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## The Teaching Function of the First Amendment

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# BOOK REVIEW

## THE TEACHING FUNCTION OF THE FIRST AMENDMENT

THE TOLERANT SOCIETY. By Lee C. Bollinger. New York: Oxford University Press, 1986. Pp. viii, 295. \$19.95.

*Reviewed by Vincent Blasi\**

In this important book, Professor Bollinger seeks to understand and remedy the inadequacy he perceives in the way our legal culture deals with extremist speech. He argues that the high level of protection the first amendment has been construed to require serves a social function that has not been fully recognized or carefully evaluated. His thesis is that the contemporary social function of the idea of freedom of speech is to help the society develop a general capacity for tolerance, a capacity that determines how we respond to many forms of conduct as well as speech. Once this function is appreciated, several familiar features of first amendment doctrine and rhetoric no longer seem justifiable. But one of the otherwise puzzling features of the first amendment tradition—the tendency to push the idea of freedom of speech to an extreme—takes on new meaning in light of the quest for a general capacity for tolerance.

In essence, Bollinger claims that speech acts should be accorded an extraordinary degree of constitutional protection not because they cause less harm, have more value, or are in any other respect different than nonspeech acts, but precisely because speech acts are *similar* to nonspeech acts. For Bollinger believes that a society, just like an individual, can best develop certain capacities by isolating one manageable sphere of operation and undertaking an effort at self-improvement to an extreme degree in that sphere. In this book, as in his earlier work,<sup>1</sup> he builds on the premise that asymmetry has a crucial role in legal anal-

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I am indebted to Bruce Ackerman, Robert Amdur, Harold Edgar, Kent Greenawalt, and Andrzej Rapaczynski for their criticisms and suggestions. I should report that Professor Bollinger is a former colleague and longstanding personal friend of mine, and that I have discussed this book with him throughout the period of its gestation. If the only useful function of a book review were to provide an objective evaluation of the author's product, I surely would be unqualified for the task. But I believe a book review can also be a valuable forum for the continued exploration of ideas introduced by the author. As someone whose professional life is spent wrestling with the same problems that engage Professor Bollinger, I want to have my say in print about a book that I regard as unusually interesting.

1. See Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich. L. Rev. 1, 26-37 (1976).



ysis, that similar phenomena sometimes should be treated differently as a means of achieving the goals of the legal system.

Unlike other first amendment theorists, Bollinger thus is not troubled by the possibility that speech may not be so valuable as is commonly assumed, or that the harms that speech causes may be every bit as great as the harms caused by conduct that most of us wish to see regulated. In fact, Bollinger even provides some original and powerful arguments that show how traditional discourse about the first amendment is based on a seriously distorted assessment of the benefits and harms that flow from speech. In his view, however, speech need not be special in order to be treated specially.

What does trouble Bollinger is that the best reason for protecting extremist speech—the contribution such a gesture can make to the development of a general capacity for tolerance—seldom surfaces in discussion about free speech. Instead, judges, academicians, and social critics continue to claim either that the value of extremist speech outweighs its harm, or that government cannot be given the authority to regulate extremist speech because such a grant of authority is likely to result eventually in the censoring of speech that really is valuable. Bollinger thinks analysis of free speech issues should not rest on dubious assumptions regarding the value of speech or the risk of government overreaching. Rather, the focus should be on the problematic nature of the response that typically is engendered—in virtually all of us—by extremist speech. That response is one of instinctive intolerance. It is a response we must recognize in ourselves and learn to control in a variety of settings: when wielding the power of the state against the many forms of conduct we perceive as threatening, when exercising the considerable power of social opprobrium, and when trying to live in harmony with friends and loved ones. Bollinger claims that until discussion of the principle of free speech better reflects the underlying social function he has identified, that social function will not be as well understood or as well served as it could be.

## I.

Throughout the book Bollinger uses as a point of reference the highly publicized controversy that ensued when a group of self-styled American Nazis asserted a first amendment right to hold a demonstration, while dressed in storm trooper regalia, in the village of Skokie, Illinois, a community notable for its large Jewish population and considerable number of residents who were concentration camp inmates during World War II. One of the features of that dispute that intrigues him is the disparity between what many observers took to be the appropriate legal and nonlegal responses to the proposed Nazi demonstration (pp. 12–14). That is, influential groups and commentators believed the Nazis' legal claim presented an easy case. The principles of the first amendment, it was asserted, unequivocally prohibited the



courts from denying the Nazis the right to march. It is impermissible, in this view, for legal prohibition to be based on the judgment that the Nazis intended to proclaim an evil doctrine, or chose a venue and style of communication designed to maximize ideological provocation, or themselves may not believe in the principle of free speech. On the other hand, virtually all those who asserted that the Nazis had a legal right to demonstrate under the first amendment made a point of denouncing the ideas of the Nazis in the strongest terms, heaping scorn and ridicule on the group to an extent limited only by shortcomings of imagination and eloquence. This willingness to denounce the Nazi creed was exhibited even by the state and federal judges who ruled in favor of the Nazis' legal claims. In addition, the executive director of the ACLU, which represented the Nazis, wrote a book defending his organization's stance in the case but felt it necessary to remind his readers of his impressive credentials as a Nazi hater.<sup>2</sup> Why, Bollinger asks, should a legal culture feel so comfortable denouncing a set of ideas and the people who hold them and yet feel itself powerless to employ legal sanctions against those ideas? More than that, why should our legal culture even take a seemingly perverse pride in its unwillingness to punish or prohibit such extremist speech?

Bollinger attributes the disparity between legal and nonlegal responses to extremist speech to the fact that the idea of free speech has evolved into a kind of cultural symbol, and as such is more or less immune from critical scrutiny and the demands of proportionality. Because our legal culture so celebrates the idea of free speech, and derives much of its identity from its commitment to that idea, "our critical faculties may be unconsciously suspended when we are in its presence, an ironic result given the commonly understood purpose of the principle to remove the shackles on dissent and to encourage openness of mind" (p. 23).

Bollinger's concern goes well beyond the failure he perceives in the way the legal culture responds to a dispute at once so poignant and so bizarre as the Nazi-Skokie controversy. He recounts (pp. 15-22) how the eminent scholar of evidence, Professor John Henry Wigmore, accused Justice Holmes of pushing the idea of free speech to an unwarranted extreme in his now legendary dissent in *Abrams v. United States*.<sup>3</sup> Why, Wigmore asked, should a democracy committed to peaceful change have to tolerate advocacy of the idea of armed revolution against properly constituted authority? Why also should tolerance be extended to persons who would not allow free speech were they themselves in power? Bollinger claims that traditional justifications for free speech do not really meet Wigmore's challenge. When the question is framed not in terms of whether free speech is a good idea in general

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2. See A. Neier, *Defending My Enemy* (1979), discussed by Bollinger at pp. 97-100.

3. 250 U.S. 616 (1919).



but whether that good idea should be taken to the extremes that it has, Bollinger suggests that Wigmore's arguments cannot be dismissed lightly: "Where else in life do we regard it as desirable to ignore that which is thought harmful until the final moments when the harm is about to occur? Solicitude for those bent on individual and social injustice seems an odd virtue" (pp. 35-36).

Two familiar aspects of traditional first amendment reasoning strike Bollinger as highly revealing of the unwillingness of free speech proponents to defend forthrightly the decision to protect extremist speech. He observes how often judges assume the posture of choicelessness in applying first amendment doctrine to extremist speakers. Thus, the language of the first amendment is said to brook no exceptions. Or the history of the adoption of the first amendment is deemed controlling. Or particular doctrines developed by the Supreme Court are claimed to foreclose the consideration of arguments that might otherwise justify the regulation of extremist speech. Bollinger dismisses these claims of choicelessness as unconvincing. He shows, for example, how the courts in the *Skokie* case might have ruled against the Nazis by construing certain traditional doctrines (fighting words, obscenity, clear-and-present-danger, time-manner-place regulation, group libel) in particular ways, but instead disclaimed the authority to do so (pp. 30-33). He suggests that these courts, like many before them in other cases, presented themselves as choiceless so as to avoid the difficult task of defending the decision to protect extremist speech.

A second aspect of traditional reasoning in first amendment cases that Bollinger treats as confirmation of his avoidance hypothesis is the excessive concern for line-drawing problems. He acknowledges that fear of the proverbial slippery slope can be a legitimate consideration in legal reasoning, but he denies that the problem takes on special dimensions when a legal standard turns on the content of speech. In many areas of law, he observes, we learn to live with uncertainty and the ever-present risk that indeterminate standards will be misapplied. He analogizes line-drawing arguments to legal fictions, and asserts that "the line-drawing claim is one of the most beguiling methods of obfuscation and diversion in legal argumentation, one that often serves as a convenient disguise for other purposes and motivations" (p. 37). Introducing a personal note, Bollinger states that he would not feel his own freedom to speak his mind threatened by the kind of exception that courts would have to make to deny the Nazis the right to demonstrate in *Skokie* (p. 38).

Given the disdain we all must feel for the Nazis' creed and for the motivations that must have lay behind their plan to demonstrate, given the sympathy we all must feel for the sensibilities of survivors of the Holocaust, and given the manageability of the line-drawing problem in this context, Bollinger asks why courts and legal scholars should have been unwilling to find a justification for ruling against the Nazis in their



dispute with the village of Skokie. More generally, he asks why our legal culture should assume the posture of choicelessness when confronted with the claims of extremist speakers when in fact choice does exist.

## II.

One reason Bollinger offers for the evasive quality of much talk about the principle of free speech is the failure of modern judges and commentators to adapt an eighteenth century concept to twentieth century realities. The first amendment was conceived during the Enlightenment, when the two dominant political ideas were that government possesses only limited power which must be kept in check and that the common people who make up the citizenry are competent to control their own political destiny (pp. 44-45). At that time, communities were small and homogeneous as compared to their modern counterparts, and the problems of technological mass culture were unknown. Democratic theory was in its infancy; the memory of absolute sovereigns was fresh. The way of thinking about free speech that we inherited from that era, which Bollinger denominates the classical model, understandably emphasized the role speech plays in the search for truth, in the processes of democratic decisionmaking, and in the development of the human personality. The harms that speech was perceived to cause were limited to the risks of persuasion to antisocial conduct and of personal offense to addressees. It was, by modern standards, a simple world.

Today, however, the regulation of speech seldom proceeds from anti-democratic impulses. It is the *majority*, asserting the prerogatives of democratic sovereignty, that typically demands that extremist speakers be silenced (pp. 50-51). More than a commitment to citizen control over officialdom is needed to justify the principle of free speech under these circumstances. And yet so much modern first amendment analysis continues to invoke the rhetoric of self-government without explaining why the principle of majority rule does not extend to decisions regarding how much extremist speech to tolerate.

Bollinger recognizes, of course, that just as the principle of liberty does not grant a person the freedom to sell himself into slavery, the principle of democracy does not grant a transient majority the power to disenfranchise nascent majorities by punishing all public criticism of those in power. But that concession hardly blunts the point that the rudimentary concept of eighteenth century democracy cannot begin to justify, and may even undercut, the extremes to which the principle of free speech has been taken in modern times:

[I]t would seem reasonably clear that few if any of the restrictions on speech we have encountered over the last sixty years, and the rejection of which now form the basis of our First Amendment jurisprudence, could be fairly described as jeopardizing the elemental structure of a democracy—or, stated



another way, that the absence of these regulations was the *sine qua non* of a democratic political system (p. 51).

This is not to say that a particular democratic majority may not be prudent to allow much more free speech than the minimal conditions of democracy require. But then the justification for free speech shifts from the demands of democratic theory to an assessment of the practical consequences of toleration.

The classical model of free speech also addresses this matter of practical consequences, but does so, according to Bollinger, in a way that fails to account for some important modern realities. For example, the model assumes that all ideas, even the most implausible and the most extreme, contribute in one way or another to the search for truth. Bollinger contests that assumption. He does not deny that vigorous challenge has upset many fighting faiths: "From personal experience, all of us can draw on numerous instances where the process of open discussion advanced our understanding and led us to abandon falsehoods we once held as firm truths" (p. 54). Moreover, he duly notes John Stuart Mill's argument that even falsehood contributes to the search for truth by causing society's perception of the truth to be clarified and defended in the process of refuting falsehood. Nevertheless, Bollinger remains unconvinced that the public expression of ideas such as racial superiority or the propriety of genocide serves any meaningful truth-seeking function:

The more we believe in the immorality or error of the ideas being expressed through the speech, the more attenuated is the truth-seeking advantage claimed as the justification for the free speech principle. The "value" to us in these terms ranges from remote to none. Just as in [the] libel area the Court has sometimes recognized no "value" in defamatory false statements of *fact*, so we might appropriately extend that to at least some portion of the realm of opinion as well (p. 54).

One way to reject false ideas is to refute them. Another way, sometimes more appropriate, is to regard them as unspeakable. "Like all human activities, dialogue is not invariably useful under all conditions" (p. 56).

Just as he doubts the truth-seeking value of some ideas, Bollinger questions the classical assumption that truth will always prevail over falsehood in the marketplace of ideas. He quotes Alexander Bickel's famous dictum on this point: "we have lived through too much to believe it."<sup>4</sup> Bollinger concedes that true ideas may have a certain Darwinian capacity for survival, but he argues that the resilience of truth hardly justifies the society in ignoring the harms caused by falsehood: "[o]nly by recurring to the empty plea that we think in terms of 'the long run' can anything be salvaged from the argument, and to nearly all of us, it is rightly said, the long run will always come too late" (p. 74). In this regard, he notes how in one of the legal culture's most impor-

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4. A. Bickel, *The Morality of Consent* 71 (1975), quoted by Bollinger at p. 74.



tant truth-seeking endeavors, the jury trial, certain facts and arguments are kept from the jurors on the assumption that selective censorship aids rather than hinders the search for truth (p. 56).

One of Bollinger's most interesting criticisms of the classical model concerns the types of harm that speech can cause. Traditional analysis of free speech, he says, takes account only of the harms that follow from persuasion or offense. But one of the most important and potentially harmful consequences of the expression of an extremist idea is the way such expression can force those who disagree with the idea to respond. He explains how in the *Abrams* dissent Justice Holmes recognized the problem but failed to consider its implications. In commenting on the impulse to censor, Holmes observed "[t]o allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises."<sup>5</sup> The important phrase here, says Bollinger, is "seems to indicate." Holmes realized, in other words, that the response the society makes to speech—whether that response be censorship or toleration—is itself a statement:

The act of speech, therefore, puts those who know of it, and who believe differently, in a serious dilemma. For them it is not simply a matter of choosing not to be offended—perhaps by "averting the eyes"—or a matter of standing like some outsider who is observing a process of potential persuasion at work. The dilemma they face is significantly more complex, for by doing nothing—by being tolerant—they may be contributing to the success of the beliefs they dislike. They are now, like it or not, part of a dynamic process, from which they can withdraw only at the risk of furthering that which they oppose. And that is why, as Holmes tells us, people in this situation are "naturally" inclined to "express [their] wishes in law and sweep away all opposition" (pp. 62–63).<sup>6</sup>

In demanding a response, extremist speech helps determine the agenda for public debate and private reflection. In a mass culture like the twentieth-century United States, the power to influence the agenda is the power to shape the society itself.

His exploration of agenda-setting and the communicative dimension of regulation leads Bollinger to conclude that the classical model of free speech is based on much too simple a view of the interaction between speakers and those who would regulate their speech. In his view, intolerance is a complicated and not wholly pernicious phenomenon, and first amendment theory cannot afford to pretend otherwise.

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5. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

6. *Id.*



## III.

Bollinger does not claim to be the first to recognize the inadequacy of the classical model. In fact he thinks the assumptions of the classical model, despite the lip service they have always been given, have not really determined the way courts decide first amendment disputes or the way critics analyze first amendment issues. He discerns a second model of free speech analysis, also deriving from eighteenth century patterns of thought, that exerts a more powerful if less explicit influence than the classical model. He calls this the fortress model.

The central premise of the fortress model is that the power to regulate speech is likely to be abused. "Every government bears within its personality an atavistic longing to recapture the autocratic powers of its ancestors. This reality, it is said, must be included in our calculations about how to structure something as important and as vulnerable as the First Amendment" (p. 77). The fear of instinctive and chronic overreaching by the government traces, of course, to the colonial experience and to the rather detailed philosophy of limited government that captured the American imagination during the late eighteenth century.

This emphasis on the abuse of the power to regulate, says Bollinger, has led proponents of the free speech principle to favor a strategy designed to minimize the consequences of the anticipated abuses. Thus, speech of dubious value and undoubted capacity to cause harm must be accorded protection under the first amendment in order to ensure that the core area of valued expression remains inviolate. The erection of such a doctrinal buffer zone is needed, so it is claimed, to shield speakers from the enervating effects even of regulatory efforts destined to be disallowed by the courts, as well as from judicial failures to protect speech due to routine errors of factfinding or analysis or distortions introduced by the censorial pressures that sometimes compromise the independence of the judiciary. Under the fortress model, the consequences of tolerating a particular instance of extremist speech, like that of the Nazis in Skokie, should not be assessed on a case-by-case basis. The frame of reference is more general, and the perspective is strategic.

The fortress model does a far better job than the classical model in explaining the posture of choicelessness that Bollinger detects in so much of the rhetoric surrounding the first amendment. If politicians are likely to abuse the power to regulate speech, then they must be presented with a constitutional tradition painted in black and white, devoid of shades of gray. If judges are likely to succumb to regulatory pressures in times of anxiety, then legal standards must leave the courts as little scope for judgment as possible. Bollinger thinks the fortress model lies behind the otherwise curious insistence of many free speech proponents that first amendment claims not be justified with reference to social consequences or specified ideals:

Given this view of the world, it seems both sensible and imper-



ative to take a position in defense of free speech in which essentially no thought is permitted: free speech is simply a "right" that each individual possesses against the larger society and that need not be defended on any other basis. It is elemental, beyond argument, *a priori* (p. 90).

What most differentiates the fortress model from the classical model is the pessimistic view of human nature embodied by the fortress model. Bollinger illustrates how most of the leading philosophers of free speech have commented upon the apparent strength of the human impulse to be intolerant toward the speech with which one disagrees. Observations to this effect can be found in the writings of Socrates, Mill, Mark Twain, Walter Bagehot, Learned Hand, Chafee, Holmes, and Meiklejohn (pp. 79-86). Bollinger is deeply impressed by this common refrain:

One might even say that no more disparaging, and despairing, view of the nature of the average person, of his and her natural tendency to be intolerant, is to be found than in the libertarian literature on the subject of free speech. The impulse may ebb and flow, possibly affected in its movements by the moons of economics or of war, but it is ever-present and ever ineradicable, so deep is it etched into the human character (pp. 82-83).

He detects in these reflections on the wellsprings of intolerance an assessment of the human character that is at odds with the faith in the power of reason that informs the classical model of free speech. In this regard, he thinks the fortress model is more realistic than the classical model, and more in tune with modern thought.

Nevertheless, in the end Bollinger finds the fortress model unsatisfying, both as an explanation for the legal culture's response to extremist speech and as a source of normative guidance for interpreting the first amendment. He thinks the pessimistic view of human nature on which the fortress model is based has implications that are in tension with the way American constitutional law has isolated the problem of legal regulation of speech and erected extraordinary safeguards against that particular exercise of power. If the impulse to intolerance is so strong, is it not likely to be manifested in intolerance toward all forms of unconventional or threatening conduct? Once the focus shifts from the worth of the activity regulated to the likelihood of abuse of the power to regulate, is there any reason to treat speech as special? Moreover, if the strength of the impulse to intolerance is the worry, why are we only concerned with *legal* regulation of speech? Why do we condone, and even applaud, the regulation of extremist speech by ridicule and social opprobrium? Also, if intolerance is so dangerous, should we not be especially sensitive to, rather than dismissive of, the harms that are caused by extremist speech that preaches the message of intolerance, as does the Nazi creed? Many of the features of the legal culture that originally provoked Bollinger's inquiry seem to him even more inexplicable from the perspective of the fortress model.



Furthermore, Bollinger sees in the fortress model a paternalistic mentality that he finds troubling: "The fortress strategy relies on the abstract language of 'the majority,' 'the public,' 'the masses,' of 'they' and 'we.' As such, it can be a beguiling posture to assume in the defense of the free speech principle" (p. 101). These elitist assumptions lead Bollinger to question "the propriety of the tasks the fortress model places on the shoulders of judicial institutions" (p. 101). He also criticizes the fortress model for fostering "an unfortunate manipulative frame of mind, a warfare mentality where each side is tacitly setting the rules by which future battles will be fought" (p. 102).

Finally, Bollinger finds the fortress model too modest in its ambitions. A convincing rationale for the free speech principle must somehow account for the pride our legal culture takes in the way the first amendment has been extended to the most trivial and worthless instances of communication. In the United States, he observes, the decision to protect free speech to an extraordinary degree represents more than just a defensive strategy born of the fear of government. It represents also an affirmative gesture, a cultural symbol important to our collective identity.

#### IV.

This observation leads Bollinger to search for a new way of thinking about free speech that combines the attractive idealism of the classical model with the realistic view of the human character that he considers the chief virtue of the fortress model. He is convinced from his critical scrutiny of the two models that the key to this endeavor lies in acquiring a richer understanding of the nature of the response that speech generates.

Toward that end, Bollinger explores the impulse toward intolerance in more depth than has been thought necessary under the fortress model. He seeks to discover not just *whether* there exists such an impulse in the human character and how strong that impulse is, but also *why* we react the way we do to certain types of speech. He concludes that the psychology behind censorship is much the same as the psychology behind racial and religious prejudice, as well as the psychology that shapes the way most persons respond to criminal behavior and violations of sexual taboos. Central to the human response in all these various instances is a concern about the attitudes of the person whose speech, conduct, or sometimes even mere status generates the response:

What leads us to react with intolerance is, typically, a concern with the *mind* perceived to be at work—with the way of thinking of the person or persons, whether that be political beliefs or general attitudes or values or whatever one might call it; and, equally important, with the fact that this thinking is essentially being communicated by the actions of those who hold, or



appear to hold, these different beliefs, attitudes, or values (p. 112).

The impulse to be intolerant is, to Bollinger's mind, a force to be reckoned with across a broad spectrum of social interaction. The effort to tame that impulse can be regarded as one of the most important endeavors of organized society. Several different provisions of the American constitution reflect that priority. The strictures against racial and religious discrimination can be viewed in this light. So too can the elaborate requirements governing criminal trials. Looking beyond the domain of individual rights, Bollinger observes that the success of a democratic system of government is jeopardized by the impulse to intolerance:

The feelings [of intolerance] must arise and must be controlled in the basic operation of a self-governing political society, where a willingness to compromise and a willingness even to accept total defeat are essential components of the democratic personality. Democracy, like literature, it may be said, requires a kind of suspension of disbelief (p. 117).

Other integral features of the social system such as the functioning of bureaucracies and professions depend on this capacity of persons to live with, and even act upon, the beliefs of others.

Thus, intolerance toward speech is not an isolated problem. The response of intolerance toward speech is only one manifestation of a general human tendency that has widespread consequences. Because the various branches of intolerance share the same psychological root, Bollinger believes that the way the legal system deals with intolerance toward speech has significance that goes well beyond whatever impact court decisions may have on the marketplace of ideas or the dignitary interests of unpopular speakers. The recognition of first amendment rights helps to shape the attitudes of the population, attitudes that determine how the universal impulse to intolerance will be channeled and controlled in a variety of settings. "A central function of free speech, therefore, is to provide a social context in which we collectively speak, in a public and official setting, to an important aspect of what we might think of as the intellectual character of the society" (p. 120).

But if the problem is general in nature and not peculiar to disputes about speech, why is not the solution general also? Why single out first amendment litigation for this ambitious enterprise of shaping the intellectual character of the society? Precisely because the enterprise is ambitious, Bollinger seems to say, it requires an extraordinary effort by the legal system that cannot be undertaken on too broad a front. He analogizes the project to personal efforts at self-improvement:

This bending over backward, pushing ourselves to an extreme, often in a limited context, is common in life. We parcel out our world in this way perhaps more than we recognize, certainly more than we acknowledge in the area of legal principles. We do so because it offers advantages over a



homogenized existence: It can provide a more manageable place in which to begin, where success is more likely and, if achieved, will in turn strengthen future resolve. It also has the great merit of allowing us to limit the costs of our mistakes, which can have a liberating effect, permitting us to experiment more freely and to take risks that would otherwise be inhibiting. It also allows us to focus attention with greater clarity on the problem being addressed, whereas if it were treated generally, it might get lost amid a sea of other problems (pp. 121-22).

Especially valuable is this use of an isolated context "when the capacity we are trying to achieve is beyond the reach of the usual methods of social control—when what is ultimately involved is a matter of attitude and capacity for searching introspection" (p. 122). Thus, even if some forms of speech may cause as much harm as many forms of conduct that are commonly regulated, and even if government is no more likely to abuse the power to regulate speech than other regulatory powers, there may be good reason to accord the principle of free speech a preferred position in our constitutional jurisprudence.

This line of analysis, however, only explains why speech might sensibly be treated somewhat differently than conduct. If Bollinger is correct that the principle of free speech has been extended to an implausible extreme, how can such a development be explained or justified in the name of character formation? Throughout the book, Bollinger invokes the Greek virtues of proportion and moderation. He does so even when discussing the need to combat the impulse to intolerance:

The feelings that generate excessive intolerance cannot be obliterated from social interaction, nor would we want them to be. Like the desire for personal gain, the impulse of intolerance must be controlled and channeled toward good social ends, not uprooted . . . We are dealing with a matter of attitude, of balance and control (p. 123).

So how is a balanced attitude toward intolerance to be fostered by doctrinal extremism?

Bollinger recognizes the problem, and he provides a litany of reasons why the protection of extremist speech may serve the social function he has identified. First, if the judicial response is meant to influence general social attitudes, that response may best achieve its purposes when it is clear and dramatic: "The extremes tend to attract attention, and that, as any educator or radical knows, can be pedagogically and symbolically advantageous" (pp. 124-25). Second, when the focus is on the response speech evokes from those who would censor it, a broad-brush approach to doctrine is almost a practical necessity: "It is simply too difficult to make a case-by-case examination of legal restraints on speech to ascertain whether the underlying motivations are of an improper variety. The problem of the impulse to excessive intoler-



erance is simply too elusive for that type of scrutiny" (p. 125). Third, the power of the impulse to intolerance "must really be confronted by creating something of an *ethic* against regulation, which will exert force in the opposite direction, very much like the presumption of innocence does in the context of the criminal jury trial" (p. 125). "To straighten a bent stick you bend it back the other way" (p. 125).<sup>7</sup> Fourth, even when a particular instance of extremist speech causes harms that far exceed its benefits, many persons will want to regulate it for the wrong reasons, for reasons of indiscriminate intolerance. The protection of extremist speech under these conditions can help to control the general impulse to intolerance. Here, shifting the focus away from the value of the speech actually strengthens the case for protection. Fifth, "[e]xtremist speech is very often the product or the reflection of the intolerant mind at its worst . . ." (p. 126). The extreme gesture of tolerating extremist speech can serve the function, ironically but powerfully, of holding up before us "that which we aspire to avoid" (p. 126). These reasons, Bollinger asserts, provide a stronger justification for the extremism of first amendment doctrine than any reasons one might derive from a commitment to the search for truth or a fear of government overreaching. Thus he claims the general tolerance theory does a better job than either the classical or the fortress model of explaining why the regulation of speech has been treated in our legal culture as so special a problem subject to such extraordinary constitutional strictures.

He also believes his theory helps to explain the dominant role the judiciary has come to play in shaping our understanding of the first amendment. For the educative function he sees as central to the free speech principle requires the kind of "coherent and articulated explanation" that courts are well suited to provide (p. 134). Also, "[t]o a degree more than with any other group, judges are expected to have mastered the tolerant mind, to have the capacity to set aside their personal beliefs and predilections, and to control the impulses that accompany them as they set about interpreting and administering the society's laws . . ." (p. 134). Perhaps most important, "[t]he process of judicial enforcement gives those opposed to the speech an institutionalized method of objecting to the speech, and thus at least partially the opportunity of signifying their position with respect to it, and a result (if the judicial decision is in favor of toleration) that is—partially or ambiguously—'beyond their control'" (pp. 136–37). Hence the importance of the rhetoric of choicelessness.

## V.

It is important to Bollinger that his theory not be viewed as just one more imaginative proposal generated by the academic mind. He

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7. Quoting M. Montaigne, *Of Husbanding Your Will*, in *The Complete Works of Montaigne* 769 (D. Frame ed. 1957).



seeks to establish roots for the general tolerance theory in some of the traditions of first amendment analysis. To that end, he attempts to demonstrate that many features of the theory are implicit in the thought of perhaps the two most important first amendment thinkers of this century, Professor Alexander Meiklejohn and Justice Oliver Wendell Holmes.

Meiklejohn's writings on the first amendment, particularly his short book, *Free Speech and Its Relation to Self-Government*,<sup>8</sup> have been enormously influential with both scholars and judges. Bollinger finds it hard to account for this influence if one looks only to the power of Meiklejohn's logic or the originality of his arguments. Others before Meiklejohn had linked the idea of free speech with the concept of self-government and the ideal of citizen participation in civic affairs. Meiklejohn's distinction between public speech and private speech has been much criticized, and in his later writings Meiklejohn seems evasive if not confused about the distinction. Yet the stature of Meiklejohn as a first amendment thinker seems to grow with each year. Why?

Bollinger contends that the true importance of Meiklejohn's work lies in "its characterization of the meaning of the act of tolerance and its counterpart of intolerance" (p. 154). Meiklejohn was primarily concerned with the goal of "creating a kind of democratic personality," and he viewed the constitutional protection of free speech as a means to that end (p. 155). In the passages where Meiklejohn articulates what it means to be a citizen, his writings achieve undeniable power. His rhetoric implores the political community to have the courage to face unpleasant ideas; he equates intolerance with fear. Meiklejohn sought a democratic personality that exhibits concern for the welfare of the whole community and faith in progress through knowledge and participation. Most of all, Meiklejohn wanted citizens with the energy, independence, and fortitude that stem from conviction. His own passionate belief in self-government leaps off the pages of his books and articles and accounts for much of his impact as a scholar.

From this perspective, the gesture of tolerating all ideas, even anti-democratic ideas, can be seen as a display of self-confidence by the forces of democracy. At bottom, that was Meiklejohn's reason for believing that all public speech is protected by the first amendment. He always described himself as first and foremost a teacher. It is not surprising then, says Bollinger, that Meiklejohn should have discerned the teaching function of the free speech principle.

Justice Holmes professed a personal and political philosophy that bears almost no resemblance to Meiklejohn's. Holmes delighted in expressing his disdain for ideologies, ideals, tenets, programs—anything bearing the stamp of conviction. Holmes was a skeptic. He adopted the intellectual stance of self-doubt. He considered truth nothing more

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8. A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).



than the prejudices of those who at any moment possess the power to enforce their views. He thought persons incapable of placing the welfare of the community above their individual interests.

But Holmes had one thing in common with Meiklejohn, Bollinger argues. Each man viewed the first amendment as a vehicle for fostering the type of personality he thought desirable. For Holmes, the reason to protect worthless or dangerous speech is to remind people that "all life is an experiment," that "time has upset many fighting faiths."<sup>9</sup> By refusing to ascribe legal significance to the evil quality of a speaker's ideas, the legal culture endorses the intellectual stance of self-doubt. So despite their antithetical outlooks on so many questions, Holmes and Meiklejohn were united in the view that the free speech principle serves primarily a teaching function:

The conflict between Meiklejohn and Holmes over the meaning of free speech was rooted in a shared effort to develop an intellectual capacity that would be reflected in, and stretched by the act of tolerance toward speech—but for one it was the capacity of shared belief and community, and for the other it was the capacity of self-doubt and individualism (p. 163).

Bollinger thus claims an impressive pedigree for his idea that a central function of the free speech principle is to help develop qualities of mind that come into play across a wide spectrum of social interaction. But if this view of the first amendment had such notable and eloquent champions as Holmes and Meiklejohn, why has the general tolerance theory remained submerged in the literature of free speech? Why do we still employ the thought patterns and rhetoric of the classical and fortress models?

Bollinger believes the explanation lies in the fact that Holmes and Meiklejohn each urged upon the society a one-sided set of character traits that could not, and should not, serve as the benchmark for cultural development. "Postures of self-doubt and affirmation of belief must be regarded as unstable; each attempts to resolve issues that are ultimately not resolvable, to settle for once and for all what cannot be" (p. 174). What is needed is a more complex democratic personality that combines elements of self-doubt and conviction, and even sustains a creative tension between those perspectives. "We are, and must inevitably remain, fundamentally ambivalent toward the process we describe as belief" (p. 174). In radically different ways, both Meiklejohn and Holmes were not ambivalent about "the process we describe as belief," and for that reason failed fully to understand the nature and function of intolerance. As a result, neither was able to work out a satisfactory interpretation of the first amendment.

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9. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).



## VI.

Although he does not regard the endeavor as central to his inquiry, in one chapter Bollinger explores some of the specific doctrinal implications of the general tolerance theory (pp. 175-212). He concludes that the current structure of first amendment doctrine is not well suited to the task of helping society channel and control the impulse to intolerance.

He observes that modern judicial doctrine regarding free speech is built around three basic principles. First is the clear-and-present-danger test, which in its most recent formulation permits speech to be regulated when it is both intended to and likely to incite imminent lawless action. Second is the two-level concept, which permits certain forms of communication such as fighting words and hard-core pornography to be regulated without any showing of danger on the theory that such communication lacks social value. Third is the content distinction, which holds that regulations of speech that turn on the communicative impact of the speaker's message require far more justification than regulations that turn on such ancillary physical consequences of the act of communication as noise level, litter, and congestion.

Each of these principles is problematic, Bollinger thinks, when considered from the perspective of the general tolerance theory. The clear-and-present-danger test takes into account only the harms that flow from persuasion. His critique of the classical model establishes that speech can cause harm in other ways. The two-level concept assumes that the toleration of speech that lacks social value serves no important function. To the contrary, the teaching of tolerance can be particularly effective when the speech is widely perceived to be worthless or pernicious. The content distinction ignores the fact that intolerance toward the perceived quality of mind of a speaker can be expressed by regulation of his choice of forum and style, as well as his choice of explicit message. Because the acquisition of a general capacity for tolerance requires that "we give those wishing to confront us with unpopular speech activity a serious and meaningful opportunity to do so," disputes regarding the time, manner, or place of speech should not be relegated to secondary status under the first amendment (p. 201).

In place of the current doctrinal structure, Bollinger proposes an approach that is more flexible, more geared to the notion of pedagogic potential, and more respectful of the strength of the impulse to intolerance:

The starting point would seem to be this: Certain extraordinary times and conditions exist in any society in which it is quite simply too much to expect of people that they be self-restrained toward speech behavior, and under which it would be counterproductive to the aspirational aims of free speech to insist on toleration (p. 182).



Turning to specifics, he concludes that fighting words should not be protected under the first amendment because the human instinct to react intolerantly when insulted face to face is simply too basic for constitutional doctrine to seek to control. He questions whether disputes over the regulation of pornography provide a good context for teaching tolerance, since portrayals of sexuality touch such deep feelings going to personal and community identity and evoke such complex responses: "The centrality of the sexual instincts to the personality may provide the best explanation we have for the desire to isolate obscenity from the general area of toleration required by the First Amendment" (p. 185). Defamation he views as likewise a problematic context, both because the social need to preserve individual honor is deeply rooted and thus hard to influence, and also because the regulation of defamation can promote as well as retard toleration since defamatory speech tends to evoke an intolerant response toward the person who is defamed. A theme that runs through Bollinger's discussion of fighting words, obscenity, and libel is that those categories of speech should receive less first amendment protection than others because of the problems they pose for the project of teaching tolerance, not because of the judgment that such speech lacks social value.

In contrast, he concludes that the dispute between the Nazis and the Village of Skokie provided a good setting for the judicial effort to teach tolerance (197-200). The case was eye-catching; the nation was watching. Attitudes of extreme intolerance were exhibited by participants on both sides of the controversy. Yet the dispute also was manageable, subject to judicial comprehension and control. The harms threatened by the Nazi demonstration were not trivial but, despite claims to the contrary by the residents of Skokie, those harms were not so great or so pointed that judicially enforced toleration of the Nazis was more than the society could reasonably be expected to bear. Particularly because we have so little trouble concluding that the Nazis' creed is pernicious and their motivation for preferring Skokie as a forum despicable, the case offered a good opportunity for the society to develop its capacity to control the impulse to intolerance.

As these examples indicate, under the general tolerance theory judicial doctrine is highly responsive to the vagaries of social context. That is not a new phenomenon: the clear-and-present-danger test also takes social context into account in measuring the likely consequences of speech. It might be argued, of course, that the contextual variables that determine whether a speech creates a clear and present danger are fewer and more susceptible to doctrinal enumeration than are the variables that determine whether a particular dispute, or category of disputes, is well suited to the teaching of tolerance. But Bollinger is not troubled by the possibility that the doctrines his theory would generate may be less formulaic and more flexible than traditional first amendment doctrines. In fact, he regards those qualities as highly desirable.



His chapter on doctrinal implications is entitled "Drawing Lines and the Virtues of Ambiguity."

Bollinger provides several reasons for his preference for flexible and ambiguous doctrines. Flexibility is valuable because the pedagogic impact of first amendment adjudication depends so much on shifting social conditions. Ambiguity is especially important under the general tolerance theory because the impulse to intolerance is itself an ambiguous social phenomenon, at once both healthy and dangerous. Moreover, the more flexible and ambiguous legal doctrine is, the more litigation it invites. In most spheres, of course, this consequence would hardly seem a recommendation. But in light of the unique teaching function of first amendment litigation, we should welcome lawsuits in this limited sphere, both to give those who are aggrieved by speech a forum to express their intolerance in a controlled and responsible way and to give courts the opportunity to expound on the meaning of tolerance (p. 195).

In preferring ambiguous and flexible doctrines, Bollinger does not share the aversion of many first amendment scholars to balancing tests. In his view, the methodology of balancing has produced distorted results primarily because the only interests placed on the speech side of the scales have related to the social value of the communication at issue. Were courts also to give proper weight to the social value of learning toleration through enduring the harms caused by the speech, balancing would often lead to the protection of unpopular speech (pp. 196-97).

## VII.

Bollinger pays comparatively little attention to the doctrinal implications of his thesis in part because he believes the way the legal culture talks about the free speech principle is at least as important as what specific doctrines are adopted and what lines are drawn. Under the general tolerance theory, judicial and academic rhetoric matters a great deal. He devotes a full chapter to "searching for the right voice" (pp. 213-36).

He notes that the problem of free speech "has attracted what seems like a disproportionate share of the most beautiful writing to be found anywhere in the law" (p. 213). He attributes the first amendment's status as a cultural symbol in part to the rhetorical contributions of Justices Holmes and Brandeis and Professors Chafee and Kalven. Were the general tolerance theory to achieve the recognition Bollinger thinks it deserves, good writing about free speech would become if anything even more important.

For this reason, however, Bollinger is concerned about some prominent features of the traditional rhetoric of the first amendment. That rhetoric, he thinks, is typically one-sided and exaggerated. The history of the first amendment is glorified. Object lessons are dis-



torted. The benefits of speech are overstated. The harms are minimized or ignored. The censorial tendencies of government are wildly exaggerated. The motivations of those who would regulate speech are impugned. Ironically, the rhetoric of the first amendment exhibits a high degree of intolerance for any ideas or facts that support the regulation of speech.

Bollinger inquires why such a one-sided rhetoric should have emerged. One explanation is that the early writers on free speech, particularly Mill and Chafee but also Brandeis, addressed the issue at times when speech was indeed under severe attack (p. 223). These writers responded as advocates. They exhibited passion and outrage. The same can be said for Justice Black's opinions during the McCarthy era (p. 224). This advocate's posture is understandable, but it did not yield a free speech rhetoric that exemplifies the virtues of balance and tolerance.

Another explanation for the unbalanced rhetoric of free speech lies in the problematic nature of the judicial role in constitutional adjudication. Deep down judges know they cannot avoid drawing upon their personal preferences when construing a constitutional provision like the first amendment, with its highly indeterminate text, history, and structure of precedent. Yet that reliance on personal preference is difficult to justify, or even to confront openly. And so judges adopt a rhetoric that minimizes the role of choice by characterizing free speech disputes in one way or another as "easy" cases (pp. 225-26). The fact that the legal culture has isolated the issue of free speech, artificially separating it from issues relating to the regulation of conduct, fosters this tendency to talk about the issue in unrealistic, one-sided terms.

Bollinger believes that a different kind of rhetoric would better serve the function of teaching tolerance. He states it would be desirable "if those who defend and apply free speech—especially, of course, as litigants and judges—viewed it as a central lesson of free speech that they themselves be wary of their own tendency to oversimplify or, in effect, to censor, the complexity of the problems involved in the cases they deal with" (p. 222). He recognizes that an oversimplified rhetoric sometimes can serve as a counterweight to powerful regulatory instincts and can also contribute to the solidarity and resolve of those who would champion the right of free speech. But he fears that a refusal in first amendment discussion to recognize the complexity of the issues and the plausibility of the arguments for regulation tends to generate a cycle of intolerance.

Under the general tolerance theory, the goal of the free speech principle is to develop in members of the society a particular type of intellectual character that embodies such virtues as open-mindedness, honesty, balance, a willingness to listen, and a willingness to accommodate. That character is best taught by example. "It seems a reasonable assumption that if [judges] are engaged in weaving a set of deceptions,



of censoring reality for themselves and for others, neither they nor we will achieve the goal" (p. 235).

### VIII.

Bollinger devotes the brief concluding chapter of the book to a series of suggestive speculations (pp. 237-48). He wonders whether there is a link between the ethic of tolerance and the fragmented division of roles necessary in a large capitalist-bureaucratic society. He debates in his own mind whether the polyglot character of the nation of immigrants accounts for the prominence of the free speech principle, or whether instead the explanation lies in the fact that the United States has exhibited a remarkable degree of shared values, as symbolized by the two-party system. (He is inclined to believe the latter.) He re-emphasizes the point that the social function, and thus the meaning, of the free speech principle is constantly evolving. "One generation may seek merely the right to speak, while another will take strength from tolerating bad speech acts. Each generation has its own agenda, as the conditions then prevailing will dictate what subjects are important for inquiry" (p. 242).

In a few revealing passages, Bollinger identifies what he sees as some of the important strengths and weaknesses of his thesis. He counts as a major strength of the general tolerance theory that it embodies "a view of free speech as having a moral dimension, of being one public context in which the society addresses an important aspect of the general quality of mind it seeks" (p. 242). He detects no comparable moral dimension in the fortress model or the various "process" justifications for free speech. One of the major weaknesses of the theory, he believes, is that the teaching of tolerance could overshoot the mark. There can be such a thing as an undesirable extreme of tolerance: "Tolerance and intolerance are not ends of a spectrum of good and bad, even in the context of legal coercion against speech, despite the frequent portrayal of them as essentially moral opposites" (p. 245). Intolerance in moderation serves a social function; we could have too little of it. Moreover, there exists a qualitative risk as well: the free speech principle "could become a method of inculcating a kind of toleration that turns naturally into passivity and uncritical obedience" (p. 247).

Toward the end of the book, Bollinger lists some of the major assumptions of the general tolerance theory. They include "the assumptions about the nature and degree of the impulse to intolerance, about the advantages of using speech as a discrete area in which to engage in extraordinary self-restraint toward troublesome behavior, about the capacity of the judicial system to effectively implement such a principle, about the role of law in shaping social attitudes generally" (p. 244). He invites further efforts to test these assumptions. But he concludes the book on a note of confidence about (I take it) both his thesis and his



subject: "In the end, we must not fail to see the genuine nobility of a society that can count among its strengths a consciousness of its own weaknesses" (p. 248).

### IX.

There is much to admire in this book. It is elegantly written. It is rich in perceptive observations. The analysis is balanced and never hackneyed. The author displays a knack for producing the apt quotation and the thought-provoking analogy. The critiques he develops are likely to prod many readers into reflecting afresh about some of their long-held tenets regarding free speech. I found the book as interesting on the third reading as on the first, and that has always seemed to me a litmus test for a work of scholarship.

Although the book advocates a sharp thesis and even presents a model, I think Bollinger's primary contribution lies in the discrete insights he offers and, appropriately, the quality of mind he reveals and invites the reader to emulate. This is the antithesis of a book that stands or falls with the persuasiveness of its central thesis. Nevertheless, because of the originality and sophistication of Bollinger's analysis, the general tolerance theory he proposes is likely to serve as one of the reference points for future thinking about the first amendment. For that reason, I wish to indicate why, though I have learned much from this book and expect to learn more from it in the future, I do not find its argument wholly convincing.

The general tolerance theory addresses the problem of freedom of speech at several levels. In part, the theory is designed to explain the cultural phenomenon that fascinates Bollinger—the tendency of many participants in the political culture to push the idea of free speech to an extreme and to treat the legal regulation of speech as a unique and especially important issue. In part, the theory is intended to serve a normative function at the level of individual choice: Bollinger offers individuals a rationale for aspiring to extraordinary self-restraint when confronted with ideas they find deeply threatening. In part, the general tolerance theory is a theory of adjudication concerned with the criteria that ought to determine how judges interpret the first amendment. It is this last dimension that interests me the most and that I find most problematic. Although I have misgivings about other aspects of Bollinger's argument, the criticisms I shall discuss pertain exclusively to the theory of adjudication he develops.

Despite Bollinger's vigorous challenge to the conventional wisdom on the subject, I still believe a good case can be made for the claim that speech is indeed special, in the sense that the legal regulation of acts of communication raises distinctive problems in a constitutional democracy. On this point, his generally illuminating construction and criticism of the classical and fortress models may have led Bollinger to



overlook certain features of speech regulation that are not fully captured by those models.

In describing the classical model, he states "the practical benefits of gathering information and ideas for the truth-building process continue to be the major attraction claimed for speech and hence the basis of our contemporary theory for the free speech principle" (p. 45). He demonstrates that the self-government theory of Alexander Meiklejohn is really a version of the classical truth-seeking model confined to the political arena: speech is seen as valuable because it contributes to informed decisionmaking by the electorate. But this focus on the search for truth, leavened only by a brief consideration of the safety-valve function of letting discontent surface, ignores two of the most important values served by political speech: participation and the checking of power.

Even if Bollinger is correct, as I think he is, that the truth-seeking benefits claimed for extremist speech are dubious, there is real value in letting persons who hold extremist views participate in the processes and rituals of governance. It is a significant gesture, symbolizing a reliance on consent rather than force, for a political community to treat its most hated and irresponsible members as citizens nonetheless. "Silence coerced by law," said Brandeis, is "the argument of force in its worst form."<sup>10</sup> The point can be made into a conceptual argument: the very legitimacy of majority rule depends on every member of the electorate being free to communicate his views, at least on political issues. Even if one rejects this conceptual claim and adopts, as does Bollinger, a method of analysis based on a comparison of the benefits and harms of speech, the participation value of free speech ought to weigh rather heavily in the balance. So far as I can discern, in Bollinger's assessment of the classical and fortress models this value receives no attention.

The classical and fortress models also fail to account for the distinctive role that communication plays in the process of checking abuses of governmental authority. Such a rationale for the free speech principle was emphasized during the eighteenth century. "[T]he right of freely examining public characters and measures, and of free communication among the people thereon," Madison observed, is "the only effectual guardian of every other right."<sup>11</sup> Often this checking value is subsumed under the search for political truth. Recall, however, that Bollinger discounts the truth value of speech because of his well-grounded skepticism regarding how well the marketplace of ideas operates. The fact that "'we have lived through too much to believe'" (p. 74)<sup>12</sup> that truth will outsell falsehood in the short-run by no means im-

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10. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

11. 4 Elliot's Debates on the Federal Constitution 553-54 (1876), quoted in *New York Times v. Sullivan*, 376 U.S. 254, 274 (1964).

12. Quoting A. Bickel, *supra* note 4, at 71.



peaches the claim that free speech plays a special role in the process of checking abuses of official power. Unlike the participation value, the checking value may not require great solicitude for extremist speech, and thus Bollinger is right to look elsewhere for an explanation of why the first amendment has been construed to protect truly hateful and harmful ideas. But the general tolerance theory is founded on the broad claim that the regulation of speech by law is not materially different, in terms of general costs and benefits, from the regulation of conduct by law. The checking value, like the participation value, provides a reason to question that claim.

Thus, at least some of the conventional arguments for treating speech as special remain unsullied by Bollinger's fresh hard look at the subject. On the other hand, the standard view of speech as special due to its limited harm-causing capacity receives a trenchant and largely persuasive refutation in the pages of this book. Even regarding the question of harm, however, I find Bollinger's analysis unconvincing in one respect.

He argues that the classical model fails to take into account the harm speech can do by forcing its addressees to send a message by the way they respond to the speech. The response of ignoring the speech can be perceived as indicating agreement with it, or else indifference or ambivalence toward it. The response of criticizing the speech but failing to have it regulated by legal sanctions can be perceived as indicating a lack of power or resolve to act on one's convictions concerning the evil quality of the speech. But the force of this point depends on what message is read into these ambiguous responses, and that depends in turn, at least in part, on the impact of first amendment doctrine and rhetoric on popular thought. In other words, the very teaching function Bollinger identifies may help to save, rather than displace, the classical model.

This is more than a debater's point. As Bollinger notes, the traditional rhetoric of the classical model often tries to link the decision not to regulate speech with such personal qualities as courage and calm. I think the rhetoric has had an effect. The sentiment attributed to Voltaire, "I disapprove of what you say, but I will defend to the death your right to say it,"<sup>13</sup> is invoked frequently in popular discussion, both public and private. The distinction between tolerance and agreement is one that is easily explained and easily understood. For that reason, it is a distinction that the rhetoric of law can effectively teach. The same holds true, I believe, for the distinction between tolerance and weakness.

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13. Actually, the oft-quoted statement is a paraphrase, adopted by an American newspaper as its motto, of a remark made by Voltaire in private correspondence. What Voltaire said is "I detest what you wrote, but I would give my life to make it possible for you to continue to write." Letter to A.M. de Riche, February 6, 1770, quoted and discussed in N. Guterman, *A Book of French Quotations* 188-89 (1963).



Bollinger is convinced, however, that no amount of judicial or academic teaching will deter people from drawing inferences of "doubt and weakness of resolve from the posture of passivity or tolerance—not because they always coincide but because they do so with enough frequency that it provides a reservoir of human experience from which to draw such inferences" (p. 64). Of course, the decision to tolerate extremist speech sometimes does indeed derive from covert agreement or lack of regulatory resolve. The question is whether the connection is so strong and so common that popular perception of the act of toleration must inevitably be dominated by suspicions of agreement or weakness on the part of those who decline to regulate speech. In this regard, I think the dispute between the Nazis and the Village of Skokie provides an atypical test case. There is a history and continuing sense of guilt surrounding the question of Jewish confrontation with the Nazi mentality that makes the implicit message of toleration in that context exceptional.

That Bollinger may overestimate the normal communicative costs of the act of toleration does not impeach his other criticisms of the classical model. I agree with him that the classical model is based on too optimistic a view of human nature and too great a faith in the marketplace of ideas. But it is Bollinger's focus on the communicative significance of the regulatory response to speech that leads him to want to replace the classical model with the general tolerance theory. My doubts about how meaningful is the message conveyed by the act of tolerating speech lead me to think he is wrong to regard the communicative impact of the regulatory response as a more important consideration than the censorial impact of regulation on the speakers and their audiences.

The fortress model focuses on this matter of censorial impact. Bollinger makes a number of penetrating observations about the fortress model; the chapter he devotes to the subject impresses me as perhaps the strongest in the book. But I believe he fails to give sufficient attention to the familiar argument that officials who hold the reins of regulatory power are particularly susceptible to impulses toward intolerance. His discussion of the fortress model is built around the proposition that in most instances the use of legal sanctions against speech is stimulated by popular demand driven by the universal human impulse to intolerance.

I do not doubt that there are occasions when widespread popular sentiment or pressure from powerful private groups forces government officials to regulate speech they might otherwise choose to tolerate. In fact, the Nazi-Skokie controversy was one such occasion.<sup>14</sup> Moreover,

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14. See D. Downs, *Nazis In Skokie* 22-23 (1985):

Once Skokie governmental officials dealt with Collin, they chose not to counter Collin's plans for village hall. At a meeting held with other local leaders (including local rabbis and Chicago representatives of the Anti-Defamation



the impact of public opinion is likely to be greatest during concentrated periods when the first amendment stakes are highest, when disorienting social and political developments lead officials and ordinary citizens alike to perceive an urgent need to repudiate certain ideas.

I think it is a mistake, however, to minimize the role government officials play in determining how widely and severely speech is regulated. In periods of relative tranquility, the issue of how dissenters are treated seldom ranks high on the priority lists of the most influential interest groups; official preferences rather than constituent pressures typically determine what speech regulation policy will be implemented. Moreover, even in periods of intense social conflict when constituent pressures count for a lot, government officials can do much to stimulate or defuse popular sentiment favoring the regulation of speech.

It stands to reason that government officials should find tolerance of speech especially difficult. Speech is perceived to be dangerous because it challenges the social order or particular tenets thereof, or interferes in some other way with the smooth working of the institutions of the society. Few persons have as much respect for or stake in the social order as those who achieve positions of authority in perhaps its most important institution, the state. That, in a constitutional democracy, power is diffuse, limited, and subject to recall only makes those who hold that power for the moment all the more inclined to feel threatened by challenges to their authority or policies. Particularly revealing is the way government officials have responded to speech in spheres where they are essentially free of constitutional constraints and pressure from public opinion. The longstanding practice of denying visas to foreign visitors on ideological grounds is one manifestation of the official mind at work.<sup>15</sup> Another is the way law enforcement agencies have chosen to deploy their scarce resources in the systematic surveillance of such menacing groups as the Socialist Labor Party and the

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League) they decided to grant Collin's request for a permit on May 1. They based their decision on the traditional "quarantine policy" of the Anti-Defamation League and other major Jewish organizations such as the American-Jewish Committee and the Jewish Federation of Chicago. In essence, to quarantine is to ignore and avoid a demonstration in the hope that it will pass away without causing disturbance and without attaining widespread publicity. At this meeting of leaders in April 1977, not one local leader (including the rabbis) dissented from the quarantine policy decision.

Yet the leaders had not anticipated the virulent reaction of the survivor community. As word spread around the community, survivor resistance and threats of counter-demonstration violence mushroomed, forcing the village to abandon the quarantine policy and to seek legal means of keeping the Nazis out. Once again, Collin asked the ACLU to litigate on his behalf, and the famous court hattle over Skokie commenced.

Id. (footnote omitted).

15. See Neuborne & Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 Wm. & Mary L. Rev. 719 (1985).



Society of Friends.<sup>16</sup>

Moreover, even if officials as a class tend to be no more intolerant than most other persons, the fact that officials wield the coercive authority of the state makes their intolerance a matter of special concern. What engenders the fortress mentality in first amendment theory is the deadly combination of intolerance and power. That mentality may be justified whether or not the latter feeds the former. Bollinger's collapsing of the phenomenon of official intolerance into the larger phenomenon of general intolerance would be persuasive only if officials were viewed as the passive instruments of the general populace so far as the question of speech regulation is concerned.

Bollinger is not oblivious to the special considerations that influence how officials respond to speech. He even mentions a "limited fortress model" that focuses on just this problem (p. 91). But his critique of the fortress model depends on the claim that official intolerance is predominantly the product of general intolerance. For instance, he finds the fortress model unacceptable partly because it is premised on a view of human nature that emphasizes the power of irrational, aggressive impulses and minimizes the role of reason in shaping behavior. This view Bollinger regards as disturbingly pessimistic, even defeatist, and also somewhat inconsistent with the high regard for reason that is commonly invoked to justify the claim that speech is an especially valuable human activity. However, a limited fortress model that derives from a recognition of the special impulses to intolerance to which officials are prone need not be premised on a pessimistic view about the importance of reason generally or about the character of the ordinary person. In addition, Bollinger objects to the paternalism he discerns in the fortress model, the assumption of superiority that leads to analysis in terms of "we" and "they." There is, to be sure, a "we-they" mentality underlying the limited fortress model as well, but the objection to paternalism seems to me to lose much of its force when the "they" whose instincts must be checked by the "we" who invoke constitutional principles consists of the population of government officials who hold extraordinary power and are subject to extraordinary pressures.

Thus, I do not think Bollinger succeeds in this book in discrediting the fortress approach, though he surely gives its proponents (among whom I count myself) much to think about. It is important, moreover, whether an approach can be defended that emphasizes, as do both the classical and fortress models, the coercive rather than the pedagogic and symbolic dimensions of speech regulation. For the general tolerance theory that Bollinger develops as an alternative to the classical and fortress models is not without problems of its own.

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16. See, e.g., *Socialist Workers Party v. Attorney Gen.*, 510 F.2d 253 (2d Cir. 1974); *Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335 (3d Cir. 1975).



Some of those problems relate to one of its fundamental premises. In Bollinger's view, a central function of first amendment adjudication is to "work toward the correction of a perceived general defect in our intellectual makeup" (p. 120). Like Meiklejohn before him, Bollinger wants courts to participate in the forging of the democratic personality. That the particular type of personality he seeks is more complex than Meiklejohn's democratic man raises serious questions of judicial capacity, to which I shall turn shortly. But even if it were feasible for courts to play a major role in shaping the intellectual makeup of the general population, is that a function that any organ of the state ought to undertake?

At least since Plato spelled out in such vivid detail his program for shaping the intellectual character of the citizenry, it has been a central problem of political philosophy what role the state should play in teaching its subjects how to think. Public schools, government information campaigns relating to health and safety, and judicial doctrines designed to discredit racist attitudes as well as disallow racist actions are only a few examples of the many ways in which liberal states assume educational functions. Teaching is an inescapable attribute of governing. This is not to say, however, that limits on the teaching function of the state are not possible or desirable. The theory of constitutional democracy posits an important conceptual separation between the individual and the state. Orwellian imagery is so powerful precisely because control over one's own thoughts represents one of the last redoubts of the individual personality. I believe the status of the first amendment as a cultural symbol also can be traced to this notion. At the least, it must be counted a problematic feature of the general tolerance theory that it is based on an expansive conception of the role of government in shaping the attitudes of the citizenry.

Bollinger alludes briefly to this problem when he invokes Isaiah Berlin's famous distinction between negative and positive liberty, which is based on the difference between "freedom from" and "freedom to."<sup>17</sup> The classical and fortress models, derived from the conventional liberal thought of the Enlightenment, view the freedom of speech as freedom *from* the coercive impact of regulation by the state. The general tolerance theory, on the other hand, views the freedom of speech as freedom *to* develop the positive capacity for tolerance. The ideal of positive liberty, prominent in the thought of Plato, Rousseau, and Marx, is sometimes said to carry the seeds of totalitarianism.<sup>18</sup> Bollinger acknowledges this concern but finds it inapplicable to the general tolerance theory, which embodies a uniquely safe strategy for pursuing the goal of positive liberty:

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17. See I. Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty* (1969).

18. See *id.* at 134; E. Barker, Introduction to J. Rousseau, *Social Contract* xxxviii (E. Barker ed. 1960); I. K. Popper, *The Open Society and Its Enemies: Plato* 86-89 (1962); 2 K. Popper, *The Open Society and Its Enemies: Hegel and Marx* 310 (1962).



What [Berlin] did not see, however, is how the two conceptions of negative and positive freedom could be yoked together, the former in service to the latter; how the establishment of a zone or field of negative freedom could become a source or method of striving for some sense of positive liberty (pp. 173-74).

Because it promotes the positive intellectual capacity it seeks only by the device of restricting the coercive power of the state, Bollinger regards the general tolerance theory as more or less devoid of totalitarian implications.

I am not so sure. I agree with Bollinger that the dangers inherent in the teaching role of government are greatly reduced when all the agents of the state are empowered to do is teach noncaptive audiences by setting an example. I also think it is wrong when sifting for the seeds of totalitarianism to regard the judiciary, with its limited resources and narrow scope of operation, as presenting a threat comparable to that posed by other organs of the state. Nevertheless, one of the cardinal functions of a constitutional tradition is to give continuing expression and contemporary meaning to the liberal principle that the power of the state is limited by the obligation to respect the autonomy and individuality of its citizens.<sup>19</sup> Even if no concrete scenario is evident regarding how adoption of the general tolerance theory could pave the way for totalitarianism, the premise that government should try to shape the "intellectual character" of the citizenry has disturbing overtones that make it a questionable starting point for interpretation of the first amendment.

I do not want to make too much of this objection. When the teaching enterprise of first amendment adjudication is confined to more discrete endeavors, such as emphasizing the distinction between toleration and weakness or keeping fresh in the public mind certain object lessons relating to the abuse of power, I am comfortable with the idea of judge as pedagogue. It is the ambitious and comprehensive catechism that Bollinger wants taught that gives me pause. For he seeks an educational experience that will influence the way persons conduct themselves across a wide range of social interaction. He speaks not of lessons or precepts but of character formation.

The complexity of the democratic personality that the general tolerance theory seeks to develop also raises a host of practical concerns. As any teacher knows, there are limits to how detailed, subtle, and multi-layered the instruction can be if it is to have a genuine impact on the thinking of students. Much depends on the setting: more complex pedagogic endeavors can be undertaken in specialized seminars than in introductory courses. I do not think the setting of first amendment adjudication lends itself to ambitious teaching. Particularly that is true

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19. See Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204, 214-16 (1972).



when, as under the general tolerance theory, the intended audience is the public at large rather than a narrower class of persons such as disappointed litigants, public officials, or groups that exhibit unusual qualities of intolerance.

Recall that Bollinger objects to what he considers the simplistic and exaggerated rhetoric of the first amendment tradition. He thinks the stirring passages from the free speech opinions of Holmes, Brandeis, and Black have had a negative effect on the development of the general capacity for tolerance because those passages censor the complexity of the issues they address. Other much-quoted first amendment opinions, such as Justice Brennan's majority opinion in *New York Times v. Sullivan*<sup>20</sup> and Justice Harlan's majority opinion in *Cohen v. California*,<sup>21</sup> are vulnerable, he says, to the same criticism (pp. 206, 223-24, 231). These judges may have tutored the general population on the subject of tolerance, but they taught the wrong lesson.

I think it is no accident that the most influential opinions in the first amendment tradition employ a rhetoric that is unsubtle, unambiguous, inattentive to complexities, and to a degree unbalanced. Those opinions teach simple lessons, and they do so by ignoring counterarguments and suppressing misgivings. I think the lessons are valid and important enough that a certain pedagogic license in teaching them is justifiable. Whether or not I am right about that, I believe experience suggests that the impact of constitutional rhetoric tends to correlate with how loud, clear, and striking is its message.

Bollinger offers no example of a first amendment opinion from any court that displays the quality of mind he thinks ought to be taught. If he could find such an example—the Frankfurter concurring opinion in *Dennis v. United States*<sup>22</sup> might be a candidate—I doubt whether the opinion could be shown to have had any significant influence on the way any segment of the population thinks about the question of tolerance. Judicial opinions are read by only a tiny fraction of the population. The important opinions are talked about, of course, in larger circles, and occasionally a judge's observations may be quoted or paraphrased widely. But then, I am confident, the richness and subtlety, the balance and proportion and complexity an opinion may exemplify are sure to be lost in translation.

Perhaps I misinterpret the scenario of instructional impact that Bollinger envisions. Although he is generally admirable in his willingness both to refine his ideas and to face up to problems, the book contains an uncharacteristic ellipsis on this question of exactly how what courts do and say is supposed to affect the thinking of the ordinary person. Perhaps the quality of mind the general tolerance theory seeks

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20. 376 U.S. 254 (1964).

21. 403 U.S. 15 (1971).

22. 341 U.S. 494, 517-61 (1951) (Frankfurter, J., concurring).



to develop in the ordinary person is not to be achieved primarily by having him hear and attempt to decipher the complex messages put out by courts relating to how natural, at times proper, but dangerous, often disproportionate, and always ambiguous is the response of intolerance. Possibly it is the *experience* of being forced by the writ of law to tolerate speech under certain conditions that is to be the chief source of instruction for the ordinary person. If so, the role of subtle and complicated patterns of judicial thought would be simply to help judges pick the right situations, from a pedagogic perspective, for conducting these experiential lessons in toleration.

But then the success of the teaching endeavor depends on the capacity of the general population to draw from the experience of enforced toleration the proper conclusions. Bollinger realizes that the pedagogy could misfire. He inveighs against inflexible doctrines precisely because he believes that only under certain social conditions will the judicial protection of unpopular speech have a salutary effect on the attitudes of the population:

The simple fact that legal coercion against speech activity has been checked does not necessarily mean [intolerance] will not resurface in other forms. Because the free speech results are likely to be considered highly arbitrary and socially unacceptable, the intolerance may actually be stimulated—and become excessive—in other areas of social interaction (p. 195).

Only if courts attempt to teach tolerance when conditions are suitable, and then only if the judges find “the right voice” in which to conduct the lesson, does Bollinger expect the population to develop an appreciation of how intolerance is at once both desirable and dangerous, valuable as a form of self-expression yet difficult to keep in proportion.

I question whether this sophisticated perspective on intolerance can be taught through the medium of adjudication—in any voice under any social conditions. Moreover, the difficulties posed by the complexity of the lesson are compounded, I believe, by the complexity of the strategy Bollinger proposes. By requiring *extreme* tolerance in the limited sphere of free speech, courts are supposed to help the general population achieve a *moderate* degree of tolerance in other spheres of social interaction. I wonder whether persons who draw a lesson from the experience of being forced by law to be tolerant of speech are likely to apply that lesson when later they respond to nonspeech conduct that stimulates the impulse to intolerance. And if they do, will it be the lesson that the proper response lies somewhere between the extreme toleration that is required by law toward speech and the relatively low degree of toleration that is enforced by law toward many forms of conduct?

The problem is complicated even further by Bollinger's insistence that judicial discourse adopt a candid idiom and refrain from “weaving a set of deceptions” (p. 235). Presumably this means that courts should



explain in their opinions that the extreme degree of protection accorded speech under the first amendment does not derive from the judgment that speech acts are more valuable or less harmful than other forms of conduct but rather from the judgment that treating similar categories of acts differently can serve a pedagogic purpose. What lesson will the public draw if it is told that the degree of toleration required of it toward speech is indeed extreme, greater than would be desirable were it not for the court's effort to dramatize the act of toleration in some isolated settings? Possibly such an awareness of the strategy will lead members of the general public to draw the desired conclusion that the proper norm in other spheres is a more moderate degree of toleration. But I am skeptical.

In sum, the project of shaping the intellectual character of the general populace is fraught with hazards and uncertainties. Even under the best of conditions, it is exceedingly difficult to predict or control what lessons the public will draw from dramatized instances of constitutional litigation. I do not doubt that one of the functions of first amendment adjudication is to teach. *Bollinger* has done us a service by exploring that function in so fresh and probing a manner. But I remain convinced that teaching tolerance to the general population is not the most important function of first amendment adjudication; protecting speakers and their audiences from the coercive consequences of government regulation is.



