

# Book Review

## On Learning To Love Vituperation

*The Tolerant Society.* By Lee C. Bollinger.\* *New York, Oxford University Press, 1986.* Pp. viii, 295. \$19.95

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Why should the village of Skokie, Illinois have been forced by the courts to put up with a march by American Nazis<sup>1</sup> which seemed to have no apparent purpose other than to proclaim their anti-Semitism to a captive audience of Jews, to imply some justification for the Holocaust, to evoke bitter memories of centuries of European and some American oppression, and to enrage and insult inhabitants of the village because of their religion? Is it because some truth emerges from all debate, even from debate as inarticulate and primitive as one in this form? Is it because proponents of hatred and violence have the same protected personal autonomy to express their vituperation as preachers of love and compassion have to extol the universality of mankind? Or is it because governmental institutions, including courts, cannot be trusted to draw lines between what is worthless and what is worthwhile, so that every form and content of expression (assuming that there is, indeed, an expression of ideas or positions in an event such as the Skokie march) must be protected at whatever cost?

These are familiar questions in classrooms and courts concerned with speech clause<sup>2</sup> problems. Such questions, as well as the answers they suggest, evoke the great names of the First Amendment theorists and their intellectual forebears—Milton, Mill, Holmes, Brandeis, Chafee,

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1. *Collin 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).

2. U.S. CONST. amend. I, cl. 2.

Meiklejohn, Emerson, Kalven<sup>3</sup>—as well as many of their less central commentators. Professor Bollinger has produced a book intended to thrust himself into this group. He immediately states his “dissatisfaction with the current explanations and theories for the modern concept of freedom of speech.”<sup>4</sup> He carefully proceeds to expound and examine the sources of his dissatisfaction, to tease out at some length the flaws, or at least the incompleteness, of each approach. Finally, he wants to discover the components of a general theory of speech, based on a general tolerance theory, that is not only less vulnerable to analytic criticism, but also universal in its application.

To give this ambitious book the serious consideration it clearly deserves involves three tasks. One is to evaluate the quality of Bollinger’s dissection of the theories of Milton, Mill, and their successors. The second is to ask whether, and how, Bollinger’s general theory of tolerance strengthens those theories, unifies them, and extends their compass. The third is to attempt to fit his accomplishment into what is going on in American legal practice, and in academic discussion, both of which are little concerned with the classic paradox of protecting extremist speech, the centerpiece of the Bollinger structure.

## I.

The easiest part of Bollinger’s job is the first task, for no general theory of the special protection of speech required by the First Amendment will explain all the major decisions of the Supreme Court in the field, much less the infinite hypothetical variations they raise.

The *Skokie* case, as Bollinger keeps insisting, could only in the most rarefied academic thinking be understood as contributing to the “free trade” and “competition of the market” in ideas necessary to democratic self-government.<sup>5</sup> No idea was expressed in any cognitive sense. Behind the Skokie march was the evocation, in the most provocative manner, of a period of history totally repugnant to any concept of democratic self-

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3. See *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., joined by Brandeis, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941) [hereinafter Z. CHAFEE, *FREE SPEECH*]; Z. CHAFEE, *FREEDOM OF SPEECH* (1920); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); A. MEIKLEJOHN, *Free Speech and Its Relation to Self-Government*, in *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); J.S. MILL, *ON LIBERTY* (1873); J. MILTON, *AREOPAGITICA* (J. Hales ed. 1917) (1644); Chafee, *Freedom of Speech in War Time*, 32 *HARV. L. REV.* 932 (1919); Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 *SUP. CT. REV.* 191; Meiklejohn, *The First Amendment Is an Absolute*, 1961 *SUP. CT. REV.* 245.

4. L. BOLLINGER, *THE TOLERANT SOCIETY* 3 (1986) [hereinafter by page number only]. Bollinger clearly intends to encompass the theories of all those mentioned in *supra* note 3.

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

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government, or human freedom. The case does not fit under the rubric of “uninhibited, robust, and wide-open”<sup>6</sup> debate on public issues that has become for many “the central meaning of the First Amendment.”<sup>7</sup> *Cohen v. California*,<sup>8</sup> surely in some sense a glorious moment in free speech history, may be the proper model: protection for Cohen’s (and the neo-Nazis’) personal autonomy to say whatever he wants, in whatever form, no matter how virulent, wrong-headed, or offensive the speech may be to the speaker’s audience. The words on Cohen’s jacket concerning the draft may or may not have expressed his own views on the subject, but certainly they did not contribute to the debate in any meaningful way. Moreover, the views could have been, and were in fact, communicated in other ways.

Yet, this notion of protecting personal liberty does not explain, as Bollinger also keeps insisting, why words, and acts with the communicative effect of words, should be specially protected (beyond the fact that speech happens to be explicitly mentioned in the Constitution), compared to other forms of personal behavior, also expressions of personal autonomy, which may be disgusting, revolting, or immoral to many members of the general public exposed to them, or, as in *Bowers v. Hardwick*,<sup>9</sup> not even exposed to them. Nor does such protection of personal liberty explain such cases as *First National Bank of Boston v. Bellotti*.<sup>10</sup> The idea that the Court was giving special protection to acts of personal autonomy of a bank is plainly preposterous.<sup>11</sup>

These problems, framed in somewhat different and more sophisticated terms, constitute the core of the first three chapters of Bollinger’s book. The discussion is coherent, intelligent, and written with clarity, precision, and well-developed insights. It is mostly a critical, historical discussion of First Amendment theory, but framed against a background that lawyers, judges, and legal academics easily overlook in arguing about legal and judicial theory. In the field of free speech, legal and judicial theory is almost always inconsistent with societal reactions to the issues. The theories raise, in Bollinger’s words, “the problem of the disjunction between our attitudes about the limits of nonlegal coercion toward speech behavior and our attitudes about the limits of legal coercion toward the same behavior.”<sup>12</sup>

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6. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

7. Kalven, *supra* note 3, at 191.

8. 403 U.S. 15 (1971).

9. 106 S. Ct. 2841 (1986) (upholding Georgia sodomy statute barring private homosexual conduct in home).

10. 435 U.S. 765 (1978) (statute barring corporate expenditures for purpose of influencing votes on referendum violates First Amendment).

11. *See id.* at 777.

12. P. 39. In this phrase, and in others throughout the book, Bollinger is annoyingly loose in the use of pronouns of the first person plural: “we,” “our,” and “us.” One is never clear whether he

The introductory chapter appropriately raises the questions of why speech behavior should be specially protected by law, and if by law, why by the courts rather than by the legislature, which expresses the will of the people. As noted, the formal answer is the existence of the speech clause, but this is not sufficient, for no one concedes that it is a limitless license to do harm. Bollinger makes effective use of the little-known contemporaneous attack by John Wigmore,<sup>13</sup> Dean at Northwestern Law School and scholarly eminence in the field of evidence, on Holmes' dissent in *Abrams*,<sup>14</sup> and in particular, on Holmes' concept of the "free trade in ideas,"<sup>15</sup> as well as his formulation of the clear and present danger test. Holmes' mistake, according to Wigmore (although I do not see how it can be squared with Holmes' votes and opinions in *Goldman*,<sup>16</sup> *Schenck*,<sup>17</sup> *Frohwerk*,<sup>18</sup> and *Debs*<sup>19</sup>), was to ignore the true harm from speech behavior, and to overestimate the damage done to the concept of freedom of speech by governmental control. If accepted, the Holmes approach would have caused fundamental damage to the implementation of important governmental policies, especially in time of war. For example, Holmes was insensitive to "[t]he national agonies"<sup>20</sup> caused by the action of people like Abrams to the national effort to produce munitions.<sup>21</sup> For all his efforts to protect free speech from governmental control, Holmes was, in Wigmore's words, a "Don Quixote, fighting giants and ogres who have long since been laid in the dust."<sup>22</sup> To Wigmore, in other words, the struggle for freedom had already been won a century before, and the punishment of some "puny anonymities"<sup>23</sup> preaching dangerous programs of action could not possibly undo the outcome.

Bollinger's point is that this almost-seventy-year-old debate is not absurd, however uncongenial it might appear to much current academic and judicial scholarship. Bollinger is right, and he does a service to speech clause scholarship to revive the old debate so forcefully. The essence of the

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means government expressing itself through law, legal theorists, people who think like himself, or some unspecified poll-like sample of Americans.

13. Pp. 15, 18-23 (citing Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thugery in War-Time and Peace-Time*, 14 ILL. L. REV. 539 (1920)).

14. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) (arguing for First Amendment protection for anti-war leaflets).

15. *Id.* at 630.

16. *Goldman v. United States*, 245 U.S. 474 (1918) (unanimous decision upholding Selective Draft Law and criminal prosecution for conspiracy against registration).

17. *Schenck v. United States*, 249 U.S. 47 (1919) (opinion of Holmes, J.) (unanimous Court upholding prosecution for anti-war conspiracy under Espionage Act).

18. *Frohwerk v. United States*, 249 U.S. 204 (1919) (same).

19. *Debs v. United States*, 249 U.S. 211 (1919) (same).

20. P. 19 (quoting Wigmore, *supra* note 13, at 549).

21. Pp. 19-20.

22. P. 21 (quoting Wigmore, *supra* note 13, at 558).

23. *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

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debate is simply a line-drawing claim, as Bollinger points out, and line-drawing claims are common to all judicial law-making. Line-drawing claims also are concerned with assessing underlying facts and policies because an ostensible purpose may serve “as a convenient disguise for other purposes and motivations.”<sup>24</sup> For Bollinger, this analysis does not answer the *Skokie* case.<sup>25</sup> It is not enough to say that the courts put more weight on the harm done to freedom by suppression of the march and less weight on the damage caused by the expression of such views. All of the judges who considered the case expressed their extreme distaste for the outcome they reached, and insisted that they reached it only because of the law, the Constitution. Bollinger, at heart a First Amendment buff, must pursue other explanations.

In Chapter Two, he turns to the “classical model” for an answer. The classical model, according to Bollinger, is that freedom of speech—full political debate—is critical for democratic self-government. Only then will people be able to see all of their choices clearly and make decisions wisely. It is a model associated with all the First Amendment theorists. Bollinger uses the classical model primarily as an introduction to the writings of Chafee,<sup>26</sup> Meiklejohn,<sup>27</sup> and Mill.<sup>28</sup> The book gives due deference to the major premises of this model: that confrontation with falsehood may be valuable in fortifying truth,<sup>29</sup> and that there is an informational gain from having falsehood expressed.<sup>30</sup> These points are wholly separate from the skeptic’s position that no one knows what the truth is, or even that there is a truth. Bollinger, however, finds two persistent flaws in the model, one perhaps a verbal trick more than a real fallacy, and the other quite persuasive. The trick is a paradox: If the core of concern is the protection of democratic self-government, how can one justify preventing people from governing themselves through self-imposed limits on their own speech? The more valuable insight, often overlooked or at least insufficiently explained, is that intolerance of speech communicates as much as an act of tolerance. There is what Bollinger calls an act of self-definition in community acceptance of speech, such as in the case of the Skokie march, a kind of mandated tolerance of Nazi ideas and Nazi history, which is ines-

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24. P. 37.

25. P. 38.

26. Pp. 46-47 (citing Z. CHAFFEE, *FREE SPEECH*, *supra* note 3).

27. Pp. 46-48 (citing Meiklejohn, *supra* note 3). In Chapter Five, Bollinger makes clear that his opinion of Meiklejohn’s theory is quite low. Pp. 164-74.

28. Pp. 54-55 (citing J.S. MILL, *supra* note 3, at 21).

29. P. 54 (citing J.S. MILL, *supra* note 3, at 21).

30. P. 55 (citing Z. CHAFFEE, *FREE SPEECH*, *supra* note 3, at 33; A. MEIKLEJOHN, *supra* note 3, at 26).

capable from the decision to let the march proceed. These factors make the "classical model" unacceptable to Bollinger as a general theory.

Bollinger's analysis then turns, in Chapter Three, to the "fortress model." Bollinger's fortress model includes all of the variations of speech theory that have as their premise a view of government, excepting the judiciary, as having an inherent "atavistic longing" for repression.<sup>31</sup> Bollinger has two difficulties with the premise. The first, which is an unsubstantiated empirical judgment even with respect to the United States and sounds a bit like Wigmore's attack on Holmes, is that it is simply "out of proportion to its reality as an actual problem."<sup>32</sup> The second difficulty is analytical. Bollinger notes that the premise assumes government to be a kind of uncontrollable machine that works by itself—power begetting power—rather than as an instrument responsive to the people. This view is inconsistent with the notion of democratic self-government, and with Bollinger's own premise, drawn in part from the writings of Walter Bagehot.<sup>33</sup> Bollinger's premise is that the real problem is the intolerance of the people to certain ideas and speech, not that government is separated in policy and behavior from the governed. According to his view, the role of the judiciary also becomes problematic as long as such intolerance exists; in forcing acceptance of the Skokie march, for example, the judiciary is protecting the people from themselves, not from some remote center of oppression.

In this way, Bollinger prepares the reader for his revelation. He has attempted to show that the approaches of his predecessors do not work in the end. They look at speech theory from three perspectives: the protection of the speaker as an individual, the protection of speech as an instrument of self-government, and the protection of the people from governmental oppression. As I understand Bollinger, his contribution is to escape to another vantage point, from which he explains and justifies the special protection given extremist speech, such as that at Skokie, in terms of its contribution to the good society rather than its instrumental value for individuals or the political system. Neither speaker, hearer, nor government is the focus of Bollinger's attention, but rather, only the public at large.

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31. P. 77.

32. P. 79.

33. P. 81 (citing W. BAGEHOT, *The Metaphysical Basis of Toleration*, in 2 THE WORKS OF WALTER BAGEHOT 340 (1891) ("Most men have always much preferred persecution, and do so still . . .").

II.

“The quest for the tolerant mind”<sup>34</sup> and the protection of speech as part of a general theory of tolerance are the foundations of Bollinger’s thesis. Its very statement is so imprecise that my initial response was that I like tolerance as well as the next person, as Justice Black had said of the right to privacy discovered in *Griswold v. Connecticut*.<sup>35</sup> But how can the obvious connection between the protection of extremist speech and tolerance for diverse, even radical and extreme, views possibly explain anything that was missed by Milton, Mill, Holmes, Brandeis, and Chafee? I am still not sure that Bollinger actually fills in a gap, but the development of his thesis demonstrates intense thought and careful analysis, and must for that reason alone be considered a significant addition to the literature. At the least, Bollinger’s thesis starts from a different perspective than accepted speech theory, and contributes to, even if it does not create, justifications for strong judicial interference in governmental controls of unpopular expression. It adds, in short, “another function”<sup>36</sup> to be taken into account, in addition to those already identified.

One premise Bollinger states about people, rather than about government as in the fortress model, is the “assumed reality of an impulse to intolerance”<sup>37</sup> that is often excessive. This premise is put forth as a generality and is not confined to speech behavior. Speech, in the model, is specially protected as a means of developing in the public a more general capacity for tolerance, which is assumed to be a good. Why is speech specially protected, as opposed to other kinds of behavior that also trigger the impulse to intolerance? Because speech behavior can be said to create less individual and social injury.<sup>38</sup>

Here, as in other places, Bollinger develops his own thesis while ignoring points he had previously made when criticizing others’ theories. For example, Bollinger began the book by making the point that speech can and sometimes does cause severe harm. But why protect extremist speech, such as that of the Nazis in Skokie? The answers Bollinger provides<sup>39</sup> seem to the casual reader (including me) to resemble the answers given to this question by earlier speech theorists: Such protection teaches a particularly strong lesson about tolerance; it develops an ethic against control of speech; case-by-case differentiations are too hard to make; the motivation towards repression is a bad thing, and tolerating repression has a simi-

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34. P. 104. This is the title of Chapter Four.  
35. 381 U.S. 479, 510 (1965) (Black, J., dissenting).  
36. P. 105.  
37. P. 106.  
38. Pp. 120-24.  
39. Pp. 125-33.

larly harmful effect on societal self-definition as does tolerating the preaching of racial hatred; finally, the protection of extremist speech shows what “we”<sup>40</sup> aspire to as a society. The judicial branch is particularly suited—in fact indispensable—to this task for familiar reasons,<sup>41</sup> including its “posture of choicelessness,”<sup>42</sup> fervently stressed by the judges in the *Skokie* case.<sup>43</sup> However, Bollinger suggests that for other modern theorists the “focus [is] less on the worthiness of speech activity as a basis for protection and more on something potentially problematic in the public response to speech acts.”<sup>44</sup>

This, then, is in summary form the Bollinger general theory of freedom of expression, devised as a subset of a general theory of tolerance. The remainder of the book purports to justify the theory in the context of the earlier literature, to identify its implications in other First Amendment contexts, and to give the theory a fuller voice in current practice.

In Chapter Five Bollinger rewrites, so to speak, Holmes and Meiklejohn, and finds in both “a recapitulation of the general tolerance function of free speech.”<sup>45</sup> I find this interpretation unconvincing, in view of Holmes’ recognized “well-known skepticism,”<sup>46</sup> “intellectual stance of self-doubt,”<sup>47</sup> and many reservations about tolerance as well as intolerance, and Meiklejohn’s image of American society as some sort of gigantic town meeting.<sup>48</sup>

Chapter Six, in turn, attempts to trace the implications of the tolerance function for certain recognized forms of line drawing, and of exceptions to speech theory, which all speech theories must address. The chapter is entitled “Drawing Lines and the Virtues of Ambiguity,” and if there are positive, instead of only necessary, virtues to ambiguity, the chapter certainly demonstrates that they exist in Bollinger’s general theory of tolerance as well as elsewhere. There is a discussion of the fighting words cases,<sup>49</sup> but I cannot see what the Bollinger view says about them that is unique. There is also a discussion of the place of pornography and obscenity in First Amendment theory.<sup>50</sup> I can see the relevance of tolerance in that area, but in some ways tolerance seems peculiarly misplaced. One can imagine the rage that some like feminist scholar Catharine MacKin-

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40. See *supra* note 12.

41. Pp. 133–37.

42. P. 137.

43. See *supra* note 1.

44. P. 145.

45. P. 172.

46. P. 160.

47. P. 162.

48. Pp. 156, 163.

49. Pp. 179–83.

50. Pp. 184–85.



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non<sup>51</sup> must feel at the notion that pornography should be protected, so that it can reflect society's tolerance of the stereotypes about and subordination of women that pornography perpetuates. There is a discussion of the constitutionality of the law of defamation,<sup>52</sup> but again Bollinger fails to inform the reader how his theory of tolerance would apply. There is no recognition, much less resolution, of the grave difficulties the application of the *Sullivan* rule<sup>53</sup> and its progeny have created in actual litigation, as is so graphically and intelligently demonstrated in Renata Adler's book on the Westmoreland and Sharon trials.<sup>54</sup> Finally, there is a brief essay on time, place, and manner regulations, based chiefly on an analysis of John Ely's work,<sup>55</sup> which also appears to gain little from the major theses of the Bollinger book.

Aside from a wrap-up in Chapter Eight, which I take to be an outline for a future book, *The Tolerant Society* ends with a discourse on "the right voice" (Chapter Seven), the kind of rhetoric needed, presumably by the judiciary, to expound the theory of tolerance. Bollinger is wary of the "rhetorical beauty"<sup>56</sup> and "'almost uncanny power'"<sup>57</sup> of free speech theory, particularly as it exists in the extraordinarily powerful dissents of Brandeis and Holmes. Without quite saying so, Bollinger seems to sympathize with Bork's characterization of Brandeis' and Holmes' command of language, which has "the power, almost half a century later, to swamp analysis, to persuade, almost to command assent."<sup>58</sup> Bollinger's own prose does not have that quality; it is analytic, clear, somewhat repetitious, and hesitant.

Throughout the book, and in this last chapter particularly, Bollinger appears to think of courts and the law as instruments for education in the grand sense, rather than as instruments of government. Thus, he deferentially complains about the deceptive appearance that judges often adopt of

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51. See generally C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 127-213 (1987).

52. Pp. 185-86.

53. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (showing of actual malice in making defamatory falsehood required for public official to receive damages).

54. R. ADLER, *RECKLESS DISREGARD* (1986). Adler's book is controversial because of her powerfully critical treatment of the behavior of the establishment press (CBS and *Time*) and bar (especially the noted law firm, Cravath, Swaine & Moore). However, it clearly and without dispute demonstrates that the *Sullivan* rule simply does not work (maybe no rule could) to divert the intractable impulse towards enormously expensive, protracted, and predictably futile litigation, when such large-scale institutional interests are at stake.

55. Pp. 204-12; see Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

56. P. 213.

57. *Id.* (quoting H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 13 (1965)).

58. *Id.* (quoting Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 24 (1971)).

total personal disengagement,<sup>59</sup> about their efforts to “appear choiceless,”<sup>60</sup> and about their disassociation of themselves from the speech acts in the matter before them.<sup>61</sup> All of this should be avoided, it seems to him, because in this context the courtroom is a “forum for education” in the value of tolerance.<sup>62</sup>

### III.

I have two major, though qualified, reservations about the Bollinger thesis. One is that he assumes, rather than demonstrates, that tolerance is a pre-eminent, indeed overriding, value in American society. I have no quarrel with that premise; it is an assumption I share, and in which I deeply believe. Yet, it is such a major premise, and one so intrinsic to the rest of the book, that even if it cannot be proved without constructing an entire theory of a just society, it at least requires extensive justification. The other reservation, of course, is that I am still unconvinced that the theory leads anywhere new (although I also am not convinced of the opposite).

There are other problems, too, having to do not with the execution or thesis of the book, but with its very subject matter. The book is about protecting extremist speech, and the prototypical case is *Skokie*,<sup>63</sup> involving the Skokie march. I agree that this is an appropriate setting for expounding a new general speech theory to be measured against other speech theories, but it is a timely and directly relevant text only if two things are true. One is that protection of extremist speech is in fact central to First Amendment history, and therefore, needs to be explained. The other is that the constitutional position of extremist speech is a core problem in current First Amendment theory and practice. I do not believe either proposition is accurate.

Certainly, it cannot be said that the history of First Amendment doctrine is one of protecting extremist speech. The great dissenting opinions of Holmes and Brandeis are just that—dissenting opinions—and, except perhaps in *Whitney*,<sup>64</sup> even they did not advocate the protection of extrem-

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59. P. 225.

60. P. 226.

61. P. 232.

62. P. 235.

63. *Collin 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).

64. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring) (setting up relatively stringent standard for application of clear and present danger test). Although technically a concurrence, the Brandeis opinion was prepared for a dissent in another case, which was mooted by the death of the petitioner, a Communist named Ruthenberg. Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 384-86 (1981).

ist speech except at the fringe, for “puny anonymities”<sup>65</sup> who could not, in fact, be heard. Even the clear and present danger test was never accepted by the Court in the form in which it was proposed. The *Skokie*<sup>66</sup> case fits into that tradition, as does the much-heralded, but never applied, *Brandenburg v. Ohio*.<sup>67</sup> The story of important extremist speech is instead that of the successful suppression of the Communist Party,<sup>68</sup> with judicial protection afforded only to inactive party members who were not shown to have spoken at all.

Nor is suppression of extremist speech of current importance to the work of the courts or academics in this area. The core problems now, as Professor Fiss has been insisting, stem from the Court’s inexplicable equation of money with speech,<sup>69</sup> and include the inability of both the Court and First Amendment theorists to recognize that the marketplace of ideas, and particularly the political process, is largely closed.<sup>70</sup> In the print media and television, voices other than those of government, of the great media corporations, and of those with money to advertise, are seldom heard. A subsidiary doctrinal dilemma is the extraordinarily thoughtless inclusion of commercial speech in the general ambit of First Amendment protection, with the *Lochner*-like<sup>71</sup> emanations that this step implies. If Bollinger’s general theory of tolerance, with its powerful implications for free speech doctrine, is to have continued vitality, someone—probably Bollinger himself—is going to have to articulate what it means in these modern contexts.

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65. *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

66. *Collin 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).

67. 395 U.S. 444 (1969) (purporting to overrule *Whitney v. California*, Court held mere advocacy of use of force without imminent danger was protected).

68. See, e.g., *People v. Ruthenberg*, 229 Mich. 315, 201 N.W. 358 (1924), writ of error dismissed, 273 U.S. 782 (1927).

69. See Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410–15 (1986); see also Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787–88 (1987) (market alone does not encourage full debate needed for democracy).

70. Bollinger is perfectly aware of this problem. See Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 2 (1976).

71. See *Lochner v. New York*, 198 U.S. 45 (1905) (striking state limitation on employment hours as violative of freedom to contract under Fourteenth Amendment).