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# The Tolerant Society: Freedom of Speech and Extremist Speech in America

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

Reviewed by Steven C. Bennett\*

#### INTRODUCTION

Lee C. Bollinger, a Professor of Law at the University of Michigan Law School and noted expert on the first amendment,<sup>1</sup> in his new book, *The Tolerant Society*,<sup>2</sup> confronts the riddle of extremist speech. Why is it, he wonders, that we universally condemn a group like the American Nazis and yet permit them to disrupt a community like Skokie, Illinois, all in the name of protecting the first amendment?<sup>3</sup> Professor Bollinger suggests that an examination of how our legal system treats extremist speech can help us develop a general vision of the meaning of the first amendment.<sup>4</sup> Rejecting two alternative theories, Professor Bollinger suggests a "tolerance"<sup>5</sup> model of the first amendment. Our society, according to Professor Bollinger, permits extremist speech not simply because it advances some well-accepted goals (like better government or increased self-expression), or because it is impossible to prohibit some undesirable speech without "chilling" other protected speech. Rather, protection of extremist speech serves more as a collective exercise in self-restraint. Intolerance manifests itself in many areas outside the context of

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1. Professor Bollinger has written several essays on first amendment issues. See, e.g., Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976); Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983); Bollinger, *The Sedition of Free Speech*, 81 MICH. L. REV. 867 (1983); Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory* (Book Review), 80 MICH. L. REV. 617 (1982).

2. L. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986) [hereinafter cited as L. BOLLINGER].

3. *Id.* at 13.

4. *Id.* at 41.

5. Professor Bollinger defines "tolerance" as "a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters." *Id.* at 10.

extremist speech (racial and religious discrimination, for example). By permitting extremist speech, our society publicly and dramatically affirms the desirability of tolerance in areas outside the context of speech. In a very important way, society adds something to its identity by permitting extremist speech.<sup>6</sup> In advancing this novel explanation, Professor Bollinger hopes to fill a "disturbing lacuna" in our first amendment theories,<sup>7</sup> and to provide a basis from which to approach the task of deciding actual cases.<sup>8</sup> This review will briefly summarize Professor Bollinger's argument, and then consider its viability both as a general theory and as a tool for deciding cases.

## I.

Professor Bollinger divides his book into eight chapters, with an introduction. The introduction acquaints the reader with the general problem Professor Bollinger wishes to explore. The introduction reminds us that the United States is alone among free societies in permitting a broad range of extremist speech.<sup>9</sup> Yet our jurisprudence on extremist speech is relatively young (some sixty or so years old).<sup>10</sup> Professor Bollinger suggests that the theory supporting that jurisprudence is, as yet, still incomplete. Much of contemporary first amendment theory, he notes, talks in terms of the benefits of free speech (like discovering the truth).<sup>11</sup> Yet extremist speech is not best understood on the level of benefits from the speech itself. Instead, Professor Bollinger introduces the notion of tolerance-teaching as the main function of cases involving extremist speech.<sup>12</sup>

The first chapter of the book outlines an example of extremist speech mentioned throughout the remainder of the book. Professor Bollinger proposes to test his theory and competing theories against a real example, the case of the Nazi march

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6. *Id.* at 6.

7. *Id.* at 9.

8. *Id.* at 11.

9. *Id.* at 3.

10. Professor Bollinger traces the origins of modern free speech doctrine to Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). *See id.* at 15.

11. *Id.* at 9.

12. *Id.* at 9-10.

through Skokie.<sup>13</sup> Professor Bollinger sees, in the public and judicial responses to the Skokie affair, a curious disjunction in attitudes about the degree to which we tolerate extremist speech. He notes, for example, that the judges who wrote the various Skokie opinions uniformly condemned Nazism, yet insisted that protection of first amendment values demanded the result obtained.<sup>14</sup>

The next two chapters explore contemporary theories of the first amendment. One theory, the "Classical Model," focuses on the benefits of speech. These benefits include the importance of speech for getting at the truth, its function as a form of self-expression, and its aid to effective government.<sup>15</sup> The Classical Model requires that the harms of speech be weighed against all these important benefits. Professor Bollinger insists, however, that the Classical Model cannot explain the results in many extremist speech cases, like Skokie. The Nazi speech in Skokie had virtually no benefits as an exercise in truth-seeking. Indeed, Nazi propaganda deliberately intends to subvert the truth. In its application, then, the Classical Model may fail in extremist speech cases.

Professor Bollinger also assesses the other major contemporary theory of the first amendment, the "Fortress Model." On this theory, extremist speech must be protected not only for its own sake but as a means of clearly demarcating the lines of protected speech.<sup>16</sup> Professor Bollinger criticizes this model for its wrong-headed assumption that the suppression of extremist speech is invariably the product of a tyrannical government bent on suppressing individual liberties. Rather, he suggests, most

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13. Frank Collin and a small group of Nazis intended to demonstrate in Skokie, a suburb of Chicago whose heavily Jewish population includes concentration camp survivors. Under pressure from a group of those survivors, Skokie's leaders decided to actively oppose the demonstration. They obtained several injunctions against it, and passed three ordinances to prevent its occurrence. The American Civil Liberties Union ("ACLU") then came to the Nazi's aid. It won four court decisions that overturned all the ordinances and injunctions. Eventually, however, Collin and his group agreed to hold their rally elsewhere. The story is outlined in Professor Bollinger's book, *id.* at 24-35, and is recounted in greater detail in earlier works, *see, e.g.*, D. HAMLIN, *THE NAZI/SKOKIE CONFLICT* (1980); A. NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1979).

14. L. BOLLINGER, *supra* note 2, at 27-28.

15. *Id.* at 46-47.

16. *Id.* at 77.

ensorship is perfectly attuned with the will of the majority. That observation, he notes, runs counter to the suggestion in the Fortress theory that extremist speech (such as that of the Nazis) must be protected in order to protect ordinary political criticism.<sup>17</sup> Moreover, he observes, this model does not entirely account for the depth of our society's commitment to the free speech principle. He phrases a poignant question: "[i]f we ever came to feel that the opportunities for our own speech as well as for other speech we genuinely value were totally secure . . . would we still have good reason for taking the free speech principle to the extreme position . . . ?"<sup>18</sup>

In chapter four, Professor Bollinger elucidates his alternative, "Tolerance Model" of the first amendment. He begins by noting the universality of the urge to intolerance, the desire to insist strongly on our own beliefs and values.<sup>19</sup> Intolerance takes many forms: racial and religious prejudice, sexism, and the suppression of unusual lifestyles are only a few examples. How to control these impulses? They cannot be forbidden altogether. There is a wide range of activities (dangerous sexual practices and drug use, for example) which our society regulates largely on the basis of intolerance, but which probably should be regulated.<sup>20</sup> The intolerant impulse must be controlled more subtly. Thus, we arrive at the heart of Professor Bollinger's model. The protection of extremist speech follows from a need to demonstrate extraordinary restraint in a limited setting in order to encourage tolerance in other areas.<sup>21</sup>

The remainder of Professor Bollinger's book explores the implications of his Tolerance Model. For example, can this model be integrated into contemporary thinking about the first amendment? Professor Bollinger suggests that some strands of his theory appear in the works of other major theorists.<sup>22</sup> He also reminds us that the process of resolving first amendment claims is as important as the resolution itself.<sup>23</sup> Finally, he explores rea-

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17. *Id.* at 78-79.

18. *Id.* at 103.

19. *Id.* at 111-12.

20. *Id.* at 113.

21. *Id.* at 122-23.

22. Professor Bollinger compares his theory with those of Alexander Meiklejohn and Oliver Wendell Holmes. *Id.* at 145-74.

23. *Id.* at 235.

sons why tolerance has become such an important value in the United States, suggesting that the combination of a capitalist economy (with its emphasis on individual effort) and the development of a bureaucratic state (which requires government actors to submerge their individual prejudices) has produced our unusual emphasis on tolerance.<sup>24</sup>

## II.

Professor Bollinger's Tolerance Model is certainly a valuable insight into the role of free speech in our society. But can his theory help us to solve the practical problems of regulating extremist speech? Professor Bollinger deliberately omits any extended treatment of these practical implications. He suggests, quite correctly, that any full-scale treatment of the doctrinal effects of his model would require more than a single book.<sup>25</sup> Nevertheless, he does provide at least a peek at what his theory might mean for first amendment doctrine. This brief discussion, unfortunately, suggests that Professor Bollinger's theory provides little concrete value as an aid in deciding cases.

Professor Bollinger's biggest problem in describing the practical operation of his theory is that he is willing to consider too many opposing arguments. He begins by asserting that "[f]ree speech does not and can not mean that we will suffer any and all consequences that speech may bring."<sup>26</sup> He then considers some well-recognized "exceptions" where speech may be regulated (fighting words, libel, pornography) and criticizes the Supreme Court's analysis of these exceptions. In *Chaplinsky v. New Hampshire*,<sup>27</sup> for example, the Court suggested that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>28</sup> Professor Bollinger criticizes the *Chaplinsky* reasoning for assuming that the value of speech is the critical inquiry in first amendment analysis. "[I]t is not the absence of social value that determines whether the princi-

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24. *Id.* at 239.

25. *Id.* at 175.

26. *Id.* at 176.

27. 315 U.S. 568 (1942).

28. *Id.* at 572.

ple of free speech is applicable; indeed, the perceived absence of value is, if anything, a major reason for protection, or more accurately, for toleration. . . . ”<sup>29</sup>

We might assume from this criticism that the Tolerance Model requires that we permit even the most extreme speech. Professor Bollinger quickly backpedals, however: “this is not to say that toleration of, or self-restraint toward, *all* speech is mandated under the broader objectives of the first amendment. . . . Certain extraordinary times and conditions exist in any society in which it is quite simply too much to expect of people that they be self-restrained. . . . ”<sup>30</sup> So, we are back to some exceptions. Yet, even these exceptions can go too far, as Professor Bollinger suggests in considering the fighting words exception: “On the other hand, we face a difficult problem of containing such an exception, as many quickly realized, for, if given a loose rein, it could ride roughshod over the entire purpose of free speech.”<sup>31</sup> Unfortunately, there are just too many “on the other hands” in this analysis.

What’s left is a deliberately vague approach to resolving cases. Professor Bollinger admits as much: “it would seem advisable to prefer an abstract—indeed, one might even say, a conscientiously ambiguous doctrinal standard.”<sup>32</sup> Professor Bollinger prefers the “clear and present danger” test first proposed by Justice Holmes in *Schenck v. United States*,<sup>33</sup> and *Abrams v. United States*.<sup>34</sup>

What are we to make of this approach? We may begin by observing that the Holmes approach hardly provided enduring protection for free speech. A formula that was initially applied to permit extremist speech even if it had some “tendency” to disrupt government<sup>35</sup> was quickly reinterpreted (though the

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29. L. BOLLINGER, *supra* note 2, at 182.

30. *Id.* (Emphasis in original).

31. *Id.* at 183.

32. *Id.* at 192-93.

33. 249 U.S. 47, 52 (1919).

34. 250 U.S. 616, 627 (1919) (Holmes, J., dissenting). See L. BOLLINGER, *supra* note 2, at 193 (referring to Holmes’ “clear and present danger” standard).

35. See *Herndon v. Lowry*, 301 U.S. 242, 258 (1937) (reversing a conviction for violating a statute prohibiting attempts to incite insurrection); *DeJonge v. Oregon*, 299 U.S. 353, 359-60 (1937) (indicating that peaceable assembly for lawful discussion cannot be made a crime; incitement must be shown).

words of the formula were not abandoned) amidst the paranoid hysteria of the McCarthy era to forbid even the advocacy of violent overthrow of the government.<sup>36</sup> Professor Bollinger accepts this indictment, but he suggests that it simply means that no formula can be written with sufficient certainty to resist the tides of intolerance that may flow in certain circumstances.<sup>37</sup>

If the Tolerance Model is not intended to create a more certain standard, what good is it? Professor Bollinger's answer is essentially that the process is more important than the result. The goal, he reminds us, is to provide an example of tolerance for the public to observe. This teaching is not done by robot-like application of a fixed formula. Instead, society must know that tolerance is a conscious exercise of will. By weighing the many factors involved in an extremist speech case judges can publicly proclaim the importance of the tolerance principle. Indeed, on this view, extensive litigation in a first amendment case (which a more certain standard might avoid) is desirable: "[l]itigation provides the framework, the occasion, for the community to think about the things free speech is intended to raise for thought."<sup>38</sup>

This observation, while unique<sup>39</sup> and significant, does little to help us decide cases. Indeed, it is difficult to imagine how a judge could operationalize Professor Bollinger's theory. Surely a judge cannot admit that the outcome of a case is unimportant so long as the tolerance principle is publicly explored. Nor can a judge simply weigh tolerance as an additional value on the side of preserving speech. Professor Bollinger's point is that tolerance is most demonstrated when there is virtually no value to the extremist speech.<sup>40</sup> Thus, the need to teach tolerance is not just another value that may tip the balance in favor of protecting

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36. See, e.g., *Yates v. United States*, 354 U.S. 298, 324 (1957); *Dennis v. United States*, 341 U.S. 494, 509 (1951).

37. L. BOLLINGER, *supra* note 2, at 194.

38. *Id.* at 195.

39. Many other scholars, of course, have remarked on the instructive effects of law, those going beyond the immediate effects of a decision. See, e.g., Burt, *Constitutional Law and the Teaching of the Parables*, 93 *YALE L.J.* 455, 471-72 (1984) (suggesting that constitutional decisions essentially use the same methods as the parables of the Gospel); West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 *N.Y.U. L. REV.* 145 (1985) (suggesting that modern jurisprudence follows four classical literary myths). Professor Bollinger's tolerance perspective, however, appears unique.

40. L. BOLLINGER, *supra* note 2, at 182.

speech. Tolerance is a trump card, or it means virtually nothing. As we find in looking at Professor Bollinger's primary example of extremist speech, Skokie, the latter is more likely the case.

### III.

Professor Bollinger uses the Skokie case as an example for testing the adequacy of the contemporary first amendment models. He concludes that neither of these models adequately explains the result in Skokie. Does his Tolerance Model do a better job? To begin to answer this question, we must briefly summarize Professor Bollinger's application of the Tolerance Model to the Skokie case.

Professor Bollinger begins by suggesting that Skokie was the perfect case for demonstrating tolerance: the potential for excessive intolerance (based on hatred of the Nazis) was great, and the case also attracted widespread public attention.<sup>41</sup> These facts apparently would lead to a presumption in favor of tolerance.<sup>42</sup>

Professor Bollinger proceeds, however, to consider the harms of tolerance, including the risk that tolerance might constitute an implicit condonation of Nazism and the risk of serious psychic injury to the Skokie residents.<sup>43</sup> Professor Bollinger concludes that these harms would not outweigh the benefits of demonstrating tolerance.<sup>44</sup>

It is possible, of course, to contest Professor Bollinger's assessment of the harms involved in the Skokie case. One might suggest, for example, that he underplays the extent of the injuries suffered by the Skokie residents.<sup>45</sup> One might also question the validity of some of his empirical observations. He suggests, for example, that "[w]hile anti-Semitism is a problem in American society . . . it is not of such magnitude, or so pervasive, as to transform toleration into an act of implicit condonation."<sup>46</sup>

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41. *Id.* at 197-98.

42. *Id.* at 199 (referring to presumption).

43. *Id.* at 199-200.

44. *Id.* at 199.

45. See D. DOWNS, *NAZIS IN SKOKIE* 28-29, 84-91 (1985) (describing the intent of the organizers and assessing harms based on interviews with leaders of Skokie's survivor community).

46. L. BOLLINGER, *supra* note 2, at 199.

These potential criticisms are minor compared to the more potent observation that in this, the quintessential example of the need for tolerance, Professor Bollinger's analysis of the tolerance concern is almost irrelevant. Even without reference to the Tolerance Model, a judge would conclude that the Nazis' speech was presumptively protected.<sup>47</sup> The remainder of Professor Bollinger's analysis explores the harms involved in the case. This assessment of harm, however, naturally says nothing about tolerance. In addition, we would note that Professor Bollinger does not insist that the Tolerance Model means that we should adopt a new framework for analysis in which we only look at the tolerance-teaching benefits of permitting extremist speech. Professor Bollinger essentially employs the same balancing approach adopted by the Supreme Court in recent opinions.<sup>48</sup>

### CONCLUSION

Irrespective of the practical value of Professor Bollinger's work, his book deserves reading. Writing on the first amendment can often be tortured or dense. Professor Bollinger makes his work more accessible by providing frequent summaries and extensive footnotes, both welcome aids to the reader. Professor Bollinger also has an engaging style, with an especially nice ear for metaphor.<sup>49</sup> Finally, his frequent reference to the Skokie case provides a continuity seldom found in free speech materials.

It may be somewhat unfair to emphasize the practical problems with Professor Bollinger's work. Naturally, a novel perspective such as his requires extensive refinement. Perhaps it is his intent to do that refinement in later works.<sup>50</sup> Such a development should not be surprising. No doubt he rightfully aspires to add a unique perspective to the literature on free speech, an area that "has attracted what seems like a disproportionate

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47. See *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978) (concluding that Nazi demonstration is within basic right of free speech).

48. See, e.g., *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 879-82 (1982) (Blackmun, J., concurring) (balancing limits on free expression against state authority to regulate education); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (weighing corporation's interest in expressing views on public issues against various asserted harms).

49. See L. BOLLINGER, *supra* note 2, at 4 ("The First Amendment landscape has both grown dramatically in size and been subdivided into many plots.").

50. *Id.* at 11 (referring to the inquiry as "preliminary").

share of the most beautiful writing to be found anywhere in the law."<sup>51</sup>

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51. *Id.* at 213.