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COMMENTARIES

THE TOLERANT SOCIETY: A RESPONSE TO CRITICS

Lee C. Bollinger *

In writing *The Tolerant Society*[1] I was, and yet remain, interested in the treatment of speech behavior in this country, a treatment notably more liberal than in other Western democracies. Liberality, however, is not its only surprising or distinguishing hallmark; so too is how the world is characterized under the free speech concept.

For some time, even after I began teaching in the first amendment area, the scope and nature of protection afforded speech seemed to me obviously right. But the more I thought about it, the more it seemed to me quite extraordinary. Existing free speech theory provided less and less adequate an account for what our society actually permits under the free speech banner. Yet I also felt a strong intuition that free speech has powerful meaning for society, that somehow it seems to strengthen society even by protecting the most appalling speech acts. I began to think about free speech as having a social significance that extends far beyond the mere removal of legal restrictions against speech. As I studied the major theorists, such as Holmes and Meiklejohn, I discovered that they also had, in the process of thinking about cases involving censorship of speech, become preoccupied with larger questions of the human personality—what I have called the intellectual character—with matters of belief and truth, and with challenges to both of those. These issues obviously transcended any hornbook understanding of the first amendment; setting the boundary of legal restraints on speech now involved thinking about its effects on the broader social culture. My research and writing in this field have been a search for that broader meaning, and what I have seen I describe under the general rubric of "tolerance."

In this Commentary I seek to respond to some of the criticism of the theory I set forth in *The Tolerant Society*. Part I states my view that the harms caused by speech are more like harms caused by nonspeech acts than is commonly perceived. Part II contains a summary of my thesis in *The Tolerant Society*. Finally, Part III addresses several questions about my thesis.

I. Harm and the Mind Behind Speech

Our society's wide toleration of speech acts permits much more

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1. L. Bollinger, The Tolerant Society (1986).

speech than what is customarily assumed to be beneficial under traditional first amendment theories. The conventional justifications for free speech are well known: Freedom of speech preserves a sphere of individual autonomy, provides a check against government abuse and, most prominently, secures our interest in advancing knowledge and truth. No doubt, much speech that is protected can be brought within the shelter of these justifications, but a lot of speech cannot reasonably find shelter here. Some speech has nothing whatever to do with truth seeking: it may be intended only for the momentary pleasure or enjoyment of both speaker and audience. Yet it is protected. Or, as with many demonstrations, the object is not to express a point of view but to disrupt other interests, such as peace and quiet, or to challenge and provoke an audience to a violent confrontation. Yet, though this speech is really just a legitimated form of social fighting, we protect it. Even racist speech and advocacy of genocide are protected, despite the fact that anyone seriously interested in seeking truth would spend no time listening to such ideas. We have good reason to think many ideas invalid and bad, and some come with a very high price. Some speech, in fact, has a great capacity for harm.

My view of this matter is quite simple: Speech can harm in ways we quite properly should take into account, a position supported by what we take into account in regulating nonspeech behavior. It is reasonable to care how people think, and speech is one way to induce others to think in ways dangerous or bad. We care about thoughts because we care about actions, and thoughts often induce actions. If law were perfect and could reach all harmful behavior, things might be otherwise. But it cannot, as a practical matter, and even when law does intervene, it often arrives after the harm has been done. Therefore, in the same way that the potential for gain has economic value, *apprehension* of future injury is reasonably within the purview of legitimate harms.

Consider the ordinary racist act. What is the injury inflicted by a policy of school segregation, or by any act of racial discrimination? Is it simply the inferior education or the denial of a room or a meal? Of course not. What is the injury of being forced to sit at the back of the bus? In all of these cases it is largely the thought and message of inferiority, of hatred and contempt, that is communicated by the discriminatory act and that afflicts the human spirit of the victim. This injury, in turn, impels us to intervene and to put a stop to the cruelty. Racist *speech* does not differ in kind, nor does it necessarily differ in magnitude of injury, from other racist acts that we prohibit. Still, and this is the paradox, one is prohibited and the other is protected as free speech.

The point is simple, yet so often overlooked. The mind—whether described as an idea, an intention or an attitude—communicated through any act matters, and can constitute a cognizable injury. For those who have any doubt that this is true, I suggest thinking about the

present and future life of Mr. Salman Rushdie.[2]

Of course, the fact that speech acts can be bad acts—or, to put it in other terms, the fact that *speech acts are just a species of acts in general*—means that we cannot just ignore them. Every time a bad act occurs, the community must decide whether it really stands for its principles and whether it will do anything about bad behavior generally. Its *own* identity becomes an issue. Furthermore, the task of fashioning an appropriate response is always highly complex and difficult, with the Scylla being to act with timidity (as did the onlookers of the murder of Kitty Genovese—an event that sticks in our collective consciousness to symbolize this failing)[3] and the Charybdis being to react with excessive hostility and anger (as did poor Billy Budd, or as would have many in Skokie who said they were ready to meet the neo-Nazis with violence).[4] Having to go through this process, which can be agonizing and painful, is a cost in itself. There is also the cost of lost opportunity: By paying attention to this—as we must—we will have foregone something else, which may on our scale of priorities be considerably more important.

Looking at what we count as harm in nonspeech acts can help us evaluate whether our thinking is askew in the speech area, but we can also freshen our perspective by seeing how the values we seek to protect in speech are not peculiar to it. The interests in having a sphere of personal autonomy and in truth are not confined to the area of talk. To someone like the great naturalist Aldo Leopold, "the chance to find a pasque-flower [was] a right as inalienable as free speech."[5] Colloquialisms like "You'll never know until you've tried it" bespeak a general truth that to do something, to act an idea, is a method of gaining knowledge equal, and perhaps superior, to pure thought and discussion. We do not, however, let the possibility of expanding our knowledge stop us from regulating all nonspeech behavior. Personal freedom and new knowledge are values that arise everywhere, but we do not always give them decisive weight. Polygamy may be a better way of life than monogamy, and by prohibiting it we lessen our chances of finding out—but we prohibit it anyway.

The basic point is that we cannot explain the protection we give to speech acts simply by pointing to the presence of certain values like personal autonomy and truth or by assuming that the costs involved are minimal. With speech those values are not always at stake, and even

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2. See, e.g., Khomeini Asks Followers to Kill "Satanic Verses" Author, Printer, L.A. Times, Feb. 14, 1989, at A1, col. 4 (leader of Iran orders death of author who wrote novel containing sacrilegious references to Islam).

3. See Martin, Kitty Genovese: Would New York Still Turn Away?, N.Y. Times, Mar. 11, 1989, § 1, at 29, col. 1 (describing apathetic response of "38 respectable, law-abiding citizens [who] . . . watched a killer stalk and stab a woman in three separate attacks").

4. See A. Neier, Defending My Enemy 58–59 (1979).

5. A. Leopold, A Sand County Almanac vii (1987).

when they are there is no reason why they should trump every other interest. And the costs of speech can be great. It is unpersuasive to argue that speech should be protected because advocacy is less harmful than doing what is advocated, since though it is true that advocacy of murder may be less harmful than murder itself, the harm from the advocacy may still be harmful enough to warrant our intervention; or that speech should be protected because the communication of ideas is something we treat as beyond the realm of legal control, since we punish communication every time we punish nonspeech acts (and call it deterrence); or that speech should be protected because we can avoid the harm by averting our eyes,[6] since we cannot in fact; or that speech should be protected because bad speech behavior is perfectly natural,[7] since we expect all kinds of "perfectly natural" impulses to be controlled; or that speech should be protected because we cannot force people to express themselves in less offensive or harmful ways without altering the message itself or diminishing the opportunity to express intensity of feeling,[8] since that logic would lead to the protection of every terrorist act.

We must, in short, be careful not to inflate the benefits of free speech or to trivialize its possible harms—both of which tend to occur in free speech discourse. And it is vitally important that we remember that is it is the mind that matters to us, all the time. That is why on a Sunday morning, when you awaken at eight o'clock and hear your neighbor mowing his lawn you are agitated and angry and experience an urge for vengeance (because of his insensitivity, or what is worse, because he is doing it deliberately to annoy you), but if you hear thunder and lightning you will return to your covers and sleep. Only those crazed like Ahab will feel the same affront from nature as from a mind—but that is because they see an evil mind behind nature.[9]

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6. See Cohen v. California, 403 U.S. 15, 21 (1971).

7. New York Times v. Sullivan, 376 U.S. 254, 271–72 (1964) (calling error and injury "inevitable in free debate").

8. *Cohen*, 403 U.S. at 26 ("[W]ords are often chosen as much for their emotive as their cognitive force .... [The] emotive function ... may often be the most important element of the message ....").

9. All visible objects, man, are but as pasteboard masks. But in each event—in the living act, the undoubted deed—there, some unknown but still reasoning thing puts forth the mouldings of its features from behind the unreasoning mask. If man will strike, strike through the mask! How can the prisoner reach outside except by thrusting through the wall? To me, the white whale is that wall, shoved near to me. Sometimes I think there's naught beyond. But 'tis enough. He tasks me; he heaps me; I see in him outrageous strength, with an inscrutable malice sinewing it. That inscrutable thing is chiefly what I bate; and be the white whale agent, or be the white whale principal, I will wreak that hate upon him. Talk not to me of blasphemy, man; I'd strike the sun if it insulted me.

H. Melville, Moby Dick 164 (Norton ed. 1976).

II. The Tolerance Thesis

With this vision of speech as a species of action with a capacity to bring some benefits (though not uniquely and not as consequential as we might think) and a capacity to inflict injury (though not uniquely and not as inconsequential as we might think), I set out to think about why protection—or, as I ended up preferring to express it, toleration—of speech acts made sense, when the traditional benefits were small and the harms great. I thought a fundamental shift in perspective was needed. That shift involved two major components. The first was to see free speech as potentially concerned not just with trying to insure that we receive the benefits that speech has to offer, but also with correcting or stopping something bad or problematic in the *reactions* toward speech acts. The second component of the shift in perspective was to see that the social value we can derive from free speech need not depend upon speech being unique or significantly different from other areas of human interaction. In other words, rather than feeling that some *special* attributes of speech justify what we do there, one might instead see free speech as a discrete area of social interaction in which we seek particularly desirable values or qualities, perhaps to an extreme degree. I wanted to think about free speech *in relation* to our dealings with social behavior in general and to see whether that could account for our readiness to calculate harms and benefits in a way that, viewed in strictly comparative terms, seems so odd.

Taking this view opened up many possibilities for thinking about the social meaning of free speech. The task became one of thinking about or identifying the improper ways in which we react to certain behavior, given the values we profess to hold. Traditional values of free speech, like trnth seeking, might themselves benefit from this perspective. One could .agree with the observation just made that nonspeech behavior can serve to advance the truth as well as speech—an observation that might otherwise be taken to challenge the legitimacy of free speech theory's removal of speech from social regulation, especially when the truth interest seems minimal—and argue that, because people have a general bias against receiving or acknowledging new ideas, it makes sense to set aside one area of social interaction such as speech and to commit ourselves to extreme pursuit of knowledge in that area. The position is not without further issues to be resolved, but the issues are importantly different. The problem of justification is no longer one of showing how the truth interest advanced by speech differs from that advanced by nonspeech acts, but rather one of showing how that interest is *similar* in both speech and nonspeech contexts, how there exists a general disinclination to pursue truth and how setting aside a special zone in which we will pursue truth to an extreme degree can provide a useful corrective for that social disability.

But this perspective also supports an enlarged conception of the social benefits potentially inhering in extreme toleration of speech acts,

one that emerges from a focus on the problematic character of the *reaction* to speech acts. At least two kinds of social meaning seem to underlie the extraordinary restraint freedom of speech mandates toward speech acts.

The first has to do with the process of social punishment. There is no reason why what we derive from free speech cannot go beyond the truth-seeking interest and also be linked to the problems we have in fixing the appropriate punishment for bad behavior. There can be little doubt that human nature is afflicted with an impulse to punish excessively, to take vengeance for injury. Our system of criminal law is filled with precautions against this impulse. Once we realize that speech can not only constitute bad behavior but can also cause palpable injury, we understand that speech can provide the context for exercising self-restraint toward bad behavior as a means of demonstrating and developing a capacity to exercise appropriate self-control when punishment is inflicted elsewhere. We let the injury pass, as it were, without exercising our power to prohibit and punish, because we recognize in ourselves the tendency to punish excessively when we do punish and use this as a means of moderating that tendency. We might call this aspect of free speech the *virtue of magnanimity*.

A second new function for free speech I call the development of the capacity for tolerance. Just as we might think of speech acts as bad acts, deserving of punishment and therefore creating an appropriate context in which to be extremely self-restrained in the exercise of punishment, so we might think of speech acts as just plain acts, verbal acts, in which people behave as they wish, despite risks of further behavior we properly dislike. This is a large and complex society, with people of varied beliefs and interests. Providing some accommodation of these varied beliefs is a critical and basic task of the society. Simply coexisting and overcoming the wish to establish an overly homogenized society are important goals. In this sense, free speech may simply function as a zone of extreme toleration, not because the behavior tolerated is important to human self-realization or to truth, but because as a practical matter living with divergent behavior is necessary.

I claim that the practice of toleration of verbal acts under free speech may help inculcate what I call the tolerance ethic. What I have in mind is the development of a general disposition, which I think is seen repeatedly in social interaction, to restrain our wants and beliefs in the exercise of social power. Some have pointed out how our constitutional law helps make raw self-interest an illegitimate basis for political power; the courts insist that argnments for laws at least be put in terms of advancing the public good.[10] I would go farther and say that through the first amendment our judges have sought to constrain our

10. See Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984).

desire to impose our own notions of the public good on others who have a different conception of it. Free speech seeks to modulate *belief*; not to destroy it, but to curb it. It is most striking that some of our greatest free speech theorists, such as Hand, Holmes and Harlan, saw in censorship an overweening belief, for which they prescribed the antidote of self-doubt. To Hand and Holmes, "Tolerance is the Twin of Incredulity."[11] It is interesting that, for them, belief and doubt were matters that go to the whole person, to the matter of intellectual character. A person who feels healthy self-doubt toward her beliefs is a person who is not just prone to let more speech go uncensored, but a person who is going to behave differently, to insist on less and to compromise more, in the give-and-take of the political process.

This begins to get at what I have in mind when I talk about free speech as a special social context concerned with creating a culture or ethic of tolerance.

III. Responding to the Critics

With this introduction and summary of my thesis in *The Tolerant Society*, I turn to some of the principal criticisms raised by the various reviews.

A. *On the Thesis and Its Justifications*

1. *What more precisely are the capacities that I see being potentially developed through toleration of speech acts?* — I detect some confusion or uncertainty about the thesis in several reviews.[12] There may be some problem with the term "tolerance," which I use as a capstone or signifier for a range of capacities. The term is problematic for many reasons, but two are especially pertinent here.

First, the term does not fully capture the connection between toleration of speech and appropriate restraint in the exercise of punishment, which is why I have begun to describe this virtue separately as that of magnanimity. The connection between free speech and punishment is one of the most striking omissions in our appreciation of the potential meaning of the free speech experience. It seems to me notable that Holmes's outrage in his dissent in *Abrams v. United States*[13] was partly directed at the punishment that had been imposed on the defendants, which he found disproportionate.

Another problem with the term tolerance is that it can sound in-

11. Letter from Learned Hand to Oliver Wendell Holmes (June 22, 1918), reprinted in Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 756 (1975).

12. See, e.g., Marshall, On Learning to Love Vituperation (Book Review), 96 Yale L. J. 1687, 1693–97 (1987); Strauss, Why Be Tolerant? (Book Review), 53 U. Chi. L. Rev. 1485, 1505 (1986).

13. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

sipid, a little too much like recommending that we all strive to achieve the "common good." We have an instinctive and to some extent healthy negative reaction to excessive abstraction; it can make us disinclined to look beneath for greater detail, even when it is there (as I hope it is in my book). I do think there is a fundamental social value in this society that requires a capacity for accommodation and compromise, albeit not without limits. That it is difficult and perhaps impossible to identify this value does not, however, prove that it does not exist.

When talking about tolerance, I am referring to something probably best called a "disposition," a way of approaching problems and conflicts. Because there must and will be limits to our disposition to be tolerant, because there is also virtue in being intolerant, because we will face countless occasions for which no clear rule or line can be laid down in advance for when to be tolerant and when intolerant, and because we may have a natural bias toward the posture of intolerance, it is appropriate to think of developing a general disposition—just as we find it perfectly intelligible to speak of developing an ethical disposition, or an environmental ethic, or a presumption of innocence in criminal trials. That is why I speak of a tolerance ethic and think of free speech as serving it.

The tolerance ethic, then, refers to a general disposition, one of being able to put aside our beliefs, of overcoming the instinct to have things our own way, to control, to dominate. It is to live in a world of difference, and to do so comfortably.

To be sure, this will always be a matter of degree. We must and ought to draw limits on how far we will let people have things their way. We often rely on the concept of "harm" to help us set this line, but it is manipulable because we must always decide *how much* harm we should sustain.

However, the task of achieving a workable social organization is more complex than simply establishing the boundaries of permissible action. What we are talking about goes to the heart of the process of democratic decision making. Every individual and group must decide again and again how much they will permit society to be structured along lines of thought differing from their own. When we speak of this we speak in terms of being "tolerant," of tolerating a wide diversity of viewpoints and life styles and choices. What ought to interest us about our extraordinary self-restraint in the realm of speech acts is that it may serve to emphasize the cultural importance not just of tolerating the expression of attitudes and ideas, but also their implementation—of allowing the world to be shaped in ways of which we might disapprove.

We might think of the function of free speech in this society as analogous to our national parks and wilderness areas. There too we symbolize and represent the need to confront the urge to control and dominate natural forces, to order things, to take the risks out of life. So it is with freedom of speech, where there is an open, almost completely

natural world full of untamed creatures, ready to accost, harass and injure through words. The meaning and significance of the act of *preservation*, in both the wilderness and speech contexts, becomes greater, the greater our power to destroy what we fear.

2. *Assuming we understand these capacities of tolerance, why should we want them?* — Many reviews raised this question.[14] I must admit that it is one I find somewhat puzzling, though it has some variations that are perfectly sensible.

I find it most puzzling when I think of having to justify the capacity for appropriate restraint in the process of punishment. That there is a wide social consensus about the tendency to be excessively punitive toward those who do bad acts I regard as self-evident. But whether extraordinary self-restraint toward bad acts in the speech context actually contributes to a moderation—or, more accurately, an appropriate level of moderation—of the punishment inflicted is, I think, a reasonable question.

As to what I am now calling the tolerance ethic, I think that is somewhat more difficult. It is possible, as I noted at the end of the book,[15] either that there is no bias in the society toward excessive intolerance or that there is a bias in the opposite direction, that is, toward excessive tolerance, in which case free speech as I envision it may be working against the social good. It is hard in a short Commentary (based on a revised lecture) to argne deeply in one direction or another on such a global question. An author at this point is, I suppose, naturally inclined to de-emphasize the normative and to emphasize the descriptive nature of his thesis—and I might therefore say that I am only describing what seems to me the most reasonable interpretation of free speech jurisprudence from *Schenck v. United States*[16] and *Abrams*[17] to the present. I am, with some justification, I think, always a little ambignous about how much of what I say about free speech I draw from the case law and commentary and how much I propose to add. But, even if the enterprise is merely descriptive, there is value in knowing what have

14. As one reviewer wrote:

> A community does affirm its identity by banning or punishing what strikes at its common good, as the Nazi march certainly did. Bollinger implies that the public values threatened by extremist speech have less need for community affirmation than has the value of toleration (because of its symbolic connection with toleration in general). But is this obvious? What of the symbolic connection of the Nazi contempt for Jews with contempt for anyone? And the fact that tolerating the disorder caused by the Nazi march is symbolic of tolerating disorder in general?

Oldenquist, *Gemeinschaft* Without Mussolini (Book Review), Chronicles, Oct. 1987, at 32; see Marshall, supra note 12, at 1696; Nagel, Teaching Tolerance (Book Review), 75 Calif. L. Rev. 1571, 1576–78 (1987); Strauss, supra note 12, at 1505–07.

15. See L. Bollinger, supra note 1, at 244–48.

16. 249 U.S. 47 (1919).

17. Abrams v. United States, 250 U.S. 616 (1919).

been the underlying motivations of those who helped make the world we now inhabit.

I do not, in any event, think the idea of a general commitment to greater tolerance is any less intuitively appealing, or more in need of proof, than are any of the other values commonly associated with the first amendment, such as personal autonomy and truth. The question whether free speech promotes an excessive and undesirable individualism or quest for truth at the expense of other undernourished values is just as unanswered in the free speech literature as—and, to my mind, no more obviously right than—the idea that we benefit by widening the capacity for tolerance through free speech.

My general feelings here are no doubt reinforced by my own personal experience, in that every group with which I have ever been associated—and that includes my own faculty—has struggled with the problem of being more, and not less, tolerant in their mutual interaction. It has always seemed to me one of the paradoxes of our culture, fostered by our first amendment writings, that we encourage both strong belief *and* toleration, and getting people to adjust and to accommodate others is always a high priority. That seems to be a basic social value, so fundamental to the society (like a sense of citizenship) that it is reasonable to take it as almost axiomatic. Pieces of evidence of the centrality of a tolerant disposition arise all the time. A scholar like my good friend and former colleague Joe Sax writes a book about the proper recreation policy for the national parks and then closes with a plea for mutual "tolerance."[18] Justices on both the majority and dissenting sides of cases structure their arguments entirely around an image of tolerance—the majority by saying they will not impose their beliefs on democratic majorities, and the dissent by saying that such majorities should not impose their beliefs on nonconforming minorities.[19] These and other examples testify to the strength of the image of tolerance in our culture.

My general claim is, in essence, that tolerance is to democracy what courage is to war. I should add, however, that this social skill or capacity is not needed peculiarly by democratic societies. Every society, whatever its social structure, must instill in its citizens the willingness to live with disagreement. The society must provide the individual with some way of accommodating differences without feeling cowardly, betraying his principles or implicitly condoning what he professes to dis-

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18. See J. Sax, Mountains Without Handrails, 108–09 (1980).

19. For example, in Bowers v. Hardwick, 478 U.S. 186 (1986), the majority stated that "respondant insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis." Id. at 196. In dissent, Justice Blackmun replied, "It is precisely because the issue raised by this case touches the heart of wbat makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority." Id. at 211.

like. The degree of toleration expected and the reasoning given differ from society to society, but the basic human response is the same. I do not, therefore, find that it undermines the importance of tolerance for a democratic system to observe, as one reviewer has, that a similar capacity might be necessary for nondemocratic societies as well.[20]

One way of thinking about what I am proposing is to see the speech area as comparable to, or an extension of, our first amendment principles about religion. With the free exercise and establishment clauses, no one argues that religious freedom ought to be preserved out of a belief in the market place of religious ideas, in which the expectation is that one true religion will eventually emerge. We do not conceive of religious freedom in terms of truth seeking or the mere right to advocate a religious point of view. Rather, we think of it in terms of preserving the public peace, of avoiding divisiveness and perhaps even civil war, and we guarantee the right to *practice* as well as advocate religious beliefs.[21] We speak in terms of *toleration.* This is precisely how I propose we think about nonreligious speech. While I fully understand that by making this analogy to religion I do not automatically provide a deep justification for free speech tolerance, it does seem helpful to draw parasitically upon the widely assumed legitimacy of religious tolerance.

3. *Does free speech, as applied, actually enhance a commitment to tolerance within the society?* — An important variation on the problem of justification is a concern raised by many reviewers: Whether free speech actually increases the capacities I label as tolerance.[22] I said in the book, and I continue to think now, that we must face the fact that the social meaning of tolerating extremist speech can vary enormously; it is not necessarily good.[23] It is possible, for example, that toleration of bad speech might be rooted in a wish to have the speakers injure the victims, or in a fear of sanctioning the speakers, or in sheer insensitivity and unconcern. Montaigue notes that a ruler might embrace a principle of religious freedom either to preserve social peace by quieting factions or for the contrary purpose, to "increase the divisions and contentions" that divide the people and thereby weaken their ability to unite against the ruler.[24] The meaning of a principle of tolerance is

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20. See Strauss, supra note 12, at 1506.

21. See, e.g., Aguilar v. Felton, 473 U.S. 402, 413–16 (1985); Meek v. Pittenger, 421 U.S. 349, 369–71 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 795–98 (1973); Lemon v. Kurtzman, 403 U.S. 602, 622–24 (1971).

22. See Lewis, Book Review, 82 Am. Pol. Sci. Rev. 622, 623 (1988); McGaffey, Book Review, 73 Q.J. Speech, 376, 377 (1987); Murphy, Book Review, 494 Annals 191 (1987); Oldenquist, supra note 14, at 32; Rosenfeld, Extremist Speech and the Paradox of Tolerance (Book Review), 100 Harv. L. Rev. 1457, 1470 (1987); Strauss, supra note 12, at 1499.

23. See, e.g., L. Bollinger, supra note 1, at 35–39.

24. M. Montaigue, Of Liberty of Conscience, *in* 3 The Essays of Montaigue 82, 86 (G. Ives trans. 1925).

neither necessarily fixed nor necessarily good, and it is my view that the underlying meaning must be understood before we commit ourselves to the general principle.

If I am right that free speech has assumed the meaning I suggest it has, how it actually happened is beyond my capacity to explain. Ascribing causes to social events is, of course, a rich and complex task—like asking why judicial review evolved in the way it has. In Germany, since the second World War, a different attitude has prevailed toward extremist speech, especially neo-Nazi speech. Even today in Germany people vigorously debate whether their society can afford not to punish those who deny the Holocaust.[25] One senses the reasons for this attitude. As long as the Holocaust remains part of recent memory, "toleration" of the expression of Nazi ideology in Germany will bear a heavy cast of approval. As usual, the past creates the meaning of the present.

In this country, on the other hand, no such past limits the present meaning of toleration of Nazi ideology. The great paradox for this country, however, is why our own past of slavery and segregation does not create the problem of tacit approval in the toleration of racist speech. Perhaps it is the fact that, except for the South, the rest of the country retains (however unmerited) a sense of innocence about its responsibility for past discrimination, which translates into an ability to tolerate racist speech while retaining a firm sense of condemnation. I continue to think that toleration of obscenity is unacceptable because it is too complicated psychologically to separate our attraction from rejection in any act of toleration.[26] I see obscenity, in other words, as akin to fighting words, in the sense that the reason both are treated as exceptions to the first amendment is the sense that toleration is too freighted with messages of weakness and condonation.

4. *What is the psychological basis of the idea that people acquire qualities, or control biases, through extreme behavior in a discrete area?* — It interests me that this has not been challenged to any great extent in the discussions thus far about the book. Because it has not, I will not spend much time on it here, but I do want to add a few thoughts. It is not, I think, a very unusual notion. Testing our general capacity to do something, or to refrain from doing something, by putting ourselves in conditions in which that capacity is put under extreme pressure is a rather common phenomenon. We might climb mountains to develop a disposition to take more risks, play team sports to find a greater capacity to cooperate or volunteer in class in order to develop self-confidence in social settings. As I suggested earlier, I like to think of free speech as the wilderness area of social interaction, rich with the meaning that comes from its being unregulated, or intellectually unurbanized. To do something

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25. See generally Stein, History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—"Lies," 85 Mich. L. Rev. 277 (1986) (discussing West German laws prohibiting speech that constitutes "race hatred").

26. See L. Bollinger, supra note 1, at 185.

and to suffer the consequences for it is, like the act of civil disobedience, a more powerful demonstration and realization of a commitment than a mere verbal declaration.

5. *Assuming that it makes sense to adopt the rationale of the tolerance ethic, why select speech for it?* — This is another common criticism.[27] In the book I suggested that speech was an appropriate area because the harm was generally less and because it offered a fairly bright line for applying the theory.[28] In this, it is sometimes argued, I contradict my earlier point that the traditional effort to justify differential treatment of speech and nonspeech on the ground that speech causes less harm is logically inadequate. But the two assertions do not contradict one another. The relevance of the observation about less harm was, I argued, that it could not be a justification in itself, or by itself, for treating speech specially. When I later rely on the relative harmfulness of speech acts I have already supplied a justification for treating some subset of behavior differently. At the point of searching for the appropriate subset, the relative levels and containability of potential harm seem clearly relevant.

Still, I am today somewhat less comfortable with the arguments I gave earlier for choosing speech. I find myself more inclined to see a historical progression or an organic model, in which multiple meanings evolve out of social practices carried on over a long period of time. Other areas of life could have been selected for the purposes of something like the tolerance ethic, but the development of this particular context may make it peculiarly suitable today.

B. *Application of the Thesis*

1. *Are courts capable of applying a doctrine of free speech that is so dependent on producing a good social meaning?* — This is a difficult question, raised by several reviewers.[29] It, too, has several different components, but here I will take up just one, and that is whether courts are capable of deciding when the social meaning of toleration is good or bad.

Now, I do say in the book that free speech doctrine ought to recognize that protection of speech might reflect a bad social meaning.[30] I ask for a "conscientiously ambiguous" free speech doctrine, which is essentially what I think we have had since Holmes's "clear and present

27. See, e.g., Barendt, Book Review, 1987 Pub. L. 124; Blasi, The Teaching Functiou of the First Amendment (Book Review), 87 Colum. L. Rev. 387, 407–08 (1987); Marshall, supra note 12, at 1693; Nagel, supra note 14, at 1576; Sherry, An Essay Concerning Toleration, 71 Minn. L. Rev. 963, 981–82 (1987); Strauss, supra note 12, at 1506–07.

28. See L. Bollinger, supra note 1, at 124.

29. See, e.g., Nagel, supra note 14, at 1580–82; Olsen, Book Review, 102 Pol. Sci. Q. 154, 155 (1987).

30. See L. Bollinger, supra note 1, at 181–200, 243–48.

danger" test.[31] I say that we must expect that a society in wartime will not find the lessons of tolerance quite so congenial, and that it would be sensible to have some flexibility in our standards to accommodate that reality. If the social meaning of toleration of speech were to become laden with the meaning one senses exists in postwar Germany, then we ought to consider a change. I make other observations in this general vein, but in a context, it should he understood, in which I have argued for a full-blooded present commitment to general toleration of a very wide range of extremist speech.

Of course, the problem with this approach, which has not gone unnoticed, is that this kind of fine tuning of free speech to correspond to the contemporary social meaning behind tolerance requires a sensitivity to the currents of thought within the society. Because we are probably asking judges to exercise insight into matters that are not very well suited to rational articulation, we run risks of error, stupidity, bias and even malice. Depending on our view of judges, these risks may be low or high. But any reasonable person must admit that these risks exist.

It should be understood that the argument for doctrine that permits some fine tuning according to social context is independent of the tolerance justification for free speech. We could accept the social goals of magnanimity and tolerance and adopt a rather rigid rule of protection, accepting the costs of such an approach. There are also levels or degrees of discretion for fine tuning. We could employ heavy presumptions against modifying free speech doctrine, or alternatively, we could have a policy of ready modification. Finally, I am not at all sure that we can realistically avoid making the scope of free speech, at some important level, dependent on social context. The wish for concretizing what we know we want now and think we will want in the future may be a quixotic undertaking, for circumstances inevitably change.

The history of free speech in this century does not give much comfort to the fervent free speech proponent who would like to lock in secure protection. Perhaps that experience would have been different, and better, had early jurists drawn a more rigid line in favor of speech. But I have never seen or heard of a line without some exceptions for public regulation, however "absolute" the protection initially was said to be. Most importantly, I wonder whether an approach to free speech that is candid and open about the functions that free speech should serve, as well as practiced in thinking about the limits of those functions, will be better in ensuring that the doctrine is applied when it ought to be.

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31. Dean Paul Brest specifically objected to this proposal on the ground that "[t]o recommend that judges create a 'conscientiously ambiguous' doctrine is to deny guidance to the other branches and, in effect, to give the judiciary exclusive responsibility for applying the Constitution." Brest, How Free Do We Want to Be? (Book Review), N.Y. Times, June 8, 1986, § 7 (Book Review), at 21.

In a way, the choice lies between a policy that seeks rigidity of enforcement, with all the social costs that will arise from allowing free speech when it ought not to be allowed, and a policy that seeks flexibility, with all the social costs that will arise from not allowing free speech when it ought to be allowed. Of course, even this understates the complexity of the problem. We should also know how possible it would be to obtain rigidity and what other costs we must incur in making the effort; on the other side, we will want to know how tempted we will be to diminish free speech unduly and how difficult it will be to read the world of social meaning.

I must admit I find it hard to say with confidence which approach is preferable in these terms. My guess is that the temptation to abandon free speech when it deserves nurturing will sometimes be great. History shows at least that, but history is not as frightening as it might otherwise be, because a clearer understanding of the social functions to be served by free speech will reduce siguificantly the risk of giving into the temptation. Also, a rigid policy will not withstand the resentment that inevitably will be directed against it when social needs justify some retrenchment. Yielding free speech to social context is no more dangerous or impossible an enterprise than we experience now with exceptions for obscenity or privacy, or with some of the exceptions to the prior restraint doctrine. Partially inexplicable but sound judgments—like the judgment of a faculty on whether to grant tenure—can be reached on inarticulable criteria. So I believe it is for free speech.

2. *Assuming the courts can apply such a theoretical approach, will the public be able to grasp and understand such a complex set of ideas?* — This is an argument that was raised most powerfully by some friendly, nearby critics. Professor Blasi, for example, writes:

> I do not think the setting of first amendment adjudication lends itself to ambitious teaching . . . . 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. 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.[32]

It is a challenging argument, one that says that to be effective the messages of our decisions must be simple, not complex; and that, in any event, because very few people ever actually read judicial opinions, it is a hapless undertaking to try to teach anything through them, particularly anything subtle.

Though I do believe the problems of achieving the proper levels of tolerance and intolerance in social interactions are almost wickedly

32. Blasi, supra note 27, at 414–15; see also Nagel, supra note 14, at 1577–78.

complex—which, again, is precisely the reason why I believe that setting aside a zone of behavior for extreme official toleration makes sense as a matter of psychology—I do not believe that their complexity is so difficult to communicate through extraordinary self-restraint toward speech. Certainly the idea that human nature harbors an impulse to excessive punishment toward bad acts, and that a collective choice to forego punishment toward bad speech acts is a recognition of the need to control that impulse, is no more difficult a concept to grasp than the idea that we ought to be more open than we are to the possibilities of truth through the market place of ideas. The same is true of the idea that generally we must be more disposed to let "ideas" (or "minds") have their way in the world, both by speaking and by other acts.

I think, in fact, that these ideas of free speech and the tolerance ethic seem difficult to communicate only because they are new. The issues of belief and doubt certainly can become philosophically complex, as I argue in my extended discussion of the thought of Holmes and Meiklejohn.[33] But these are ideas that, like those of individual autonomy and truth, can be discussed and considered at various levels of simplicity or complexity. Since I seriously doubt that anyone would question the fact that free speech has contributed to inculcating respect for the possibility of knowledge, or the propriety of such a contribution, it seems reasonable to suppose that free speech might do the same for the vision of tolerance.

I confess that I do not understand the mystery of the transmission of values from our courts to the public; but that it occurs I believe indisputable.

C. *Thematic Criticism*

1. *Is a theory of free speech based on a tolerance rationale paternalistic?* — I detect behind the concerns of several critics a feeling of unease about commissioning the courts to undertake a project of inculcating the tolerance ethic. In Professor Blasi's review, for example, this unease is explicit:

> 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.[34]

I wonder how much difference of opinion there really is on this

33. See L. Bollinger, supra note 1, at 145–74.

34. Blasi, supra note 27, at 413; see also Schlag, Freedom of Speech as Therapy (Book Review), 34 UCLA L. Rev. 265, 274–75 (1986) (tolerance theory acts as "national collective therapy").

issue. Behind every first amendment theory lies a vision of the world, one that becomes deeper and more complex the more people discuss it. To impose that vision, through results, can be described as a kind of paternalism. To say that the democratic system has produced a result that undervalues the truth in relation to other social goals or that fails to see how the social system will function in fact is to substitute one set of values, one vision, for that of the democratic majority who felt otherwise. To say that speech must be protected not because of its intrinsic value (given the purposes of the first amendment) but because any exception created for censorship will be misused by the democratic system is to distrust that system and to substitute a court's judgment.

Most theories of free speech seek not only results (the protection of speech) but the protection of speech so that certain things regarded as valuable will happen in the society. I see very little difference on the scale of "paternalism" between an approach that would simply attempt to order the world one way rather than another out of a belief in the "rightness" of that order, and an approach that would order the world one way so as to suggest that certain values be adopted by the society. Of course, the society may freely embrace or reject the values suggested.

2. *Do I propose that the tolerance rationale supplant the more traditional theories?*[35] — I think my answer to this can be quite brief. At several points in the book I am at pains to indicate that, generally speaking, I am adding and not subtracting from the foundational theories of free speech.[36] I see no reason why several meanings cannot exist simultaneously.

3. *Does the tolerance rationale proceed from a position of relativism or neutrality?*[37] — I find this criticism or understanding of my theory troublesome, precisely because I think the theory is not neutral but arises from what I would call a moral center. It is not based on a position that tolerance is an unalloyed good, or on the view now commonly classified as "liberal" that the state has no business reflecting any particular value structure. Rather, it arises from a fundamental commitment to a society believed to be essentially just, but one that must face the dilemma of providing greater leeway than it would otherwise like for opinions and attitudes and ideas, manifested in both speech and nonspeech forms, while achieving an appropriate level of punishment for those who do bad things. That tolerance has its limits and that the very enterprise of free speech itself more or less makes those limits clear seems

35. See, e.g., Barendt, supra note 27, at 124, 126–27; Farber & Frickey, Practical Reason and the First Amendment, 34 UCLA L. Rev. 1615, 1618–19, 1624–27 (1987); Sherry, supra note 27, at 976.

36. See, e.g., L. Bollinger, supra note 1, at 11 ("[T]he [tolerance] label . . . should not divert attention from the differences in perspective offered by competing or complementary theories.").

37. See, e.g., Sherry, supra note 27, at 976–78.

to me right and proper. It was, to put it briefly, entirely appropriate for the courts in the *Skokie* case to indicate, as they did, collective disapproval of neo-Nazi behavior and ideas.[38]

D. *The Problem of Consistency*

A central theme of my argument in *The Tolerant Society* is that we make a serious analytical mistake when we insist that the area of speech activity must differ in some relevant or material way from nonspeech activity before we rationally can consider treating it differently. I have argued that we might very well choose, reasonahly, to behave differently—more tolerantly—toward speech behavior, even though it does not materially differ from nonspeech behavior. We might make this choice out of a belief that we have a bias toward excessive reaction in both areas, and that extreme self-restraint in one area offers many advantages in our effort to point up the need for corrective self-restraint in both areas, to establish a commitment to react appropriately to nonspeech as well as speech behavior. It is, as it were, a bending over backwards in a subset of life, as a way of establishing a capacity to control very powerful impulses.

This claim has been criticized by Professor Robert Nagel. He argues that to propose differential treatment of speech and nonspeech behavior "[s]ubverts some of the most venerable constitutional traditions," is "dramatically inconsistent with normal assumptions about constitutional authority" and undercuts the "legitimacy of the enterprise of judicial enforcement" because it "depends in large part on the belief that the priorities established in the fundamental law are based on important distinctions that justify extraordinary protection."[39]

What interests me is not just the merits of this particular contention in the context of free speech, but rather the utility or importance for legal thinking of the more general idea that there are sometimes very important benefits to be gained by treating otherwise similar things differently. I detect an unfortunate block in legal thought against being able to appreciate the benefits of differential treatment. I think I have come to understand some of the sources of the block.

It seems fundamental to our system of justice that laws be applied evenhandedly. That kind of "consistency" is so obvious to us that it has become implicit in our thinking. If we have a rule of law that a promise becomes enforceable when it will lead a reasonable person to conclude that an acceptance will create a binding legal relationship, it is a violation of sound legal thinking to apply that rule differentially to litigants depending, for example, upon whether or not the promisor is wealthy. In this case, consistency or equality of treatment has compelling force.

But there is another way in which consistency is profoundly rooted

38. See L. Bollinger, supra note 1, at 28.

39. Nagel, supra note 14, at 1578–79.

in our general notions about rational legal thinking. From the very beginning of a law school education, we inculcate a way of thinking that, while critical to sound legal reasoning, comes to have an unfortunate dominance over the intellect. It is the routine stuff of law school to take a new case and to ask whether it is materially different from earlier cases, the working assumption being that if it is not, then an identical result must follow. If a court holds that the interest in "uninhibited, robust and wide-open" discussion bars a public official from suing for false statements of fact made about the official, absent actual malice, then what about a libel suit by a public figure? Do not public figures often have power over public issues comparable to that of public officials? Do they not have opportunities to rebut the false charges equal to those of public officials? And so the analysis goes. Without a distinction, the rule once adopted should be extended so far as its rationale will take it.

All of this is perfectly sensible as far as it goes. But it sets up a style of reasoning that can lead to unfortunate results, primarily by treating our interests as being static across cases and by failing to take account of the fact that we often have multiple and even inconsistent goals. What we should demand of ourselves by the principle of "consistency" is only that we have good reasons for what we do. For example, we make a serious mistake in law and in life when we think that if we treated *x* before in this or that way, then in the next case involving *y*, we must also treat *y* in the same way unless *y* differs in relevant respects from *x*. The mistake arises from the failure to realize that our goal in life is not always to be sure that *x* and *y* situations are treated similarly. Our goal may be to blend different interests, to accommodate different demands—and the best way to do that may be to treat *x* and *y* differently, even though they are quite the same for purposes of this analysis, and even though the only reason *x* is treated differently from *y* is because *x* happened to come up first. We only realize this, however, by stepping back from any problem and asking ourselves what our goals are, and by realizing that problems are often incremental or very much influenced by context. The context of the second case (the *y* case) may differ from the context of the first case (the *x* case) simply because the first decision changed the world in some relevant way.

Let me try to give more clarity to these abstract comments by referring to a specific area of the law. Consider another problem from first amendment jurisprudence, the so-called public forum doctrine. We all know that several decades ago the Supreme Court held that streets and parks were subject to special constitutional rules and that cities and governments across the country had to permit speakers to speak in those places on a first-come-first-served basis, without regard to the content of the messages to be communicated.[40] Since then, dozens of

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40. See, e.g., Boos v. Barry, 458 U.S. 312 (1988); Police Dep't v. Mosely, 408 U.S.

cases have come before the Court involving claims that this or that area of public property is or is not a "public forum," just like streets and parks and subject to the same constitutional rules. It is natural in such cases for a litigant on the free speech side to argue in the following fashion: Since the government's interest in restricting speech in this area of public property is no greater than the government's interest was in the cases involving streets and parks, and since the free speech interest in this case is just as great as it was in the earlier cases, sound legal reasoning and a respect for precedent compel the conclusion that this new public property must also be desiguated a public forum. To avoid this logic, which at first glance seems compelling, the Court has developed a number of responses for "distinguishing" streets and parks from other public areas. One is to ask whether "historically" this was a space that had been left open for public expression.[41] Another is to ask whether expression would be "inconsistent" with the function of the property.[42] Still another is to ask whether the government already has opened up the space for expression, thereby "designating" it appropriate for expressive purposes and making a requirement of nondiscrimination less intrusive on nonexpressive governmental interests.[43]

But none of these really provides us with an intelligible and acceptable solution to how much public property must be subject to the public forum rules, given the prior decision to make streets and parks conform to those rules. History is a rational reason only to the extent that one can give some other reason why what has or has not been should matter. By itself it is meaningless, and the truth is that we do not rely on it consistently. More speech will always be inconsistent with the purposes of the space, and the fact that the space is already being used for expressive purposes is not something the Court has allowed to dictate whether a public forum analysis should follow; apparently, other reasons not mentioned override that consideration when the Court refuses to apply the public forum doctrine.

It is neither sensible nor necessary to live life in such a way that, having decided once that a certain interest in conflict with a second interest overrides that second interest, we then insist that the first interest must *always* override or supersede that same interest in any other setting. When our interest is in satisfying our tastes for different beverages, as they occur, then it makes sense sometimes to have wine and

92 (1972); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. Irvington, 308 U.S. 147 (1939).

41. See, e.g., Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986); Greer v. Spock, 424 U.S. 828 (1976).

42. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972).

43. See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Widmar v. Vincent, 454 U.S. 263 (1981); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).

sometimes beer. We know it would be absurd to think that because on one occasion we decided to have wine then the principle of "consistency" would require us to choose wine ever after. We often, perhaps always, have many different interests and desires to satisfy.

We do not always prefer cities. Sometimes we prefer wilderness. The possibility of both leads us to divide up the available land into urban and natural areas to satisfy those competing interests. The experiences we have in each may interact with those in the other, enriching both. It would be absurd to think that because we had decided in the first instance that we wanted a city, we would then be compelled by "consistency" to have development everywhere.

What do these observations suggest about the public forum doctrine? They suggest the imperative of asking what purpose lies behind the doctrine. If, for example, the object of the doctrine is to make sure that people with small wealth and strong feelings have an opportunity to present their views to the market place of ideas, then very different results follow as we move from the streets and parks to other areas. Having opened up the streets and parks, the free speech interest may have been satisfied or significantly reduced. The subsequent case must be decided in the context in which it arises, and what is relevant in that context may include the fact that the world has changed as a result of the first case. What is true of the free speech interest over time may also be true of the social interests at stake. It may be that as one public space is dedicated to open speech the incremental loss to the social interest at stake (such as quiet) increases the value of what is left. This is a complex way of saying that the society may be prepared to give up *some* areas of peace and quiet and beauty to correct disparities in access to the market place of ideas, but at some point the interest in free speech can be satisfied, and the aesthetic and other interests remaining become all the more important. Like all choices, this involves a compromise of interests. But the important point is that it would be strange if the structure of legal reasoning made it impossible for us ever to make such compromises because of a rigid idea of what constitutes "consistent" behavior.

I do not mean to argue here that the only reason behind the public forum doctrine is the correction of disparate access, though I do happen to think that that is a primary purpose. Another purpose might call for a different result across a sequence of cases. It could be, for example, that the doctrine is intended to stop the government from using its power and property to favor certain speech in the market place. Insofar as that is the purpose of the public forum doctrine, the most obvious remedy (nondiscrimination among viewpoints) seems poorly tailored. In *Southeastern Promotions, Ltd. v. Conrad,*[44] a well-known case involving a municipal theater that refused permission to a group to stage a produc-

44. 420 U.S. 546 (1974).

tion of the musical "Hair," the Court applied a public forum analysis and seemed to demand a nondiscrimination policy.[45] That seems a very odd result, leading one to wonder whether museums, for example, which surely have been "dedicated to expressive purposes" and which select on the basis of "content," will be required to open up their walls to all would-be artists on a first-come-first-served basis. If that would be a mistake, as I am prepared to assume without present argument it would, then it could be that the flaw in *Southeastern Promotions* is either that it failed to consider the points made earlier about the fault of assumed consistency or that it failed to narrow its idea of what it disliked about the operation of that particular municipal theater. I think the latter explanation is the more accurate, for the theater in that case was operating under a very vague standard of "clean and healthful and culturally uplifting entertainment,"[46] which presumably permitted the public board to favor mainstream political opinion. The upshot is that, while a public forum purpose of stopping government favoritism in the market place of ideas may be sensible, and does provide a different result across a sequence of cases than would the first purpose of providing access, it is a purpose that ought to be limited to government favoritism of a particular kind of expression.

The public forum cases simply illustrate the importance of not being led astray by the concept of consistency. What matters is that our goals be clear and that they be reasonable, and from that it will follow how the world ought to be structured. If we find ourselves asking whether a municipal theater is "really any different" from a public street or city park, for purposes of the public forum doctrine, or whether speech is "materially different" from other conduct for purposes of developing a free speech theory, then we ought to make sure we have asked ourselves whether the object we are trying to achieve makes that question a sensible one.

That is a question we ought to ask ourselves frequently, because our purposes are not always clear to us at first. Sometimes when we take the first step we do not consider the possibility of another option coming along. We must therefore be careful to ask in the next case not what we wanted to do in the first one but what we would have wanted to do had we known of the possibilities that exist presently. The flaw is a general one. We seem disposed to think that if streets and parks are held to be public fora and other spaces are not, then it is because streets and parks are "different." Rather, we should appreciate the possibility that we intuit that result not because of any difference between the two categories but because streets and parks happened to come up first, and had it been the other way around the other space might have done just as well to fulfill our purposes. I do not fully un-

45. See id. at 554–58.

46. Id. at 563 (Douglas, J., dissenting in part).

derstand why our minds (and I probably should say legal minds) are so disposed to demand an accounting of "difference," but I am clear about the existence of that disposition and also about its ill effects on good reasoning.

Diversity, ambiguity, complexity, differential treatment—all can make good sense. There are benefits from organizing the world in a mixed fashion. It can introduce competition and spur better behavior; it can pit interest against interest and reduce the risk of bad interests prevailing; it can provide a means of experimenting with different ways of doing things. In the end, the point is not that all things should be treated differently. It is that consistency is something for which we must argue, and which must be justified with reference to some more meaningful goals of social life.

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