

REVIEWS

Why Be Tolerant?

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The Tolerant Society: Freedom of Speech and Extremist Speech in America. Lee C. Bollinger.¹ Oxford University Press, New York, 1986. Pp. viii, 295. \$19.95.

Many of our rights are important because they give rise to rituals. That is, the right is valuable not only because its holders can insist upon something that is their due, but because the exercise of the right has useful social or psychological consequences. *Miranda* warnings are an example: part of their value lies in the fact that by reciting them, an interrogating officer performs a rite of self-abnegation, a ritual acknowledgment that he or she does not have total power over the suspect.² The criminal jury trial may be another example of a different kind: part of its purpose may be to serve as a ceremony that makes us more comfortable about inflicting punishment.³

Lee Bollinger argues that the institution of free speech, established by the First Amendment, functions principally as a kind of didactic ritual: by requiring us to be tolerant of the most abhorrent speech, the First Amendment teaches us to be tolerant throughout political life. Bollinger's primary focus is on what he calls "extremist speech." His principal example of extremist speech is the effort a few years ago by a Nazi group to march in Skokie, Illinois, a

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² See, e.g., Stephen J. Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 880 (1981), reviewing Yale Kamisar, *Police Interrogation and Confessions* (1980).

³ See, e.g., Mortimer R. Kadish and Sanford H. Kadish, *Discretion to Disobey* 53-66 (1973); Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1198-99 (1979).

Chicago suburb with a large Jewish population that includes several thousand survivors of concentration camps. Bollinger rejects, not as worthless but rather as insufficient and obsolete, what he sees as the two principal received justifications for providing legal protection to such extremist speech: the view that all speech, including extremist speech, must be protected so that democratic politics can function successfully; and the theory that if extremist speech is not tolerated, the government will be able to suppress speech that is unquestionably valuable and worthy of protection. He argues instead that the purpose of free speech is to teach self-control by forcing people to tolerate an activity they would like to suppress. In particular, this enforced toleration teaches us to understand and control the "impulse toward intolerance" that is present in everyone—an impulse that has its legitimate claims, Bollinger says, but that, if unchecked, can have devastating consequences for society.

Perhaps this is a predictable compliment, but it is true nonetheless: this book admirably reflects the kind of "tolerant mind" that its author esteems. Bollinger's tone is civilized, sensitive, and restrained. His arguments have none of the "my theory, right or wrong" quality that sometimes characterizes theoretical legal writing. He persuades by being reasonable and plausible; he is careful to give the arguments he rejects the credit they deserve. This is not a euphemistic way of saying that this is an uninteresting or unoriginal book. On the contrary, it is filled with interesting and controversial observations about human behavior, social practices, and the law and literature of the First Amendment. As I will explain, I disagree with several of the points Bollinger makes. But I cannot recall a single occasion on which I thought his arguments were superficial or unfair.

I.

Bollinger begins by challenging what he calls the "classical" defense of free speech. This is the view that free speech is necessary to enlightened democratic self-government because the suppression of information and ideas thwarts the search for truth and impairs a political system's ability to reach the right decisions (pp. 45-50).⁴ In acknowledging, ungrudgingly, that this view has considerable force, Bollinger characteristically relies on an insight into

⁴ All parenthetical page references are to Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986).

personal psychology: he points out that we all know from our personal lives that dialogue with others helps us reach better decisions. And he acknowledges that the "classical" defense of free speech is of great importance when a community is trying to establish "the minimally essential conditions of a 'democratic' society" (p. 51).

But while some level of free exchange of information and ideas is necessary to a self-governing society, our society has far surpassed that level, Bollinger says, and we could suppress a good deal of extremist speech without rendering ourselves literally incapable of democratic self-government (p. 51). Most Western European nations, for example, have laws forbidding speech that incites racial hatred, including speech that is almost certainly constitutionally protected here (pp. 39 n.66, 254-56).

Bollinger also attacks the classical view, as others have, on the ground that it prevents us from applying to speech the kind of cost-benefit calculations that we unhesitatingly apply in dealing with actions (see pp. 13-14, 22, 35-36, 54-58).⁵ Perhaps speech is, in general, less harmful than action. But is it plausible to say that speech is *so much* less harmful that the government has free rein to regulate action but can almost never regulate speech? Perhaps, as John Stuart Mill argued, the search for truth is advanced by confrontation even with egregiously false ideas.⁶ But do we really believe that the search for truth is advanced by allowing the Nazis to march? Or, more precisely, is the likelihood that the Nazis will contribute to our search for truth really great enough to outweigh the harms that their speech will inflict—in particular, the very real emotional suffering of the concentration camp victims (pp. 54-56)?⁷ Bollinger meets the usual objection—if Skokie can lawfully suppress the Nazis, then segregationist communities could have suppressed civil rights demonstrators—by denying that it is impossible to draw the necessary lines. After all, we have no difficulty drawing a line that prohibits the *actions* that the Nazis advocated while permitting the actions supported by the civil rights movement (pp. 38-39). Why should we have any more difficulty drawing a line that distinguishes the speech of those two groups?

⁵ See, e.g., Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L. J. 589.

⁶ John Stuart Mill, *On Liberty* ch. 2, ¶¶ 1, 19-32, in *The Philosophy of John Stuart Mill* 205, 223-37 (Marshall Cohen, ed. 1961) ("Mill's Philosophy").

⁷ See Harry H. Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105, 1106-07 (1979).

In addition to his effective presentation of these familiar challenges to the "classical" defense of free speech, Bollinger offers two somewhat unconventional arguments. The first is to compare political debate to the debate we allow before a jury (p. 56). In a jury trial, we believe that we are more likely to arrive at the truth by refusing to allow anything that remotely resembles the "uninhibited, robust and wide-open"⁸ expression that First Amendment doctrine extols. We take the opposite approach: we carefully screen out emotional or inflammatory speech, or speech that is likely to be accorded "too much weight."⁹ Bollinger argues that if the purpose of the First Amendment were really to promote the search for truth, we would apply to public debate the same rules that supposedly enhance the search for truth in a jury trial. There are answers to this argument: for example, the factual truth sought in a jury trial is different from the kind of "truth" sought through public debate; and the way in which a jury decides—by giving brief but highly focused consideration to a relatively narrow question, without any opportunity for reconsideration at a later date—is not at all characteristic of public debate. But Bollinger's analogy to a jury trial is still fairly persuasive in suggesting that the classical view of the First Amendment is not the entire story.

Bollinger argues in addition that the defense of the classical view systematically ignores the virtues of *intolerance* (pp. 62-68, 71). People confronted with an idea they abhor, Bollinger says, have a deep need to express their abhorrence. Intolerance is itself a "communicative act[]," a "form of expression intended to avoid creating the wrong impression—either that we don't really believe what we claim to believe or that we don't have the courage of our convictions or the power to defend them" (p. 63, emphasis omitted). Both individuals and communities define themselves by refusing to tolerate certain ideas, and if they are forced to tolerate an abhorrent view they may "feel implicated in, and their identity tarnished by," that view (p. 71). In reply to the contention that one should express intolerance of a view by speaking against it, not by suppressing it, Bollinger argues that legal prohibition is a particularly effective way for a community to express its opposition to an idea (pp. 71-72).

The other conventional defense of free speech that Bollinger

⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁹ See, e.g., Fed. Rule Evid. 403 (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury).

challenges is what he calls the "fortress model" (pp. 76-103). According to one version of this view, there is a more or less constant danger that "the government" will suppress speech with which it disagrees. In view of the costs of litigation, including the chance that courts will err and the dangers of self-censorship, we risk losing much valuable speech if we do not have a clear doctrinal barrier—a fortress—that precludes the suppression of almost any speech, including extremist speech (pp. 77-79).

Bollinger asserts—perhaps too quickly—that this conception is artificial and unrealistic in assuming that the threat comes from "the government" (p. 79). With relatively rare exceptions, he says, efforts to suppress speech are the result of popular sentiment, not of the independent decisions of government officials; the officials are just acting as intermediaries for the popular will (pp. 79-80).

Bollinger then dissects the view that the constitutional protection for free speech is needed as a fortress against popular efforts to suppress speech (pp. 92-95). He notes that the conception of human nature underlying this theory almost directly contradicts the classical theory (p. 92). The classical theory views people as rational creatures who will arrive at the truth if only given a chance to think and discuss. The fortress theory, by contrast, takes a pessimistic view of human nature; it proceeds from the assumption that people are likely to be intolerant of any behavior, including speech, that deviates from their own, and that people are prone to give in to the intolerant impulse to suppress such speech or behavior.

Bollinger raises several probing questions about the system that the fortress theory prescribes. Isn't that theory inconsistent with the premises of democratic government? If people are so irrationally intolerant, why do we trust them to make *any* decisions; why do we trust them to regulate behavior other than speech? After all, the impulse to excessive intolerance can lead to harsh and oppressive political decisions about all behavior, not just about speech (p. 92). In any event, if people are that prone to intolerance, why does it matter whether dissidents can speak? The intolerant masses will just ignore them; the freedom to speak will be an empty right (pp. 94-95). And if people generally are prone to be intolerant, isn't that a powerful argument *against* allowing speech that, like the Nazis', advocates extreme intolerance (p. 93)? Isn't there far too great a danger that such speech will be persuasive? Doesn't it follow from the psychological premises of the fortress theory that we should adopt the jury trial model—that is, we should carefully restrict the extent to which we permit speech that

panders to the tendency of the people to be intolerant?

Bollinger develops his own view in counterpoint to the fortress theory. The purpose of the institution of free speech, he says, is not to build a redoubt against intolerance and the intolerant but rather to teach all citizens how to control the impulse toward intolerance in themselves.

In contrast to the fortress theory, which addresses intolerance as a danger only in the area of speech, Bollinger's approach begins from the premise that excessive intolerance can be a threat throughout political life. That is why it is so important that we be educated to control it (p. 116). Speech is a good area in which to practice self-control because the stakes are lower than in the area of conduct: less harm will be done if we tolerate bad speech than if we tolerate bad actions (p. 124). But we exercise "extraordinary self-restraint" (p. 120) toward speech in order to teach ourselves to be more tolerant throughout "the whole tapestry of social intercourse" (p. 119). In particular, if the impulse toward intolerance is not controlled, it can undermine the give-and-take necessary in a democracy (pp. 117-18).

The institution of free speech serves this educative function in several ways. First, Bollinger says, the "public and perhaps rather rigid and indiscriminate rejection of the [intolerant] type of thinking deemed improper . . . symboliz[es] the 'proper' way of thinking, which, it is hoped, will then be employed throughout all areas of behavior" (p. 122). When people tolerate harmful speech—when the residents of Skokie tolerate the emotionally bruising speech of the Nazis, for example—their "self-restraint in the face of the injury sustained" has a broader social meaning; it "demonstrates powerfully, more powerfully than a general injunction to be appropriately tolerant in all circumstances ever would, to [them]selves and others, a commitment to exercise moderation throughout social intercourse" (p. 123).

Second, enforced tolerance makes us confront the motivations underlying our impulse to be intolerant—motivations that, according to Bollinger, are often a mix of the good (for example, a desire to dissociate oneself from an abhorrent idea) and the bad (for example, a desire to suppress differences among people or to make scapegoats of the extremists). When we are forced to confront the speech itself and therefore our impulse to suppress it, we may be led to try to purge ourselves of the illegitimate aspects of our motivations (pp. 126-31). Third, since extremist speech often reflects the attitudes of the intolerant mind—contempt for the views of others, "incapacity to cope with uncertainty in human affairs," and

a "quest for simple and clear answers" (p. 131)—exposure to such speech enables us to identify those attitudes and resolve not to entertain them ourselves (p. 132). Finally, the institution of free speech requires us to practice self-control; from tolerating extremist speech, Bollinger says, "we derive something of the same personal meaning and satisfaction of the religious fast, a self-initiated and extraordinary exposure to temptation that reaffirms the possibility of self-control over generally troublesome impulses" (p. 143).

One might ask why Bollinger's theory requires us to tolerate offensive *expression* and not other offensive things, like loud noises or foul odors. Bollinger does not address this question explicitly, but his answer seems to be implicit in his discussion of the difference between tolerance and passivity (or, as he calls it, "obedience"). Tolerance, he says, is an active capacity. It is not just a matter of accepting something that one dislikes; it involves engaging that which one dislikes, analyzing what is repellent about it, and considering whether one should submit to it or not. Bollinger explains that "[t]he mind sought through free speech is distinguishable from the obedient mind in this one critical respect: . . . the tolerant mind sought through free speech is free to consider openly, to entertain seriously, the possibility of disobedience" (p. 247). Ideas, unlike noises, can force one to engage and question and to consider the possibility that one's own ideas might be wrong. For that reason, Bollinger seems to say, exposure to ideas with which one disagrees teaches the active capacity of tolerance instead of just enforcing passivity or obedience.

Bollinger spends one chapter developing some of the striking implications that his theory has for First Amendment doctrine (pp. 175-212). For example, he asserts that regulation of the content of speech should no longer be viewed as a greater threat than regulation of the time and place of speech (pp. 200-02). The purpose of free speech is to ensure that citizens confront views with which they disagree; time and place restrictions may enable many persons to avoid all such confrontations, thereby defeating the purpose of the institution. Restrictions on the content of speech might not have that effect. "A frequent and full confrontation with some offending speech may be more beneficial than is more limited contact with all speech" (p. 202).

Bollinger's theory also leads him to take several positions directly contrary to those taken by most defenders of the First Amendment. Bollinger urges that in times of strong public sentiment, such as wartime, it is less, not more necessary to protect dissident speech. To support this conclusion, he invokes his view that

a community has a legitimate interest in maintaining its "identity" by being intolerant of certain speech (p. 191), and he again relies on an insight into personal psychology:

We do not expect parents to be "objective" in the way they think about their children. . . . The way we think about people for whom we feel love or affection is to some extent inconsistent with a frame of mind in which we are continually prepared to reexamine that thinking with cool detachment. Love, like religious faith, requires something of a withholding of critical judgment.

This seems equally true in certain periods of a nation's life. There are times when uncritical belief is vital, when little self-doubt can be tolerated, when wholehearted commitment is needed (pp. 188-89).

Bollinger also argues that if circumstances are extreme, and people cannot be induced to be tolerant, there is no point in trying to force them. That will just overtax their capacity for tolerance and defeat the effort to teach them its value (p. 182). This is the reason, Bollinger explains, for denying First Amendment protection to fighting words (p. 183); it is equally true of certain political speech during times of strong popular sentiment. "Certain extraordinary times and conditions exist in any society in which it is quite simply too much to expect of people that they be self-restrained toward speech behavior, and under which it would be counterproductive to the aspirational aims of free speech to insist on toleration" (p. 182).

Bollinger also flatly disagrees with the conventional view that First Amendment doctrine should be clear and unambiguous so as to discourage litigation. A "conscientiously ambiguous" doctrine (p. 192)—such as the "clear and present danger" formula, with the term "danger" given a "wide and sensitive compass" (p. 193)—is better than a clear rule. According to Bollinger, the educative function of free speech does not require a clear rule, and a court should be free to consider in the balance all of the social harms that speech might cause (pp. 192-93). Litigation is good, not bad, because it gives the forces of intolerance a chance to have their say. This helps maintain the community's "identity" while also revealing the dark side of intolerance. In addition, if litigation is widely publicized, it can engage all of society in the educative toleration ritual (p. 195). As Bollinger recognizes, the Skokie controversy itself is a good example of how highly publicized litigation can serve such a function.

II.

There are many very valuable things in this book. Bollinger's theory is original and plausible, and developing an original and plausible theory in the area of free speech—which has probably attracted more attention from more talented writers than any other legal subject—is a truly impressive achievement. It is also notable that his theory has strong and controversial implications for First Amendment doctrine. It is not just another way of rationalizing the conventional wisdom.

In addition, Bollinger's theory, in my view, captures a distinctive feature of the First Amendment better than any other theory. No other theory of free speech explains as effectively why we *celebrate* the fact that we allow all manner of revolting and untenable views to be expressed. For example, as Bollinger notes, the judges who upheld the Nazis' right to march in Skokie—in a reaction that was quite typical of defenders of the Nazis' rights—excoriated the Nazis for their views but proudly explained that one of the things that distinguishes our society from societies like the Third Reich is that we allow the expression of views we revile (p. 36).¹⁰

The conventional theories of the First Amendment essentially treat the toleration of speech like the Nazis' as an unfortunate necessity; we know the Nazis' views are wrong, but we have to tolerate them because the alternative—opening the door to the suppression of valuable speech—is worse. That approach does not explain why we are so proud of tolerating such speech; one does not ordinarily celebrate having to do the least of available evils. According to Bollinger, however, tolerating offensive speech is not a necessary evil but an affirmative good, because it has valuable educative effects. The celebration is precisely the point. The purpose of allowing groups like the Nazis to speak is to celebrate, and thereby reaffirm, the value of tolerance and our commitment to it.

Finally, Bollinger's conception of the First Amendment is an important advance because, unlike the theories he criticizes, it is contextual and dynamic, not static and abstract. Social institutions affect the views and habits of those who live under them, and it is a mistake to evaluate an institution without taking those effects into account. Many of the theories Bollinger criticizes treat the institution of freedom of speech as a kind of machine that, if allowed to function, will crank out "good" political outcomes; the "marketplace of ideas" metaphor makes this approach almost explicit. This

¹⁰ See *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978).

approach is congenial to lawyers for many reasons—because of the influence of relatively crude economic models in legal analyses, such as Holmes's marketplace metaphor; because for the run-of-the-mill legal doctrine, the immediate practical effects are more important than the uncertain long-term educative effects; and because concern with long-term educative effects, as opposed to more specific practical consequences, smacks of "social engineering."

As Bollinger fully recognizes, these are not good reasons for ignoring or downplaying the effects of free speech on people's habits and views. Free speech is, as Bollinger persuasively argues, not a mere legal doctrine but a powerful social ethos (p. 7). If freedom of speech affects people's character, it is far better to understand those effects and shape the institution in light of them instead of ignoring the effects, ostrich-like, on the ground that we do not want to engage in social engineering. Bollinger's theory therefore provides a much-needed shift of focus from the outcomes the free speech "market" produces to the long-term effects it has on the people who live under it.

In this respect, incidentally, I believe that Bollinger follows Mill. It is unfortunate that Bollinger treats Mill principally as an exemplar of the "classical" view (e.g., pp. 54-55); he could have portrayed himself as Mill's heir.¹¹ Mill explicitly reacted against a utilitarian approach that was concerned, as he saw it, only with the immediate consequences of social decisions and institutions. He emphasized that the more important effects of social institutions—and particularly of the institution of tolerance—are their educative effects on human character.¹² Much of his famous justification of liberty, I believe, rests on the view that a climate of liberty will have beneficial long-term educative effects on the human character.¹³

There are several other good things in this book. Bollinger gives an acute critique of the distinction between regulating the communicative aspect of behavior and regulating its noncommunicative aspect (pp. 206-09).¹⁴ Specifically, he points out that actions

¹¹ Bollinger does hint at this view of Mill at p. 96.

¹² See Mill, Bentham ¶¶ 39-50, 62, in *Mill's Philosophy* at 30-37, 48 (cited in note 6).

¹³ See Mill, *On Liberty* ch. 2, ¶ 27, in *Mill's Philosophy* at 230-32; *id.* ch. 3, ¶¶ 6-16 at 254-66.

¹⁴ See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *Harv. L. Rev.* 1482 (1975). See also the analyses of this distinction in Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 *U. Chi. L. Rev.* (forthcoming 1987); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 *Wm. & Mary L. Rev.* 189, 207-17 (1983).

communicate a variety of messages, and that the danger that the government is reacting to the message is present in many cases that current doctrine considers "content neutral" and unproblematic.¹⁵ Bollinger also embarks on several splendid discussions of the literature on the First Amendment. For example, he recognizes that the theories of Holmes and Meiklejohn differ from each other and from his own views. Nevertheless, he is able to argue persuasively that Holmes and Meiklejohn actually focused, as Bollinger does, "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" (p. 145). Bollinger also points out the irony that the literature that celebrates free speech itself manifests an impulse toward intolerance; it often refuses to take seriously the arguments of those who assert that the institution of free speech rests on unexamined myths about, for example, the contribution that offensive speech makes to society (see pp. 23, 74-75, 214-15, 222).

III.

Before I discuss some deeper difficulties I have with Bollinger's approach, I should identify a few less important points on which I believe his argument is vulnerable.

A.

To my mind, Bollinger does not wholly refute the "classical" theory, primarily because he understates the difficulty and costs of applying a standard that distinguishes between, for example, the Nazis' speech and the speech of the civil rights demonstrators. Of

¹⁵ For example, John Hart Ely suggested that government regulation of graffiti on public buildings need not be subjected to close scrutiny so long as the government is not concerned with the message conveyed but is only attempting to avoid the expense of cleaning the buildings. Ely, 88 Harv. L. Rev. at 1504 (cited in note 14). Bollinger responds that a graffiti writer is not just conveying the explicit message of her words: she is also " 'expressing' disrespect for authority or for public property" (p. 207) and similar attitudes.

[T]hese underlying feelings—or ways of thinking—which are reflected and communicated in the act of defacement, will unquestionably affect our (or our representatives') responses to the offenders. . . . What stirs people to want to punish a speaker is often not the explicit message at all . . . but what we call . . . the 'insensitivity' or the 'thoughtlessness' or the excessive 'hostility' manifested in the way in which the view is expressed [pp. 207-08].

Bollinger's argument on this point might even be carried one step further. We often punish crimes more severely because they reflect a particularly abhorrent attitude—a contempt for the law or for human life, for example. When we do this, are we not punishing the act in part because of its communicative significance?

course, as he says, First Amendment doctrine will necessarily require judges to draw some problematic lines, no matter how hard we try to establish nondiscretionary standards (pp. 36-37). But a standard that permits the suppression of speech on the ground that it is extreme, wrong, or distressing, or that it has destructive consequences, is in a different category.¹⁶ Such a standard will be especially susceptible to being used against speech—like that of the civil rights demonstrators—that is *thought* to be extreme and wrong, and that is distressing and destructive because it challenges institutions that *should* be uprooted. Consequently, there is good reason to fear that judges applying a standard designed to permit the suppression of Nazi speech—for example, a standard that denies protection to speech that arouses racial hatred—might also be persuaded to allow the suppression of civil rights protests.

If, as Bollinger suggests, one uses a realistic assessment of costs and benefits in this area, the costs of using a standard that allows the suppression of too much “extremist” speech must be counted as enormous. It is easy to think of instances in which important changes were brought about by speech that many people regarded as extreme, and that might have been suppressed had the legal barriers been more flexible. The abolitionist movement and protests against the war in Vietnam, as well as the civil rights movement, are probably examples. Obviously changes in these areas were not brought about by speech alone, but the fact remains that, at least in a reasonably cohesive and democratic society, the classical defense of free speech is quite plausible: when a substantial number of citizens make a strong, persistent, and sincere moral appeal, their fellow citizens are sometimes moved to reexamine their own views and to consider positions that they had previously thought to be extreme.

In addition, Bollinger’s treatment of the line-drawing problem seems to underestimate the importance of a central function of the law. One of the principal purposes of the law is to help maintain stability by identifying, or creating, areas of agreement among people who strongly disagree on questions that are important to them. This is a reason—not always a sufficient reason, of course—to avoid doctrines that require judges to take positions on divisive issues. A segregationist who would never agree that civil rights protesters are less pernicious than Nazis might be willing to assent

¹⁶ At times Bollinger seems to make just this point—and quite well. See, e.g., p. 36. But his rejection of the classical model depends crucially on discounting the problems of line-drawing.

to the proposition that it is the American way that everyone have a chance to speak out. By avoiding the question that arouses the most violent disagreement—whether the civil rights demonstrators' speech is, unlike the Nazis' speech, worthwhile—the law can discover or create common ground. When we make exceptions based on the content of speech, we risk undermining the capacity of the law to perform this unifying and stabilizing function.¹⁷

B.

Another difficulty I have with Bollinger's theory is that it may apply not to First Amendment issues generally but only to extremist speech, and perhaps only to certain cases of extremist speech. If that is true, then the doctrinal implications he draws from his theory, while still important, are substantially less dramatic than they first appear to be.

This difficulty is suggested by Bollinger's quick dismissal of the version of the fortress theory that sees the First Amendment as a bulwark against *government*, as opposed to popular, efforts to suppress speech. Bollinger argues that episodes like Skokie and the McCarthy era involved not independent actions by government officials but attempts at suppression by a genuine democratic majority (pp. 79-80). Many disputes about freedom of speech, however—and probably most disputes that raise unresolved legal issues—do not involve outpourings of popular intolerance. They often concern relatively low-visibility issues of which most members of the public are probably unaware. They therefore fit the fortress theory's model of government officials limiting speech on their own initiative. This seems to be true, for example, of most "public forum" cases, and in general of many of the Supreme Court's recent First Amendment cases.¹⁸

In such cases, the fortress model has much to commend it.

¹⁷ Of course, we may not want the law to perform this function. See, e.g., Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 567-70, 583-602 (1983). But as long as we do want it to perform this function, it will sometimes be useful for legal rules to avoid forcing judges to decide highly controversial issues.

¹⁸ See, e.g., *Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986); *City of Los Angeles v. Preferred Communications*, 106 S. Ct. 2034 (1986); *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 106 S. Ct. 903 (1986); *United States v. Albertini*, 105 S. Ct. 2897 (1985); *Cornelius v. NAACP Legal Def. and Educ. Fund*, 105 S. Ct. 3439 (1985); *United States v. Albertini*, 105 S. Ct. 2897 (1985); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983); *Heffron v. Int. Soc. for Krishna Consc., Inc.*, 452 U.S. 640 (1981).

When free speech conflicts with other interests, government officials may have a tendency systematically to undervalue the interest in protecting speech. One could argue that the role of the courts is to correct this bureaucratic tendency. The tendency to suppress speech comes from numerous sources.¹⁹ Officials may tend to overvalue short-term, concrete interests that conflict with allowing free speech, and to undervalue the more abstract, long-term interests served by speech. Free speech (assuming it does not involve the press) may be less well defended by the kind of organized constituent groups that are effective in influencing government officials. Free speech may tend to create disorder, and officials might place undue emphasis on the need to maintain control. Officials may be less able to sympathize with the relatively powerless outsiders who must resort to somewhat disorderly speech than with the representatives of groups whose interests are in conflict with those of the speakers. Finally, of course, to the extent the speech criticizes the officials themselves, their concern for their own reputations and positions may cause them to be unduly hostile to it.

For these reasons, the fortress model gives a satisfactory account of why speech is protected in many First Amendment contexts—including cases of extremist speech—where the impetus for suppression comes from government officials. In these cases, Bollinger's theory might provide an additional reason for protecting speech, but it would not serve as a basis for *reducing* protection below the levels dictated by the fortress theory. Bollinger's arguments for reducing protection would be confined to the relatively rare cases of the Skokie or "red scare" variety, where the attempts at suppression reflect true popular sentiment. And in view of the difficulty and risks involved in distinguishing cases in which officials act on their own initiative from those in which their actions reflect popular sentiment, the protections dictated by the fortress theory arguably should apply across the board; Bollinger's theory might never justify reduced protection.

C.

Bollinger's own theory might not survive the kind of challenges he makes, quite effectively, to the classical and fortress models. One point comes immediately to mind, and Bollinger,

¹⁹ See generally David Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 *Buff. L. Rev.* 175, 206-13 (1983).

characteristically, acknowledges it (pp. 244-45): the empirical psychological premises underlying his theory are not obviously true. It is not at all clear that people who are forced to tolerate speech they abhor will become more tolerant in other contexts; they might easily become *less* tolerant, in which case Bollinger's theory would collapse. Indeed, it would become an argument for suppression.

It would, however, be a mistake to make too much of this objection. As I understand Bollinger's enterprise, he has tried to show that many deeply-rooted judgments and attitudes about free speech—for example, that speech should not be suppressed solely on the ground that it is wrong or offensive, and that the tolerance of such speech is something to be celebrated—make sense only if the purpose of the First Amendment is to educate people to be more tolerant throughout political life. To the extent he has succeeded in showing this, he has done something very valuable. He has demonstrated, among other things, that if in fact protecting extremist speech does not have this educative effect, we *all* have some rethinking to do. Either we should rethink our views about extremist speech, or we must develop a new justification for protecting it.

Perhaps a more serious difficulty with Bollinger's view is that it is vulnerable to a charge he levels against the fortress theory—indeed, more vulnerable to this objection than the fortress theory itself. Bollinger argues that the fortress model—insofar as it views the First Amendment as a bulwark against popular efforts to squelch dissidence—creates a system that is “manipulative,” “alienating,” “elitist,” and fundamentally at odds with the values of rational discourse that free speech is usually thought to promote (pp. 101-03). Although Bollinger does not put the point in these terms, he seems to be saying that the fortress model does not satisfy the requirement, emphasized by Kant and Rawls, that the reasons for social institutions must be capable of being made public.²⁰

Specifically, Bollinger suggests that the fortress model divides the world between the intolerant masses, who would eradicate all heterodoxy if they had the chance, and an elite that alone understands the value of protecting a wide range of speech. The institutions of free speech are designed by the elite to hold the masses in check. But since the masses obviously cannot be told *that*, the only way to hold them in check is to publicize essentially false stories about free speech—for example, that the language or history of the

²⁰ See Immanuel Kant, *Perpetual Peace*, in Hans Reiss, ed., *Kant's Political Writings* 125-30 (1970); John Rawls, *A Theory of Justice* 133 & n.8 (1971).

First Amendment unambiguously prohibits all suppression, or that all speech, even Nazi speech, contributes to progress. Judges and others responsible for maintaining the institution of free speech cannot acknowledge that the original intent of the First Amendment is unclear, or that we do not have a fully satisfactory explanation of why all speech must be protected. Once they admitted that there was some doubt about whether extremist speech must be protected, the waves of mass intolerance would rip through the cracks in the dike and swamp all valuable unorthodox speech.

Bollinger asserts that there is something wrong with an institution that can survive only by propagating a series of noble lies about its absoluteness and necessity (pp. 87-89, 102). It would be especially ironic, he notes, if the defenders of free speech—whose rhetoric emphasizes the importance of vigorously debating all preconceptions—had to rely on an uncritical acceptance of aspects of the institution of free speech itself (e.g., pp. 74-75).

This is a powerful argument. But a similar argument can be made against Bollinger's theory. Like the fortress model, Bollinger's view begins from the premise that people generally are deficient in their ability to respond rationally to ideas and behavior that they dislike. But where the fortress view prescribes rigid doctrinal barriers to guard against the impulse toward intolerance, Bollinger prescribes a kind of collective psychotherapy.²¹ We are to force ourselves to come face to face with our own impulse toward intolerance so that we can understand and control it better. Both theories can be seen as involving the imposition of a regime—rigid barriers in the one case, therapy in the other—on the ignorant, intolerant masses by an elite that alone understands both the virtues of tolerance and the way to manipulate institutions in order to achieve it.

On the other hand, it is possible to defend both the fortress theory and Bollinger's view against this charge. People can recognize their own deficiencies and voluntarily take actions to deal with them; the institution of free speech might be seen as a collective choice of a way to deal with the impulse toward intolerance. Bollinger's theory would be comparable to a collective decision to submit to the kind of therapy that he believes the tolerance of abhorrent expression supplies. This seems to be the way Bollinger understands it (see pp. 136-37). But by the same token, the fortress model is comparable to the familiar story of Odysseus tying

²¹ At one point Bollinger even uses the word "treatment" to describe what tolerance provides (p. 244).

himself to the mast;²² we recognize that we may be tempted to be intolerant, so we all collectively decide, ahead of time and in a cool hour, to make it more difficult for any of us to give in to that impulse when it occurs.²³

It is therefore possible that neither theory is elitist and manipulative in the way that Bollinger describes. In fact, it seems to me that a person who is forced to hear or see painfully abhorrent speech would feel more imposed upon, would feel that his autonomy had been more invaded, if he were told Bollinger's story—that he was being subjected to an admittedly painful therapeutic process designed to improve his own self-control. One would feel less imposed upon and manipulated if he were told, in accordance with the fortress theory, that in view of the dangers of popular overreaction, it will be better for all of us if we agree to make intolerance a more difficult choice.

IV.

On a more fundamental level, I have two substantial and related reservations about Bollinger's theory. First, this book is, in a sense, deeply conservative—in a way that Bollinger does not attempt to justify. Second, I do not think Bollinger succeeds in explaining why tolerance is desirable after all.

²² See generally Jon Elster, *Ulysses and the Sirens* (rev. ed. 1984); and, in this issue, Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 *U. Chi. L. Rev.* 1129, 1140-45 (1986).

²³ This is similar to the basic idea of theories that derive a principle of tolerance from a social contract. See John Locke, *A Letter Concerning Toleration* ¶¶ 7-9 (J.W. Gough ed. 1956); Rawls, *A Theory of Justice* at 206-16 (cited in note 20).

Incidentally, I believe it is a weakness of Bollinger's account that he does not deal seriously with social contract theories of tolerance. Such theories hold, roughly speaking, that people would adopt a principle of tolerance to govern society if they were situated in a way that eliminates circumstances that should be irrelevant to the decision of moral questions—for example, if they did not know their particular abilities, interests, or positions in society. See, e.g., Rawls, *A Theory of Justice* at 206-16.

In the only passage I can find in which Bollinger makes remarks bearing on the correctness of social contract views—he never addresses them as such—he suggests that such a view “introduces into our public institutions . . . an unfortunate manipulative frame of mind, a warfare mentality where each side is tacitly setting the rules by which future battles will be fought. One wonders whether the legal institutions of this country ought to be engaged in this kind of implicit bargaining . . . instead of attempting to reach for nobler ends” (p. 102). This argument overlooks the fact that a social contract theory can attempt to define the agreement people would make in a hypothetical situation not characterized by the inequalities and differences that give rise to “manipulation” and a “warfare mentality.”

A.

When I say that this book is conservative, I do not mean that it would give government greater power to regulate speech than existing doctrine allows; on balance it is not clear that it would. I am referring instead to the way in which Bollinger argues for his conclusions. The typical way to argue in favor of an institution or policy is to show that it is consistent with (or, better still, dictated by) a set of more abstract normative premises. For example, in political philosophy, one might argue that an institution is dictated by a principle of utility or a conception of a social contract; in constitutional law, one would argue that certain results follow from an established body of doctrine, the intent of the framers, or the purposes underlying a constitutional provision.

Bollinger's method is very different. He takes something that people do, either individually or as a society, and he examines it with great sensitivity and sympathy, seeking to find out what human need it serves. When he identifies the need that the practice or institution serves, that tends to become, for him, the justification for the practice. This is why Bollinger frequently analyzes complex or problematic social practices by showing how they arise from the same psychological impulses as everyday human behavior: he is trying to understand why we do certain things.²⁴ He is usually successful.

But understanding a practice is different from justifying it. To the extent that Bollinger equates the two, he creates a profound conservative bias, a bias that he does not defend. That is, Bollinger concentrates on understanding existing practices rather than challenging them by comparing them to an ideal. As a result, he is deflected from suggesting that any deeply rooted practices are worthless or pernicious.

This point is illustrated by Bollinger's treatment of the two central notions in his theory—intolerance and tolerance. Bollinger asserts that to deny people the power to satisfy the impulse toward intolerance is to impose a serious cost on them (see pp. 65-73, 192, 243). One of Bollinger's most significant criticisms of the classical theory is that it wrongly ignores the need to satisfy this impulse (p. 72-73). To justify this position, Bollinger notes that people and communities can feel deeply threatened by the expression of abhorrent ideas (e.g., pp. 68-71). He points out that one reason we

²⁴ See also Geoffrey P. Miller, *The Glittering Eye of the Law*, 84 Mich. L. Rev. 1901 (1986), reviewing Joseph Vining, *The Authoritative and the Authoritarian* (1986).

react so strongly against some kinds of actions is not because of their intrinsic quality but because of the "mind"—the ideas and attitudes—revealed by the action (pp. 114-16). He gives as an example (in a slightly different context) the threat to its national identity that the United States felt when its citizens were held hostage at the American Embassy in Teheran from 1979-1981; it was the attitudes that that act revealed on the part of the captors, he says, that caused us to react so strongly (p. 114). Similarly, as I noted, Bollinger argues for allowing suppression of speech in wartime by describing the uncritical commitment one feels toward a family member and suggesting that one feels a similar commitment toward one's nation in wartime (pp. 188-91).

Bollinger's accounts are persuasive as descriptions of why people are intolerant. But they do not justify such intolerance. They do not explain why we should count it against the classical theory that it denies people the opportunity to act on their impulse toward intolerance. One might argue that the First Amendment means precisely that feelings of being threatened by an idea or of wanting to dissociate oneself from it should not carry any weight in the governmental process. (One could draw an analogy to the reform tradition in criminal law that has argued that only concrete consequences, and not the bare desire to express intolerance for criminal behavior, should play a role in determining criminal punishments.²⁵) Such an interpretation of the First Amendment may be wrong, but it cannot be refuted simply by giving an account—even one as sensitive as Bollinger's—of how and when we feel our identity is threatened.

Similarly, it might be argued that we should define our identity in such a way that it is not threatened by abhorrent speech or nose-thumbing by hostile nations. Bollinger's theory asserts that *if* we want to redefine our identity in this way—that is, by making ourselves less intolerant—the institution of free speech will help us. But his theory provides no guidance as to the extent to which we *should* try to purge ourselves of the impulse toward intolerance. Bollinger plainly believes that the impulse toward intolerance needs some moderating (e.g., p. 73). But nothing in his theory dictates that conclusion or suggests to what extent the impulse should be moderated. And his theory seems simply to assume that we cannot redefine our identities so as to do without intolerance completely. Similarly, one might answer Bollinger's argument about

²⁵ See, e.g., H.L.A. Hart, *Essays on Bentham* 45-46 (1982) (discussing Bentham and Beccaria).

speech in wartime by pointing out that a nation is not a family, and that an uncritical attitude toward one's nation is not morally on a par with an uncritical attitude toward family members (even assuming that one should maintain an uncritical attitude toward family members when they have acted wrongly).

Bollinger uses the same approach, with the same limitations, in analyzing tolerance. Consider, for example, his excellent insight that other views do not adequately explain why we are so proud of our toleration of extremist speech. Bollinger assumes that our celebration of tolerance serves a valuable function, and he proceeds to explain what that function might be. A more cynical or radical observer might take a different view of the celebration. Such an observer would point out that, as Bollinger himself emphasizes, the First Amendment inhibits only the imposition of legal restrictions; it leaves untouched many other actions that can powerfully discourage unpopular speech—actions ranging from ridicule and social ostracization to official denunciations like those in the Skokie opinions (see pp. 12-13, 29, 109-10). As a result of these extra-legal sanctions, and probably also of such influences as schools and popular culture, American society, as Bollinger again notes, shows a great deal of ideological conformity. We are not troubled by balkanized parliaments, the danger of a military coup, or extremist groups that seriously threaten the government, and there is a broad consensus on liberal democratic values. We have never even had an overtly socialist or overtly aristocratic major political party.

A critic might say that, against this background, our self-congratulation for allowing groups like the Nazis to march is empty and hypocritical. He would say that our vaunted tolerance consists of allowing a small, pathetic, reviled group to stage a pointless demonstration after we have made sure, through powerful informal controls, that its ideas will have no effect.²⁶ He would say that our pride in tolerating the Nazis comes very cheap; we have never had any real Nazi threat in our country, and it is therefore easy for us to regard the Nazis as absurd curiosities. Or a critic might go one step further and say that the self-congratulatory tolerance ritual that Bollinger identifies is worse than empty; it helps defuse opposition by furthering the illusion that we have a tolerant society when in fact, in many important ways, our society is deeply con-

²⁶ Consider, e.g., *Abrams v. United States*, 250 U.S. 616, 628-30 (1919) (Holmes, J., dissenting) (quoted in Bollinger at p. 60) (remarking that the case involved "puny anonymities" and "a silly leaflet [published] by an unknown man").

formist and intolerant.²⁷ I am not suggesting that these views are necessarily superior to Bollinger's. But they are not obviously wrong, and Bollinger does not address them. He appears not to consider the possibility that the tolerance of extremist speech might serve a perverse, as opposed to a valuable, function.

B.

Finally, and paradoxically, I am not sure that Bollinger ever explains why tolerance is valuable. For him, of course, tolerance of extremist speech is not intrinsically valuable; it is desirable only because it helps people be more tolerant in other contexts, where tolerance is needed. In particular, Bollinger says that tolerance is crucial to the success of a democracy:

[A] capacity to contain one's beliefs in the interest of maintaining a continuing community is critical. . . . Those who possess the power to see their choices put into effect must decide whether and how far to press ahead in the face of opposition. Those in the minority must decide whether to accede to the will and power of the majority or in what ways to continue the fight. . . . In this sense, therefore, the capacity sought through free speech bears a special relevance to the actual functioning of a democratic system of government [pp. 117-18, citations omitted].²⁸

But why is *tolerance* the capacity that democracy requires?

²⁷ See, e.g., Herbert Marcuse, *Repressive Tolerance*, in *A Critique of Pure Tolerance* 84 (1965).

²⁸ I hope it is not unfair to use this passage as a summary of Bollinger's explanation of why tolerance is desirable. Bollinger emphasizes that the impulse toward intolerance can affect both decisions about what kinds of behavior to allow and decisions about how severely to punish the behavior we do not allow. He suggests that tolerance is needed to temper the impulse toward intolerance in both contexts (pp. 108-17). But except for quoting a passage from Aristotle that endorses the golden mean (p. 116), he does not explain *why* the impulse toward intolerance must be tempered. Why should the community's process of self-definition not be allowed to operate unimpeded?

Elsewhere, Bollinger suggests that tolerance is desirable because it instills "the spirit of compromise basic to our politics" (p. 141) and "the willingness to compromise and accommodate" (p. 228). This seems to me the same point as that made in the passage I quote in the text. Bollinger also mentions that tolerance is an important virtue for lawyers and bureaucrats, including judges, because they must frequently subordinate their own values to the values of others (see p. 118). Bollinger makes interesting use of this insight. For example, he suggests that it may explain why our society, in which so many people occupy bureaucratic roles, currently values tolerance (pp. 238-39). But it does not explain why we should incur costs in order to try to make the *whole* society more tolerant; tolerance (like aggressiveness, physical courage, or strength) could remain just a qualification for certain professions.

Many other capacities seem to be equally effective in causing political winners not to press their advantage to the point of instability, and political losers not to rebel. Enlightened long-term self-interest alone might suffice; both winners and losers may believe that they have more to gain from preserving the system than from disrupting it. Indeed, in most reasonably democratic societies, this seems likely to be true of the losers and is certainly true of the winners. If long-term self-interest is sufficient to maintain the democratic system, we do not need to teach tolerance by tolerating extremist speech; we only need institutions that teach people to be rationally self-interested.

Other qualities also seem sufficient: patriotism; a sense of fair play, comparable to that which causes competitors not to cheat even when they can escape detection; or a belief in democratic institutions. Not all of these qualities will correlate well with tolerance, and there is no reason to believe that tolerating extremist speech—and thus incurring the very real costs that Bollinger emphasizes—is the most efficient way to cultivate these qualities. Bollinger's theory tells us (assuming its empirical premises are correct) *how* to make society more tolerant; but it does not tell us why we would want to do so.

Indeed, it seems that passivity—a quality that Bollinger is careful to distinguish from tolerance—would do at least as well as tolerance in maintaining stability in a democracy. As long as the losers are passive, democracy will survive. And one might ask why Bollinger confines his reasoning to democracies. There are winners and losers in any society, and no society can survive unless the losers submit and the winners do not press their advantage too far. If anything, non-democracies are even more in need of tolerance, because they cannot count on other qualities—such as self-interest among the losers and the sense of fair play—to the same extent as a democracy can. But undemocratic societies do not usually have an institution of free speech to teach tolerance to their citizens.

Bollinger does not address these problems; he does not adequately explain why he sees a close connection between tolerance and democracy. One possible explanation of the connection, of course, is that self-government requires active, engaged citizens and will fail if citizens are merely passive. But Bollinger does not give this kind of explanation, because it belongs to the classical model that he rejects. Indeed, he makes a fine argument that a version of this view actually animated Meiklejohn's thought (pp. 148-58). It is possible to imagine the answer Bollinger would give to such an argument: Does democracy really require that all citi-

zens be active and engaged? Isn't it enough that there is an active and engaged elite, along with citizens who bestir themselves from time to time when self-interest, or a very weighty moral interest, is at stake? That is probably an accurate description of our society. An active and engaged citizenry is necessary to one particular form of democracy, characterized by a high degree of participation and civic virtue. But one must then explain why it should be a function of the First Amendment to bring about such a democracy, as opposed to, for example, the one we now have.

This interesting and insightful book teaches us a great deal about tolerance and the First Amendment. It also paints a picture of the tolerant mind and the tolerant society and invites one to admire it, which one instinctively does. It paints this picture both explicitly—in several eloquent passages on the importance of reasonableness and intellectual integrity—and in the way it asserts its own position. But in the end, one is left with the question that perhaps no one has completely answered: what is so good about tolerance?