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## Tolerance Theory and the First Amendment

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# TOLERANCE THEORY AND THE FIRST AMENDMENT

*James L. Oakes\**

THE TOLERANT SOCIETY: FREE SPEECH AND EXTREMIST SPEECH IN AMERICA. By *Lee C. Bollinger*. New York: Oxford University Press. 1986. Pp. viii, 295. \$19.95.

Freedom of speech, according to Lee Bollinger's *The Tolerant Society*, is no longer a simple slogan or rubric by which we protect speakers against governmental regulation. It is, or has become, in the United States in this century, a method of social interaction which benefits, within wide bounds, the *tolerator* (and perforce his or her society) as much as, or more than, it does the *tolerated* (whose own intolerance as expressed in his extremism may be better exposed by the tolerance of it than by its censorship).

Utilizing the "extreme" Skokie case both as springboard/catalyst and checkpoint, Professor Bollinger reexamines the theory, function, and role of free speech in our society. His underlying premise is that "extremes are not to be understood as the peripheral cost of an inevitably imperfect world . . . but rather as integral to the central functions of the principle of free speech" (p. 133). He argues forcefully that "the constitutional principle of free speech has taken on important new meaning in this century" (p. 244). He constructs a "general tolerance theory" (Chapter Eight). This involves tolerance of extremist speech (e.g., the Nazis' march, swastikas displayed, in a community composed largely of holocaust survivors and descendants or relatives of survivors). It does not merely result in curtailing legal intervention at the edge of social behavior, but rather effectuates a "general social ethic" (p. 248). That ethic, involving the toleration of most (but not all) extreme speech, Bollinger suggests, focuses not so much on the speech or behavior of the speaker/believer as on the social interaction among the listeners/observers (p. 10). By carving out this very area for "extraordinary self-restraint" (p. 10), society is led "to develop and demonstrate a social capacity to control feelings" (p. 10) by way of self-examination and "confrontation with the more complex, and less comfortable, processes at work behind the desire to punish [extremist] speakers, whether by legal or nonlegal means" (p. 127). Confrontation with extremism, then, should involve the recognition of the intolerance in each of us (p. 127) and the ensuing dialogue — public and

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judicial — should sensitize us to a “general impulse to intolerance” (p. 234). Thus we are educated by self-examination (of ourselves and of society) toward restraint and productive social intercourse (p. 238), and away from an oversimplification of societal issues (p. 222) that carries with it irrationality, exaggeration, censorship, and ultimately the dangers or actuality of tyranny (p. 218).

This review will first encapsulate how Professor Bollinger constructs his thesis developing the tolerance function. It will then seek to examine critically the extent to which the thesis draws from past thinking and its underlying strengths, weaknesses, and implications.

In his preface (p. 4), Bollinger notes that to think about how far the first amendment should be extended is inevitably to think about the general theory of the first amendment; by examining what seems to be almost peripheral he is led to examine what is central. He notes the popular misconception (pp. 4-5) that in the first amendment area there is a certainty or inevitability of interpretative legal reasoning that somehow makes its meaning “preordained.” So doing, he points to the “deceptive clarity” of the language (p. 5) and suggests that there is a “sea of possible interpretations” of the amendment (p. 6). He postulates that the contemporary rhetoric of free speech, drawing on a multiplicity of sources going back at least to Milton’s *Areopagitica*,<sup>1</sup> may not reveal the new meanings of “the free speech principle” (p. 7). Noting that the free speech idea is one of our “foremost *cultural* symbols” (p. 7), Bollinger aims to show that there *is* new meaning to the principle which flows naturally out of “traditional patterns of theoretical thought” (p. 8) but has not yet emerged clearly in first amendment discussion. His focus is not so much on the value of the activity protected, but “the disvalue of the response to that activity” (p. 9). He assumes that a good part of the speech behavior under consideration is “often unworthy of protection” and “might very well be legally prohibited for entirely proper reasons” (p. 9). His vision is that the rationality and wisdom of tolerance of such speech activity derives from the concept that it evokes the same feelings or reactions in our society evoked by *nonspeech* behavior. He considers his inquiry preliminary though essential to future debate based on an understanding of the “goals of free speech” (p. 11).

Chapter One asks whether we are “enslaved to freedom.” Bollinger notes the difference between the *nonlegal* response to deeply offensive speech (ridicule, humiliation, shunning,<sup>2</sup> etc.) and the legal response, such as the federal court of appeals’ and Illinois Supreme

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1. J. MILTON, *AREOPAGITICA, A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND* (1644), *quoted in part in* N. DORSEN, P. BENDER & B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1-3 (4th ed. 1976).

2. Shunning is a method of social reaction to behavior that has ancient antecedents. *See* E. LE ROY LADURIE, *MONTAILLOU: THE PROMISED LAND OF ERROR* 302-03 (1979) (wearing yellow cross required of heretics in 1308).

Court's decisions<sup>3</sup> protecting the speech activity of the Nazis at Skokie. He then points to the resignation of 30,000 ACLU members when their organization took up the defense of the Nazis. And he likens the natural reaction of the ACLU members to the attack by Dean Wigmore upon Justice Holmes' dissent in *Abrams v. United States*,<sup>4</sup> the sentiments of which proved to be the auspicious beginning of contemporary free speech. In that attack<sup>5</sup> Wigmore saw Holmes' free speech dissent as a misguided, distorted social vision, ignoring greater fundamentals. Wigmore saw a "free trade in ideas" as already existing in 1920 "in every blasphemous, scurrilous, shocking, iconoclastic, or lunatic idea that any fanatical or unbalanced brain can conceive."<sup>6</sup> He added bluntly: Why should society tolerate speech calculated to destroy it?

The Skokie cases Bollinger analyzes in depth (pp. 24-36). While happy with their result, he finds the opinions disappointing as "avoiding" rather than "confronting" the social meaning involved and relying on the misused legal fiction of an appeal to the difficulty in line-drawing, which Bollinger decries (p. 37) as obfuscating and diverting.

Chapter Two analyzes contemporary thought about free speech, using first what Bollinger calls the "classical model" and pointing out its limits or rather limitations. The "classical" (because traditional) model is that free speech is protected because it has values; it springs from the age of enlightenment out of which the spirit of the American Revolution came.<sup>7</sup> The values include truth-seeking and knowledge-advancement, as a societal object, as well as, to a lesser degree perhaps, self-fulfillment on the part of the individual speaker. More recently these values have focused through thinkers like Zechariah Chafee and Alexander Meiklejohn, on the political or public context of democratic self-government. Political dialogue is the paradigm aim and *New York Times Co. v. Sullivan*<sup>8</sup> is the paradigm case for emphasizing "the practical importance of freedom of speech for a democracy" (p. 49). The theoretical defect Bollinger sees in the classical model (p. 50) is that the self-governing democracy may itself decide to limit its commitment to free speech activity. And to say that democracy should stop a majority from voting to punish public criticism of the state leaves too many questions unanswered and too many cases where there have been democratically sponsored efforts to control or

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3. *Collins v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of Am.*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

4. 250 U.S. 616, 624 (1919).

5. Wigmore, *Abrams v. United States: A Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539 (1920).

6. *Id.* at 558.

7. See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); H. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976).

8. 376 U.S. 254 (1964).

regulate speech unresolved. Certainly, extremist speech like the Nazis' cannot be justified with truth- or knowledge-seeking as the value to be protected. And while dialogue may, as John Stuart Mill argued, be desirable or we may benefit by having a "thermometer for registering the presence of disease within the body politic," (p. 55) dialogue is not invariably useful (p. 56). After all, we limit inflammatory or emotional speech before a jury. Bollinger also sees the classical model as dealing inadequately with the whole subject of the harm speech can cause, viewing only actions but not words as capable of inflicting injury,<sup>9</sup> and failing to take sufficiently into account the need of individuals to express themselves by way of prohibition of speech activity (p. 63). Speech often demands response and social activity depends on interaction. Speech can hurt — racial groups, religious groups; it can invade privacy; it can make us fear for our safety and well-being. Have we not seen too much successful use of propaganda and other manipulation of public opinion, Bollinger asks in effect, to put all our free speech eggs in the basket of democratic truth-seeking or knowledge-attainment?

Chapter Three explores the "fortress model" of contemporary free speech theory and its limitations. Under this model, as explained by Bollinger, we sharply, if quietly, constrict choices over speech regulation, the judiciary manning the fort, and the theorists give the judges little room to maneuver by extending the protection of free speech to the "hinterlands of speech."<sup>10</sup> The problem is not just with government, though there is a problem with government — Bollinger refers to the Pentagon Papers<sup>11</sup> case; I might refer to *Snepp*<sup>12</sup> — but there is a problem with the public as well, as the McCarthy era showed. We recognize in effect the beast within us all. Protection of free speech is

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9. Pp. 58-61. *But see* A. KOESTLER, *JANUS: A SUMMING UP* 15-16 (1979):

Man's deadliest weapon is *language*. He is as susceptible to being hypnotized by slogans as he is to infectious diseases. And when there is an epidemic, the group-mind takes over. It obeys its own rules, which are different from the rules of conduct of individuals. When a person identifies himself with a group, his reasoning faculties are diminished and his passions enhanced by a kind of emotive resonance or positive feedback. The individual is not a killer, but the group is, and by identifying with it the individual is transformed into a killer. This is the infernal dialectic reflected in man's history of wars, persecution and genocide. And the main catalyst of that transformation is the hypnotic power of the word. The words of Adolf Hitler were the most powerful agents of destruction at his time. Long before the printing press was invented, the words of Allah's chosen Prophet unleashed an emotive chain-reaction which shook the world from Central Asia to the Atlantic coast. Without words there would be no poetry — and no war. Language is the main factor in our superiority over brother animal — and, in view of its explosive emotive potentials, a constant threat to survival.

10. P. 78. A recent statement of the fortress model is that of Norman Dorsen, constitutional law professor and president of the American Civil Liberties Union, in *Can Free Speech Become Too Costly?*, N.Y. L.J., July 25, 1986, at 2 ("I therefore suggest a 'maximum protection' theory for free speech.")

11. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

12. *Snepp v. United States*, 444 U.S. 507 (1980); *see* Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. MICH. J.L. REF. 497, 514 (1982).

“a very fragile enterprise” (p. 86), since something deep in human nature denies its importance.<sup>13</sup> Indeed it is precisely because the judges in this Bollinger model are protecting the public against itself or its own “*intellectual incapacity*” (p. 92; emphasis in original) that this model is insufficient since, he asks, if the public cannot be trusted with the free speech principle, with what can it be trusted? The fortress model he thus considers unattractively elitist (p. 101). What value is a legal right to speak, Professor Bollinger adds, when there is no one ready to listen? And suppose the buffer zone protected is filled with the enemy whose freedom of action (to drive for orthodoxy, or otherwise) is also preserved. In short, he considers that “[t]he fortress model contributes to a tendency to rely excessively on a kind of legalistic method of solving social problems, and it is shortsighted about the ultimate ends one can hope to achieve through the free speech enterprise” (p. 102).

In Chapter Four, entitled “The Quest for the Tolerant Mind,” Bollinger lifts the curtain further on his tolerance function. Having warned against trivializing the needs behind acts of intolerance and the fortress model’s recognition for the need of a check upon intolerant impulses, he now finds “a crucial social role for the free speech principle in the context of the assumed reality of an impulse to intolerance” (p. 106). Free speech thus provides “a method of addressing a ubiquitous social incapacity [intolerance]” (p. 107). We tolerate excessive speech activity so as to help better our intellectual character in addressing nonspeech issues. Herein he recognizes “symbolic speech” (p. 111), nonspeech behavior that communicates ideas, but he does not stop there. He thinks of all human behavior and the impulse in all of us to insist too strongly on our own beliefs and values, be they political or religious, our attitudes toward aliens, foreigners, racial groups. He recalls our recent experience with the hostages held by Iran and the wave of anger and outrage in the United States, which threatened to, and did, erupt into violence against Iranians visiting in the United States with no connection to the Ayatollah’s forces. His thesis, reemphasized through repetition, is:

that the purposes of the free speech enterprise may reasonably include not only the “protection” of a category of especially worthy human activity but also the choice to exercise extraordinary self-restraint toward behavior acknowledged to be bad but that can evoke feelings that lead us to behave in ways we must learn to temper and control. What is important about speech is not that it is special but that the excessive intolerance we sometimes experience toward it is both problematic and typical, in the sense of reflecting a general tendency of mind that can potentially affect many forms of social intercourse. [p. 120]

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13. Cf. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 30 (1981) (“One can imagine a world in which anti-speech injunctions were sought and issued with regularity; subpoenas to compel the testimony of news reporters were once a rarity.”).

Again, by selecting the area of free speech as one for public and rather rigid rejection of intolerance, we can symbolize the "proper" way of thinking so as to use it in all areas of behavior (p. 122). Thus (again using Skokie to illustrate), extremist speech cases have at least three uses for us: (1) to gain notice needed for the concept (of free speech) to play its larger, symbolic role; (2) since extremists often represent the paradigm of the intolerant mind at work, we can learn through observation of that intolerance; and (3) extremist speech may make us perhaps more conscious of the potential lurking behind more innocent versions of the same ideas, e.g., the Nazis may remind us of the latent forces of anti-semitism in the society (pp. 132-33). Here he notes with satisfaction that having a body of judges do the line-drawing is altogether appropriate (because they are at least supposed to be tolerant). Moreover, as members of the weakest branch, they need toleration to be effective. The ambiguities inherent in the legal system and its case-by-case development also create a beneficial environment for public dialogue.<sup>14</sup> What we hope to do in our quest for the tolerant mind is to develop intellectual attitudes including a spirit of compromise and objective distancing from our beliefs (p. 141).

Chapter Five explores the "internal dialectic of tolerance." Looking at the writings of Professor Meiklejohn and Justice Holmes, Bollinger finds passages in which these two thought about "the general character of mind as it was reflected in the public efforts to suppress speech" (p. 145). But instead of their having anticipated his theory of tolerance, he sees them in deep conflict as well as profoundly ambivalent. Meiklejohn's seminal essay, *Free Speech and Its Relation to Self Government*,<sup>15</sup> with its emphasis on protection of speech that is public, i.e., relevant to self-government, and hence on the minds of hearers, Bollinger finds not original (p. 149); its methodological reliance on article I, section 6, the speech and debate clause, as well as the due process clause of the fifth amendment, to read meaning into the first

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14. I agree but would take the thought one step further. As I said in the James Madison Lecture on Constitutional Law at New York University:

While I surely agree with Justice Douglas' assertion in the fourth James Madison Lecture that "the Bill of Rights is not enough," and thereby fully comprehend that the rights carry with them an equally important duty of good citizenship, I view, as I am sure he did, the day-to-day concrete exposition of those rights not only as a continuing educational process — educative to expositor and exposittee alike — but as an activity at the heart of our democratic system. I take for granted the dialogue between the federal judges and the nation, on a substantive level, and insist that our task is to present and to be able to defend reflective, historically aware and contemporaneously applicable views of what every citizen's rights and correlative duties are, as the questions arise in particular cases. Indeed, there is no other institution in our society that continually carries on a systematic exposition of human rights and their relationship to society. The "dialogue" then serves not only as an inspiration to both judges and nation, but as a bedrock against the encroachment of tyranny, whatever its derivation, and especially when the sources of that tyranny are, as they are sometimes, hidden in the "hearts of men and women."

Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 925-26 (1979) (footnotes omitted).

15. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948).

amendment (and incidentally to permit the abridgement of "private" speech) he finds "textual legerdemain" (p. 151). Yet he perceives in Meiklejohn's awareness of the reality of democratic intolerance and intent to protect even subversive speech a deeper confrontation with the problem of extremist speech: under Meiklejohn's theory of self-government, why cannot a self-governing society choose to prohibit speech advocating the end of self-government itself (p. 153)? Thus Bollinger sees as valuable the essay's real theme that "free speech provides the occasion for making a general assessment of the intellectual character of the society" (p. 154), *i.e.*, "creating a kind of [collective] democratic personality" (p. 155).

Bollinger attributes Holmes's views to his relativism and individualism. The "free trade in ideas" and reference to the marketplace in the *Abrams*<sup>16</sup> dissent come after Holmes' recognition of the "logical" impulse to intolerance: "Persecution for the expression of opinions seems to me perfectly logical," because intolerance derives from certitude either "of your premises or your power."<sup>17</sup> As Learned Hand put it in a letter to Holmes, a sentiment which Holmes endorsed, "Tolerance is the twin of Incredulity."<sup>18</sup> Thus, while Meiklejohn rests tolerance on shared belief in community values, Holmes sees it as based on lack of belief in the "truth" of those values (p. 163). Bollinger sees neither as providing an acceptable or stable foundation for free speech. Meiklejohn's "values" can become a justification for suppression (p. 166) while Holmes' self-doubt can become self-interested and nihilistic (p. 166) since one must be skeptical of one's skepticism. Nevertheless each has helped to "broaden the inquiry into the role of free speech as a forum for defining certain fundamental intellectual values" (p. 169), even while reflecting a fundamental ambivalence in our society toward belief or beliefs; while beliefs are at the core of the impulse to intolerance, they are also the foundation of a system of morality and structure of societal behavior.

In Chapter Six, entitled "Drawing Lines and the Virtues of Ambiguity," Professor Bollinger seeks to "consider . . . afresh" basic first amendment law in the light of his "general tolerance theory" (p. 175). Here Bollinger examines the exceptions to free speech protection, the first of which is the prohibition against revealing information to an enemy at war (p. 176). The clear and present danger test of *Schenck*,<sup>19</sup> as modified in *Abrams*,<sup>20</sup> restated in *Whitney*,<sup>21</sup> and more

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16. *Abrams v. United States*, 250 U.S. 616, 624 (1919).

17. 250 U.S. at 630 (Holmes, J., dissenting).

18. P. 163; see Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 756 (1975).

19. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

20. 250 U.S. at 628 (Holmes, J., dissenting).

21. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

recently revisited in *Brandenburg v. Ohio*,<sup>22</sup> deals with this kind of “dangerous” speech, something which Bollinger agrees should be regulable. The other three categories he examines are “fighting words,” libel, and obscenity. Protection is withheld in these areas by virtue of their absence of social value, a method of reasoning Bollinger finds unacceptable since “[i]t is self-restraint toward what we believe to be without social value” (p. 182) that teaches us — as he sees it — toleration. Rather he sees the exceptions as reflecting patterns of social thinking that are “residual behavioral needs” (p. 183), *e.g.*, the need to respond, say, by dueling to verbal insults, or reflected in the attitudes toward family, community, and aggression that are affected by pornography or societal reactions to it. Libel law does not fit his tolerance model neatly but he looks both to the societal value of preserving honor and reputation as well as the individual harm to the person defamed as supporting nontoleration. In the end he admits that “the tolerance function must occasionally give way to the reality of human needs” (p. 187).

Then, in a jump I do not quite follow, Bollinger sees the first amendment religion clauses as supporting the importance of limits on tolerance. Both freedom to exercise and insulation from establishment reinforce the ethic that religion and politics ought to be kept separate. This ethic exists because of the “tremendous potential of religious belief to produce divisive, even explosive intolerance.”<sup>23</sup> We have kept religion from creating social conflict by removing it from public discourse. In the end, Bollinger says:

Whatever verbal formulation is ultimately used as a starting point for free speech analysis, it must be flexible enough to permit, and perhaps even invite, consideration of the wide variety of social harm speech may cause, while also strong enough to reflect the important institutional role of free speech, that the central purpose of the enterprise is to push the boundary of toleration far beyond what would be considered normal by the usual standards of the society. [p. 192]

Thus a “conscientiously” as well as, I would add, a consciously “ambiguous doctrinal standard” (pp. 192-93) is what Bollinger is searching for, and he is willing to accept “clear and present danger” with the term “danger” more widely and sensitively defined. He rejects the fortress model and fortress thinking. I will return to this later, as I think it perhaps the weakest part of the book.

Finally he looks at his theory in light of time, place, and manner regulation as well as of expressive nonverbal behavior, *i.e.*, “symbolic speech.” He sees the tolerance perspective as permitting more speech and recognizing time, place, and manner restrictions for what they are as real intrusions, no less consequential than content regulations (with

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22. 395 U.S. 444 (1969).

23. P. 188. *See* note 9 *supra*.

“manner” defined broadly enough, such a regulation goes to content) (p. 202). As for symbolic speech, as in the case of graffiti, he sees the way of thinking underlying the more verbal act as coloring the response to the act (p. 208) and, since the nonverbal act may also involve harm to person or property, something can be said for regulating it (pp. 210-11). Indeed, the line may be drawn at anonymous, secret acts (like graffiti drawing) since they are not public.

Chapter Seven, “Searching for the Right Voice,” is a coda on the rhetoric of free speech — the literary enterprise — since it has brought out the best writing of Holmes, Brandeis, Chafee, Kalven, and others. Bollinger sees this rhetoric by its quality as emphasizing the “tremendous symbolic role” of the first amendment even if it often tends not to view speech as the possible instrument of an intolerant mind. Bollinger believes that it would be “unfortunate” if people came to believe that all intolerance of speech was bad and that there are “boundaries of bad behavior that should not be crossed” (pp. 217, 220). And he sees in the eighteenth and nineteenth centuries’ rhetoric surrounding free speech with its talk of tyrannical tendencies of governments and rationality of people as, if not simplistic, at least outdated (p. 218). Rather he would have free speech advocates be wary of their own tendency to oversimplify the complexity of the problems involved in a given case. And he would not have the judge simply appear to be totally personally disengaged, *i.e.*, choiceless, or follow an interpretive path that provides the least opportunity for interjection of personal values, since this obfuscates and trivializes (pp. 227-28). Rather he would have the judge state with caution his own attitude toward the speech in question since the tension between the judge’s and speaker’s views make a more persuasive argument for toleration (pp. 230-31). He points out that tolerance may signify insensitivity to those injured by speech, *e.g.*, at Skokie, or even mask a desire to injure, *i.e.*, anti-semitism, racial prejudice, or the like; thus, “[t]olerance for the wrong reasons can be a form of vicarious aggression” (p. 233).

Bollinger ends in Chapter Eight by setting “An Agenda for the General Tolerance Theory,” which he redefines as “the toleration of undesirable and unwanted behavior as a method of pointing up troublesome tendencies within those wishing to be intolerant, often by the community’s engaging in self-restraint toward the very behavior it seeks to avoid” (p. 238). He sees free speech as “stand[ing] symbolically as the gateway to social intercourse” (p. 238).

American society has evolved with this as a principle according to Bollinger because it is a capitalist economic society, with pervasive bureaucratic and professional systems, where personal preferences tend to be submerged; because it is composed of large immigrant groups of many different cultures and religions; and because it is stable with a relatively homogeneous two-party system not likely to be sup-

planted by splinter, deviant groups. The first amendment has taken on meaning, he again reminds us, beyond merely preserving meritorious speech or preserving an area of freedom for each individual beyond the reach of the state, a meaning which can be seen in the context of extremist speech cases. The meaning is that free speech principles enable us to see the elements in our thinking that distort our judgment in drawing the lines that inevitably have to be drawn in a pluralistic society (p. 243). Free speech is thus a means, as well as an end.

Bollinger inquires whether by fostering tolerance in the free speech context we are making the impulse to intolerance more attractive in other, nonspeech areas (pp. 244-45). And he worries lest tolerance turn naturally into passivity and uncritical obedience (pp. 246-47). But these questions he leaves for future examination when free speech is examined as a concept in social thought, as a general social ethic rather than simply as a means of curtailing legal intervention into speech. He sees in the end "the genuine nobility of a society that can count among its strengths a consciousness of its own weaknesses" (p. 248).

Has Professor Bollinger said anything new? Indeed he has, even if some of his concepts have real antecedents. I have reexamined some of the most recent works by several scholars of the highest repute and for whom I have the greatest respect: Thomas Emerson's *The System of Freedom of Expression*,<sup>24</sup> Laurence Tribe's *American Constitutional Law*<sup>25</sup> and *Constitutional Choices*,<sup>26</sup> the late Melville Nimmer's *Nimmer on Freedom of Speech*,<sup>27</sup> Vincent Blasi's *The Checking Value in First Amendment Theory*,<sup>28</sup> Kenneth Karst's *Equality as a Central Principle in the First Amendment*,<sup>29</sup> as well as Professor Bollinger's colleague at Michigan, Frederick Schauer's *Free Speech: A Philosophical Enquiry*.<sup>30</sup>

Emerson's four main premises for the system of freedom of expression include "individual self-fulfillment," "advancing knowledge and discovering truth," "participation in decision making by all members of society," and "achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavages and necessary consensus." He comes closest to anticipating Bollinger's tolerance thesis in the fourth premise which sees open discussion promot[ing] greater cohesion in a society because people

24. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

25. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

26. L. TRIBE, *CONSTITUTIONAL CHOICES* ch. 13 (1985).

27. M. NIMMER, *NIMMER ON FREEDOM OF SPEECH* ch. 1 (1984).

28. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 550.

29. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

30. F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

are more ready to accept decisions that go against them if they have a part in the decision-making process. . . . Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society.<sup>31</sup>

Tribe takes a different approach, asking the question: Is freedom of speech only a nexus to some other end, *e.g.*, successful self-government, or is it an end in itself? He criticizes Meiklejohn's and Holmes' conceptions as "too focused on intellect and rationality" and insufficiently accommodating to the emotive role of free speech. This role, as set forth by Justice Harlan in *Cohen v. California*,<sup>32</sup> derives from our belief in "the premise of individual dignity and choice upon which our political system rests." Thus freedom of speech is an end in itself and "a constitutive part of personal and group autonomy."<sup>33</sup> Tribe insists that "[a]ny adequate conception of freedom of speech must . . . draw upon several strands of theory in order to protect a rich variety of expressional modes."<sup>34</sup> But while he comes close, he does not expressly rely on or postulate Bollinger's tolerance function.

Nimmer speaks principally of the "enlightenment function" but also of the "self-fulfillment function" and the "safety valve function" of free speech. While the "safety valve function" as set forth by Brandeis in *Whitney*<sup>35</sup> might be thought to be the flip side of Bollinger's tolerance theory, it proceeds basically on the premise that "repression breeds hate" which "menaces stable government," or, as Nimmer puts it, men will be less prone to violence when speech is an emotional outlet.<sup>36</sup> As Nimmer points out, however, there are at least two other aspects to the safety-valve function seen by Brandeis — first the effect on those in power, permitting them to respond to grievances,<sup>37</sup> and, second, the effect on audiences by enabling them to avoid behavior aimed at outrage and protest.<sup>38</sup> There is thus a hint of the tolerance theory with Nimmer's oblique reference to *Richmond Newspapers* and

31. T. EMERSON, *supra* note 24, at 6-7.

32. 403 U.S. 15, 24 (1971).

33. L. TRIBE, *supra* note 25, at 579.

34. *Id.*

35. But they [the Founding Fathers] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

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

36. See M. NIMMER, *supra* note 27, at § 1.04 & n.4 (citing Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 672-73).

37. M. NIMMER, *supra* note 27, at § 1.04 n.1 (citing Blasi, *supra* note 28 at 550).

38. *Id.* at § 1.04 n.3 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980)).

its footnote reference to audience. But in the end Nimmer states that “[t]he safety valve function is probably much too ephemeral and speculative for it, in itself, to justify speech which might otherwise be abridged by reason of given anti-speech interests.”<sup>39</sup> He thus does not envisage a general principle of tolerance at work.

Vincent Blasi recognizes that our basic first amendment theories developed in response to cases involving anarchists and socialists in the 1920s, Jehovah’s Witnesses in the 1940s, and communists in the 1950s, litigants who pressed claims either to engage in advocacy or to keep their beliefs private.<sup>40</sup> Those theories included:

(1) a concept of individual autonomy concerning personal beliefs; (2) a commitment to diversity in a wide range of affairs, summed up in the metaphor of a “marketplace of ideas”; and (3) a theory of political community known as “self-government,” which holds that each member of the polity, no matter how eccentric or humble, occupies a vital role in the governing process and thus enjoys a right to hear and be heard on all matters relevant to governance.<sup>41</sup>

But the civil rights and antiwar movements with new tactics to influence the collective consciousness presented issues not soluble in terms of fair play for the dispossessed. Large news organizations also became involved in challenging governmental and social orthodoxy. Thus Blasi sees “values relating to the concept of countervailing power in a democratic state”<sup>42</sup> as figuring in the disputes of today. Calling for “fresh thinking at the theoretical level,”<sup>43</sup> Professor Bollinger’s former Michigan Law School colleague cites the law of libel since *New York Times v. Sullivan* as a “series of unsuccessful efforts to adapt traditional free-speech theories . . . to what is really a problem of corporate incentives and responsibilities.”<sup>44</sup> Blasi makes the point that “our articulated understanding of First Amendment values is incomplete.”<sup>45</sup> He then goes on to advance the theory that “free speech, a free press and free assembly can serve in checking the abuse of power by public officials”<sup>46</sup> — the checking function — surely a most valuable insight. But Blasi leaves room for Professor Bollinger’s tolerance function, too.<sup>47</sup>

Kenneth Karst, as a prelude to developing his views on equality

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39. *Id.* at § 1.04.

40. Blasi, *supra* note 28, at 523-24.

41. *Id.* at 524.

42. *Id.* at 525.

43. *Id.*

44. *Id.* at 526.

45. *Id.*

46. *Id.* at 527.

47. See Blasi, *supra* note 13 (which starts its discussion of a theory of prior restraint with the checking function).

and the first amendment (what he calls the principle of equal liberty of expression), states:

The principle of equal liberty of expression underlies important purposes of the first amendment. Three such purposes, not always distinct in practice, are commonly identified: (1) to permit informed choices by citizens in a self-governing democracy, (2) to aid in the search for truth, and (3) to permit each person to develop and exercise his or her capacities, thus promoting the sense of individual self-worth. As a practical matter, realization of these goals implies realization of the first amendment's equality principle.<sup>48</sup>

But he admits that:

These purposes are not exhaustive. For example, on another view, the first amendment serves chiefly as a safety valve, permitting peaceful reform within a stable system — or, as Herbert Marcuse would have it, preventing revolution through “repressive tolerance.” The function can be seen more positively as one of legitimizing. Chief Justice Warren remarked in the context of a claim of equal protection: “Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”<sup>49</sup>

Thus the safety-valve purpose does expressly involve “tolerance” even if it is “repressive” in Marcuse’s terms. Karst does not develop this thought further, however.

Frederick Schauer’s work presents a special case. His and Bollinger’s work touch upon some of the same themes. In the highest traditions of academic collegiality Bollinger gives Schauer full credit both in his acknowledgments (p. vi) and in a footnote (p. 45 n.4) “[f]or a major, and comprehensive, philosophical critique of prevailing theories of free speech.” Schauer’s work recognizes that “[t]he modern conception of freedom of speech has roots in two distinct strands of thought,” one of which “is the theory of religious toleration, as exemplified in Locke’s *Letter Concerning Toleration*, Bayle’s *Treatise on Universal Toleration*, and Turgot’s *Memoire to the King on Toleration*.”<sup>50</sup> As stated, the connection between tolerance, or at least religious tolerance, and free speech has been in the minds of philosophers for some time. But in view of the fact that Schauer and Bollinger have obviously discussed their ideas on many occasions one is not surprised to find the former discussing in some depth “the paradox of tolerance,” so called by Karl Popper because it is “paradoxical to allow freedom of speech to those who would use it to eliminate the very principle upon which they rely.”<sup>51</sup> Schauer uses the *Skokie* case to

48. Karst, *supra* note 29, at 23 (footnote omitted).

49. *Id.* at 23 n.18 (quoting *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969); citing also C. BLACK, *THE PEOPLE AND THE COURT* 34-55 (1960)).

50. F. SCHAUER, *supra* note 30, at 106.

51. *Id.* at 160.

show that the problem is not hypothetical and goes on to argue that, since we cannot delegate to any licensing authority, county council, or court the power to withhold speech-making privileges by deciding which groups threaten freedom and which do not, "the denial of free speech rights to those who are 'fascists,' 'racists,' or 'totalitarians' is as much at the core of the Free Speech Principle as would be the denial of the same rights to Democrats, Republicans, Liberals, Conservatives, or Catholics."<sup>52</sup> It speaks well for Professor Bollinger's intellectual candor that this is one argument that he really does not make for his tolerance principle — the argument of who will censor the censors — probably out of respect for a colleague's ideas, even though the argument is a persuasive one.

Bollinger has made a real contribution to recent literature and analysis of the first amendment, and nothing that I say below should be construed as taking from his accomplishment. Still, he makes his tolerance function seem so obvious that one wonders if one did not just assume it to be one of the functions of free speech even if not explicitly stated as such by recent theorists on the subject. As Schauer points out, toleration has after all been systematically proposed since Locke's *Epistola de Tolerantia*, published in 1688. To be sure, Locke was talking principally about religion, but when he spoke about things that could not be tolerated he addressed opinions, speech, and activity:

- (1) the propagation of "opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society";
- (2) any claim "to special prerogative opposite to the civil right of the community";
- (3) the activity of "persons who are ready on any occasion to seize the government, and possess themselves of the estates and fortunes of their fellow subjects";
- (4) transferring allegiance to a foreign prince;
- and (5) denying the existence of God.<sup>53</sup>

In Thomas Jefferson's first inaugural address he spoke of tolerance in the context of free speech or opinion:

During the contest of opinion through which we have passed, the animation of discussion and of exertions has sometimes worn an aspect which might impose on strangers unused to think freely and to speak and to write what they think; but this being now decided by the voice of the nation, announced according to the rules of the constitution, all will, of course, arrange themselves under the will of the law, and unite in common efforts for the common good. All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression. Let us, then, fellow-citizens, unite with one heart and one mind. Let us restore to social intercourse that harmony and affection without which liberty and even life itself are but dreary

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52. *Id.* at 163.

53. 8 THE ENCYCLOPEDIA OF PHILOSOPHY 145 (1967).

things. *And let us reflect that having banished from our land that religious intolerance under which mankind so long bled and suffered, we have yet gained little if we countenance a political intolerance as despotic, as wicked, and capable of as bitter and bloody persecutions.* During the throes and convulsions of the ancient world, during the agonizing spasms of infuriated man, seeking through blood and slaughter his long lost liberty, it was not wonderful that the agitation of the billows should reach even this distant and peaceful shore; that this should be more felt and feared by some and less by others; that this should divide opinions as to measures of safety. But every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all republicans — we are federalists. If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.<sup>54</sup>

And there were hints, moreover, of the tolerance function, as Bollinger himself notes in Chapter Five, in the writings of Professor Meiklejohn and the opinions of Justice Holmes. And the safety-valve function referred to in Brandeis' *Whitney* passage<sup>55</sup> is but a step away, once focus is upon the audience and not just the speaker. But, of course, the basic literature has generally looked at free speech from the perspective of the speaker, rather than the audience. Indeed, it is only in the last few decades that we have begun to focus upon the audience at all.

Twenty-five years ago Paul Freund put it that “[t]he right to speak is the individualized legal reflection of the more generalized right to hear, which is basic to the process of political flux.”<sup>56</sup> While *Thomas v. Collins*<sup>57</sup> recognized the rights of workers to hear labor organizers, it was not until *Lamont v. Postmaster General*<sup>58</sup> that a first amendment right of a mail recipient was recognized, and a wave of cases<sup>59</sup> in the 1970s generally recognized an independent first amendment right on the part of an audience or putative audience to hear (though “captive” audiences have long had rights *not* to hear<sup>60</sup>). With this new emphasis on the audience, it took — in what has been rather an easy time for free speech — something really extreme, stirring to one’s soul, the *Skokie* case, to bring out Bollinger’s new focus.

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54. First Inaugural Address of Thomas Jefferson (Mar. 4, 1801), reprinted in N. DORSEN, D. BENDER & B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 4 (4th ed. 1976) (emphasis added).

55. See note 35 *supra* and accompanying text.

56. P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 81 (1961).

57. 323 U.S. 516 (1945).

58. 381 U.S. 301 (1965).

59. See M. NIMMER, *supra* note 27, at § 1.02[F][1] & n.37.

60. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Packer Corp. v. Utah*, 285 U.S. 105 (1932).

The *Skokie* case does summon up in us, as Professor Tribe says,<sup>61</sup> mixed emotions. Why should we tolerate as free speech a march or a demonstration not only totally antithetical to our democratic views and principles of religious freedom but also aimed specifically in time and place at injuring the sensibilities of the very group of people with the most heightened sensitivity to anti-semitism in its most outrageous form? Bollinger provides us with a most convincing answer and this alone is a contribution — by exercising tolerance the impulse to intolerance in each of us is effectively restrained. Norman Dorsen, wearing his ACLU president's hat, makes a more direct argument for the ACLU's defense of the Nazis:

It [the "maximum protection" theory which Dorsen espouses] shows that attempts to prevent peaceful protests are inconsistent with the First Amendment, whether directed against labor organizers in Detroit, civil rights workers in the South, antiwar demonstrators at the Pentagon, the Jewish Defense League in St. Louis, or American Nazis in Skokie, Illinois.<sup>62</sup>

Dorsen argues from a different premise than Bollinger, however. He reacts from what Bollinger calls the fortress model of free speech; he would keep the exceptions to the exercise of free speech as narrow as possible consistent with the survival of our institution of government, lest the exceptions be too open-ended.

This brings me to the point of perhaps my greatest difficulty with Bollinger's thesis; he goes beyond recognition of the tolerance function of free speech by almost considering it at times as the sole function. I find myself asking the question whether, in expressly declining to proceed from the fortress model, he would open the door to exceptions beyond "fighting words," libel, obscenity, and clear and present danger (redefined)? I read his reliance in Chapter Six on "residual behavior needs" (p. 183) or "the reality of human needs" (p. 187) as potentially a justification for creating new exceptions or evidencing old ones. Indeed, why is not intolerance itself a "residual behavior need"? How, in other words, does one distinguish a "residual human need" that must be recognized as real from a need that does not have to be recognized since it is not real? And in line-drawing in specific areas — say the law of defamation or the law pertaining to obscenity — how does this serve as any guide?

I share with Vincent Blasi<sup>63</sup> a "pathological" concern for the first amendment, indeed for the whole Bill of Rights. As I wrote in my Madison Lecture,

Viewed as an interwoven fabric or spirit, with the creative tension this implies, the Bill of Rights also takes on a more fragile aspect. We

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61. L. TRIBE, *supra* note 26, at 219.

62. Dorsen, *supra* note 10, at 2.

63. See Blasi, *supra* note 13, at 30.

come to recognize that the illegal police practice, the abuse of a prison inmate, the denial of a termination hearing to a welfare recipient, are all potentially assaults upon our own rights because each of us is protected only as much as others are. This concept is all the more telling as the power of government through technology and sheer size becomes the more awesome and the role of the individual correspondingly less significant.

....

... Our institutions fortunately do not hang by a thread, but a deep depression, a serious blow to national pride, extensive internal terrorism, a serious external threat to security, or a combination of these may enlarge the ranks of the elements of society that are ever ready to abandon liberty for order and to abandon freedom for security. In the meantime let us beware lest by default we permit some of these rights to be chipped away.<sup>64</sup>

On this score I find Bollinger's exposition of the tolerance function lacking. When this is coupled with downplayed concern about the role of government or a given majority, as I think Bollinger sometimes tends to engage in,<sup>65</sup> my "pathological" concern gets aroused.<sup>66</sup> While giving effect to community values and respect to democratic self-government, Professor Bollinger may be a little sanguine — overlooking, say, the power of an executive branch gone astray (as in Watergate) to deceive the public, at least for a while. The new term "disinformation" — a government feeding lies to the press to accomplish a foreign objective — speaks to my concern. The truth-seeking function of free speech remains high on my agenda, as essential to appropriate self-government.

Saying that, however, I must point out three strengths of the book which I have not yet mentioned. The first is its recognition, albeit brief, of the role that religion can play in fomenting divisiveness.<sup>67</sup> Surely any future agenda for the tolerance function or free-speech thinking must explore and expose this tendency further, in a day when certain religious leaders are seriously mentioned as thinking, with the support of their religious constituencies, of running for the highest office in the land, and when in the name of religion humanism in education is reviled or abortion clinics burned out; and there is functioning in this country a "religious" movement "blending hatred of blacks and

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64. Oakes, *supra* note 14, at 924-25 (footnotes omitted).

65. See p. 218. *But see* pp. 111-20.

66. In fairness to Professor Bollinger, he does refer to protection of free speech as "a very fragile enterprise" (p. 86). This shows his concern for the first amendment but does not close the door to increasing the scope or number of exceptions to first amendment protection.

67. Here Bollinger recognizes the interrelationship of the speech and religion clauses of the first amendment. I would go further and point to the interrelationship of the first, fourth, fifth, sixth, seventh, and eighth amendments. See Oakes, *supra* note 14, at 919-24. "Time and again it was in protecting freedom of thought, of conscience, or of expression that the procedural rights embodied in our fourth through eighth amendments were first asserted, then given substance, and finally enshrined as basic to our institutions." *Id.* at 921-22.

Jews with visions of an imminent apocalypse and advocating — and sometimes practicing — armed violence to achieve its goals.”<sup>68</sup>

The second additional strength is the focus Bollinger brings to bear on time, place, and manner regulations of speech as intrusive — often as consequential as content regulation. Suppose, for example, a community were to impose a forty-five day waiting period for marches, protests, or other public assemblies or demonstrations. Would not that alone serve to dampen prospective symbolic speech so as to be an unreasonable intrusion?

Finally, by seeing the role of the free speech cases as one of developing community-wide or nationwide awareness of the complexity of social issues and the need “to develop and demonstrate a social capacity to control feelings” (p. 10), Professor Bollinger has given us all a somewhat broader vision. Free speech, he is saying, is not serving just as a safety valve for audience, speaker, and society generally; it is awakening us to a new public consciousness of the importance of free speech. We may hope this is true. Optimists of the human spirit may always hope for its improvement.

In the end I would say that Professor Bollinger has made a valuable contribution to free speech theory by reexamining the fundamental bases on which freedom of expression rests. He has also recognized that the first amendment is not self-executing; that the dialogue created by hard cases like *Skokie* is in and of itself enlightening, if not upgrading; and that we can wholly agree neither with Mencius that “the tendency of human nature to do good is like that of water to flow downward” or with Hsun Tzu that “man’s nature is evil.”<sup>69</sup>

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68. Ostling, *A Sinister Search for “Identity,”* TIME, Oct. 20, 1986, at 74.

69. Bollinger’s suggestion that judges’ opinions articulate their own feelings about given speech (pp. 226-36) should be commented upon by a reviewer-judge. I agree that judges should be aware that they are making value choices, see Oakes, *supra* note 14, at 929-34, and that “[j]udges should not overlook or conceal value choices, enshrouding them in some mysterious, semi-Delphic pronouncements from on high.” *Id.* at 930. Still, to state one’s own views of given speech before addressing the legal consequences or constitutional choices concerning that speech smacks too much of the ad hoc, personal, state-of-the-digestion jurisprudence that Cardozo long ago taught us to eschew. See B. CARDOZO, *The Nature of the Judicial Process*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 151 (1947).