal attack has no relation to the business of governing. If, however, the same verbal attack is made in order to show unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment. And the same principle holds good if a citizen attacks, by words of disapproval and condemnation, the policies of the government, or even the structure of the Constitution. These are "public" issues concerning which, under our form of government, he has authority, and is assumed to have competence, to judge. Though private libel is subject to legislative control, political or seditious libel is not.

This brings me back to *New York Times v. Sullivan*.[45] Some of the statements in the advertisement were not true. The first amendment question was whether its protections nevertheless limit a state's power to apply traditional libel law principles, since the statements were made in criticism of the official conduct of a public servant. In other words, the case presented a classic example of an activity that Dr. Meiklejohn called an activity of "governing importance" within the powers reserved to the people and made invulnerable to sanctions imposed by their agency-governments. The Court held that Alabama's use of its civil libel law in this context violated the constitutional guarantees. Professor Kalven suggests that the result might have been based on the "clear and present danger," "redeeming social value," or

[43] *Id.* at 262.
[44] *Id.* at 259.
[45] 376 U.S. 254 (1964).

"balancing" tests;[46] however, he correctly points out that the opinion relied on none of these tests. Instead, the Court examined history to discern the central meaning of the first amendment, and concluded that that meaning was revealed in Madison's statement "that the censorial power is in the people over the Government, and not in the Government over the people." [47] This, the Court said, was the lesson taught by the great controversy over the Sedition Act of 1798.[48] That act created a crime, punishable by a $5,000 fine or five years in prison: [49]

> . . . if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States . . . .

That act expired by its terms in 1801, and no case testing its constitutionality was brought to the Supreme Court. It had been roundly condemned, however, as patently unconstitutional in a broadside attack joined in by Jefferson and Madison. The attack was founded upon their claim that the Government established by the Constitution was powerless to impose sanctions for criticism of Government and Government officials. *The New York Times* opinion concludes that this view carried the day in the court of history. The opinion gives particular attention to Madison's views forcefully expressed in the Virginia Resolutions of 1798. The Court states:[50]

> Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. "Is it not natural and necessary, under such different circumstances," he asked, "that a

[46] Kalven, *supra* note 36, at 213–18.
[47] 4 ANNALS OF CONGRESS 934 (1794).
[48] 376 U.S. at 273.
[49] 1 Stat. 596 (1798).
[50] New York Times Co. v. Sullivan, 376 U.S. at 274–75.

> different degree of freedom in the use of the press should be contemplated?" . . . Earlier, in a debate in the House of Representatives, Madison had said: "If we avert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . ." 4 Elliot's Debates, *supra*, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.

Professor Kalven's appraisal of the opinion is this: [51]

> The Court did not simply, in the face of an awkward history, definitively put to rest the status of the Sedition Act. More important, it found in the controversy over seditious libel the clue to "the central meaning of the First Amendment." The choice of language was unusually apt. The Amendment has a "central meaning" — a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, "the censorial power" would be in the Government over the people and not "in the people over the Government." This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected. The theory of the freedom of speech clause was put right side up for the first time.

Then, in capsule form, Professor Kalven says the opinion held that "the central meaning of the Amendment is that seditious libel cannot be made the subject of government sanction. The Alabama rule on fair comment is closely akin to making seditious libel an offense. The Alabama rule therefore violated the central meaning of the Amendment." [52]

The Court also buttressed the decision by reference to a case, *Barr v. Matteo*,[53] which created an absolute privilege barring libel suits against high-ranking government officials for state-

[51] Kalven, *supra* note 36, at 208.

[52] *Id.* at 209.

[53] 360 U.S. 564 (1959).

ments, even if defamatory, made in their official capacity. Of this, Professor Kalven says: [54]

> There is the analogy to *Barr v. Matteo* and the privilege of the high-ranking government executive. The rationale in *Barr* was that the threat of damage suits would dampen the ardor of the official for the performance of his duties. "Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer." It is now not only the citizen's privilege to criticize his government, it is his duty. At this point in its rhetoric and sweep, the opinion almost literally incorporated Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official.

But Professor Kalven was also mindful of my earlier caveat that courts are chary of sudden fundamental changes in doctrine, for he says: [55]

> The closing question, of course, is whether the treatment of seditious libel as the key concept for development of appropriate constitutional doctrine will prove germinal. It is not easy to predict what the Court will see in the *Times* opinion as the years roll by. It may regard the opinion as covering simply one pocket of cases, those dealing with libel of public officials, and not destructive of the earlier notions that are inconsistent only with the larger reading of the Court's action. But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming. If the Court accepts the invitation, it will slowly work out for itself the theory of free speech that Alexander Meiklejohn has been offering us for some fifteen years now.

Professor Kalven talked with Dr. Meiklejohn last summer after the *New York Times* decision. In a footnote to his article Professor Kalven speaks of that meeting: "Before I had disclosed my own views, I asked him for his judgment of the *Times* case. 'It is,' he said, 'an occasion for dancing in the streets.' " [56]

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[54] Kalven, *supra* note 36, at 209. Dr. Meiklejohn used a different but similar analogy, namely, art. I, § 6(1) of the Constitution, providing that "for any speech or debate in either House, . . . [Congressmen] shall not be questioned in any other place." Dr. Meiklejohn argued: "Just as our agents must be free in their use of their delegated powers, so the people must be free in the exercise of their reserved powers." Meiklejohn, *supra* note 29, at 256.

[55] Kalven, *supra* note 36, at 221.

[56] *Id.* at 221 n.125.

Less than a month before Dr. Meiklejohn's death the Court decided *Garrison v. Louisiana*.[57] This was the conviction under Louisiana's criminal defamation statute of the District Attorney of Orleans Parish. In a press interview, he had attributed a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges, and accused them of hampering his efforts to enforce the vice laws, saying in the latter connection that "this raises interesting questions about the racketeer influences on our eight vacation minded judges." The Court applied the *New York Times* principle in reversing that conviction, saying: [58]

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since ". . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ," 376 U.S. at 271–272, only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Doubtless some of you may think that the sentence of the opinion, "for speech concerning public affairs is more than self-expression; it is the essence of self-government," echoes Dr. Meiklejohn's statement, "the freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government." [59]

Note that the *New York Times* principle has an important qualification: it does not bar civil or criminal libel actions for false criticism of the official conduct of a public official if that criticism is made with knowledge of its falsity or in reckless disregard of whether it was false or true. The underpinning of that

[57] 379 U.S. 64 (1964).
[58] *Id.* at 74–75.
[59] Meiklejohn, *supra* note 29, at 252.

qualification is the "redeeming social value" test. For as we said in *Garrison*: [60]

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088–1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Since Dr. Meiklejohn equated "governing importance" with "social importance," [61] he might have approved that qualification. Mr. Justice Black's concurring opinion in *New York Times*,[62] which he reaffirmed in *Garrison*,[63] disapproved of it, and this is consistent with his absolute view of the first amendment.

Of course, only time and more decisions, many more, can reveal the significance of *New York Times* and *Garrison* in the evolution of first amendment theory. However, one thing may safely be ventured: The Court has proceeded well beyond an 1897 decision, called by Dr. Meiklejohn "the most disastrous judicial pronouncement that I have found." [64] That pronouncement was: "The law is perfectly well settled that the first ten amendments

[60] 379 U.S. at 75.
[61] Meiklejohn, *supra* note 29, at 262.
[62] 376 U.S. at 293.
[63] 379 U.S. at 79–80.
[64] Meiklejohn, *supra* note 29, at 265.

to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors . . . ." [65] For Dr. Meiklejohn, the first Mr. Justice Harlan, dissenting in that case,

> . . . cut into meaningless bits the assertion that no "novel principles of government" were in mind when the Bill of Rights was adopted. Arguing, in his dissent, about the constitutionality of involuntary servitude, . . . [Mr. Justice Harlan] said: "Nor, I submit, is any light thrown upon the question by the history of legislation in Great Britain [about seamen]. The powers of the British Parliament furnish no test for the powers that may be exercised by the Congress of the United States." The distinctive feature of our Constitution, . . . [the Justice] declared, that marks it off from British political institutions, is that it is established, not by the legislature, but by the people. And he summed up the novelty of our system: "No such powers have been [given to] or can be exercised by any legislative body [organized] under the American system. Absolute arbitrary power exists nowhere in this free land. The authority for the exercise of power by the Congress of the United States must be found in the Constitution. Whatever it does in excess of the powers granted [to] it, or in violation of the injunctions of the supreme law of the land, is a nullity, and may be so treated by every person." [66]

To this Dr. Meiklejohn commented: "To a teacher of freedom in the United States that seems to be good law. I wish it would seem so to those who now have authority to determine what good law is." [67]

It is only seemly, I think, that your lecturer of this evening leave to you to say how nearly Dr. Meiklejohn's hope has been realized.

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[65] Robertson v. Baldwin, 165 U.S. 275, 281.

[66] Meiklejohn, *supra* note 29, at 265–66, quoting from Robertson v. Baldwin, 165 U.S. 275, 296. The sections of the quote from Mr. Justice Harlan indicated by square brackets were omitted by Dr. Meiklejohn.

[67] Meiklejohn, *supra* note 29, at 266.