1987

Teaching Tolerance

Robert F. Nagel
University of Colorado Law School

Teaching Tolerance

THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA; BY LEE C. BOLLINGER.† OXFORD AND NEW YORK: THE CLARENDON PRESS, 1986. PP. VIII, 295. $19.95 CLOTH.

Reviewed by Robert F. Nagel‡

Reading *The Tolerant Society* is like participating in an excellent conversation. The book does not lecture or posture or browbeat. It engages the reader in a common endeavor, a calm but insistent inquiry into a troubling and important problem. It assumes the best of faith and carefully, moderately raises even the most ominous possibilities. As can happen with a prolonged and illuminating conversation, only gradually does the reader recognize the force in the encounter.

Professor Bollinger's central claim is that the purpose of the free speech clause has become the cultural validation of a useful set of intellectual and psychological capacities gathered (perhaps somewhat misleadingly) around the adjective "tolerant." Those capacities are the very characteristics that make the "conversation" of the book so arresting and appealing. Thus the author persuades by demonstration. In so doing, he implicitly but audaciously sets up the dissemination of his own evident strengths as the objective of free speech. Moreover, by addressing his readers as if we too possessed these strengths, he invites us to acknowledge the existence of those values, if only as aspirations, in ourselves. His quiet, unhurried voice suggests that the ideal of freedom of speech is the way we are or want to be while listening to him. The tolerant conversation of the book is sufficiently engaging that the substantive thesis is difficult to resist. Bollinger's proposal is powerful but also disquieting, because it would involve using the coercive power of the courts to teach the general public traits that are as personal and difficult as they are admirable.

I

The subject of *The Tolerant Society* is not the protection of speech

† Dean and Professor of Law, University of Michigan. B.S. 1968, University of Oregon; J.D. 1971, Columbia University.

‡ Moses Lasky Professor of Law, University of Colorado. B.A. 1968, Swarthmore College; J.D. 1972, Yale University. Bruce Swartz and Arthur H. Travers, Jr. contributed useful suggestions for this review.

generally but the protection of "extremist" speech. Why should courts protect speech that aims at undermining democratic institutions or, like the march of Nazis proposed for Skokie, causes anguish and outrage? Of course other writers have attempted to justify "overprotection" of speech, but few have pursued the problem as relentlessly as Bollinger. He insists on an answer that can explain not just our support but our enthusiasm for protecting sordid and destructive speech from legal sanctions (pp. 14, 35); he insists on an answer that will reconcile this enthusiasm with our simultaneous approval of a host of nonlegal sanctions commonly used to inhibit the same kinds of speech (pp. 12-14); and he insists that the answer be realistic for an era when information is plentiful and serious censorship a remote possibility (p. 79). He convincingly dismisses the familiar claims that extremist speech promotes truth or democracy (pp. 50-58). He drives past (though he is more intrigued by) the strategic argument that in the long run valuable speech can be protected only by building a "fortress," the outer walls of which consist of protection for extremist speech (pp. 100-03).

The rejection of strategic arguments as exaggerated and manipulative contains the seeds of what is most interesting and troubling about the book, for Bollinger sees through to the intolerant character of many arguments for legal tolerance (pp. 88-90, 102). Indeed, he characterizes much of free speech theory and law as being designed precisely to censor thought and criticism (p. 218). Examples include the arguments that the language of the first amendment is absolute; that its history is unambiguous; that legal precedents foreclose any possibility of approving a suppression; and that any minor deviation from the principle of protection is dangerous. By denying the possibility of choice, these arguments all informally suppress full consideration of the appropriateness of official acts of suppression.

To find a dark trace of intolerance behind arguments for legal tolerance is characteristic of Bollinger's thinking. His analytic technique is not so much iconoclastic as encompassing; he is able to approach an idea from several perspectives and hold the differing views simultaneously. Although this ability can entail indecisiveness, Bollinger comes to firm conclusions about vexing questions. For example, without putting aside any of the difficulties, he concludes that the march on Skokie should have been permitted (pp. 197-200). This ability can also be associated with a tendency to gloss over important distinctions. To characterize intolerant arguments for protecting speech as censorship is to submerge the normal distinction between informally discouraging a thought and officially punishing one. The value of Bollinger's approach depends on whether his willingness to deemphasize such distinctions is heuristic. To label certain types of free speech arguments as suppressive usefully pinpoints the moti-

vations—the sense of repugnance, for instance—that underlie both informal and formal censorship; it reveals that those who oppose and those who support unfettered speech in a particular instance are not as different or as far apart as is commonly supposed. At any rate, tolerance for ambiguity, uncertainty, and originality is an important element of the set of capacities that Bollinger argues free speech law should validate. Thus, the interest and pleasure generated by Bollinger's complex insights are persuasive buttressing for his substantive argnment.

An encompassing consideration of the protection of extremist speech requires not only a skeptical appraisal of tolerance but also a sympathetic appraisal of intolerance. Accordingly, Bollinger insists on a justification of tolerance that takes into account the virtues of intolerance (including, by the way, the virtues of the sort of intolerance that is found in much free speech law and theory[1]). In short, his commitment to tolerance as a way of understanding extends to the phenomenon of intolerance. He describes intolerance as a way of preventing harm to individuals and communities. Tolerance can expose painful insecurities. While this can be beneficial, it can also leave self-doubt where confidence is required. More fundamentally, to tolerate morally offensive speech is self-defining. As Bollinger says, "The trouble with speech behavior . . . is that it very often demands a response from those who know of it. . . . We can no more afford to ignore these feelings than we can the need to mourn the death of someone close" (p. 64). Toleration identifies the kinds of harms that an individual is willing to abide. As the Jew who would tolerate the Skokie march (or the woman who would not suppress pornography) knows, it changes the tolerant person's place within important communities. To push back the outer limit of acceptability is a significant act morally and psychologically. On the other hand, intolerance can define high aspirations and sensitive identifications. To be intolerant can be, in short, to communicate (p. 63).

The paradox is rich: "Given the fact that free speech theory itself urges us to recognize the tremendous need of every individual to express himself or herself, we can hardly ignore or minimize the power of that need just because it arises in the form of restraints on the speech of others" (p. 63). Arguments for tolerance, then, can be suppressive, and acts of intolerance can be expressive; we should be intolerant of some tolerance and tolerant of some intolerance. As enjoyable as paradox can be, Bollinger's discussion is not concerned with puzzles. The analysis invites us to reconsider the nature of tolerance and intolerance. The

1. While his condemnation of techniques of suppression in free speech law is severe ("It is like lying while enforcing a principle of good faith" (p. 218)), Bollinger moves immediately to a consideration of the possible advantages ("Perhaps we are better off treating free speech as something of a social taboo" (p. 219)).

reconsideration is disturbing in that it suggests that the two impulses are necessary for one another and, ultimately, that free speech decisions are concerned with matters that are dismayingly basic and intractable.

II

Having denied that protecting extremist speech can be satisfactorily justified as a means of promoting truth or governmental accountability or as a way of keeping at bay savage threats to democratic institutions, Professor Bollinger proposes a modification of the usual theories. He suggests that judicial protections should be demonstrations to various segments of the public of the attractive (if sometimes painful) qualities of tolerance. The judiciary should provide, as this book provides, exemplars of that trait. The reason for teaching tolerance is specific neither to politics nor to speech. Tolerance should be taught because it is difficult to appreciate and to practice, and because, fully understood, it is a virtue in all aspects of life. To envision the courts as engaging in pedagogy at this level is heady indeed; the importance and practicality of the proposed endeavor turns in large measure on what Bollinger means by "tolerance," the concept that he so successfully complicates.

At times Bollinger speaks as if tolerance were essentially an intellectual attribute, something close to capacity for information or the trait of open-mindedness (pp. 141, 164, 169). But his book, both as a substantive argument and a demonstration, implicates a much more complex set of characteristics. He refers often to the personal discipline—the control over feelings—that tolerance requires (pp. 10, 119, 138). He speaks of "self-restraint in the face of . . . injury" (p. 123). He suggests that tolerance is related to the judge's detachment (p. 239), the civil servant's patience (p. 239), the scholar's fairness (p. 224), and the political participant's capacity for compromise (p. 240). As Bollinger uses the word, then, "tolerance" is a matter of psychology, of character, and even of wisdom and morality.

The tolerant person does not accept an endless stream of information, is not intrigued by any idea no matter how frivolous or immoral, and is not always bemused by ambiguities or uncertainty. The tolerant person is the balanced person, who (within the contexts of political roles, social affiliations, and personal morality) can decide appropriately. It is "a matter of attitude, of balance and control" (p. 123). Relying on Aristotle, Bollinger says the objective is people who can be "angry with the right person and to the right extent and at the right time and with the right object and in the right way" (p. 116).[2]

For Bollinger to urge that we should be intolerant of some tolerance

2. Quoting THE ETHICS OF ARISTOTLE 73 (J.A.K. Thompson, trans. 1953).

and tolerant of some intolerance is not, then, paradoxical at all. Both instincts are necessary for arriving at any decision about what to believe or say or do. A decision is simply the instant when, with varying degrees of definiteness and permanency, we cut off further information and reflection about an issue. Even the decision to speak or write is a decision to stop considering what ought to be expressed. In brief, one important reason for tolerance is to know when and how far to be intolerant.

Tolerance and intolerance, then, are different instincts that are part of the same activity. Neither is useful or even understandable without the other. The ideal person is one who arrives at appropriate decisions because of the capacity to resist cutting off the intellectual process too soon. Viewed this way, tolerance requires considerable amounts of self-confidence, directness, honesty, sensitivity, perceptiveness, and decisiveness. These traits—or what might be described more generally as "health" or "virtue"—allow for sound decisions, including decisions about what to say.

The characteristics that make reading *The Tolerant Society* such an engaging conversation testify to the array of capacities that make up the tolerant mind. Consider, for example, the trappings that are absent from the book. Neither the text nor the notes contain the kind of padding that is so common in legal scholarship. There are no intimidating references to continental philosophers, nor any arcane economic analysis, nor even the usual exhaustive recitation of current scholarship on free speech. Instead, Bollinger gives prolonged treatment to a few important jurists and theorists (Holmes, Meiklejohn, Mill, Wigmore, Chafee, and a few others). Again and again, the authority he relies on is the reader's capacity for introspection and empathy. The book begins, for instance, with the announced intention of explaining "a shared intuition" that extraordinary tolerance somehow significantly strengthens society (p. 9). Later he asserts that "it is only by feeling the nature, and indeed the justice, of the desire to punish speech acts" that true appreciation for tolerance can emerge (p. 42). In discussing the harm done to Jewish residents by the proposed march in Skokie, Bollinger says simply, "We can all appreciate the fear these people must have felt" (p. 68). On the other hand, he suggests this about the darker side of the urge to suppress: "[I]t is the intolerance we feel toward our own intolerance that contributes to our wanting to censor the external, exaggerated reflection of that part of ourselves" (p. 127). Finally, in seeking a full explanation of the urge to protect unpopular speech, Bollinger observes, "Virtually everyone knows the fear that he or she may become the unpopular member, the victim" (p. 100). At every important juncture in his argument, Bollinger appeals to our ordinary, shared understandings as his authority.

The book's lack of pretentiousness is essential to the underlying

argument for tolerance. It allows the reader no escape from introspection. Thus the author displays his own capacity for tolerating the personal discomfort of thinking at the same time he demands the same from the reader. Like the book's demonstrated moderation, self-doubt, complexity, and judgment, its use of authority displays the qualities (and tensions) at issue in free speech cases. However, by effectively conveying how much is woven into the word "tolerant," Bollinger makes more ambitious and more doubtful his claim that the importance of free speech law is the symbolic affirmation of those complex capacities.

III

The intricacy of Professor Bollinger's use of the word "tolerant" opens his argument to a number of obvious questions. Since tolerance is desirable only as a balance, not as an absolute, can the courts be expected to teach appropriately subtle lessons? Since the correct balance is specific to circumstances (and therefore varies among the many political and economic roles available (pp. 118, 239)), is there any one kind of lesson that should be taught? Since tolerance is as important with respect to repugnant behaviors as it is with respect to repugnant speech, why should the courts single out cases involving speech?

Bollinger anticipates these and other questions.[3] One answer is basic enough to deserve consideration here. Society, Bollinger says, "gains by structuring itself in nonlinear ways" (p. 121). Race, for instance, is an impermissible consideration in public decisionmaking but an acceptable one in private (p. 121). Conflicting principles are often pushed to the extreme in discrete areas. Compartmentalization allows for dramatic articulation and exploration of the principle; it permits variety and limits risk; it encourages the simultaneous development of opposing ideas and habits, so that the society as a whole can benefit from tension among forces that (having been nourished separately) are vigorous enough to play a part in a complex society.

Courts, then, need not teach precisely the proper balance represented by mature tolerance because excessive tolerance taught in the area circumscribed as "speech" can be a healthy influence in the broader arena of social and political behavior where many other competing forces are also at work. Judicial decisions need not communicate any single

3. For example, Bollinger writes:

> But there are also good grounds for reservations about the [toleration] principle. All the components of the theory—the assumptions about the nature and degree of the impulse to intolerance, about the advantages of using speech as a discrete area in which to engage in extraordinary self-restraint toward troublesome behavior, about the capacity of the judicial system to effectively implement such a principle, about the role of law in shaping social attitudes generally, and others—are matters that, quite obviously, may be challenged as unworkable in practice, even if sound in theory (p. 244).

appropriate lesson because courts are not the only teachers. Many within the larger system will not hear the courts' lessons at all; despite judicial teachings, there will be zealots of all types. Indeed, the lessons of restraint and sympathy will be useful as a part of a system that includes many who are immoderate. Finally, speech should be singled out simply because it is a reasonably containable area of behavior where the lesson of tolerance has traditionally been taught and can continue to be taught with less potential for injury than in other areas (p. 124).

Given the objective of instilling *some* enhanced capacity for tolerance among at least *some* types of citizens, the question remains, however, whether free speech decisions even push in the right direction. The symbolism actually perceived by the relevant members of the public is, of course, an empirical matter. Bollinger gives some important reasons to expect that an appropriate lesson is being taught,[4] but his insights strongly suggest that judicial action will have multiple meanings. He points out, for instance, that judicial protection of the Nazis' right to march in Skokie might express not only admirable self-discipline in the face of provocation, but also insensitivity or even aggression towards the Jewish residents (p. 233).

A number of related reasons to expect some dysfunctional messages from the judiciary readily suggest themselves. In any political or cultural period, the urge to suppress, at least as to some salient issue, may be expressed most frequently by an identifiable group—whether defined by class, race, gender or religion. When this occurs, judicial acts of tolerance will necessarily appear to be directed disproportionately at that group. Thus, the appearance of judicial bias might be tied to or even overwhelm the lesson in tolerance, especially when the composition of the judiciary is different from that of the intolerant group. Moreover, when courts enjoin the acts of other officials, their decisions have both a restraining and an officious quality. Judicial behavior might therefore be viewed (especially by the competing governmental decisionmaker) as evidencing arrogance or myopic distrust as much as tolerance.

Finally, because the effect of judicial protection is to prevent the imposition of sanctions, there is also a danger that the salient message will be not the court's self-restraint, but the speaker's irresponsibility. To teach that speech ought not be punished is, perversely, to teach that it

4. For example, Bollinger argues that there is symbolic clarity in extraordinary efforts in a discrete and concrete area (pp. 123-25) and communicative potential in the literary abilities of at least some of the great jurists (p. 213). Moreover, he notes that judges can speak in relative unison and that some of their professional norms involve appreciation for tolerance (pp. 134-35). He also observes, "In this society the terminology of 'rights' sometimes seems to perform . . . [the] psychological function of providing an automatic, and socially accepted, way of separating oneself from the acts of others, which is usually an important predicate for tolerance" (p. 168; *see also* pp. 135, 200).

ought not be regarded as a serious act. Much modern public debate does have a carnival cast. Protest marches have become pleasant parades or giant celebrative "events." Acts of defiance have become theatrical. Protestors now sometimes prearrange with the authorities to symbolically "breach" a police line and to then be arrested as a kind of show for public consumption.[5] Bollinger reminds us that to suppress speech is to take it seriously. The converse can be one of the powerful lessons taught by judicial protections.

Without measuring, it is impossible to know how different publics perceive and sort out the various messages that are implicit in judicial acts of protection. It is tempting, therefore, to emphasize the kinds of language and explanation that courts use in order to make inferences about the lessons likely being taught.[6] However, the very originality of many of Bollinger's observations about legal theory and doctrine creates some doubt that the language of free speech law can be expected to validate tolerance. To the considerable extent that Bollinger's insights enable us to see free speech issues anew, there is reason to think the case law has been an ineffective teacher.

An example is Bollinger's emphasis on the "nonlinear" structuring of society. Why in the context of the first amendment is it so striking to propose that nonuniform treatment of equivalent behaviors might be desirable? Part of the reason, I think, is that the intellectual standards of constitutional law place such a high value on linear rationality and uniformity. The notion that likes ought to be treated differently subverts some of the most venerable constitutional traditions.[7] For instance, Bollinger argues that speech and behavior are not distinguishable with respect to the underlying value at stake (tolerance), and yet ought to be

5. At my university, for example, protests have been mounted against CIA recruiting. In one instance, negotiations between the police and protest leaders resulted in a system for facilitating orderly arrests: "As police stood at the door of a bus, protesters filed toward them, crossed a line to be arrested, [and] were hauled off . . . ." Boulder Daily Camera, Nov. 19, 1985, at 1A, col. 1. This method was decided upon because, although the "demonstrators wanted to make their point by getting arrested in large numbers with news reporters and photographers on hand," for several hours the police would make no arrests. *Id.* at 6A, col. 1. A year later, an activist planning a protest on the same issue commented, "The little game the protesters played with the police [last year] minimized the significance of our stance." Boulder Daily Camera, Nov. 13, 1986, at 1C, col. 1.

6. In the first amendment area, examples of the same general approach (with the same disadvantages) include Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 466-76 (1985) (arguing that judges should adhere to "simple," spartan first amendment principles in order to strengthen the restraining power of the first amendment in times of crisis); Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 324-30 (1984) (arguing that the judiciary's reliance on high-sounding principles in first amendment cases, particularly in extreme and difficult cases, is an obstacle to public appreciation of free speech). For an example from a different area of constitutional law, see Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455, 486-89 (1984) (court decisions in antidiscrimination cases are pedagogic devices providing occasion for recognition of communal bonds and interdependence).

7. It is obviously at odds, for instance, with the criterion of neutrality.

given different legal treatment. This is dramatically inconsistent with normal assumptions about constitutional authority. It contradicts the idea that the textual specification of protection for speech reflects an authoritative judgment that speech is special. The legitimacy of the enterprise of judicial enforcement depends in large part on the belief that the priorities established in the fundamental law are based on important distinctions that justify extraordinary protection. It is therefore not surprising that the judiciary has assiduously insisted on teaching the opposite lesson from the one Bollinger wants taught.[8] Even when the Court has produced nonlinear decisions in specific areas, the absence of conventional rationalization has been an acute embarrassment, and thus the differential treatment has been ignored rather than explored.[9] The Court's opinions do not help us to appreciate the equivalence of speech and behavior with respect to the value of tolerance. For that it is necessary to read someone who, like Bollinger, sees past what the Court says.

Consider another of Bollinger's insights. The argument that tolerance should include a sympathetic appreciation for intolerance is a breakthrough *because* it also gets past the lessons that the courts have taught for so long. Bollinger's discussion itself shows that even in its most respected opinions, the Court has tended toward the position that all intolerance is deeply antithetical to democratic values.[10] His somewhat hesitant suggestion that such errors may be a correctable failure of understanding (pp. 222-23, 245) is properly modest. For courts to recognize the close functional and moral relationship between tolerance and intolerance would be at odds with their understandable desire to persuade the public of the necessity for decisions that inflict great costs on prized values like personal reputation and decent political debate. The vindication of tolerance in extreme settings does, as Bollinger says, have

8. The decisions insist that the benefits of speech are special and that, for this reason, freedom of speech is the foundational constitutional right. *E.g.*, Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

9. *Compare, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding FCC "right-of-reply" regulation for broadcasters against a first amendment challenge) *with* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating a right-of-reply statute for newspapers on first amendment grounds). Although Professor Bollinger later provided an interesting nonlinear defense of the two decisions, *see* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 32-37 (1976), the Court dealt with the obvious discrepancies by not mentioning them.

10. To take two prominent examples: The Court said "vehement, caustic" and "erroneous" statements must be protected from the danger of self-censorship in order to ensure adequate democratic accountability. New York Times Co. v. Sullivan, 376 U.S. 254, 270-72 (1964). Some years later, it suggested that in principle suppression of "one particular scurrilous epithet" threatened the creation of "a more capable citizenry and more perfect polity." Cohen v. California, 403 U.S. 15, 22-24 (1971). Bollinger discusses both cases (pp. 34, 48-50, 170-72).

pedagogic advantages such as high drama and visibility. Unfortunately, it also ensures that free speech will seem extremely costly and possibly unwise unless the courts can successfully exaggerate the stakes.[11] The price of immoderate lessons is the kind of intellectual obfuscation that Bollinger's book so successfully penetrates.

From a close reading of judicial doctrines and free speech theories, Bollinger does tease strands of thought that are consistent with his understanding of tolerance.[12] This is interesting as creative legal analysis and intellectual history, but one reason for the interest is that the connections are not obvious. They do not, therefore, demonstrate that theorists or judges have been teaching about tolerance effectively. If theory or doctrine had been effective, Bollinger's book would not be revealing and significant—both of which it manifestly is.

For all its understatement, *The Tolerant Society* is a radical recommendation that free speech law exhibit more of the qualities of insight and honesty that are its object:

> [T]he same theory of free speech that instructs us on the ends for which the principle is aimed . . . also provides us with a source for self-criticism, as a set of premises about human thought and action that applies every bit as much to free speech disputes as to any other social controversy (p. 236).

What would it take for judicial decisionmaking to exhibit the mix of attributes Bollinger calls "tolerance"? Because tolerance requires a full inquiry into the importance of the urge to suppress, courts would have to take into account large and highly speculative considerations. In the *Skokie* case, for instance, Bollinger argues that the courts should have "seriously" considered the risk that the proposed march might have disrupted "the peaceful coexistence that had tentatively been maintained in the community between Jews, Christians, and blacks" (p. 191). Those who are close to the moods of the populace might be able to assess such possibilities. But there is no obvious reason to expect the relatively insulated judiciary to be able to do so. This sort of political and cultural understanding—especially if the prospect of "degeneration of relations" is long-term—is not the kind of thing about which legal briefs or authoritative judicial decisions can be easily written.

Because tolerance requires assessment of varied and conflicting fac-

---

11. *See* Nagel, *supra* note 6, at 313-17.

12. Bollinger describes the traditional justifications offered by Meiklejohn and Holmes as an "epiphenomenon" (p. 145). When he probes beneath, he finds "not . . . some single-minded urge for information but . . . [a] perceived need to correct what might be thought of as a bias or a deficiency in the way people think about issues" (p. 172). Similarly, in Chapter 6 he examines several basic free speech doctrines "afresh in the light of the general tolerance theory" (p. 175) and finds them surprisingly compatible with his thesis.

tors, courts should employ "conscientiously ambiguous" doctrine (pp. 192-93), and free speech scholarship should:

> turn somewhat away from . . . the intricacies of the tests employed in the various areas of First Amendment litigation, and examine more broadly what the impact of the concept seems to be in social thought generally. Free speech is too vital a national symbol to be thought about exclusively in doctrinal terms (p. 247).

Now, the judiciary's reverence for clarity and its devotion to doctrine cannot be easily cast off. Clarity is an ideal bred early into every law student; doctrine—those tests that define a "public figure" or "obscenity," and so on—has been the obsession not only of first amendment law but of almost all constitutional law during the modern period.[13] To significantly reduce the influence of either would require far more than greater understanding of the value at issue in free speech cases. It would require important alterations in patterns of legal thought and in the functions of judicial review.[14] If, for example, legal explanations are to be richer and more ambiguous, communicative force will be achieved at the price of predictability and control. Lower courts and other political institutions, while perhaps learning from the example set by the Supreme Court's more expressive opinions, would nevertheless have more discretion in making concrete decisions. After all, the point of a tolerant judicial opinion would be to communicate the fullness and difficulty of a dispute.[15] Without simplistic rules to "censor" what is complex and problematic, decisions would improve in part by leaving more autonomy to other decisionmakers. To the extent that the Court is committed to an exalted bureaucratic function—the achievement of measurable racial integration in public schools, a political system characterized by an ascertainable amount and mix of information, and so on—it will continue to depend on crude clarity. Teaching the subtle lessons of tolerance would jeopardize the judiciary's deep commitment to instrumental efficacy.[16]

To urge that free speech decisions be "a forum for education" (p. 235) is to call for a function that is at odds with the judiciary's task of authoritatively terminating disputes. If litigation "provides the framework, the occasion, for the community to think about the things free speech is intended to raise for thought," then, as Bollinger acknowledges, the process must move slowly (p. 195). Both this ventilation function and the need for quality opinion-writing are in tension with the amount

13. *See* Nagel, *The Formulaic Constitution,* 84 MICH. L. REV. 165, nn.2-18 (1985).

14. For a more extensive treatment of this subject, see *id.* at 177-82.

15. *See* Gibson, *Literary Minds and Judicial Style,* 36 N.Y.U. L. REV. 915 (1961).

16. The inconsistency between communicative and instrumental functions is one of the themes in R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (forthcoming from University of California Press).

of work required for an extensive dispute resolution role. Moreover, because courts end disputes by coercing one party or the other, it may be too much to ask that opinions candidly and sympathetically portray all sides of the question. For a judge to do so is to risk throwing the resolution of the case into doubt and thus to undermine the authority of the decree and of the court. Perhaps judges are wrong to fear such consequences, but there is ample evidence that they long have,[17] and there is reason to think they will continue to do so as long as one party must be made to lose.

Bollinger, naturally, does not suppress any of the difficulties his proposal involves. He acknowledges that tolerance is inconsistent with the adversarial nature of the litigation process because that process encourages the "tendency to oversimplify, or, in effect, to censor, the complexity of the problems" (p. 222). Indeed, he vividly describes how the surprising and perplexing facts that underlie the *Skokie* litigation differ dramatically from the commonly understood significance of the case and with judicial explanations (pp. 26-30). He observes that excessive definitiveness—for instance, the false portrayal of the constitutional text as absolute—may result not from misunderstanding, but from normal judicial ideals such as fidelity to external legal authority and personal disinterest (p. 235). The central doubt about Bollinger's theory, in short, is how much change we can realistically expect of courts, which have deeply ingrained habits and ideals and functions that all involve significant amounts of intolerance. To the extent that the sort of enlightenment offered in this book cannot be expected to alter the behavior of the judiciary, that institution cannot be expected to teach tolerance to the rest of us.

CONCLUSION

The Tolerant Society is a threatening book. It proposes a radical alteration of judicial norms for the sake of a complex and elusive objective that, while surely attractive, is but one kind of virtue. The book demonstrates that it is the better part of wisdom not to shut off thought too soon; its appreciation of tolerance is so genuine and full that only an obdurate reader could react by quickly rejecting the function that Professor Bollinger proposes for free speech decisions. On the other hand, intolerance has many directions: another would be to conclude too quickly that tolerance can be accommodated with existing legal traditions. If it cannot, we must consider the uncomfortable possibility that nothing, not even the agreeable image of ourselves that Professor

17. Bollinger provides some evidence (*see* pp. 29, 235). Other evidence, if any is needed, can be found in Gibson, *supra* note 15, at 916, and in Nagel, *supra* note 13, at 190-97.

Bollinger's book evokes, justifies the regime of judicial protections to which we have become so accustomed.