extended to other cases? When a fortune-teller is arrested for false pretenses or a faith-healer for illegal practice of medicine, shall a jury be allowed to determine whether his claim that he is a Spiritualist or a Scientist is made in good faith? If a bequest is conditioned on the beneficiary's "accepting Christ," can a court inquire into the sincerity of his conversion?

Mr. Rubenstein and Mr. Torpey have done the back-breaking job of collecting a mass of case and statutory material, and have put it in an organized form. They have made clear the breadth and complexity of the problem. From this raw material and preliminary work, it is earnestly hoped that they or others building upon what they have done will spell out the broader principles upon which the cases are based and give additional light on some of these difficult problems.

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SEPARATION OF CHURCH AND STATE IN THE UNITED STATES. By Alvin W. Johnson and Frank H. Yost. Minneapolis: The University of Minnesota Press, 1948. Pp. 279. $4.50.

What emerges from this volume, and is repeated on almost every page, is the authors' firm conviction that "the fundamental principle of separation of Church and State" is a good thing. Most Americans are inclined to give an unthinking assent. The real trouble comes when we try to find out just those words mean. At that point we soon discover, as Alice remarked to Humpty Dumpty, that "the question is whether you can make words mean so many different things." The process of making the same word mean too many different things is going on in all sections of the world under our eyes today. In Soviet Russia, where (unlike the United States) the words "separation of Church and State" appear in the constitution, those words, like "democracy," mean something quite different from what they mean to us or to the authors of this book. Even in our own country, we appear to be witnessing a considerable shift of meaning in certain quarters, with the result that "the principle of separation of Church and State" is today being invoked in a way which would make the Founding Fathers turn over in their graves.

To say that a given practice is or is not consistent with "the principle of separation of Church and State" is apt to be misleading unless we knew just what that "principle" is. A careful study of the material painstakingly collected by the authors, and covering such diverse subjects as Bible reading in the public schools, the right of pacifists to be naturalized, and the propriety of laws which forbid barbers to work on Sunday, leaves us with the uncomfortable feeling that the "principle" may not be a principle after all, but only a rather dangerous catchword. If the authors have been unable to dispel existing confusion on this score, the fault is not theirs alone, but is to be shared with a good many judges, who, like other human beings, are not above the temptation of labeling catchwords as "principles" in order to cover up gaps in logic. The real difficulty in drawing the line of separation between church and state arises from the fact that man is composed of a mortal body and an immortal soul; and you cannot draw a clearly visible line between his body and soul except with the executioner's axe or its equivalent—in which case he ceases to be a complete man. So long as the two parts of him stay together, he will continue to have two allegiances; and those two allegiances will sometimes conflict.

It is out of such conflicts that most of the litigation tabulated in this book has arisen. By far the greater part of that litigation has involved the field of education. As the authors quite rightly point out, education in this country was from the start primarily

a religious matter. It was only by slow degrees and within comparatively recent times that the state got into the business. A real problem of our times is just how far the process is going to go. *Pierce v. Society of Sisters*[1] established in striking words that "the child is not the mere creature of the State,"[2] that the state had no right to a monopoly of education, and that parents are entitled to the decisive word in the matter. That decision, as the authors recognize, stands as a bulwark against totalitarianism in this country.

It is precisely on this question of the right of parents against the claims of the omnipotent secular state that a good many people have been alarmed—I hope unduly—by some of the implications which they have seen in the language of recent Supreme Court decisions. When the Supreme Court in *Everson v. Board of Education,*[3] said that neither a state nor the Federal Government "can pass laws which aid one religion, *aid all religions,* or prefer one religion over another,"[4] and when the same Court in *McCollum v. Board of Education,*[5] criticized released-time religious instruction on the ground that *"pupils compelled by law* to go to school for secular education are released *in part from their legal duty,"*[6] the specter of a godless state telling all parents how they should educate their children seemed closer to American homes than is altogether comfortable.

The authors of this book give only the briefest mention to the *McCollum* case—perhaps because the decision was handed down too late for fuller discussion. At any rate, they quote from only one of the four opinions handed down in that case, and do not even mention the other three. If, as Justice Jackson in that case feared, the Supreme Court has become a "super board of education for every school district in the nation,"[7] we can at least expect clarification at the highest level.

The Founding Fathers, after all, recognized the right order of values when they said in the Northwest Ordinance:

> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.[8]

Unless we are to go the way of the totalitarian countries, the state can never become completely godless nor divorce itself from morality—or, more specifically, from Christian morality.

After all, as the Supreme Court said in *Church of the Holy Trinity v. United States,*[9] we are (or at least until recently were) a Christian country. Justice Story, who was closer than we are to the time of the Founding Fathers, said in his *Commentaries* that at the time the Constitution was adopted

> An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation.[10]

Indeed, if the catch-phrase "separation of Church and State" is to be applied as a principle in all cases, future editions of Messrs. Johnson and Yost's book may require a good many additional chapters. If the state is to stop aiding any or all religions, it will have to stop a good many practices not mentioned in the present edition. Tax exemption on church properties had better be stopped at once; but that is only the beginning. What right, for example, has the godless state to employ and pay the clergy to minister as chaplains to the spiritual needs of convicts, members of the armed forces, and Congress-

[1] 268 U. S. 510 (1925).
[2] *Id.* at 535.
[3] 330 U. S. 1 (1947).
[4] *Id.* at 15. (Italics supplied.)
[5] 333 U. S. 203 (1948).
[6] *Id.* at 209-210. (Italics supplied.)
[7] *Id.* at 237.
[8] July 13, 1787, 1 STAT. 51, n., Art. III.
[9] 143 U. S. 457 (1892).
[10] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §1868 (1833).

men? What right has it to waste the money of atheist taxpayers in building chapels on military reservations? If, on the theory of holding all religions equal, there is no difference in the eyes of the state between Christian and Mohammedan morality, why should I go to jail if I insist on having four wives at the same time?

The plain fact, whether we like it or not, is that American political institutions and American ideas of morality have developed out of the background of western Christianity, and are founded on it. So long as those institutions and that idea of morality continue, state and church will live together on friendly terms and can never be completely separated. The state will continue to inculcate and uphold those moral ideas; and the church will continue to inculcate and uphold good American citizenship. Conflicts of course are bound to arise; but it is a credit to the good sense of the American people that most of such conflicts until now have been around the fringes and over relatively minor matters. In the main, they have been settled, and I hope in the future will be settled, on a basis of mutual give-and-take and commonsense recognition of the rights of both sides.

The real and serious conflict comes—and I hope that in this country it will never come—when the forces of complete and total secularism get control of the state. Right here we have a real danger in the uncritical acceptance of clichés and catchwords as a substitute for careful thinking. It was Huey Long who said that if fascism ever established itself in the United States it would probably be under the label of "anti-fascism." In somewhat the same way, if secular totalitarianism ever establishes itself here, it will probably be under the label of "freedom of religion" and "separation of Church and State." That is something against which we must all be on guard. I wonder whether the authors—or the readers—of this book are sufficiently aware of the danger.

There are a number of errors in the book—some merely typographical and others of more importance—which call for correction. A good many of them betray what appears to be the non-legal background of the authors. *Permoli v. First Municipality,*[11] appears at page 12 as *"Permodi v. Municipality"* and at page 37 as *"Permoli v. Orleans,"* and is indexed under both titles. The Oregon school case, *Pierce v. Society of Sisters,*[12] hardly belongs on page 38 in the chapter entitled "Bible Reading in the Public Schools." A petition for mandamus is not brought "by the people in relation to" the relator;[13] nor does a state legislature pass an "action."[14] The Supreme Court of Pennsylvania was not called upon in the case cited at page 144 to interpret or apply "the school code of New York." "Chief Justice Cardoza" (*sic*) appears at page 78 and "Chief Justice Holmes" at page 183. Mrs. McCollum's famous action was brought in the Circuit Court of Champaign County, Illinois, and not in the Supreme Court of the state.[15] It is hardly accurate to say that nuns wear "clerical garb,"[16] or that the wearing of such garb constitutes "the flaunting of a unique act of religion."[17] The facts set forth in an opinion are not "the facts of the court."[18] A lawyer who tried to carry his case "through the New York court of appeals to the state supreme court"[19] would find himself involved in pretty serious jurisdictional difficulties. *Donahoe v. Richards,*[20] which dealt with Bible reading in the public schools and is cited on that subject at page 36, is cited again at page 146, apparently for the proposition that a state cannot support parochial schools. Constitutional lawyers would be more than mildly surprised to learn[21] that *Meyer v. Nebraska,*[22] "is one of the comparatively small number of cases" in which state statutes have been thrown out under the Fourteenth Amendment. It is somewhat puzzling to be told[23] that *Cochran v.*

[11] 3 How. 589 (U. S. 1845).
[12] See note 1 *supra.*
[13] Pp. 53-54.
[14] P. 81.
[15] P. 88.
[16] P. 105.
[17] P. 124.
[18] P. 122.
[19] P. 158.
[20] 38 Me. 376 (1854).
[21] P. 135.
[22] 262 U. S. 390 (1923).
[23] P. 148.

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

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

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

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

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

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

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

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

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

Professor Meiklejohn rejects the Holmes distinction between speech as action and

[24] 281 U. S. 370 (1930).

[1] P. 26. [2] P. 90. [3] Pp. 39-40.