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Book Review: The Tolerant Society: Freedom of Speech and Extremist Speech in America. by Lee C. Bollinger.

James Magee

function. As Professor Preble Stolz has argued, there are good reasons for being concerned about the state courts when it comes to correcting errors of federal law:

> The lack of effective supervision over state courts in their enforcement of federal law is much riskier than is the de facto final lawmaking power of the federal courts of appeals . . . . Numerous intangible factors tend to make federal judges loyal to the influence as well as the command of the Supreme Court. . . . In contrast, there is relatively little beyond the constitutionally required oath that binds the more than 200 state supreme court judges to the United States Supreme Court.[15]

Yet in the name of federalism, the Court in recent decades has often cut back on the extent to which federal lower courts can review or forestall state court error on matters of federal law.[16] When the Court construes narrowly federal habeas corpus and civil rights statutes allowing federal trial courts to enforce vital federal rights, it often leaves itself as the only available federal forum for the correction of possible state court error. Before the Justices or the rest of us accept any proposal to reduce further the extent to which the Supreme Court can correct error in individual cases, we should take into account how well the rest of the system protects litigants against error and injustice.

THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA. By Lee C. Bollinger[1] New York, N.Y.: Oxford University Press. 1986. Pp. 295. $19.95.

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Nearly a decade ago, the highly publicized *Skokie* case presented one of the most dramatic and controversial free speech issues ever to arise in American courts. It involved an attempt by a few dozen members of the National Socialist Party to march through the streets of Skokie, Illinois, a suburb of Chicago inhabited by some forty thousand Jews of whom several thousand were

15. Stolz, *Federal Review of State Court Decisions on Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 959-60 (1976) (footnotes omitted).

16. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (excluding fourth amendment claims from federal habeas review of state convictions in most cases); Younger v. Harris, 401 U.S. 37 (1971) (requiring more than irreparable harm for federal court to enjoin pending state criminal prosecution).

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survivors of Nazi concentration camps. The United States Supreme Court refused to review the lower courts' conclusions that the first amendment provided constitutional protection to the inhumane Nazi messages. The judges in *Skokie* were at pains to denounce Nazi doctrines as utterly evil. Yet they felt bound to protect expression of these doctrines; the first amendment, they insisted, dictated that result.

The *Skokie* controversy led many observers to reconsider the purposes and scope of freedom of speech. Such a reconsideration is precisely the aim of Professor Lee C. Bollinger's book. About *Skokie* he says: "Here individuals were advocating an ideology the country had invested incalculable resources only a few decades ago to defeat; now it was being protected in its efforts to resurrect itself. Surely, many wondered, there is something disturbingly anomalous about that." The judicial opinions in *Skokie*, he says, "convey a strong sense of helplessness on the part of the judges. The dominant image suggested by the opinions is that of judges compelled to reach the results they did." Although Professor Bollinger finds reasons, derived from his own theory of free speech, to protect the expression in *Skokie*, he is dissatisfied with "the current explanations and theories for the modern concept of freedom of speech, particularly as they apply to cases involving what we think of as extremist speech."

I

Is it possible to discern or even to imagine a general theoretical principle that will integrate the disparate decisions of the Supreme Court since its first serious encounter with the first amendment in *Schenck v. United States*? Do we have (or have we ever tried to develop) a similar theory, for example, of the commerce clause? Constitutional law tends to be an accumulation of policy choices made over time by judges responding to a variety of lawsuits in which important societal interests conflict. Sometimes these choices form a consistent pattern; but often they do not. The complete incoherence of commerce clause decisions between 1890 and 1937 exemplifies constitutional inconsistency; the judiciary's partial withdrawal from the commerce field is probably the only reason that a more consistent pattern has existed since 1937. The highs and lows of the Court's roller coaster adjudication of free speech claims of the last five decades would seem to foreclose any possibility of theoretical integrity in that realm as well.

Bollinger's goal is less ambitious and thus more realistic. Instead of trying to reconcile all the decisions, he wants to find a prin-

ciple that will justify freedom of expression, particularly in cases involving "extremist" speech that is "unworthy of protection in itself and might very well be legally prohibited for entirely proper reasons."

Before he fully articulates his own free speech principle, Bollinger dissects and rejects what he sees as the two prevailing rationales for modern first amendment jurisprudence.

THE CLASSICAL MODEL

He begins with the "classical" defense of freedom of speech, which he finds evolving from John Milton's *Areopagitica* to Harry Kalven's laudatory evaluation of Justice Brennan's opinion in *New York Times v. Sullivan*. Contributors to the progress of the classical theory have included such notables as John Stuart Mill, Oliver Wendell Holmes, Zechariah Chafee, Louis Brandeis, Alexander Meiklejohn, and, of course, Kalven and Brennan.

Their "classical" version derives from the principal preoccupations in the political thought of the Enlightenment: human reason and limited government. Reason could produce truth, and truth would facilitate wise political decisions; government, therefore, should not stifle freedom of expression, the most reliable means of attaining truth and advancing knowledge. This presupposition expanded inexorably to include the correlative values of individual autonomy and development through self-expression. Brandeis, Chafee, Meiklejohn, and Brennan emphasized the importance of free speech as the primary vehicle to achieve "democratic self-government." This was the "central meaning" of the first amendment, according to Kalven.

Bollinger concedes, as of course one must, that freedom of speech is closely associated with the quest for truth and knowledge and that it is essential in a democracy. Yet he has no difficulty discerning confusion and paradox in the classical theory, as applied to the extremist speech found in *Skokie*. Extremist speech "seeks to subvert the truth-seeking process"; as applied to such speech the classical model is "a commitment to a principle of free speech [which] can lead to protection of those who would advocate the abolition of free speech itself."

Some defend the classical model in language that suggests that the first amendment's purpose is to prevent the government from imposing its will on the people, who should be left free to govern themselves. "The first amendment has not been confined," however, writes Bollinger, "to imposing limits on errant, undemocratic,

official efforts to control speech but on democratically sponsored efforts as well."

> [F]ew if any of the restrictions on free speech we have encountered over the last sixty years, and the rejection of which now form [sic] the basis of our First Amendment jurisprudence, could be fairly described as jeopardizing the elemental structure of a democracy—or, stated another way, that the absence of these regulations was the sine qua non of a democratic political system.

If the fundamental purpose of free speech is to guarantee self-government, does it make sense to prohibit the people of Skokie from preventing intentional Nazi bombardment of the fragile sensibilities of vulnerable survivors of the holocaust? Of course, we can say that by constitutional design in the first amendment the people have denied themselves the right to make these decisions; but that seems little better than saying that the people have denied themselves the right to preserve self-government.

Not content to make telling criticisms of the classical model, Professor Bollinger cavalierly brushes aside some of the architects of modern free speech jurisprudence. He hardly mentions Thomas Emerson, and dismisses Justice Black's first amendment jurisprudence as mere "legerdemain."[3] Moreover, Holmes's "free trade in ideas" metaphor strikes Bollinger as ridiculous: "Holmes's proposal that truth will naturally emerge victorious . . . [has] the Pollyannaish claim that the truth will always win out as a natural result of evolutionary processes. . . ."

The pithy Holmes may be justly criticized for metaphors that glided past some tough issues. But we should not oversimplify his thought. He never asserted what Bollinger attributes to him, at least not in his "classic" dissent in *Abrams v. United States*. Bollinger quotes it at length:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is *better reached* by free trade in ideas—that the *best* test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. *That at any rate is the theory of our Constitution.*

Although Bollinger's quotation stops here, Holmes continued:

> It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.

It is difficult to comprehend how any sensible reader can deduce from the sentiments expressed in these passages a conviction

3. My own views on Justice Black are set forth in J. MAGEE, MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT (1980).

that the "natural result" of evolutionary forces is that truth will "emerge victorious." Holmes gave no assurance that truth will always be reached, but only that the "competition of the market" is the *best* test of truth, better than censorship, and "that at any rate is the theory of our Constitution." A moral relativist, Holmes could hardly have been Bollinger's Pollyanna; indeed his letters reveal that he had difficulty justifying freedom of speech.[4]

Nevertheless, Bollinger is correct when he says that the classical model provides little assistance to those who grapple with cases involving extremist speech, the purpose of which is ultimately to destroy the values that the classical model enshrines as fundamental.

THE FORTRESS MODEL

"[A] more complex and less naive understanding of the role of free speech in modern society," Professor Bollinger continues, is "to secure the boundary of protected speech at some considerable distance from the speech activity we truly prize." The goal is to erect a fortress around the valuable speech that merits protection. The price to pay, of course, is the protection of socially undesirable speech. Whereas the classical model built upon the assumption "that people are rational, capable, and worthy of trust, . . . [t]he fortress model builds upon an opposite vision of people—that they are moved by irrational impulses and are not to be trusted, not, at least, when it comes to deciding what the limits on speech activity within the society should be." The open marketplace in which the people engage in the "free trade in ideas" therefore becomes suspect.

Bollinger illustrates the fortress model with an argument from the prologue to Aryeh Neier's book, *Defending My Enemy*, in which Neier, as a Jew and executive director of the American Civil Liberties Union during the *Skokie* litigation, sought to justify the ACLU's role in defending the Nazi march. Neier's position, Bollinger explains, is basically "a matter of self-protective political strategy, a response to a perceived reality of ever-threatening intolerance and prejudice by the politically powerful against the politically weak." The fortress model creates a legal principle as "a refuge, but one oddly secured by admitting into it the archenemy. . . . From

4. "I wonder if cosmically an idea is any more important than the bowels," Holmes once wrote in a letter to Sir Frederick Pollock. As quoted in OLIVER WENDELL HOLMES, JR: WHAT MANNER OF LIBERAL? 97 (D. Burton ed. 1979). "The theme of the 'unknowable' runs through his letters as it runs through his speeches," Daniel Boorstin has written. *Id.* at 133. Bollinger himself tells us that Holmes saw the basis of freedom of speech "as a commitment to an intellectual stance of self-doubt." Can we discern a Pollyanna here?

this fear of being a persecuted minority the fortress model derives its appeal."

Bollinger concedes the obvious, if troublesome, allure of the fortress model. It provides legal shelter against the surges of intolerance that too frequently impel the actions of those wielding political power. While the classical model, when stripped of its florid rhetoric, appears irrelevant and contradictory, the fortress model does account for extreme cases and deals more realistically with the characteristics of mass society.

> It offers a way of conceiving of free speech at the outer perimeter that is comprehensive and unblinkingly realistic. It offers a practical, pragmatic perspective of the world. It is conscious of the threat of conflict within the society and of the need for barriers to keep power from falling into the hands of those who will be inclined to sacrifice freedom for orthodoxy. It focuses, furthermore, on the process of presenting the free speech principle, not just on the particular results to be reached.

With the fortress model, "[y]ou have at least preserved something of value, and possibly the activity you have thus preserved will itself become a means of dealing effectively with the larger phenomenon of intolerance, if only by offering the opportunity to notify one's allies of the approaching danger in other areas."

The fortress model tends to justify an absolutist first amendment standard. It confers constitutional protection upon loathsome speech. It can explain, if not justify, some of the courts' more extreme libertarian decisions.

While he recognizes its appeal, Bollinger finds the fortress model "seriously incomplete." "Probably the most serious cost of the fortress approach is the problem of introducing an unattractive elitist outlook into free speech thinking and analysis." That is, the fortress model envisions a "we" and "they," and thus "alienation between groups. Free speech becomes a divisive force within the community." The strategy of the model generates "a warfare mentality" and "can rest on a highly troublesome conception of social reality." "While the fortress perspective may not be dismissible as irrelevant to the actual world we inhabit, or as illogical, there may be other and better means of securing the ends we seem to be seeking through the idea of free speech." Besides, "the fortress model simply does not account for all that we derive from the principle, especially when it is applied at the extremes."

Bollinger never explains why or how the fortress model might create a "warfare mentality." Do people degenerate into "we/they" groups because of a scholarly theory? Does society pay attention to the intricacies of theoretical models or the reasoning employed by lawyers and judges to settle difficult first amendment issues? Profes-

sor Bollinger's elaborate discussion does not extend to these obvious questions. He merely assumes that allegiance to the fortress model has divisive effects. It is difficult to see why this should be so.

II

The rest of the book is devoted to Bollinger's own "general tolerance theory," most if not all aspects of which, he concedes, can be found in earlier writings. Various forces, however, (such as the unending rhetoric about liberty and self-government) have worked to submerge or diminish the primacy of the tolerance ethic which he insists is at the heart of the free speech enterprise in America. Thus, while his theory is rooted in earlier justifications, it has not been the articulated centerpiece of first amendment writings.

Bollinger envisions freedom of speech, not so much as a manifestation of individual freedom recognized as fundamental by the Constitution and enforceable by courts, but as a social phenomenon with tremendous potential to create and shape a community. "In this view the social function of free speech is to provide a focus on the mind behind the act of intolerance [that moves to suppress expression] rather than to protect the activity of speech itself as something that possesses independent value." Proper toleration of speech, especially extremist speech, can generate a way of thinking, a social character that encourages tolerance in other areas of social interaction. "In that role free speech is a complex enterprise that has a more involved function than preventing governmental interference in the democratic process, maximizing the flow of data, or protecting the rights of speech for minorities against tyrannical majorities." The concern is not with the worthiness or value of particular expression but "something potentially problematic in the public response to speech acts."

Free speech cases—especially those like *Skokie*—provide public drama in which the virtue of tolerance competes with the natural human impulse toward intolerance; toleration here teaches society general tolerance elsewhere, in other dimensions of collective human existence. Toleration helps to define the community and its values. Advocates of the fortress model seek a fixed, nearly absolute standard that would protect expression and avoid litigation; for them *Skokie* was an easy case. Yet Bollinger carefully reminds us that excessive tolerance can "destroy the collective bonds that normally hold society together." Moreover, litigation should be seen "as an *opportunity* rather than a reason for distress. . . . [It] provides the framework, the occasion, for the community to think about the things free speech is intended to raise for thought." *Sko-*

kie, for instance, provided the occasion for a dramatic lesson in toleration; the occasion was lost, according to Bollinger, because of what he regards as a nearly mindless rejection of the asserted social interest in suppressing the Nazi march. Such dogmatic decisions reflect an intolerant defense of tolerance which exhibits "precisely the intolerant mind that the [tolerance ethic] is intended to point up and condemn."

The obvious alternative to "dogmatic" first amendment jurisprudence is "balancing the interests." Many liberals object to balancing of interests in free speech cases, partly because of the subjectivity (and hence unpredictability) of that endeavor, but also, and more importantly, because of the Supreme Court's abuse of the balancing approach during the dismally intolerant years of McCarthyism.[5] Bollinger wishes to resurrect balancing to serve as the technique for resolving speech cases through the nurturing of the tolerance ethic in American society. "The recognition of complexity," he explains, "ought to be the first rule . . . of effective free speech application. Judges may distinguish themselves from other decision makers in the degree to which they are able to engage in that recognition." In discussing balancing and the limits on speech, he says:

> The starting point would seem to be this: 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.

"Balancing looks dangerous," Bollinger admits, "depending on what is being balanced." "By taking free speech according to its function of helping to create a tolerance ethic within the society," however, "that method is both transformed and rendered more appealing."

III

Professor Bollinger's theory raises a host of questions. First, are judges really better able than other politicians to develop the tolerant mind necessary to do the job Bollinger assigns them? Second, how will we overcome the notorious faults of balancing tests? While he discovers virtues (presumably, flexibility and discretion) in the ambiguity of balancing doctrine, Bollinger offers very little guidance for courts. This is particularly disturbing in a book that begins by asserting that tolerance itself sometimes "constitutes moral

5. *See generally* Alfange, *The Balancing of Interests in Free Speech Cases: In Defense of an Abused Doctrine*, 2 L. TRANSITION Q. 35 (1965).

weakness and is itself properly to be condemned." The book offers very few details and refers to maybe a dozen cases, but, with the exception of *Skokie*, in only marginal ways. How, for example, are judges to resolve speech cases in which both sides are intolerant?

"As with everything," writes Bollinger, "good things may be done for the wrong reasons, and with free speech the reasons are what matter most." Thus inquiry into motivation is essential to the operation of the tolerance theory. Bollinger explains that "if one looks not at the speech but at the motivation behind the restrictions, one may properly conclude that the restrictions were imposed for bad reasons." Yet earlier in the book he had rejected judicial scrutiny of motivation: "It is simply too difficult to make a case-by-case examination of legal restraints on speech to ascertain whether the underlying motivations are of an improper variety. The problem of the impulse to excessive intolerance is simply too elusive for that type of scrutiny."

Bollinger's abstractions must confront some hard, challenging data. One very plain problem with his theory can be seen in the *Skokie* case itself. The American Civil Liberties Union's decision to support the Nazi group led to massive defections from its ranks and a corresponding financial loss of over $500,000. If the impulse toward intolerance can be exposed within the country's most forceful, articulate, and organized advocate of individual rights, is it plausible that judicial declarations in favor of extremist expression will wear down the deeper and broader base of intolerance among the general public? The evidence seems to be overwhelmingly against such a possibility.

Although badly disfigured by a combination of militant social intolerance and timid judges in the 1950s, freedom of speech was renewed and flourished in the 1960s under the Warren Court. Most of the Warren-era decisions survived the tenure of the Burger Court. If Bollinger's thesis is empirically valid, then presumably Americans are now more tolerant than they were before the Court's lessons in tolerance. Yet the evidence suggests otherwise. Prior to this resurrection of freedom of speech, during the end of the McCarthy era, social scientists examined the American public's attitudes toward tolerance and civil liberties. Herbert McClosky was one researcher who discovered that the American public then was not very tolerant of anything other than orthodox political and social opinions—where the first amendment, of course, is ordinarily not needed.[6] More than a generation later, in the wake of unprece-

6. McClosky, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361 (1964).

dented legal protection for freedom of speech, one would expect a wider and deeper diffusion of the toleration ethic—assuming the validity of Bollinger's argument that protection of controversial speech helps to create a tolerant public.

The unpleasant truth, however, is that the general public has been unable to learn the tolerance ethic even in the narrow area of freedom of speech itself, much less in the broader realm of non-speech behavior. In a recent book McClosky and Alida Brill arrive at conclusions about toleration in America that are not significantly different from the depressing assessment which McClosky had made a generation earlier.[7] While the public today, as before, overwhelmingly supports freedom of speech as an abstract ideal, it exhibits an intolerant mind when that ideal is applied to concrete (and hardly extremist) examples of expression.

The contemporary data compiled by McClosky and Brill demonstrate persuasively that "freedom of speech is, in the public mind, a more tenuous right than one might infer from the nearly universal endorsement it receives when stated in its abstract form."[8] For example, only 23 percent would allow a group access to a public building to make a speech denouncing the government; almost half would deny foreigners who dislike or criticize the American government entry into the United States. In the area of symbolic expression, "only a small minority of the general public (about one in four) are willing to endorse the right to make political statements by means of dramatic or shocking actions. Even actions which appear to be relatively harmless are not widely tolerated." If a professor at a university were "suspected of spreading false ideas" in the classroom, nearly 80 percent of the population would "send someone into his classes to check on him."[9]

These findings raise grave doubts about Bollinger's tolerance theory. Assuming that tolerance toward speech teaches us other forms of tolerance (a connection which Bollinger never empirically demonstrates), we must first cultivate toleration of freedom of speech itself. The general population, it seems, has learned very little toleration since the 1950s, despite many libertarian judicial decisions. McClosky and Brill conclude, moreover, that the American public's general intolerance toward expression is evident in nearly every dimension of behavior which we tend to regard as falling within the framework of civil liberties.[10]

7. H. McCLOSKY & A. BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES (1983).

8. *Id.* at 54.

9. *Id.* at 52-54, 108.

10. *Id. See* ch. 9.

This is not to say that Professor Bollinger is wholly mistaken. The general public does not appear to have become more tolerant, but opinion leaders may be different. Indeed, there is a wide chasm between the tolerance level of opinion leaders and that of the mass public.[11] Perhaps there is no tolerant society, but instead a tolerant elite.

What if we were to revise Bollinger's hypothesis, making the courts the educators of elites, and presuming that the elites—having been taught tolerance by the judges—will help to create a more tolerant society? As thus revised, the theory would be more difficult to refute, but it would remain highly conjectural. Since the 1960s very important progress in promoting tolerance has been made on several fronts: civil rights, women's rights, gay rights, and the rights of the handicapped and mentally ill, to mention only the most conspicuous examples. Whether and how these advances are attributable to judicial pronouncements in free speech cases is difficult to document.

Despite the free speech decisions of the past few decades, America is now witnessing growing intolerance for some of the progress made in combating racial bias, frightful reminders of which have been catapulted into headline news. Eruptions of widespread racial bigotry and violence have been reported throughout American college campuses, at both elite private and large state universities, where the tolerance ethic is theoretically the sine qua non of academic existence. Some commentators correlate these incidents with a more overtly racist atmosphere in the country in the 1980s, manifested in the racial confrontations in Forsyth County, Georgia, and in the Howard Beach section of New York City.

Meanwhile, conservatives complain that conservative speakers are shouted down when they try to address audiences in our elite universities.

How does Professor Bollinger's theory explain this apparent undoing of tolerance? Perhaps increased judicial protection for extremist speech, as in the *Skokie* case, encourages *intolerance*. Or perhaps, as McClosky's polls suggest, free speech decisions do not affect public attitudes. Either of these hypotheses seems at least as plausible, and as consistent with the evidence, as Professor Bollinger's theory.

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11. *Id.*, *passim*.