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

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# BOOK REVIEW

## THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA

By Lee C. Bollinger (Clarendon Press, 1986)

Reviewed by Judge Abner J. Mikva, United States Court of Appeals for the District of Columbia.

The difficulty with the First Amendment to the United States Constitution is that it sets a higher standard for national behavior than most of us are willing to observe most of the time. With the exception of absolutists like the late Justice Hugo Black (who insisted that the clause "Congress shall make no law" meant "Congress shall make *no* law"), most of us waver over the parameters of first amendment strictures.

*The Tolerant Society*, by Professor Lee Bollinger, offers a thorough and scholarly analysis of our ambivalence. In discussing the abortive attempts of Nazis to march in Skokie, Illinois, and various landmark first amendment cases, Bollinger forces a confrontation between our pious affection for the first amendment in general and our distinct uneasiness with its application to odious causes. See Bollinger at 13-15, 23-44, 67-70, 126-31; see also Bollinger at 15-23 (discussing *Abrams v. United States*, 250 U.S. 616 (1919)); Bollinger at 31-32, 179-82 (discussing *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

I had the personal discomfort of representing the Village of Skokie, Illinois, as a United States Congressman during the turbulence surrounding the Nazi march. My conflicts were enhanced on the one hand by my status as a Jew of World War II vintage and on the other hand by my having served as a long-time, active member of the American Civil Liberties Union and my having studied the first amendment at law school under the late Harry Kalven, one of the certified heroes of free speech and press.

As good scholars do, Professor Bollinger refrains from presenting any clear-cut resolutions to my conflicts. Rather, he puts forth a clear picture of the reasons for our national ambivalence and identifies the weaknesses of the various competing schools of first amendment thought. It is comforting to know that even the experts are in conflict and that the simple explanations (Justice Black's absolutist views, Justice Holmes's "clear and present danger" exception to freedom of speech) are indeed simple — and unsatisfactory to the task.

What do we think about the first amendment? Most of us who are lawyers treat it as a legal device — a limitation imposed on Congress against passing any laws abridging "freedom of speech." We barely stop to think of how broadly it has been interpreted. The first amendment was the easiest to "incorporate" into the fourteenth amendment due process clause and thereby the easiest to apply against the states; the rights of freedom of speech and freedom of the press were the first rights that

the Supreme Court held to be so incorporated. *Gitlow v. New York*, 268 U.S. 652 (1925) (speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (press). Even critics of the incorporation theory generally agree that state and local governments should be restrained from abridging freedom of speech. See, e.g., *Adamson v. California*, 332 U.S. 46, 85-86 (1947) (Black, J., dissenting). We tarry even less at the question of what is being protected. We may argue about what is "speech," but we seldom look at what is "freedom" of speech. We do expect some kinds of limitations (because it is a legal concept, and legal concepts generally abhor absolutes), but we fight furiously over when, where and how those limitations can be applied.

For the majority of Americans who are not lawyers, freedom of speech is one of the things that separates us from communist or fascist dictatorships. We have freedom of speech, and people living under dictatorships do not. Nevertheless, with the greatest of ease, we insist that people should not be allowed to espouse philosophies of dictatorship in our country. Many, if not most, of those who wanted to keep the Nazis from marching in Skokie saw no tension between their own collective attitude and the first amendment. From their perspective, what the Nazis wanted did not involve "free speech."

If the situation in Skokie looks like an easy free-speech problem — and it does to many who did not live there — one should study the factual situation in *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (discussed in Bollinger at 31-32, 74, 181). In that case, an extremist wrote a leaflet urging his fellow citizens to join his White Circle League to prevent "Negroes" from "mongrelizing" the white population of America. 343 U.S. at 252. He was convicted under an Illinois "group libel" statute, *id.* at 251, and the Supreme Court upheld the conviction in a five-four decision. (I have a penchant for being around when the first amendment erupts: I was a law clerk that year for Justice Minton, who joined in Justice Frankfurter's majority opinion, notwithstanding my exhortations to the contrary). *Beauharnais* seemed clear-cut (and wrong) to me at the time — the defendant was convicted under a vague and silly statute. After Skokie, I realized that the problem is not quite as clear-cut if one is on the receiving end of hostile or inflammatory speech.

Obscenity usually is no obstacle for first amendment lawyers. We repeat the profundity that no one was ever molested by a book and expect to carry the day. Most of the time we do. But how do we fit "kiddie-porn" into the pattern? Why is sexually explicit material covered by the first amendment except when it involves children? When is a child not covered by the first amendment? Why can a sixteen-year-old buy cigarettes but not *Playboy*? All of these questions destroy any notion of symmetry in this difficult area of the law — so much so that the late and distinguished Justice Stewart will be most remembered for his candid admission that he could not legally define obscenity, but he knew it when

he saw it. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

As I have indicated, Professor Bollinger does not provide this missing symmetry — at least not in the sense of explaining and reconciling all of the landmark first amendment cases or all of the different thoughts and approaches of the first amendment experts. What he does provide is a different rationale for having the first amendment at all. See Bollinger ch. 4. It is a mark of our national strength that we have the first amendment as part of our fundamental “social ethic.”

In every other area of activity, we impose legal restraints, including fines and imprisonment, to regulate conduct and to deter or punish anti-societal behavior. Only in the area of speech activity do we construct a wall insulating such activity from restraint. See *id.* ch. 3. John Milton was a great poet, but after Adolf Hitler and Ayatollah Khomeini, it is hard to continue to believe his assertion that the truth will always win out, obviating the need for restraint. See *id.* at 58-59. Studying the appeal of Milton’s pronouncement, Professor Bollinger comments, “Speech is either entirely innocuous or will be stopped naturally from causing harm when confronted by the truth.” *Id.* at 59. I believe that the explanation for exalting speech must be more complicated than Milton made it.

Neither Milton nor the variation on Milton that suggests the need for exchange of political ideas to improve society provides a sufficient rationale. The latter is the “political speech” notion which my colleague Judge Robert Bork once espoused but has since rejected. That was the rationale which allowed the Supreme Court once to hold that motion pictures were outside the first amendment because they were only “entertainment” and not “political speech.” Handy as such extrapolation might be for handling pornography and obscenity, it is a distinction without a difference. One can speak through the medium of entertainment. “Doonesbury” entertains some as a comic strip; it vexes others as much as the editorials in the *Wall Street Journal* do.

My law professor Harry Kalven, whose works Professor Bollinger discusses along with the works of Alexander Meiklejohn, *id.* at 146-58, was concerned that the cases concentrated too much on the right to hear and were subjugating the right to speak. Kalven worried about the “heckler’s veto,” which measured the requisite level of restraint on freedom of speech by the violence of the reaction. That concern is no less valid today. Professor Bollinger points out that the central exceptions to freedom of speech still broadly cited by the courts — the “fighting words” exception, libel, and obscenity — constitute attempts to categorize restricted speech by its offensiveness to its audience or, in the case of libel, its harm to one individual. See *id.* at 181-86. The cases testing these exceptions are complicated and many. *New York Times v. Sullivan*, 376 U.S. 254 (1964), did not end the run of libel cases (see *Gertz v. Welch*, 418 U.S. 323 (1974)). *Chaplinsky v. New Hampshire*, 315 U.S. 568

(1942), did not set clear guidelines as to how courts should measure the consequences of disturbing speech (see *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). Professor Bollinger criticizes the “lack of social value” test used to explain these exceptions as too simplistic. See Bollinger at 180-85.

All the country’s judges and all the country’s law professors cannot put this simple little first amendment freedom back together again into an intelligible, consistent, coherent whole. John Hart Ely, for instance, tried to sort the cases into those in which speech had a “communicative impact” and those in which the impact did not have any communicative significance. See *id.* at 204-12. He used this categorization to explain how the Supreme Court could uphold a conviction for draft-card burning, *United States v. O’Brien*, 391 U.S. 367 (1968), yet could strike down a conviction for wearing a black armband to high school. *Tinker v. Des Moines Indep. Commun. School Dist.*, 393 U.S. 503 (1969). Some of us still have trouble with that explanation.

Professor Bollinger does not think such a reconciliation is necessary. To him the right of free speech is a way of testing the limits of our self-restraint as hearers of offensive speech. See Bollinger at 182-183. The greater our self-restraint — our maturity and self-confidence as a nation — the greater will be our tolerance for extremist speech. If Chaplinsky had been allowed to “mouth off” on further occasions, the people of New Hampshire might have learned to tolerate such fighting words as “fascist” and “racketeer.” That tolerance has its limits is obvious. Professor Bollinger recognizes this. See *id.* at 187. That the limits will vary from time to time and from provocation to provocation is also obvious. Professor Bollinger’s analysis shifts the emphasis from trying to find some solid dimensions in the first amendment to be applied automatically in free speech cases toward an examination of the socio-political underpinnings of the first amendment. We are a better nation for trying to exercise tolerance in the face of offensive speech — even if we do not always succeed.

Even though it may not help me decide any hard questions arising under the first amendment, I liked Professor Bollinger’s book. He even makes me feel better about my lack of success in dealing with the Skokie case or in trying to influence the result in *Beauharnais*. In a complicated, pluralistic, opinion-ridden society like ours, tolerance does not always win.