

FREE SPEECH IN POLITICAL PHILOSOPHY AND ITS RELATION TO AMERICAN CONSTITUTIONAL LAW: A CONSIDERATION OF MILL, MEIKLEJOHN, AND PLATO

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I. INTRODUCTION

The American Constitution's success, according to its Founders, required that the people understand the document. One telling argument for adding a bill of rights to the Constitution was that "if a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book."¹ If we assume this is true for constitutional law as well, the Supreme Court's treatment of freedom of speech is cause for our concern. Not only has the Court decided controversial free speech cases with increasingly complicated doctrines, but it has extended protection to expressive activities which citizens do not ordinarily associate with freedom of speech. For example, in 1992 the Supreme Court invalidated a bias motivated crime ordinance under which a young man was convicted for having burned a cross inside the fenced yard of a black family.² While the decision was unanimous, only a bare majority of the Court agreed on the reasoning: while the prohibited expression came under the "fighting words" categorical exception to protected speech, the "content neutrality" rule should be applied nonetheless; under that rule the ordinance failed, since certain, but not all, "fighting words" were selected for prohibition on the basis of the message conveyed.³ Similarly, even when a government regulation is upheld, what

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1. Federal Farmer XVI, in Herbert J. Storing, ed., *2 The Complete Anti-Federalist* 324 (U. of Chicago, 1981).

2. *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 504 U.S. — (1992).

3. *Id.* at 2548-50.

the Justices call “protected expression” is at times hard to square with the high-toned justifications for protecting free speech. The major free speech case in 1991 involved nude dancing at the Kitty Kat Lounge.⁴ In a 5-4 decision upholding a public indecency statute that prohibited nude dancing at the Kitty Kat Lounge, a majority of the Court was unable to affirm that the government’s interest in banning nudity in places of public accommodations was unrelated to the suppression of free expression. Justice Souter, who cast the deciding vote, wrote that “such performance dancing is inherently expressive,” and thus “subject to a degree of first amendment protection,” but he went on to explain his vote with reference to “the State’s substantial interest in combating the secondary effects [e.g., likelihood of prostitution] of [such] adult entertainment establishments.”⁵ First Amendment scholar Frederick Schauer attributes the reasoning in cases such as *R.A.V.* and *Barnes* to “the process of abstraction” whereby

Nazis become political speakers, profit maximizing purveyors of sexually explicit material become proponents of an alternate vision of social existence, glorifiers of sexual violence against women become advocates of a point of view, quiet residential streets become public forums, and negligently false harmful statements about private matters become part of a robust debate about issues of public importance.⁶

The Supreme Court has drawn much of its understanding of freedom of speech from the famous Holmes-Brandeis opinions in the “subversive advocacy” cases from 1919-1927. These opinions assumed that the “marketplace of ideas” should be perfectly free of governmental restraint, because truth will win out and the best response to harmful speech is more speech, unless there is a “clear and present danger” of a substantive evil that government has a right to prohibit.⁷ The most recent development of this doctrine permits government to outlaw advocacy only when it “is

4. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 501 U.S. — (1991).

5. *Id.* at 2468.

6. Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. Chi. L. Rev. 397 (1989), a review of Kalven’s posthumously published book, Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (Harper & Row, 1988).

7. “[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” *Abrams v. United States*, 250 U.S. 616, 630 (1919); see also *Schenck v. United States*, 249 U.S. 47 (1919); *Gilow v. New York*, 268 U.S. 652 (1925); and *Whitney v. California*, 274 U.S. 357 (1927).

directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁸

This development is part of a treatment of freedom of speech which starts by distinguishing categories of unprotected speech, including incitement, obscenity, and “fighting words,” from all other speech, which is protected. Protected speech cannot be prohibited and can only be regulated, as part of a “time, place and manner” regulation or as incidental to a regulation of conduct, if the regulation is “content” and “viewpoint” neutral. This means that protected speech cannot be treated differently on the basis of subject matter or point of view. As a result of the “hate speech” decision discussed above, the content neutrality rule now applies even to unprotected speech. When both symbolic expression, such as draft card or flag burning, and offensive expression, such as wearing “F— the Draft” on a jacket in a public place, are included within the First Amendment, we arrive at our current legal condition on free speech. Do we really believe that such an extensive freedom of expression is good for our polity, that the truth, whatever that might mean as applied to nude dancing or cross burning, wins out, and that no harm results from such enforced permissiveness? To begin a reconsideration of these questions, I want to examine the philosophic source of our current views on free expression.

Modern political philosophy, as developed in the writings of Hobbes, Spinoza, Locke, Montesquieu, and Rousseau, has provided the foundation for our Constitution and for modern liberal constitutionalism generally. Government’s purpose is limited to the securing of individual rights and its authority comes from the people, who give their consent (in the versions of Locke and Montesquieu, which the American Founders followed) via representatives. In addition, the powers of government are arranged in and divided among different branches, which include a separation of powers among the political branches of government and an independent judiciary.

Turning specifically to freedom of speech, while Spinoza, Locke, and Montesquieu discuss the subject in a manner consistent with their emphasis on securing rights, John Stuart Mill (whose teaching draws on the previous philosophers) and Alexander Meiklejohn are the most prominent proponents of the free

8. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

speech doctrine the Court has followed.⁹ Thomas Emerson's well-known list of reasons for the importance of freedom of speech¹⁰ comes in large part from Mill, with a hint of Meiklejohn. Gerald Gunther, who quotes from Emerson's list, also identifies Mill and Meiklejohn as prominent sources for explaining the importance of free speech. As I will show shortly, the Court's approach to freedom of speech embodies Mill's position. In addition, Harry Kalven's famous article on the New York Times libel case and Justice Brennan's article both made Meiklejohn a household name among students of the First Amendment.¹¹

In their writings on free speech, Mill and Meiklejohn both cite Socrates.¹² Mill addresses the unsettling effect Socrates had on the Athenian citizens and the extreme action they took in response, i.e., capital punishment. Meiklejohn attempts to reconcile Socrates's speech in the *Apology* with his refusal to allow his friends to spring him from jail in the *Crito*. This material is important for American constitutional law because our understanding of freedom of speech depends upon our understanding of the relationship between political activity and the activity of thought generally, that is, philosophic reflection, scientific inquiry, and artistic expression. Our current free speech doctrines assume a fundamental harmony between these two activities. If this harmony cannot be assumed, as I intend to show with this examination of Mill, Meiklejohn, and Plato, then the Supreme Court's justifications for upholding free speech claims, and its very decisions in certain cases, will need to be reconsidered.

9. John Stuart Mill, *On Liberty* (Stefan Collini, ed., Cambridge U. Press, 1989); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper & Brothers, 1960).

10. Freedom of speech is important (1) "as a means of assuring individual self-fulfillment"; (2) as "an essential process for advancing knowledge and discovering truth"; (3) as "essential to provide for participation in decision-making by all members of society"; and (4) as "a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." Thomas I. Emerson, *The System of Freedom of Expression* 6-7 (Random House, 1970).

11. Gerald Gunther, *Constitutional Law* 996 (Foundation Press, 12th ed. 1991); Harry Kalven, Jr., *The New York Times Case: A Note on the "Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191; William Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965).

12. Mill's discussion refers to the Athenian trial, the condemnation and the execution of Socrates, whereas Meiklejohn refers explicitly to Plato's account of these events. My discussion of Socrates will always mean Plato's Socrates, except where I refer to Xenophon's account of Socrates' trial.

II. THE MODERN VIEW OF FREE SPEECH AND ITS RELATION TO FREE GOVERNMENT

Mill's arguments in *On Liberty* concern civil liberty in general, as his thesis indicates.

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used by physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.¹³

Presenting the foundation for this principle in chapter three, Mill argues that "the free development of individuality is one of the leading essentials of well-being," and that "the evil is, that individual spontaneity is hardly recognized by the common modes of thinking, as having any intrinsic worth. . . ." ¹⁴ Likening human nature to a "tree, which requires to grow and develop itself on all sides," as opposed to "a machine to be built after a model," Mill argues that the more desires and feelings one has the more one has "of the raw material of human nature."¹⁵ Such a formulation suggests the need for strong government for security, as Hobbes argued. Mill, however, posits a social part of human nature as he claims that "there is a full equivalent in the better development of the social part of [that] nature, rendered possible by the restraint put upon the selfish part."¹⁶ This seems to be Mill's way of denying any tension between the good of an individual and the common good.

We thus approach Mill's argument for free speech in light of the overall object of the work: to minimize governmental and social control over individuals—at least over adults in advanced societies—in order to allow them to fully develop their unique natures. Mill argues that the free expression of opinions, in

13. Mill, *On Liberty* at 13 (cited in note 9). This work was first published in 1859. The thesis applies to mature human beings and to advanced, or non-backward, societies (despotism may be appropriate for less advanced societies, if the end is their improvement). The thesis argues for limits on social constraints as well as on legal, or criminal, ones.

14. *Id.* at 57.

15. *Id.* at 60.

16. *Id.* at 63.

speech and writing, does not lead to any social harm. Mill goes on to put a limit on free speech which anticipates the Supreme Court's "clear and present danger" test:

even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.¹⁷

Mill makes a threefold classification for analyzing society's dominant opinions in relation to "the liberty of thought and discussion."¹⁸ First, the opinion which society wishes to suppress may be true, and those who wish to suppress it are incorrectly assuming infallibility. He presents and responds to two counterarguments here. In the first case, forbidding the propagation of error no more presupposes infallibility than any other form of acting on the basis of one's judgment. He responds that there is a significant difference "between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation."¹⁹ The second counterargument is from utility. To this claim Mill replies that "[t]he usefulness of an opinion is itself a matter of opinion" and that "[t]he truth of an opinion is part of its utility."²⁰

In the second case, the received opinion, society's orthodoxy, may be true, and the challenging opinions may be false. But this does not justify suppression of those challenging opinions, Mill says, since rational beings must be in a position to know the truth, not simply hold it from authority. This is especially true in matters of "morals, religion, politics, social relations, and the business of life," where "three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favour some opinion different from it."²¹ Mill maintains that the arguments of adversaries must be heard not

17. *Id.* at 56. This "mob rule" example, occurring within the civilized society that is supposedly advanced enough for full freedom of speech, seems to point to a broader problem than Mill is willing to acknowledge.

18. That is the title to chapter two, which contains Mill's free speech argument.

19. *Id.* at 22.

20. *Id.* at 25.

21. *Id.* at 38.

simply by able teachers but by the adversaries themselves, "presented as they state them, and accompanied by what they offer as refutations."²² According to Mill, over time mankind will agree on more and more important doctrines. To the counterargument that only the few, not mankind in general, need to have full knowledge of "all that can be said either against or for their opinions," Mill replies that "in the present state of the world," given the widespread availability of writing, such a proposal "is practically impossible."²³

The third case presents a mixed situation, which is the most common: the "conflicting doctrines" may "share the truth between them."²⁴ In elaborating on this position, Mill refers to Rousseau's critique of the Enlightenment and then to Christian morality. I will return to this argument below.

Mill paints an attractive picture of critical open-mindedness in the service of full human development. At the same time, his confidence in the progressive development of mankind, which seems to justify his ambition to reduce the authority of society as well as government, leads to unreasonable expectations. Consider his discussion of the suppression of Socrates, of Jesus, and of Christianity by Marcus Aurelius. For Mill, the first two cases involve the State's suppression of a moral exemplar and the third case involves a moral man's misguided attempt to suppress a moral teaching foreign to him. Mill does not emphasize the distinctive teachings of Socrates, Jesus, or Rome, nor does he bewail the loss of great men. Rather he directs attention to the ill-effects of suppression *per se*. His confidence in the benefits of individual development accounts for his position on truth. According to Mill, the dictum that "truth always triumphs over persecution" is "one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes."²⁵ He does, however, believe that "when an opinion is true," men will periodically rediscover it until "some one of its reappearances falls upon a time when from favorable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it."²⁶

22. *Id.* at 38.

23. *Id.* at 39-40. This is an important point, since it seems to tell against any return to the position of classical political philosophy. It also has wider implications in the age of television. Still, if the assumed harmony, over time, between the few and the many does not occur, we may need to rethink the questions of practical application.

24. *Id.* at 47.

25. *Id.* at 31-32.

26. *Id.* at 31.

So truth is resilient and suppression of opinion is harmful. But what is this thing called “truth” that gains adherence over time? Since human liberty is a natural good, the more people are given a chance to be free, the more they will develop their individuality. Moreover, freedom of thinking, and hence speaking and writing,

is as much and even more indispensable, to enable average human beings to attain the mental stature which they are capable of. There have been, and may again be, great individual thinkers, in a general atmosphere of mental slavery. But there never has been, nor ever will be, in that atmosphere, an intellectually active people.²⁷

An intellectually active people must be involved in controversy over important subjects. Only then can “the mind of a people [be] stirred up from its foundations, and the impulse [be] given which [can raise] even persons of the most ordinary intellect to something of the dignity of thinking beings.”²⁸

Truth for Mill, then, is the rights of man and the advancement of science for the relief of man’s estate, the truth of the Enlightenment. The political truths regarding rights, security, and full self-development are as likely to find favor with a people that is allowed to hear all opinions as scientific truths are likely to win the assent of disinterested scientists. The challenge is to get well intentioned people to see that coercion, social or governmental, need not go beyond self-protection, since if it does, it is unnecessary and harmful to full self-development.

Mill’s position on coercion explains his treatment of Rousseau and his final treatment of Christianity, contained in part three of the argument. Rousseau argued, in part from the perspective of the ancient city, that the restoration of the sciences and arts, the Enlightenment, does not purify morals, because the sciences and the arts look up to the universalism of philosophy and science while morality reflects the particularism of one’s city and the demands of citizenship.²⁹ For Mill, Rousseau made a temporary contribution but he was more wrong than right: his “paradoxes . . . explode[d] like bombshells in the midst, dislocating the compact mass of one-sided opinion, and forcing its elements to recombine in a better form and with additional

27. Id. at 36.

28. Id. at 36.

29. See Rousseau, *First Discourse* in *The First and Second Discourses* (Royer D. Masters, ed. & Roger D. Masters & Judith R. Masters, trans., St. Martin’s Press, 1964).

ingredients.”³⁰ In other words, Rousseau’s criticism of the arts and sciences for their deleterious effects on the citizenry of a free republic did not require any fundamental reconsideration of individual self-development and free society.

Mill treats Christianity with more circumspection. He does not want to offend his audience by denying categorically that Christian morality is true. He does say that the Gospel’s precepts are confined “to the particulars in which that morality was to be corrected, or superceded by a wider and higher [one]; expressing itself, moreover, in terms most general, often impossible to be interpreted literally, and possessing rather the impressiveness of poetry or eloquence than the precision of legislation.”³¹ Criticizing “so-called” Christian morality for being negative and passive rather than positive and active, Mill can still claim that

the sayings of Christ . . . are irreconcilable with nothing which a comprehensive morality requires; that everything which is excellent in ethics may be brought within them, with no greater violence to their language than has been done to it by all who have attempted to deduce from them any practical system of conduct whatever.³²

Mill was not the first modern philosopher to criticize Christianity so tactfully that not every reader would understand, but he was the first to express such confidence in the positive effects of full and free discussion on important beliefs. He seems to have thought that zealous religious convictions would become a thing of the past.

Alexander Meiklejohn is Mill’s intellectual heir, applying some of Mill’s ideas to specific cases and questions. In *Free Speech and its Relation to Self-Government*, first published in 1948, Meiklejohn advocated a wider scope for freedom of speech than the Supreme Court’s interpretation of the “clear and present danger” test had allowed up to that time.³³ Like Mill, Meiklejohn believes that when all opinions are heard, the results will be beneficial for civil society. His emphasis is on the citizens’ responsibility for collective deliberation in a democratic form of government. Meiklejohn draws on the Constitution’s preamble

30. Mill, *On Liberty* at 48 (cited in note 9).

31. *Id.* at 49-50.

32. *Id.* at 51.

33. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (cited in note 9). Part one of this book is a second edition of Meiklejohn’s *Free Speech and its Relation to Self-Government*; part two contains additional papers. My discussion draws on the first part of the original work, which is entitled “The Rulers and the Ruled.”

to interpret the First Amendment. "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."³⁴ Free speech cannot be abridged by the self-governing community, because it would deny to citizens "information or opinion or doubt or disbelief or criticism" which they need to make decisions.³⁵ "It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed."³⁶

Because it emphasizes matters of citizen deliberation, Meiklejohn's argument has reinforced the idea that the First Amendment only protects political speech. This position was criticized by scholars and in response Meiklejohn expanded his own definition of political speech.³⁷ But Meiklejohn was right to emphasize the political speech of citizen critics of government, because otherwise freedom of speech becomes a part of a general individual liberty, a freedom from government. His insistence on a qualitative distinction between freedom of speech and a general liberty, which is subject to regulation under the due process clause, has found some support in constitutional law.³⁸

But Meiklejohn's use of the concept of the traditional town meeting to elaborate his free speech argument does not acknowledge the significance of representation for modern free government. The citizens choose a moderator who "calls the meeting to order," requires debaters to confine their remarks to "the question before the house," maintains orderly discussion, and makes sure "that everything worth saying shall be said" (assuming, of course, that such is consistent with Robert's *Rules of Order*).³⁹ Using the example of a school board, Meiklejohn writes that questions concerning where to locate a school, who should teach, what should be taught are matters for full and free discussion and decision. No policy "shall be denied a hearing because it is on

34. *Id.* at 15.

35. *Id.* at 27.

36. *Id.* at 27 (emphasis omitted).

37. Schauer notes the difficulties in defining political speech in Frederick F. Schauer, *Free Speech: A Philosophical Enquiry* 44-45, 211 n.9 (Cambridge U. Press, 1982). Robert Bork has interpreted the Framers' intentions on free speech as limited to political speech, in his *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1 (1971). Meiklejohn expanded the reach of political speech to include philosophy, science, literature, and the arts in *The First Amendment is an Absolute*, 1961 *Sup. Ct. Rev.* 245, 257.

38. Meiklejohn, *Free Speech and its Relation of Self-Government* at 8-9 (cited in note 33). This resembles the Supreme Court's "preferred position" approach to individual liberties. Cf. Justice Stone's footnote 4 in *United States v. Carolene Products*, 304 U.S. 144 (1938).

39. *Id.* at 24-26.

one side of the issue rather than another."⁴⁰ He adds that "[n]o 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."⁴¹

Since Meiklejohn has the Smith Act's outlawing of the Communist Party in mind, we might ask whether he is referring to the proposal to bring about violent revolution or to the proposal to outlaw organizations advocating violent revolution as a rule of action. The abolition question might well come before the house, but it would be a representative legislature. How would the violent revolution question "come before the house"? If this is Meiklejohn's way of describing the people's right to alter or abolish government, is that not a pre-political natural right which cannot be constitutionally recognized?⁴² And if the intention is to have all matters come before the sovereign people through their representatives, a legislative decision to outlaw the Communist Party does not prevent a reconsideration of such a measure in the future. But whenever the Supreme Court nullifies a law for abridging freedom of speech, it prohibits the citizen body from deliberating and deciding on the matter altogether. Meiklejohn's "self government" argument fails to make a persuasive case for such an extensive freedom from government.⁴³

Does Meiklejohn assume that full disclosure to rational adults, no matter what the arena, no matter how potentially dangerous a secret association might be, will always produce beneficial results and never produce irreparable harms? I think so. His interpretation of Socrates, from the *Apology* and *Crito*, illustrates his position and also reveals the weakness of his argument.

According to Meiklejohn, "[i]n both dialogues, Plato is considering the right which a government has to demand obedience from its citizens The question is whether or not Socrates is in duty bound to obey the government. In the *Apology* the answer

40. *Id.* at 27.

41. *Id.*

42. See John Locke, *Second Treatise of Government* chapters XIII, XIX (J.W. Gough, ed., Barnes & Noble, 1966), the Declaration of Independence, and Lincoln's First Inaugural on this point.

43. Frederick Schauer makes a similar point in his discussion of Meiklejohn's position in *Free Speech: A Philosophical Enquiry* at 37-45 (cited in note 37). Schauer, following Mill, thinks that the "fallibility argument" is the only persuasive reason for limiting government. He also cites Tocqueville, but that author is more sensitive to the special threats posed by associations, as opposed to sole individuals. See Alexis de Tocqueville, *Democracy in America* 191, 193 (J.P. Mayer, ed., Doubleday, 1969).

is 'No.' In the *Crito*, the answer is 'Yes.'⁴⁴ Meiklejohn claims that Plato's Socrates has provided a consistent and defensible position toward law-abidingness and he finds that position in the American Constitution also. In the *Apology*, the city charges Socrates with corrupting the young and not believing in the gods of the city. Meiklejohn writes:

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.⁴⁵

Meiklejohn interprets Socrates's defense as a "First Amendment" argument to his judges, to the effect that they have no right to inquire into his beliefs and teachings. I return to this below.

In the *Crito*, Socrates refuses to accept his friend's offer of help to escape jail, and hence execution. Socrates constructed a dialogue between himself and the laws of Athens to show his friend that he had consented to live under those laws all his life, enjoying the rights and privileges of Athenian citizenship. How can he now, when his life is threatened, unilaterally remove his consent? Meiklejohn, accepting Socrates's argument at face value, argues that while government may not limit a man's freedom of thought, it can deprive someone of his life or property after giving him a fair trial. Hence, the lesson from Plato, according to Meiklejohn, confirmed in the language of the First Amendment, is that civil disobedience based on belief or conviction is permissible, but refusal to accept whatever punishment follows from due process of law is not.⁴⁶

44. Meiklejohn, *Free Speech and its Relation to Self-Government* at 22 (cited in note 33).

45. *Id.*

46. Meiklejohn thus anticipates Martin Luther King's famous argument for civil disobedience.

In summary, Mill and Meiklejohn offer a defense of freedom of speech which draws on Plato's *Apology of Socrates*. Both assume that Athens was wrong and Socrates, as an individual asserting his rights, was right. Turning to Plato, I want to show that the correct interpretation of these two dialogues, by themselves and in conjunction with the *Republic*, yields a more complicated, but also more instructive teaching.

III. FREE SPEECH IN CLASSICAL POLITICAL PHILOSOPHY: A RECONSIDERATION OF PLATO'S *APOLOGY OF SOCRATES* AND *CRITO*

In Plato's version of the trial, Meletus, Anytus, and Lycon make the following charge: "Socrates does injustice by corrupting the young, and by not believing in the gods in whom the city believes, but in other *diamonia* [daimonic, or godlike, things or beings] that are novel."⁴⁷ After Socrates is found guilty, by a vote of approximately 280-220, the accusers, on behalf of the city, propose the death penalty. The jury, after hearing Socrates propose "tenure for life" as his "penalty," chooses death.⁴⁸ The two substantive questions are, what does Socrates claim for himself and what does he allow the city? Before examining them, however, I consider the character of this dialogue and Socrates's remarks about his defense speech and speech in general.

The *Apology* is the only Platonic dialogue in which Socrates is presented in a conversation with the entire city of Athens, that is, with the randomly selected five hundred-man jury. In all the other dialogues in which Socrates appears, he speaks with a select few. Socrates insists that his interlocutor and he must be the judges, not some external jury, and that question and answer, rather than long speeches, be employed. Furthermore, in the *Phaedrus*, Socrates criticizes writing as frozen speech, which says the same thing to everyone, and he praises speaking for allowing the speaker to tailor his remarks to the specific audience.

Socrates has a popular and hostile audience in the *Apology*. Such an audience will affect his ability to instruct his listeners,

47. *Plato and Aristophanes: Four Texts on Socrates* 73 (24b-c) (Thomas G. West & Grace Starry West, trans., Cornell U. Press, 1984).

48. If the death penalty and the criminal process are both taken out of the case, we can imagine a modern version of Socrates' condition: having a teacher and scholar who is up for tenure defend himself against the charges that his teachings, opinions, or beliefs are detrimental to the students and harmful to the larger community. The American Association of University Professors' principles on academic freedom follow the arguments of Mill and Meiklejohn.

and hence it will affect what he says. Socrates claims at the beginning of his speech that unlike his accusers, who are clever speakers but liars, he will tell the simple unadorned truth; it is, he claims, the only way he knows, since at seventy this is his first time in a law court as a defendant. Socrates implies that all that is necessary for justice is truth telling. But at the end of the dialogue, he contradicts his first statement by indicating that he could have spoken differently. Now it appears that if he had wanted to save his life *at all costs*, he could have spoken shamelessly, saying what needed to be said to please his hearers.⁴⁹ The latter statement is consistent with Socrates's remark about the flexibility of speaking, whereas the first statement about simply telling the truth is not. Socrates's two accounts of his manner of speaking give some indication of the meaning of Socratic irony and suggest the need to approach the critical arguments on the charges carefully.

Turning to his defense, Socrates begins with the corruption charge. He asks who makes the youth better. After first saying that the laws do, Meletus (in response to Socrates's prodding) gives the democratic answer that the citizen judges ("all of them") are able to educate the young.⁵⁰ Socrates notes that in the training of horses it is the few who know, rather than the many who do not, who make them better. Socrates suggests two possible reference points for rearing the young: on the basis of knowledge of human excellence simply or on the basis of what a given political association, or body politic, looks up to.

The second charge against Socrates is that he teaches the youth "not [to] believe[] in the gods in whom the city believes, but in other daimonia that are novel."⁵¹ His response to this charge is very different from what Meiklejohn says it is. After getting Meletus to expand on the charge by asserting that he is an atheist,⁵² Socrates can point out that Meletus has contradicted his own indictment, according to which Socrates believes in, or introduces, daimonia, godlike things or beings, that are novel.⁵³ According to Leo Strauss, "[t]his refutation is so beautiful be-

49. *Plato and Aristophanes: Four Texts on Socrates* at 93 (38d) (cited in note 47).

50. *Id.* at 74 (24e).

51. *Id.* at 73 (24b-c).

52. [S] "Or do you assert that I myself do not believe in gods at all and that I teach this to others?" [M] "This is what I say, that you do not believe in gods at all." *Id.* at 76 (26c).

53. *Id.* at 76-78 (26b-27d). The daimon is Plato's Socrates's ironic way of describing some of his actions, such as a decision to stay out of political life; he refers to it later in the dialogue as not having opposed his form of defense.

cause it leaves entirely open whether Socrates believes in the gods of the city."⁵⁴

Perhaps Socrates does not believe in the gods of the city and the city may rightfully be concerned about that. Unlike Mill and Meiklejohn, Plato's Socrates does not expect, or even think, that a philosopher can live in full harmony with a city, i.e., a political community. The complex relationship between philosophy, or the life of the mind, and politics involves more than the city's having a claim on its citizens, however, because Socrates has a claim on the city. Socrates presents his account of his way of life by constructing a hypothetical argument on behalf of the jurors: that they will let him go on condition "that you no longer spend time in this investigation or philosophize; and if you are caught doing this you will die."⁵⁵ To this Socrates responds

I, men of Athens, salute you and love you, but I will obey the god rather than you; as long as I breathe and am able to, I will certainly not stop philosophizing, and I will exhort you and explain this to whomever of you I happen to meet, and I will speak just the sorts of things I am accustomed to: 'Best of men, you are an Athenian, from the city that is greatest and best reputed for wisdom and strength: are you not ashamed that you care for having as much money as possible, and reputation, and honor, but that you neither care for nor give thought to prudence, and truth, and how your soul will be the best possible?'.⁵⁶

In this popular presentation of philosophy, the emphasis is on exhortation rather than inquiry, the care of the soul is moral rather than intellectual, and the activity, like law-abidingness, can be expected of everyone. On this formulation, there is no inherent tension between the life of philosophy and the demands of politics. If Plato's Socrates were serious about this account, both Mill and Meiklejohn would be right to portray the conflict between Athens and Socrates as they do: that an overzealous democratic city made a tragic mistake because it was unable to recognize the moral and intellectual contribution that Socrates was making to the city.

54. *Plato's Apology of Socrates and Crito*, in Leo Strauss, *Studies in Platonic Political Philosophy* 44 (U. of Chi. Press, 1983). This is especially noteworthy; the Greek word which is translated "believe in" ("*nomizein*") can also mean "publicly acknowledge" or "worship," and in Xenophon's version of Socrates' defense, he has Socrates deny the charge by asserting that many Athenians have seen him sacrificing to the gods. *Socrates' Defence to the Jury*, in *IV Works of Xenophon* 646-47 (Loeb Classical Lib., Harv. U. Press, 1923).

55. *Plato and Aristophanes: Four Texts on Socrates* at 81 (29d-e) (cited in note 47).

56. *Id.*

But there is abundant evidence in the *Apology*, which is further confirmed by the *Republic*, that Socrates's popular presentation of his philosophic way of life cannot be taken literally. First, we noted how the simple unadorned truth does not necessarily get itself accepted by a democratic jury, precisely because, as Meletus showed, a democratic people is suspicious of any claim that any one or few persons possess political wisdom. Second, Socrates's refusal to address the relationship between the city's gods and his way of life suggests that there is not a simple harmony between the requirements of politics and the life of the mind.⁵⁷ Socrates acknowledges this shortly afterward by first likening himself to "some gadfly" who awakens a "great and well-born horse who is rather sluggish" and then by saying that he has had to avoid political life to survive.

For know well, men of Athens, if I had long ago attempted to be politically active, I would long ago have perished Rather, if someone who really fights for the just is going to preserve himself even for a short time, it is necessary for him to lead a private rather than a public life.⁵⁸

After Socrates is found guilty, he explains again why he cannot keep silent:

[I]f I say that this even happens to be a great good for a human being—to make speeches every day about virtue and the other things about which you hear me conversing and examining both myself and others—and that the unexamined life is not worth living for a human being, you will be persuaded by me still less when I say these things.⁵⁹

This account of philosophy does not include exhortation and does not imply that the activity is embraceable by all. Socrates did not spend his time conversing with the man on the street. The *Republic* gives a fuller account of why the philosophic life is necessarily in conflict with the demands of politics. The desires of most human beings are for goods that are connected to the particularity of body and hence cannot be truly shared. On the other hand, if political life is to reflect true human dignity, it needs to look up to the universal human capacity for thought and

57. The *Republic* does not teach the contrary, since the perfect regime, in which the philosopher rules, requires, among other things, the elimination of the family, which is contrary to natural desire and hence not possible. In addition, the few philosophers in the perfect city are different in kind from the many non-philosophers, whose lives are based on opinion, not knowledge. See *Republic* VII (Allan Bloom trans., Basic Books, 1968).

58. *Plato and Aristophanes: Four Texts on Socrates* at 82 (30e) (cited in note 47).

59. *Id.* at 92 (38a).

reflection on the nature of things. That activity both transcends politics but also ultimately dignifies it. In that sense, Socrates was not speaking foolishly when he described himself as a gadfly or when he proposed what amounted to "lifetime tenure" on the part of the city as what he deserved from the city.

Since Meiklejohn attempted to reconcile the *Crito* with the *Apology*, I want to consider that dialogue briefly. In it, Socrates's good friend comes to see him in jail and urges him to go along with an escape plan that he and his friends have devised. The reason Socrates gives for not going along may have more to do with *Crito* than with the truth. After all, at the end of the *Apology* Socrates first spoke to his condemners, chastising them for their foolishness:

For the sake of a little time, men of Athens, you will get a name and be charged with the responsibility, by those wishing to revile the city, for having killed Socrates, a wise man For you see that my age is already far advanced in life and close to death.⁶⁰

Crito's own personal expression of concern for Socrates plus the absence of any treatment of philosophy in the dialogue⁶¹ suggest that Socrates is addressing a non-philosophic friend. Hence he makes an argument from the laws which abstracts from the difference, highlighted in the *Apology*, between those who make the laws and those who might have true knowledge of politics. If the truly just man must lead a private life, how can it be said that the just Socrates has been reared by the laws, and therefore owes a pious duty to obey the laws? In his speech in the *Apology*, Socrates indicated that he would have disobeyed a hypothetical law explicitly prohibiting philosophy. In the *Crito*, he argues for categorical law-abidingness. The argument has a surface plausibility, apparently enough to make *Crito* feel better about Socrates's execution. In light of Socrates's remark about his age at the end of the *Apology*, we are invited to wonder what he would have done if he had faced execution at age thirty-five. Contrary to Meiklejohn, Plato teaches that the tension between the requirements of political life and the good of the individual cannot be resolved by allowing full freedom of expression as long as criminal punishment for that expression follows due process. Nor can we assume that the special claim Socrates made on be-

60. Id. at 92 (38c).

61. The word "soul" is noticeably absent precisely when one would expect it from the context; see id. at 105 (47d). Leo Strauss points this out in *Plato's Apology of Socrates and Crito* at 58 (cited in note 54).

half of his distinctive way of life, philosophy, can be extended to every individual's chosen way of life.

CONCLUSION: APPLYING CLASSICAL POLITICAL
PHILOSOPHY TO FREE SPEECH AND FREE
GOVERNMENT UNDER LIBERAL
CONSTITUTIONALISM

The Supreme Court's free speech doctrines assume the best results from the widest possible freedom of expression and fear the worst results if any distinctions are made on the basis of the content of the ideas expressed. Likewise, the Court does not distinguish between an individual and an association, between speech and symbolic expression, or between civil speech and vulgar speech. Perhaps we should not hold Mill and Meiklejohn responsible for every development in our constitutional law on free speech, but their arguments support the contention that the fullest freedom of expression is good and that governmental or social restraints on individuals are only justified by an immediate threat to security. They favor freedom as an unqualified good because they assume a fundamental harmony between the life of inquiry and political life. Since they both refer to Socrates for support, I examined the *Apology* and *Crito* to show that Plato's account does not support their position and moreover that Plato's account of a tension between the demands of a healthy political life and the good of the individual is superior to theirs. Plato provides further evidence for his position in book eight of the *Republic*, where Socrates describes democracy as the regime of freedom, which means the people look up to the "equality of the pleasures."⁶² According to Socrates, such a view of the good life is accompanied by the following speeches:

[N]aming shame simplicity, they push it out with dishonor, a fugitive; calling moderation cowardliness and spattering it with mud, they banish it; persuading that measure and orderly expenditure are rustic and illiberal, they join with many useless desires in driving them over the frontier. . . .

Now, once they have emptied and purged these from the soul of the man whom they are seizing and initiating in great rites, they proceed to return insolence, anarchy, wastefulness, and shamelessness from exile, in a blaze of light, crowned and accompanied by a numerous chorus, extolling and flattering

62. *Republic* VIII (cited in note 57).

them by calling insolence good education; anarchy, freedom; wastefulness, magnificence; and shamelessness, courage.⁶³

This critique of freedom implies a need for restrictions more severe than are compatible with liberal democracy. We should not reject the critique categorically, however. We learn from Plato, not Mill, that the fully developed individual can take various forms, and that moderate regimes cannot be indifferent to the range and intensity of those forms. At the same time, Plato's Socrates reminds us that democracy's toleration of a variety of human types allows the life of inquiry to flourish also. Liberals today place too much reliance on toleration, however, with the result that they blur the distinction between toleration and approval.

The success of liberal democracy, whose foundations lie in modern political philosophy, has produced two consequences. First, we enjoy the benefits of virtually unlimited intellectual inquiry, but the consignment of religion and other accounts of how one should live to the private sphere, beyond the authority of government, has led to a regime of tolerance that is often unable to defend itself against intolerance. Second, the liberal project has succeeded in minimizing the effect of moral constraints on individual expression and action, but instead of the flowering of the intellectual development of the people at large that Mill predicted, we have witnessed less appreciation of true intellectual diversity of opinion and we have been forced to tolerate cruder and more offensive expression. We can no longer rely on religious education for the cultivation of moderate habits. And any attempt by government to give support to such habits runs up against a widespread distrust of such authority, among First Amendment scholars⁶⁴ as well as the population at large.

Returning to the Supreme Court, I do not think that every major decision in the area of freedom of speech was wrongly decided and needs to be overturned. I do think, however, that the ramifications of the *Brandenburg* "incitement" test, which includes the subjective "clear and present danger" as well as the objective "incitement to imminent violence," components, have not been fully considered. Interpreted fairly, the test makes government wait too long before it can take appropriate action against serious threats to national security or public safety.⁶⁵ In

63. *Id.* at 239 (560c-561b).

64. See Schauer, *Free Speech: A Philosophical Enquiry* at 81 (cited in note 37).

65. The Court's decision in *Haig v. Agee*, 453 U.S. 280 (1981), sustaining the regulation permitting the Secretary of State to revoke a passport on national security grounds,

addition, an inflexible application of the "content neutrality" doctrine to government action in all contexts, including public education, gives the impression that government is unable to stand for anything. And finally, surely not every form of communication of a message, be it profanity in the street or nude dancing, should receive the high level of protection that Meiklejohn or Mill would apply to citizen deliberation on governmental matters.⁶⁶ Since many of these cases involve "blowing off steam" which offends a given community, would not a balancing of interests test be more appropriate?⁶⁷

If we wish to strengthen liberal constitutionalism, we must be sure that our treatment of freedom of speech gives due weight to the claims of individual rights. But those claims should be considered with a realistic appreciation of the benefits of freedom of speech in liberal democracy along with a recognition of the importance of civility among the citizenry and responsibility in the political branches of government.

was right, since former agent Agee was planning to expose CIA agents, but did it pass the *Brandenburg* test? After including the case in his book, Gerald Gunther, a strong supporter of freedom of speech, asks whether *Brandenburg* should be applied "to the communication of information that may lead to criminal acts." Gunther, *Constitutional Law* at 1066 (cited in note 11).

66. See Justice Stevens opinions in *Young v. American Mini Theatres*, 427 U.S. 50 (1976) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

67. In a recent book which challenges the conventional wisdom, Robert Nagel argues that "the use of principle requires courts to protect speech even in cases in which the immediate advantages are questionable and the social disadvantages are clear." He doubts "that courts actually promote free speech by engaging in principled decision making." Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 39, 40 (U. of Calif. Press, 1989). While I find his approach refreshing, I think the Supreme Court can promote free speech and free government by engaging in a full and candid balancing of governmental interests against free speech claims.