# POLITICAL FREEDOM

## THE CONSTITUTIONAL POWERS OF THE PEOPLE

BY ALEXANDER MEIKLEJOHN

With a Foreword by Malcolm Pitman Sharp
SCHOOL OF LAW, UNIVERSITY OF CHICAGO

A GALAXY BOOK

NEW YORK OXFORD UNIVERSITY PRESS 1965

# FOREWORD

BY MALCOLM SHARP
School of Law, University of Chicago

WHEN I first read these lectures ten years ago, and discussed them with their author, I was fully persuaded of the soundness of the position taken. Moreover, the discussion indicated how practical and manageable, in their application to specific cases, are the distinctions which the author has stated generally. As a reader and a hearer, I was delighted, as I had been more than thirty years before when I was a student in Mr. Meiklejohn's classes at Amherst. Now that I am honored by being asked to write a preface, I find that besides pleasure, another feeling appears—one which I first met in 1916 and have experienced since. Mr. Meiklejohn is not one to leave his students in peace. His classes were like nothing I have ever experienced, not only for pleasure, but for stimulus and disturbance. Now that I am not simply reading and listening, but responding, I feel again that tension and interest which are the work of an incomparable teacher.

I am back in his classroom. It is true that I have become a lawyer, and acquired a little of what some members of my profession might consider their peculiar qualifications for considering a book on law. I think that they would be mistaken. On the great questions of law, the lawyer must still go to school to the philosopher.

Since I have returned to his classroom, I have somehow again become aware of the tension in Mr. Meiklejohn's thought, the paradox that is there implicit in the seemingly direct statement,

the contradiction and multiplicity as well as the consistency and the simplicity of things.

If the reader becomes a fellow student, he will stop and wonder, and appreciate as well, while he reads. He may be interested, moreover, in recalling the vindication which the thesis of these lectures has received in the years since they were first given.

## 1

First at Amherst and later at Wisconsin, I found Mr. Meiklejohn going back most often to Plato and to Kant. What these two philosophers appear to have said about the non-human part of the universe is not here Mr. Meiklejohn's concern; indeed, his one observation here about the non-human part of the universe reminds us that he is not to be too easily classified. His view about the nature and functions of the truth, and his conception of man as markedly distinguished by his intelligence from all the other animals, have, however, a classical history. His argument about the meaning of the First Amendment of the Constitution is not based immediately—at least so he says—on a theory about the nature of man. Yet the reader will find that the theory of human nature appearing throughout the lectures makes an important contribution to the author's theory of the meaning of the text of the Amendment, and its relation to a scheme of rational self-government.

The student, as in his college days and often since, has put some questions to the teacher; and the teacher has allowed the student to quote his answers.

THE TEACHER: It is not easy for the non-lawyer who writes this book to think of Professor Sharp as his student in matters of law. But being cast in the role of teacher, I must try to play it. And in doing so, I recall that, when theories are debated, the teacher's duty is not to give authoritative answers, but rather to clarify questions by challenging their assumptions. He

should seek not to end a discussion, but to start it, or to keep it going. The following replies have that intention.

QUESTION 1: The argument here does not concern itself with the adjustment of conflicting interests or the comparison of consequences. The interpretation of the Constitution here advocated will presumably have some undesirable results along with the desirable ones. Must not the interests affected and the expected results be listed and compared?

ANSWER: The listing and comparing of the merits and defects of the Constitution, though exceedingly important on other occasions, is, I think, foreign to my present argument. We are not adopting or amending our Plan of Government. We are asking what, in its deepest meaning, the present plan is.

The reader who is acquainted with the hard-fought conflict between the Pragmatist and Idealist philosophies of the last fifty or sixty years will recognize how tightly packed are the controversial and confusing issues enclosed within this question. I shall try to deal with those issues as one who thinks himself to be both Pragmatist and Idealist.

I am sure that any interpretations of the First Amendment, including that of these lectures, will have, if adopted, undesirable as well as desirable results. When we govern we choose. We seek to win one value by sacrificing another. And, it must be added, we make mistakes.

But further, in a society like our own, where forms of belief and communication are changing ever more rapidly and radically, the justifiability of the First Amendment or of our interpretation of it must always be kept open to constant and critical reconsideration. We may never cease to ask the question, "Is it just and wise?"

These two sets of considerations make it clear that with respect to any provision of the Constitution, "the interests affected and the expected results" *must* be "listed and compared," re-listed and re-compared.

It is at this point that my questioner remarks that in the book which he presents to the reader, no such listing and comparing have been done. To this observation two replies are, I think, valid and necessary.

First, the questioner knows that on many other occasions, I have expressed the conviction that, as measured by its consequences, our national program of religious and political freedom has been one of the greatest and most useful of human achievements.

But second, this book is written, not to praise or to justify the First Amendment, but to discover what it means. Finding out what a principle intends to say seems to me prior, though not alternative, to judging its usefulness and truth.

QUESTION 2: You seem to say that the hypothesis that *intelligence can control* is the critical hypothesis of self-government. As you know, the influence of other factors in government was recognized by the framers of our Constitution and their contemporaries. The hidden work of irrational impulses has been studied in recent years, and its influence seen in the conduct of affairs. It is possible to infer your view of these matters, from the course of the argument; but it would be interesting to have an explicit observation about them.

ANSWER: Our American venture in self-government is not based on "assurance" that we are intelligent enough to be free, but only on the "hope" that our minds can carry the responsibilities which the Constitution assigns to them. As my questioner says, it is well known that among the writers of the Constitution there were grievous fears at this point. And further, our current studies of the irrational elements in our decision-making are increasing those fears. Unless our national education can be raised to much higher levels, it is possible that our enormous wealth and power will be used to weaken intelligence rather than to strengthen it. Our self-governing is not, then, based on assurance of success. It is, as Mr. Justice

Holmes has told us, an "experiment." We have only a chance, but one which is worth fighting for—*with our minds.*

QUESTION 3: You make a persuasive distinction between the freedom to speak on public matters protected without qualification by the First Amendment and the "liberty" to speak on private matters protected by the Due Process Clauses, subject to control by "due process of law." In your discussion of radio you emphasize the distinction by saying that here private speaking not only may but should be subject to control. The question of policy is not the same as the question of constitutional validity. Some would say, however, that freedom of speech is most likely to be given full protection against group pressures and government alike, in a society in which other freedoms, the "liberties," are given all the protection consistent with elementary order. I judge you have some doubt, at least, about that view. How much, if any, force does it have? Are the two sets of immunities, the freedoms and the liberties, quite distinct ?

ANSWER: Yes, I believe that, constitutionally, the public "powers" by which citizens govern themselves are "quite distinct" from the private "liberties" which, by corporate action, those citizens grant to themselves and others, as individuals whom they govern. The "freedom" of the First Amendment and the "liberty" of the Fifth are, I think, "quite distinct" in kind and in constitutional status.

Since you ask for my opinion on the question whether or not a policy of relatively unregulated private enterprise is more favorable to political freedom than is a policy of active governmental regulation, I will try to indicate my point of view. On the whole, the "liberties" of what we call "Free Enterprise" are, I think, destructive of the "freedoms" of a self-governing society. The unregulated self-seeking of the profit-makers is much more dangerous in its effect upon the morality and intelligence of the citizen than that *participation in regulatory*

*action* for the common good to which free enterprise has so often shown itself hostile. In the first edition of this book I cited, as a striking example of the disastrous effect of giving great "liberty" to private enterprise, the handing over of the use of the air waves to radio corporations. But privately sponsored television has proved to be even more deadly. Those business controls of communication are, day by day, year by year, destroying and degrading our intelligence and our taste by the use of instruments which should be employed in educating and uplifting them.

QUESTION 4: You say that teachers and others in Germany under occupation after the Second World War had no moral claim to the kind of freedom of speech protected by our Constitution, since they were not part of a self-governing community. Does this observation indicate a significant general principle? What other cases of the sort might be considered or imagined?

ANSWER: Yes, there is here a significant principle which must be recognized: Political freedom, as we have it, exists, and exists only, in virtue of a compact by which it is agreed that all the members of our national group shall share, with equal status, in responsibility for the making of decisions concerning the common good. Freedom of this kind does not come to us as a gift or an endowment. It comes only as we create institutions of self-government and maintain them by exercising the powers which are granted to us, by assuming the obligations which are laid upon us. The text of the first edition mentions a few types of social grouping which are not self-governing in the political sense. There are many others. For purposes of illustration we could take a family, a university football team, a business corporation of the usual type. The owners, managers, and workers who make up the membership of a business group are *not* equal in status with respect to the

governing of their enterprise. The group is not self-governing as free citizens are under the Constitution.

One final difficulty may appear to a student. Anyone who has studied contracts will be fascinated by Mr. Meiklejohn's theory of a social contract entered into by successive generations and changing in its meanings with the changing contexts of different times. On the other hand, anyone who has also studied constitutional law and constitutional history will realize the more clearly that lawyers have a singular knack of making changes which suit their notions of policy in ways which render the process of change invisible to the ordinary eye. If, for example, judges are to continue to have the last word about the Constitution, are we to trust them to mold it in accordance with their views of the needs of the time? Experience indicates that with the lawyer's skill they will mold it imperceptibly in their own images. Other government agencies, advised by lawyers, may do the same thing with legislation and sometimes with the Constitution. A lawyer may think that his fellow lawyers in power need to be controlled by a text with a fixed meaning.

Here, at any rate, this particular student is satisfied that the objection does not affect Mr. Meiklejohn's thesis about the First Amendment. Little is known about the context in which the First Amendment was first written and read. The word "abridge" has one familiar meaning of "decrease." If Congress must not "decrease" freedom of speech, the reference may be to existing law, and the most likely law for reference would be the eighteenth century common law of the Colonies and of England. That common law, after something of a battle, excluded prior restraints on the publication of ideas, but in its application to American conditions, it was otherwise at best indeterminate.

The difficulty has not yet been fully investigated, but an alert younger student, very much under Mr. Meiklejohn's influence, is trying to explore the matter without bias. Mr. George Anastaplo has found, for example in Blackstone, instances in

which "abridge" is clearly taken to mean "restrict," and to refer to a natural or ideal state of law. This way of speaking would be a reasonable one for eighteenth century lawyers. While it is not Mr. Meiklejohn's way of speaking, it has some similarity to the course of his thought. And it makes it possible for a lawyer skeptical about his own profession's self-restraint to recognize that at the very least the ambiguity of the word "abridging" in the First Amendment is such as to make appropriate Mr. Meiklejohn's lawyerlike and—still better—philosophical treatment of the meaning of this critical constitutional provision.

The student may say that if he has to choose he would feel that the historical meaning of the Constitution should control, but he is well satisfied with a result in which that coincides with Mr. Meiklejohn's philosophical meaning. The teacher would reply that this is indeed fortunate, but if there were a difference, the philosophical and—he might add—the contemporary meanings are the ones which a reasonable philosopher must prefer.

## 2

Whatever its philosophical characteristics, the thesis of these lectures has been supported by our experience in the years since they were first delivered.

In 1948, the year of their publication, the time of pervasive loyalty proceedings before committees and boards was not far advanced. The requirement of non-Communist affidavits for union leaders as a condition of access to the National Labor Relations Board was soon to be followed by the conviction of Communist Party leaders for conspiracy to teach and advocate the violent overthrow of our government. This was followed, in turn, and for some in a way confirmed, by the spy cases. In 1954, as we can now see, the emotional factors in the sequence of events began to lose some of their effect. If Mr. Meiklejohn's views had been accepted in 1948 by the community, its Congress, or the Courts, individuals would have been spared injustice. The coun-

try would have avoided a period of exaggerated fear and hostility, adding its stimulus to the cold war and the war, and threatening sane standards of administration.

Since 1954 there has been a change in our emotional tone and a new judicial approach to legal problems. We may hope that both will be permanent. So far as views like those expressed by Mr. Meiklejohn appear in the Supreme Court, we see the value of the position taken in the lectures. When we recognize the possibility that a time like the six years before 1954 may again occur, we see again, in a different way, the value of the freedom of speech and sanity of mind advocated in this book.

It is to be hoped that the author's views will receive further consideration by the Court for whose position he shows such profound respect. Recent opinions prepare the way for his increasing influence, or at least for the increasing influence of opinions close to his.

In two of the 1957 cases which seem to indicate a new judicial approach to problems of freedom of speech, ideas approaching Mr. Meiklejohn's were expressed. One involved a union organizer and Congress and the other a scholar and a state legislature. It was held that a witness before a committee or similar agency must be given, by some means, a fair basis for judging whether refusal to answer questions would be illegal. The requirement is comparable to the constitutional requirement of reasonable clarity in the definitions of crimes.

In both the 1957 cases ideas had been inquired into by procedure now held unconstitutional. Chief Justice Warren wrote the opinions of the Court in both cases, and Mr. Justice Frankfurter concurred in special opinions.

The Chief Justice said, "The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. . . .

Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time."

Mr. Justice Frankfurter said, "These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university."

On the same day the Court held that the activities of a Communist group teaching and advocating revolution as something to be believed in, but not to be undertaken, were not a criminal conspiracy. Its earlier opinion in the first Communist leaders' conspiracy case was strictly limited.

Mr. Justice Black, while urging that the Court should go further than it did in finally disposing of the cases of some of the defendants, concurred in other respects with the opinion of the Court. In an opinion in which Mr. Justice Douglas concurred, Mr. Justice Black made explicit his approach, which had appeared in earlier opinions, to a position very much like Mr. Meiklejohn's. Citing these lectures he said: "I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal."

Indeed, in view of the ambiguity of the word "incites" in its application to various circumstances, it may be that Mr. Justice Black is going further in protecting freedom of speech than Mr. Meiklejohn, in conversation, has indicated he would be ready to go. Abstract advocacy is not always easy to tell from "incitement," nor can incitement always be easily distinguished from "command." When we pass to the communication referred to by the term "command," we come to the type of communication which any state worthy of its name will of course suppress, as it

will suppress racial violence or rioting. It is the discussion of political ideas, often involving warmth and enthusiasm, which is always to be protected against our officials, in the view of Mr. Meiklejohn and Mr. Justice Black alike.

Last year, state legislation conditioning churches' and veterans' tax exemption on oaths and, if necessary, proof of freedom from subversive ideas was held invalid. Again Mr. Justice Black, with whom Mr. Justice Douglas concurred, wrote an eloquent concurring opinion recalling earlier opinions in which he had expressed similar views. In addition, referring to the First Amendment, the Justice gave a concise key to an argument which is perhaps not exactly the same as the one on which Mr. Meiklejohn depends, but which includes some of the same features.

"We should never forget that the freedoms secured by that Amendment—Speech, Press, Religion, Petition and Assembly—are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities."

Mr. Meiklejohn's insight has been doubly vindicated. First, the safeguards which he proposed, in the form of an interpretation of the First Amendment, might well have saved us from some of the intolerance of recent years. And second, in the cases culminating in 1957, the Supreme Court has shown a solicitude for freedom of opinion and communication which is heartening for many citizens.

Two of this year's Supreme Court decisions have occasioned some doubt about the implications of the 1957 cases dealing with Legislative and Congressional committees and investigations. At the least the opinions in these two recent cases indicate that witnesses are thought to need only a rather limited definition of a committee's functions to help them in judging whether their rights are being invaded.

The opinions in some passages seem to go further. In a strange misapplication of the already somewhat simple versions of "in-

terest theory" current in some circles, the Court speaks of "balancing" the "private" interests protected by the First Amendment against the "public" interest in national self-preservation. It returns in other passages to earlier uncritical statements about the threat of the domestic Communists, which have been corrected by the course of conspiracy cases since the Court announced its wise and conservative views of conspiracy in 1957. Further, the Court does not observe in these recent cases that the broad though not unlimited powers of Congress and legislatures to direct investigations of matters of legislative concern do not inevitably carry with them the power to employ methods not necessary, often not even helpful, for their exercise. The investigative power of Congress was first clearly held to carry with it the subpoena power in the investigation of the Teapot Dome scandals, where a subpoena power was perhaps helpful or even necessary. It is doubtful however whether any of the legislation produced by the benevolent committees of the thirties or by the committees investigating the Communists in the forties and fifties, and the Teamsters in the fifties, owed or can ever owe anything to information resulting from the use of subpoenas in those investigations. One may at least await with interest the appearance in practice of what seems in principle a limiting case: the case of the witness whose record gives no preliminary indication that he can contribute information useful to a committee, and whose position on some such public issue as desegregation or public housing gives rise to an inference that he is being exposed on that account.

Subpoena powers are not necessary to enable Congressional committees to obtain the information needed for ordinary legislative purposes. They are no more necessary to serve the educational or political campaign purposes thought by some to be a justification for congressional investigations. As the dissenting Justices in the recent cases said, with some force, their one constant purpose is to provide non-judicial agencies with means of punishment in the form of exposure by procedures which are

travesties of judicial procedure. The practice is serious enough in the case of the Teamsters, whose leaders' powers may well need some moderation. When it is applied to the minorities who provide some of the leaven of our lives but who are dangerously exposed, it becomes more serious. It is here that the procedural point becomes again inextricably combined with the substantive point, which Mr. Meiklejohn insists is the important one. If we are punishing by exposure before committees who make their own substantive and procedural law as they go along, when this punishment is directed toward the communication of unpopular beliefs it becomes a critical violation of the First Amendment. Here again Mr. Justice Black, dissenting, recalls us to the wisdom of Mr. Meiklejohn's approach to this question:

> . . . The First Amendment says in no equivocal language that Congress shall pass no law abridging freedom of speech, press, assembly or petition. The activities of this Committee, authorized by Congress, do precisely that, through exposure, obloquy and public scorn. . . .
>
> I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process. . . .
>
> But even assuming what I cannot assume, that some balancing is proper in this case, I feel that the Court after stating the test ignores it completely. At most it balances the right of the Government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations. Such a balance, however, mistakes the factors to be weighed. In the first place, it completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves. It is this right, the right to err politically, which keeps us strong as a Nation. . . .
>
> Moreover, I cannot agree with the Court's notion that First Amendment freedoms must be abridged in order to "preserve" our country. That notion rests on the unarticulated premise that this Nation's security hangs upon its power to punish people because of

what they think, speak or write about, or because of those with whom they associate for political purposes. . . . The First Amendment means to me, however, that the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be changed; "Therein lies the security of the Republic, the very foundation of constitutional government." . . .

It is to be hoped that the two recent cases, which do not determine the issue raised by Mr. Meiklejohn's thesis about the First Amendment, represent only a temporary qualification of the tendency toward acceptance of his views and the similar views expressed by majority and dissenting Justices in recent cases. Our unhappy experience before 1957 and the return of reason since are now supplemented in their educational effect by some of the language in these last opinions suggesting a threat to return us to the jurisprudence of 1951. Against this threat Mr. Meiklejohn has offered us a wise and sound theory of our fundamental law.

In observing that by the tests of history, logic, experience, and human value, Mr. Meiklejohn's position seems to be good law, we should not overlook the fact that for some it may have an even greater importance. In its gay and cheerful spirit as well as in its careful and serious argument, this book will serve the health and happiness of the community. It can educate the members of the community who in the end determine for us the critical issues of government.

Mr. Meiklejohn's lectures appeal to our wisdom and our intelligence as the most valuable features of the known universe. It should be noticed that one characteristic of a healthy intelligence is its opposition to the hatred, cruelty, and destruction which are less amiable features of the universe. The reticence of the lectures should not lead the reader to overlook their affirm-

ative relation to the Christian as well as the Greek elements in our tradition.

They are the work of an incomparable teacher. At Amherst, at Wisconsin, in California, he has been the leading proponent of the most constructive features of recent thinking about education. He has taught generations of students by thoughtful example and stimulus. As he says, his philosophy of education seems to him more important as a whole than that part of it which appears here. Nevertheless, this part is of critical importance today, for both domestic and foreign policy. It is, moreover, a perfect introduction for a reader who may be prepared to read further, or to re-read, the published work of this courageous teacher.

# PREFACE

THE ARGUMENT of this book was first given in three lectures at the University of Chicago, under the Charles R. Walgreen Foundation for the Study of American Institutions. It was later given, in the same form, at the Law School of Yale University, at St. John's College, and, in part, as a lecture and discussion in the Great Issues Course at Dartmouth College. It is here presented with some slight changes which are intended to serve the transition from the hearing of an argument to the reading of it.

The book discusses a principle of law. It is written, however, not by a lawyer, but by a teacher. It springs from a strong conviction that a primary task of American education is to arouse and to cultivate, in all the members of the body politic, a desire to understand what our national plan of government is. The book, therefore, is a challenge to all of us, as citizens, to study the Constitution. That constitution derives whatever validity, whatever meaning, it has, not from its acceptance by our forefathers one hundred and sixty years ago, but from its acceptance by us, now. Clearly, however, we cannot, in any valid sense, "accept" the Constitution unless we know what it says. And, for that reason, every loyal citizen of the nation must join with his fellows in the attempt to interpret, in principle and in action, that provision of the Constitution which is rightly regarded as its most vital assertion, its most significant contribution to political wisdom. What do We, the People of the United States, mean when

we provide for the freedom of belief and of the expression of belief?

## 1

The First Amendment to the Constitution, as we all know, forbids the federal Congress to make any law which shall abridge the freedom of speech. In recent years, however, the government of the United States has in many ways limited the freedom of public discussion. For example, the Federal Bureau of Investigation has built up, throughout the country, a system of espionage, of secret police, by which hundreds of thousands of our people have been listed as holding this or that set of opinions. The only conceivable justification of that listing by a government agency is to provide a basis for action by the government in dealing with those persons. And that procedure reveals an attitude toward freedom of speech which is widely held in the United States. Many of us are now convinced that, under the Constitution, the government is justified in bringing pressure to bear against the holding or expressing of beliefs which are labeled "dangerous." Congress, we think, may rightly abridge the freedom of such beliefs.

Again, the legislative committees, federal and state, which have been appointed to investigate un-American activities, express the same interpretation of the Constitution. All the inquirings and questionings of those committees are based upon the assumption that certain forms of political opinion and advocacy should be, and legitimately may be, suppressed. And, further, the Department of Justice, acting on the same assumption, has recently listed some sixty or more organizations, association with which may be taken by the government to raise the question of "disloyalty" to the United States. And finally, the President's Loyalty Order, moving with somewhat uncertain steps, follows the same road. We are officially engaged in the suppression of "dangerous" speech.

Now, these practices would seem to be flatly contradictory of the First Amendment. Are they? What do we mean when we say that "Congress shall make no law . . . abridging the freedom of speech . . . ?" What is this "freedom of speech" which we guard against invasion by our chosen and authorized representatives? Why may not a man be prevented from speaking if, in the judgment of Congress, his ideas are hostile and harmful to the general welfare of the nation? Are we, for example, required by the First Amendment to give men freedom to advocate the abolition of the First Amendment? Are we bound to grant freedom of speech to those who, if they had the power, would refuse it to us? The First Amendment, taken literally, seems to answer, "Yes" to those questions. It seems to say that no speech, however dangerous, may, for that reason, be suppressed. But the Federal Bureau of Investigation, the un-American Activities committees, the Department of Justice, the President, are, at the same time, answering "No" to the same question. Which answer is right? What is the valid American doctrine concerning the freedom of speech?

## 2

Throughout our history, the need of clear and reasonable answering of that question has been very urgent. In fact, under our system of dealing with problems of domestic policy by "party" discussion and "party" action, the demand for such clarity and reasonableness is basic to our "democratic" way of life. But, with the ending of World War II, that demand has taken on a new, and even greater, urgency. Our nation has now assumed, or has had thrust upon it by Fate, a new role. We have taken leadership in the advocating of freedom of expression and of communication, not only at home, but also throughout the world. In the waging of that campaign we Americans have made many accusations against our enemies in war, hot or cold. But our most furious and righteous charge has been that they have suppressed, and are suppressing, the free exchange of information and of

ideas. That evil drawing of a smoke curtain, we have declared, we will not tolerate. We will not submit to it within our own borders. We will not allow it abroad if, by legitimate means, we can prevent it. We are determined that, with respect to the freedom of its communications, the human world shall be a single community.

Now, the assuming of that high and heavy responsibility for a political principle requires of us, first of all, that we understand what the principle is. We must think for it as well as fight for it. No fighting, however successful, will help to establish freedom unless the winners know what freedom is. What, then—we citizens under the Constitution must ask—what do we mean when we utter the flaming proclamation of the First Amendment? Do we mean that speaking may be suppressed or that it shall not be suppressed? And, in either case, on what grounds has the decision been made?

3

The issue here presented has been dramatically, though perhaps not very effectively, thrust upon the attention of the citizens of the United States by a recent order of the Attorney General. That order restricts the freedom of speech of temporary foreign visitors to our shores. It declares that certain classes of visitors are forbidden, except by special permission, to engage in public discussion of public policy while they are among us. Why may we not hear what these men from other countries, other systems of government, have to say? For what purpose does the Attorney General impose limits upon their speaking, upon our hearing? The plain truth is that he is seeking to protect the minds of the citizens of this free nation of ours from the influence of assertions, of doubts, of questions, of plans, of principles which the government judges to be too "dangerous" for us to hear. He is afraid that we, whose agent he is, will be led astray by opinions which are alien and subversive. Do We, the

People of the United States, wish to be thus mentally "protected"? To say that would seem to be an admission that we are intellectually and morally unfit to play our part in what Justice Holmes has called the "experiment" of self-government. Have we, on that ground, abandoned or qualified the great experiment?

Here, then, is the question which we must try to answer as we interpret the First Amendment to the Constitution. In our discussions of public policy at home, do we intend that "dangerous" ideas shall be suppressed? Or are they, under the Constitution, guaranteed freedom from such suppression? And, correspondingly, in our dealings with other nations, are we saying to them, "The general welfare of the world requires that you and we shall not, in any way, abridge the freedom of expression and communication"? Or are we saying, "Every nation may, of course, forbid and punish the expression of ideas which are dangerous to the form of government or of industrial organization which it has established and is attempting to maintain"?

No one, of course, may prescribe that citizens of the United States shall interpret the Constitution in this way or that. It is not even required that the meaning of the Constitution shall be in the future what it has been in the past. We are free to change that meaning both by interpretation and by explicit amendment. But what is required of us by every consideration of honesty and self-respect is that we practice what we preach, that we preach only what we practice. What, then, as we deal with the present, as we plan for the future, do we intend that the principle of the freedom of speech shall mean?

# CHAPTER I

## THE RULERS AND THE RULED

THE PURPOSE of these lectures is to consider the freedom of speech which is guaranteed by the Constitution of the United States. The most general thesis of the argument is that, under the Constitution, there are two different freedoms of speech, and, hence, two different guarantees of freedom rather than only one.

More broadly, it may be asserted that our civil liberties, in general, are not all of one kind. They are of two kinds which, though radically different in constitutional status, are easily confused. And that confusion has been, and is, disastrous in its effect upon our understanding of the relations between an individual citizen and the government of the United States. The argument of these lectures is an attempt to clear away that confusion.

As an instance of the first kind of civil liberty I would offer that of religious or irreligious belief. In this country of ours, so far as the Constitution is effective, men are free to believe and to advocate or to disbelieve and to argue against, any creed. And the government is unqualifiedly forbidden to restrict that freedom. As an instance of the second kind, we may take the liberty of an individual to own, and to use the income from, his labor or his property. It is agreed among us that every man has a right, a liberty, to such ownership and use. And yet it is also agreed that the government may take whatever part of a man's income it deems necessary for the promoting of the general welfare. The liberty of owning and using property is, then, as contrasted with that of religious belief, a limited one. It may be invaded by the government. And the Constitution authorizes such invasion. It

requires only that the procedure shall be properly and impartially carried out and that it shall be justified by public need.

Our Constitution, then, recognizes and protects two different sets of freedoms. One of these is open to restriction by the government. The other is not open to such restriction. It would be of great value to our argument and, in fact, to all attempts at political thinking in the United States, if there were available two sharply defined terms by which to identify these two fundamentally different kinds of civil liberty. But, alas, no such accurate use of words has been established among us. Men speak of the freedom of belief and the freedom of property as if, in the Constitution, the word "freedom," as used in these two cases, had the same meaning. Because of that confusion we are in constant danger of giving to a man's possessions the same dignity, the same status, as we give to the man himself. From that confusion our national life has suffered disastrous effects in all its phases. But for this disease of our minds there is, so far as I know, no specific semantic cure. All that we can do at present is to remember that such terms as liberty, freedom, civil rights, etc., are ambiguous. We must, then, in each specific case, try to keep clear what meaning we are using.

## 1

We Americans think of ourselves as politically free. We believe in self-government. If men are to be governed, we say, then that governing must be done, not by others, but by themselves. So far, therefore, as our own affairs are concerned, we refuse to submit to alien control. That refusal, if need be, we will carry to the point of rebellion, of revolution. And if other men, within the jurisdiction of our laws, are denied their right to political freedom, we will, in the same spirit, rise to their defense. Governments, we insist, derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers.

Now, this political program of ours, though passionately advocated by us, is not—as we all recognize—fully worked out in practice. Over one hundred and seventy years have gone by since the Declaration of Independence was written. But, to an unforgivable degree, citizens of the United States are still subjected to decisions in the making of which they have had no effective share. So far as that is true, we are not self-governed; we are not politically free. We are governed by others. And, perhaps worse, we are, without their consent, the governors of others.

But a more important point—which we Americans do not so readily recognize—is that of the intellectual difficulties which are inherent in the making and administering of this political program of ours. We do not see how baffling, even to the point of desperation, is the task of using our minds, to which we are summoned by our plan of government. That plan is not intellectually simple. Its victories are chiefly won, not by the carnage of battle, but by the sweat and agony of the mind. By contrast with it, the idea of alien government which we reject—whatever its other merits or defects—is easy to understand. It is suited to simple-minded people who are unwilling or unable to question their own convictions, who would defend their principles by suppressing that hostile criticism which is necessary for their clarification.

The intellectual difficulty of which I am speaking is sharply indicated by Professor Edward Hallett Carr, in his recent book, *The Soviet Impact on the Western World*. Mr. Carr tells us that our American political program, as we formulate it, is not merely unclear. It is essentially self-contradictory and hence, nonsensical. "Confusion of thought," he says, "is often caused by the habit common among politicians and writers of the English-speaking world, of defining democracy in formal and conventional terms as 'self-government' or 'government by consent.'" What these terms define, he continues, "is not democracy, but anarchy. Government of some kind is necessary in the common interest precisely because men will not govern themselves. 'Government by consent' is a contradiction in terms; for the purpose of govern-

ment is to compel people to do what they would not do of their own volition. In short, government is a process by which some people exercise compulsion on others."[1]

Those words of Mr. Carr seem to me radically false. And, whatever else these lectures may do or fail to do, I hope that they may, in some measure, serve as a refutation of his contention. And yet the challenge of so able and well-balanced a mind cannot be ignored. If we believe in our principles we must make clear to others and to ourselves that self-government is not anarchy. We must show in what sense a free man, a free society, does practice self-direction. What, then, is the difference between a political system in which men do govern themselves and a political system in which men, without their consent, are governed by others? Unless we can make clear that distinction, discussion of freedom of speech or of any other freedom is meaningless and futile.

Alien government, we have said, is simple in idea. It is easy to understand. When one man or some self-chosen group holds control, without consent, over others, the relation between them is one of force and counterforce, of compulsion on the one hand and submission or resistance on the other. That relation is external and mechanical. It can be expressed in numbers—numbers of guns or planes or dollars or machines or policemen. The only basic fact is that one group "has the power" and the other group has not. In such a despotism, a ruler, by some excess of strength or guile or both, without the consent of his subjects, forces them into obedience. And in order to understand what he does, what they do, we need only measure the strength or weakness of the control and the strength or weakness of the resistance to it.

But government by consent—self-government—is not thus simple. It is, in fact, so complicated, so confusing, that, not only to the scholarly judgment of Mr. Carr, but also to the simple-mindedness which we call "shrewd, practical, calculating, common

[1] Edward Hallett Carr, *The Soviet Impact on the Western World* (New York, Macmillan, 1947), p. 10.

sense," it tends to seem silly, unrealistic, romantic, or—to use a favorite term of reproach—"idealistic." And the crux of the difficulty lies in the fact that, in such a society, the governors and the governed are not two distinct groups of persons. There is only one group—the self-governing people. Rulers and ruled are the same individuals. We, the People, are our own masters, our own subjects. But that inner relationship of men to themselves is utterly different in kind from the external relationship of one man to another. It cannot be expressed in terms of forces and compulsions. If we attempt to think about the political procedures of self-government by means of the ideas which are useful in describing the external control of a hammer over a nail or of a master over his slaves, the meaning slips through the fingers of our minds. For thinking which is done merely in terms of forces, political freedom does not exist.

At this point, a protest must be entered against the oversimplified advice which tells us that we should introduce into the realms of economics, politics, and morals the "methods" of the "sciences." Insofar as the advice suggests to us that we keep our beliefs within the limits of the evidence which warrants them, insofar as it tells us that our thinking about human relationships must be as exact and tentative, as orderly and inclusive, as is the work done by students of physical or biological fact, no one may challenge either its validity or its importance. To believe what one has no reason for believing is a crime of the first order. But, on the other hand, it must be urged that the chief source of our blundering ineptness in dealing with moral and political problems is that we do not know how to think about them except by quantitative methods which are borrowed from non-moral, non-political, non-social sciences. In this sense we need to be, not more scientific, but less scientific, not more quantitative but other than quantitative. We must create and use methods of inquiry, methods of belief which are suitable to the study of men as self-governing persons but not suitable to the study of forces or of machines. In the understanding of a free society, scientific think-

ing has an essential part to play. But it is a secondary part. We shall not understand the Constitution of the United States if we think of men only as pushed around by forces. We must see them also as governing themselves.

But the statement just made must be guarded against two easy misinterpretations. First, when we say that self-government is hard to interpret, we are not saying that it is mysterious or magical or irrational. Quite the contrary is true. No idea which we have is more sane, more matter-of-fact, more immediately sensible, than that of self-government. Whether it be in the field of individual or of social activity, men are not recognizable as men unless, in any given situation, they are using their minds to give direction to their behavior. But the point which we are making is that the externalized measuring of the play of forces which serves the purposes of business or of science is wholly unsuited to our dealing with problems of moral or political freedom. And we Americans seem characteristically blind to the distinction. We are at the top of the world in engineering. We are experts in the knowledge and manipulation of measurable forces, whether physical or psychological. We invent and run machines of ever new and amazing power and intricacy. And we are tempted by that achievement to see if we can manipulate men with the same skill and ingenuity. But the manipulataion of men is the destruction of self-government. Our skill, therefore, threatens our wisdom. In this respect the United States with its "know-how" is, today, the most dangerous nation in the world.

And, second, what we have said must not be allowed to obscure the fact that a free government, established by common consent, may and often must use force in compelling citizens to obey the laws. Every government, as such, must have external power. It must, in fact, be more powerful than any one of its citizens, than any group of them. Political freedom does not mean freedom from control. It means self-control. If, for example, a nation becomes involved in war, the government must decide who shall be drafted to leave his family and home, to risk his

life, his health, his sanity, upon the battlefield. The government must also levy and collect and expend taxes. In general, it must determine how far and in what ways the customs and privileges of peace are to be swept aside. In all these cases it may be taken for granted that, in a self-governing society, minorities will disagree with the decisions which are made. May a minority man, then, by appeal to the principle of "consent," refuse to submit to military control? May he evade payment of taxes which he thinks unwise or unjust? May he say, "I did not approve of this measure; therefore, as a self-governing man, I claim the right to disobey it"?

Certainly not! At the bottom of every plan of self-government is a basic agreement, in which all the citizens have joined, that all matters of public policy shall be decided by corporate action, that such decisions shall be equally binding on all citizens, whether they agree with them or not, and that, if need be, they shall, by due legal procedure, be enforced upon anyone who refuses to conform to them. The man who rejects that agreement is not objecting to tyranny or despotism. He is objecting to political freedom. He is not a democrat. He is the anarchist of whom Mr. Carr speaks. Self-government is nonsense unless the "self" which governs is able and determined to make its will effective.

## 2

What, then, is this compact or agreement which underlies any plan for political freedom? It cannot be understood unless we distinguish sharply and persistently between the "submission" of a slave and the "consent" of a free citizen. In both cases it is agreed that obedience shall be required. Even when despotism is so extreme as to be practically indistinguishable from enslavement, a sort of pseudo consent is given by the subjects. When the ruling force is overwhelming, men are driven not only to submit, but also to agree to do so. For the time, at least, they decide to make the best of a bad situation rather than to struggle against

hopeless odds. And, coordinate with this "submission" by the people, there are "concessions" by the ruler. For the avoiding of trouble, to establish his power, to manipulate one hostile force against another, he must take account of the desires and interests of his subjects, must manage to keep them from becoming too rebellious. The granting of such "concessions" and the accepting of them are, perhaps, the clearest evidence that a government is not democratic but is essentially despotic and alien.

But the "consent" of free citizens is radically different in kind from this "submission" of slaves. Free men talk about their government, not in terms of its "favors" but in terms of their "rights." They do not bargain. They reason. Every one of them is, of course, subject to the laws which are made. But if the Declaration of Independence means what it says, if we mean what it says, then no man is called upon to obey a law unless he himself, equally with his fellows, has shared in making it. Under an agreement to which, in the closing words of the Declaration of Independence, "we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor," the consent which we give is not forced upon us. It expresses a voluntary compact among political equals. We, the People, acting together, either directly or through our representatives, make and administer law. We, the People, acting in groups or separately, are subject to the law. If we could make that double agreement effective, we would have accomplished the American Revolution. If we could understand that agreement we would understand the Revolution, which is still in the making. But the agreement can have meaning for us only as we clarify the tenuous and elusive distinction between a political "submission" which we abhor and a political "consent" in which we glory. Upon the effectiveness of that distinction rests the entire enormous and intricate structure of those free political institutions which we have pledged ourselves to build. If we can think that distinction clearly, we can be self-governing. If we lose our grip upon it, if, rightly or wrongly, we fall back into the prerevolutionary attitudes which regard our chosen represent-

atives as alien and hostile to ourselves, nothing can save us from the slavery which, in 1776, we set out to destroy.

## 3

I have been saying that, under the plan of political freedom, we maintain by common consent a government which, being stronger than any one of us, than any group of us, can take control over all of us. But the word "control" strikes terror into the hearts of many "free" men, especially if they are mechanically minded about their freedom. Out of that fear there arises the passionate demand that the government which controls us must itself be controlled. By whom, and in what ways?

In abstract principle, that question is easy to answer. A government of free men can properly be controlled only by itself. Who else could be trusted by us to hold our political institutions in check? Shall any single individual or any special group be allowed to take domination over the agencies of control? There is only one situation in which free men can answer "yes" to that question. If the government, as an institution, has broken down, if the basic agreement has collapsed, then both the right and the duty of rebellion are thrust upon the individual citizens. In that chaotic and desperate situation they must, for the sake of a new order, revolt and destroy, as the American colonies in 1776 revolted and destroyed. But, short of such violent lawlessness in the interest of a new law, there can be no doubt that a free government must be its own master. If We, the People are to be controlled, then We, the People must do the controlling. As a corporate body, we must exercise control over our separate members. That principle is a flat denial of the suggestion that we, acting as an unorganized and irresponsible mob, may drive into submission ourselves acting as an organized government. What it means is that the body politic, organized as a nation, must recognize its own limitations of wisdom and of temper and of circumstance, and must, therefore, make adequate provision for

self-criticism and self-restraint. The government itself must limit the government, must determine what it may and may not do. It must make sure that its attempts to make men free do not result in making them slaves.

Our own American constitutional procedure gives striking illustration of the double principle that no free government can submit to control other than its own and that, therefore, it must limit and control itself. For example, our agencies of government do their work under a scheme of mutual checks and balances. The Bill of Rights, also, sharply and explicitly defines boundaries beyond which acts of governing may not go. "Congress shall make no law . . ." it says. And again, "No person shall be held to answer for a capital or otherwise infamous crime unless . . ." And again, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." All these and many other limits are set to the powers of government. But in every case—let it be noted—these limits are set by government. These enactments were duly proposed, discussed, adopted, interpreted, and enforced by regular political procedure. And, as the years have gone by, We, the People, who, by explicit compact, are the government, have maintained and interpreted and extended them. In some cases, we have reinterpreted them or have even abolished them. They are expressions of our own corporate self-control. They tell us that, by compact, explicit or implicit, we are self-governed.

Here, then, is the thesis upon which the argument of these lectures is to rest. At the bottom of our American plan of government there is, as Thomas Jefferson has firmly told us, a "compact." To Jefferson it is clear that as fellow citizens we have made and are continually remaking an agreement with one another, and that, whatever the cost, we are in honor bound to keep that agreement. The nature of the compact to which we "consent" is suggested by the familiar story of the meeting of the Pilgrims in the cabin of the Mayflower. "We whose names are underwritten, . . ." they said, ". . . Do by these Presents sol-

emnly and mutually, in the presence of God, and one another, Covenant and Combine ourselves together into a Civil Body Politick, for our better ordering and preservation, and furtherance of the ends aforesaid; and by virtue hereof do enact, constitute, and frame such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony; unto which we promise all due submission and obedience. . . ." This is the same pledge of comradeship, of responsible cooperation in a joint undertaking, which was given in the concluding words of the Declaration of Independence already quoted—"We mutually pledge to each other our Lives, our Fortunes, and our sacred Honor." And, some years later, as the national revolution moved on from its first step to its second, from the negative task of destroying alien government to the positive work of creating self-government, the Preamble of the Constitution announced the common purposes in the pursuit of which we had become united. "We, the People of the United States," it says, "in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America."

In those words it is agreed, and with every passing moment it is reagreed, that the people of the United States shall be self-governed. To that fundamental enactment all other provisions of the Constitution, all statutes, all administrative decrees, are subsidiary and dependent. All other purposes, whether individual or social, can find their legitimate scope and meaning only as they conform to the one basic purpose that the citizens of this nation shall make and shall obey their own laws, shall be at once their own subjects and their own masters.

Our preliminary remarks about the Constitution of the United States may, then, be briefly summarized. That Constitution is based upon a twofold political agreement. It is ordained that all

authority to exercise control, to determine common action, belongs to "We, the People." We, and we alone, are the rulers. But it is ordained also that We, the People, are, all alike, subject to control. Every one of us may be told what he is allowed to do, what he is not allowed to do, what he is required to do. But this agreed-upon requirement of obedience does not transform a ruler into a slave. Citizens do not become puppets of the state when, having created it by common consent, they pledge allegiance to it and keep their pledge. Control by a self-governing nation is utterly different in kind from control by an irresponsible despotism. And to confuse these two is to lose all understanding of what political freedom is. Under actual conditions, there is no freedom for men except by the authority of government. Free men are not non-governed. They are governed—by themselves.

And now, after this long introduction, we are, I hope, ready for the task of interpreting the First Amendment to the Constitution, of trying to clear away the confusions by which its meaning has been obscured and even lost.

## 4

"Congress shall make no law . . . abridging the freedom of speech . . ." says the First Amendment to the Constitution. As we turn now to the interpreting of those words, three preliminary remarks should be made.

First, let it be noted that, by those words, Congress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it. The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bringing them together in activities of communication and mutual understanding. And the federal legislature is not forbidden to engage in that positive

enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, in that positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech.

And second, no one who reads with care the text of the First Amendment can fail to be startled by its absoluteness. The phrase, "Congress shall make no law . . . abridging the freedom of speech," is unqualified. It admits of no exceptions. To say that no laws of a given type shall be made means that no laws of that type shall, under any circumstances, be made. That prohibition holds good in war as in peace, in danger as in security. The men who adopted the Bill of Rights were not ignorant of the necessities of war or of national danger. It would, in fact, be nearer to the truth to say that it was exactly those necessities which they had in mind as they planned to defend freedom of discussion against them. Out of their own bitter experience they knew how terror and hatred, how war and strife, can drive men into acts of unreasoning suppression. They planned, therefore, both for the peace which they desired and for the wars which they feared. And in both cases they established an absolute, unqualified prohibition of the abridgment of the freedom of speech. That same requirement, for the same reasons, under the same Constitution, holds good today.

Against what has just been said it will be answered that twentieth-century America does not accept "absolutes" so readily as did the eighteenth century. But to this we must reply that the issue here involved cannot be dealt with by such twentieth-century a priori reasoning. It requires careful examination of the structure and functioning of our political system as a whole to see what part the principle of the freedom of speech plays, here and now, in that system. And when that examination is made, it seems to me clear that for our day and generation, the words of the First Amendment mean literally what they say. And what they say is that under no circumstances shall the freedom of speech be

abridged. Whether or not that opinion can be justified is the primary issue with which this argument tries to deal.

But, third, this dictum which we rightly take to express the most vital wisdom which men have won in their striving for political freedom is yet—it must be admitted—strangely paradoxical. No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libellous assertions may be, and must be, forbidden and punished. So too must slander. Words which incite men to crime are themselves criminal and must be dealt with as such. Sedition and treason may be expressed by speech or writing.* And, in those cases, decisive repressive action by the government is imperative for the sake of the general welfare. All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then, we may take it for granted, *does not forbid the abridging of speech.* But, at the same time, *it does forbid the abridging of the freedom of speech.* It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is.

5

As we proceed now to reflect upon the relations of a thinking and speaking individual to the government which guards his freedom, we may do well to turn back for a few moments to the analysis of those relations given by Plato. The Athenian philosopher of the fourth century B.C. was himself caught in our paradox. He saw the connection between self-government and

* I shall be grateful if the reader will eliminate from the sentence, "Sedition and treason may be expressed by speech or writing," the words "Sedition and." "Treason" is a genuine word, with an honest and carefully defined procedural meaning. But "sedition," as applied to belief or communication, is, for the most part, a tricky and misleading word. It is used chiefly to suggest that a "treasonable" crime has been committed in an area in which, under the Constitution, no such crime can exist. (Note added 1960.)

intelligence with a clarity and wisdom and wit which have never been excelled. In his two short dialogues, the *Apology* and the *Crito,* he grapples with the problem which we are facing.

In both dialogues, Plato is considering the right which a government has to demand obedience from its citizens. And in both dialogues, Socrates, a thinker and teacher who had aroused Plato from dogmatic slumber, is the citizen whose relations are discussed. The question is whether or not Socrates is in duty bound to obey the government. In the *Apology* the answer is "No." In the *Crito* the answer is "Yes." Plato is obviously using one of the favorite devices of the teacher. He is seeming to contradict himself. He is thereby demanding of his pupils that they save themselves and him from contradiction by making clear a basic and elusive distinction.

In the *Apology,* Socrates is on trial for his life. The charge against him is that in his teaching he has "corrupted the youth" and has "denied the Gods." On the evidence presented by a kind of un-Athenian Subversive Activities Committee he is found guilty. His judges do not wish to put him to death, but they warn him that, unless he will agree to stop his teaching or to change its tenor, they must order his execution. And to this demand for obedience to a decree abridging his freedom of speech, Socrates replies with a flat and unequivocal declaration of disobedient independence. My teaching, he says, is not, in that sense, under the abridging control of the government. Athens is a free city. No official, no judge, he declares, may tell me what I shall, or shall not, teach or think. He recognizes that the government has the power and the legal right to put him to death. But so far as the content of his teaching is concerned, he claims unqualified independence. "Congress shall make no law abridging the freedom of speech," he seems to be saying. Present-day Americans who wish to understand the meaning, the human intention, expressed by the First Amendment, would do well to read and to ponder again Plato's *Apology,* written in Athens twenty-four centuries ago. It may well be argued that if the *Apology* had not

been written—by Plato or by someone else—the First Amendment would not have been written. The relation here is one of trunk and branch.

But the argument of the *Crito* seems, at least, to contradict that of the *Apology*. Here Socrates, having been condemned to death, is in prison awaiting the carrying out of the sentence. His friend Crito urges him to escape, to evade the punishment. This he refuses to do. He has no right, he says, to disobey the decision of the government that he must drink the hemlock. That government has legal authority over the life and death of its citizens. Even though it is mistaken, and, therefore, unjust, they must, in this field, conform to its decisions. For Socrates, obedience to the laws which would abridge his life is here quite as imperative as was disobedience to laws which would abridge his belief and the expression of it. In passages of amazing beauty and insight, Socrates explains that duty to Crito. He represents himself as conversing with The Laws of Athens about the compact into which they and he have entered. The Laws, he says, remind him that for seventy years, he has "consented" to them, has accepted from them all the rights and privileges of an Athenian citizen. Will he now, they ask, because his own life is threatened, withdraw his consent, annul the compact? To do that would be a shameful thing, unworthy of a citizen of Athens.

Plato is too great a teacher to formulate for us, or for his more immediate pupils, the distinction which he is here drawing. He demands of us that we make it for ourselves. But that there is a distinction and that the understanding of it is essential for the practice of freedom, he asserts passionately and without equivocation. If the government attempts to limit the freedom of a man's opinions, he tells us, that man, and his fellows with him, has both the right and the duty of disobedience. But if, on the other hand, by regular legal procedure, his life or his property is required of him, he must submit; he must let them go willingly. In one phase of man's activities, the government may exercise control over him. In another phase, it may not. What,

then, are those two phases? Only as we see clearly the distinction between them, Plato is saying, do we know what government by consent of the governed means.

6

The difficulties of the paradox of freedom as applied to speech may perhaps be lessened if we now examine the procedure of the traditional American town meeting. That institution is commonly, and rightly, regarded as a model by which free political procedures may be measured. It is self-government in its simplest, most obvious form.

In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed. Except as he is overruled by the meeting as a whole, he will enforce those rules. His business on its negative side is to abridge speech. For example, it is usually agreed that no one shall speak unless "recognized by the chair." Also, debaters must confine their remarks to "the question before the house." If one man "has the floor," no one else may interrupt him except as provided by the rules. The meeting has assembled, not primarily to talk, but primarily by means of talking to get business done. And the talking must be regulated and abridged as the doing of the business under actual conditions may require. If a speaker wanders from the

point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared "out of order." He must then stop speaking, at least in that way. And if he persists in breaking the rules, he may be "denied the floor" or, in the last resort, "thrown out" of the meeting. The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged. It is not a Hyde Park. It is a parliament or congress. It is a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion. It is not a dialectical free-for-all. It is self-government.

These speech-abridging activities of the town meeting indicate what the First Amendment to the Constitution does not forbid. When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak whenever, wherever, however he chooses. They do not declare that any man may talk as he pleases, when he pleases, about what he pleases, about whom he pleases, to whom he pleases. The common sense of any reasonable society would deny the existence of that unqualified right. No one, for example, may, without consent of nurse or doctor, rise up in a sickroom to argue for his principles or his candidate. In the sickroom, that question is not "before the house." The discussion is, therefore, "out of order." To you who now listen to my words, it is allowable to differ with me, but it is not allowable for you to state that difference in words until I have finished my reading. Anyone who would thus irresponsibly interrupt the activities of a lecture, a hospital, a concert hall, a church, a machine shop, a classroom, a football field, or a home, does not thereby exhibit his freedom. Rather, he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary.

What, then, does the First Amendment forbid? Here again the town meeting suggests an answer. That meeting is called to discuss and, on the basis of such discussion, to decide matters of

public policy. For example, shall there be a school? Where shall it be located? Who shall teach? What shall be taught? The community has agreed that such questions as these shall be freely discussed and that, when the discussion is ended, decision upon them will be made by vote of the citizens. Now, in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. Both facts and interests must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another. As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged.

The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so. If, for example, at a town meeting, twenty like-minded citizens have become a "party," and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously out of order for each of the others to insist on reading it again. No competent moderator would tolerate that wasting of the time available for free discussion. What is essential is not that everyone shall speak, but that everything worth saying shall be said. To this end, for example, it may be arranged that each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available. But however it be arranged, the vital point, as stated negatively, is that no

suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that though citizens may, on other grounds, be barred from speaking, they may not be 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. No speaker may be declared "out of order" because we disagree with what he intends to say. And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

If, then, on any occasion in the United States it is allowable to say that the Constitution is a good document it is equally allowable, in that situation, to say that the Constitution is a bad document. If a public building may be used in which to say, in time of war, that the war is justified, then the same building may be used in which to say that it is not justified. If it be publicly argued that conscription for armed service is moral and necessary, it may likewise be publicly argued that it is immoral and unnecessary. If it may be said that American political institutions are superior to those of England or Russia or Germany, it may,

with equal freedom, be said that those of England or Russia or Germany are superior to ours. These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters, need to hear them. When a question of policy is "before the house," free men choose to meet it not with their eyes shut, but with their eyes open. To be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged.

# POSTSCRIPT

THIS BOOK has attempted to interpret the intention and the general provisions of the Constitution, so far as they relate to that self-government which is our political freedom. And now, with basic abstractions tentatively defined, common sense requires that a citizen of the United States should face and grapple with the more concrete issues suggested by Professor Sharp in his Foreword. Under the actual conditions of life in the United States does the Constitution work well? Does it provide wise and efficient guidance for our dealing with the desperate issues which are now, in ever-new forms, rushing upon the nation? If not, should it be amended or even abandoned? What alternative lines of Constitutional planning, if any, give promise of providing better care for the national welfare? Or, as against all these suggestions, may we decide that the source of our political difficulties lies not in the Constitution, but in ourselves? Have we unwittingly fallen into a way of life which is inherently hostile both to the Constitution and to the human values which it seeks to enhance and preserve? If so, how shall we change that way of life to make it promote, rather than prevent, the creation of freedom?

As my good friend, former pupil, and present teacher intimates, the inquiry of two decades, as reported in these pages, has not dealt directly with any of these "practical" problems. It has tried to do nothing more than to clear the ground for the struggle to solve them. And the writer of this book is pragmatic enough to believe that abstract reasoning which does not contribute to the removing of the difficulties and the realizing of the purposes out

of which it arises, is worthless. And yet it must be said with equal emphasis that no form of action is more inefficient and self-defeating than that which—refusing to abstract principles from their concrete settings—undertakes to manage practical affairs one by one, without searching out the general ideas of fact and value which, interpreting those affairs, give them meaning for one another.

This Postscript, as it takes its stand on that platform, makes no claim that we have answered the questions which Mr. Sharp has suggested. Many decades and much intellectual cooperation will be needed for the carrying on of that enterprise. But out of the argument of the book there seem to run three lines of inquiry along which the search for practical wisdom might proceed.

First, the electoral machinery which, by custom and legislative action, we have imposed upon the Constitution, has been peculiarly unsuccessful in winning our confidence that it is suited to its purpose. The party system, as we use or abuse it, with its conventions and platforms, its campaigning appeals so commonly directed to the self-seeking interests of individuals and groups, does not give the impression that we are a nation of free, self-governing minds thinking loyally and objectively about the common good. On the contrary, it makes of us rather that scrambling collection of "factions" which Jefferson feared and condemned. The term "politics" which, if we are free men, should connote our highest aspirations, our most serious and carefully cultivated thinking, has become a term of reproach and contempt. It speaks of trickery rather than of intelligence. Here is a set of problems which our political scientists should be studying, not merely to find out what our practices are, but rather what they must be if the intention of the Constitution is to be realized. What are the best procedures, we ask them, by which free people may, acting together, govern themselves?

The second question which needs fearless and thorough study concerns education. Can one hundred seventy million people of different racial stocks, of conflicting and changing private

interests, of imperfect and impeded communication with one another, learn to think together about the general welfare in such a way that each of them may have a valid sense of responsible sharing in the common enterprise of making and managing a free society? To develop that capacity of mind and will is the primary task of our schools and colleges and, perhaps more important, of our classes in adult education. We Americans lack freedom chiefly because we do not know what it is. And that failure of understanding is not due to a lack of capacity. It is due primarily to a lack of interest in such a reflective or theoretical problem. We are concerned with "making good" with forms of competitive success which, as contrasted with the interpreting and practicing of freedom, are trivial and illusory. Nothing short of a fundamental transformation of the spirit and method of our national education, whether in schools or outside of them, can fit us for the responsibilities of thinking and deciding which the Constitution lays upon us. Here are problems for our teachers in relation to which we seem to fall back more than we go forward.

A third difficulty, which follows closely upon the educational one, is that in the course of our enormous and rapid growth in wealth and power, there has grown up in and around us an "American way of life" which is incongruous with and hostile to the intention of the Constitution. "Free enterprise," so-called, and "self-government" are fundamentally at odds with one another. The nature and source of that incongruity can be seen if we examine closely the double meaning of the word "power" as it is used in discussions of the relations between "the people" and their "government."

The word "power" is used by the Constitution in a very special sense which is foreign to our ordinary non-Constitutional use of the term. When the great document provides that we shall reserve and exercise "power" to govern ourselves, it is speaking only of a political "authority" assigned to us under an agreement as to a "plan of government." But that provision gives no assurance that in the actual course of events, we, the people, are able to do what

we are authorized to do. "Power," in the sense of "political authority" is radically different from the "power" of private individuals or groups who have the physical, intellectual, and social strength which are needed to take control over human beings and human situations, and to use them for defined plans and purposes. And in the same way, the possession of power in the second sense gives no assurance that those who exercise it have, or should have, authority to do so.

Now it is very easy for the "realistic" or "pluralistic" scholars, who study American political and social life, to show that at the present time, the mass of the voters, who have political authority, are relatively powerless in the deciding of issues of public policy. The power which controls the nation, those scholars tell us, is held by a vast array of non-official groups and individuals who, through shrewdness and influence in their aggressive self-seeking, use the machinery of the laws and the Constitution, as they use other devices, for the furthering of their own private interests. This is, we are told, the "American way of life." In accordance with it private individuals and groups have at their disposal wealth or knowledge or both of them. And so deeply are their activities entrenched in our customs of action and belief that their energy and enterprise and skill seem to us the most characteristic expressions of the spirit of the nation. These "powers" see what they want, and they are clever in getting it. They fight among themselves continuous battles, in which the casualties are heavy. They also combine together for common action. And it is here—so the pluralistic realists tell us—in the conflicts and alliances of non-political groups and individuals, that public policies are worked out, that the controlling of the nation is done.

Is that the way of life of a self-governing society? No one can doubt that there is much of truth in the portrayal which it gives of the external powers or forces which control our national life. But what does it tell us about our freedom? The story, as it is commonly told, does not mean that the private and self-seeking forces of which it speaks have power to "govern" us. It means

only that they can, and do, "control" us. But, so far as that is true, "government," in the sense intended by the Constitution, has ceased to exist. To that extent, the people of the United States are not "governed," either by themselves or by anyone else. And the belief that they are "free" is, in so far, merely a myth by means of which they may be manipulated, cajoled, or driven into acting without knowing what they are doing.

Here then, in the relation between authority and power, is the third inquiry for which this book has tried to clear the ground. We Americans have Constitutional authority to govern ourselves. But we can do so only in so far as our deliberate and informed judgment-making is equipped with the power which is needed to control and direct the pursuit of private interest in whatever way the public welfare may require.

By what practical steps can we make our way toward that far-off goal of political freedom? This book has deliberately held back from consideration of that question. In its closing words, however, it may offer for consideration five opinions, bearing upon the issue, which seem to the writer to be implied by the meaning of the Constitution. They are:

(1) The commonly urged identification of Constitutional freedom with the freedom of business enterprise is an illusion which could be entertained only in a society which is too busy in seeking success to give time or energy to finding out what success is.

(2) As judged by our response to the opportunities and obligations of political freedom, we Americans are not, in effect, a competent body-politic. On the contrary, we are, in many of our moods, an unintelligent and ungovernable mob.

(3) It is not true that the best government is the one which governs least. There is much more truth in the maxim that "Eternal Vigilance is the price of Freedom (Liberty)." No nation can be free unless it is strong enough and active enough to control, whenever necessary, every private individual or group whose action affects the general welfare.

(4) We do not understand what a free government is when

we interpret its making and administering of laws as merely repressive, as merely limiting the actions of men. All the repressive and regulatory activities of the Constitution are incidental and secondary features of a creative, constructive undertaking, namely, that of which its Preamble speaks.

(5) Our greatest present disloyalty to the Constitution lies in the fact that we do not study and criticize it as did the men who devised and adopted it. They met novel and desperate situations by establishing unheard-of and revolutionary forms of government. We too are facing novel and desperate situations. Shall we do as they did, or shall we hate and fear those who follow their example? In the practical answering of that question it will be revealed whether the American experiment in freedom is still going on or has already been abandoned.

# SPEECHES AND PAPERS ON THE FIRST AMENDMENT

## BY ALEXANDER MEIKLEJOHN

### *Articles in Law Journals*

Educational Cooperation Between Church and State
In "Symposium on Religion and the State," published in *Law and Contemporary Problems,* journal of Duke University School of Law, Durham, N.C., Winter 1949

The First Amendment and Evils That Congress Has a Right to Prevent
*Indiana Law Journal,* xxvi, 4, Summer 1951

What Does the First Amendment Mean?
*University of Chicago Law Review,* xx, 3, Spring 1953

The Priority of the Marketplace of Ideas
University of Chicago Law School Fiftieth Anniversary Celebration, Conference on Freedom and the Law, *Conference Series #13,* May 1953

### *Papers Prior to 1948*

Liberty—For What?
*Harper's Magazine,* August 1935

Teachers and Controversial Questions
*Harper's Magazine,* June 1938

### *Publications Subsequent to* Free Speech and Its Relation to Self Government *(1948)*

Professors on Probation: Should Communists Be Allowed to Teach?
*New York Times Magazine,* March 27, 1949