Essay

An Essay Concerning Toleration

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Where there is no vision, the people perish.[1]

For over three decades, judges, lawyers, and legal scholars have been taking rights seriously. Definitions, limitations, and justifications of individual rights have dominated the field of constitutional law. The obstacles to achievement of a rights-based legal system—majoritarianism, community values, and a focus on the concrete rather than the abstract—have been discredited more or less successfully.[2] Governmental neutrality on moral choices and a pervasive, liberal moral relativism are

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1. *Proverbs* 29:18.

2. For a review of the literature constructing a rights-based morality and refuting opposing concepts, see Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 563-74 (1986). The seminal defense of rights theory is DWORKIN, TAKING RIGHTS SERIOUSLY (1977). *See also* Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 977-78 (1986) (suggesting that "[t]he language of 'rights' has become the rhetoric of choice in our society for asserting moral and legal claims"). On majoritarianism, see, for example, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 83-84, 111-17, 151-59 (1970); J. ELY, DEMOCRACY AND DISTRUST 63-69 (1980); Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099, 1112-17 (1977); Sherry, *Issue Manipulation by the Burger Court: Saving The Community From Itself*, 70 MINN. L. REV. 611, 612-16 (1985). The rejection of community values usually takes the form of advocating governmental neutrality toward individual value choices. *See, e.g.*, B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10-12 (1980); Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 142 (S. Hampshire ed. 1978); Richards, *Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism*, 5 SOC. THEORY & PRAC. 461, 461, 468-83 (1980). The rejection of concreteness in favor of abstraction is inherent in any theory of rights. Rights adhere to persons in general, not to specific persons, and thus rights theory treats individuals as "ciphers." *Cf.* Reynolds v. Sims, 377 U.S. 533, 623 (Harlan, J., dissenting) (implicitly accusing the majority of treating people as "ciphers"). In the judicial arena, the dominant achievement of the Warren Court may be characterized as the practical implementation of rights theory. *See* G.E. WHITE, EARL WARREN: A PUBLIC LIFE 356-57 (1982); Lewis, *Foreword* to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T at vii (V. Blasi ed. 1983).

now the legal, if sometimes judicially imposed, norm.[3]

The focus on individual rights has substantially transformed and improved many aspects of our society. Antidiscrimination law is based largely on notions of individual rights. The increased protection of freedom of expression is a reflection of the increased protection of individual rights generally. Many of the procedural protections accorded criminal defendants rest on a determination that individual rights must outweigh the societal interest in convictions. A whole panoply of rights involving intimate individual and familial decisions has been created. We have, in short, become a more just and humane society as a result of taking rights seriously.[4]

The rights revolution, however, has also had an adverse effect on society. In rejecting community values and using an entirely abstract method of discourse, rights theory has created a moral vacuum with serious practical consequences. Rights discourse discourages a morality of aspiration. "Thinking in terms of rights . . . encourages us to think about what constrains us from doing what we want, not what obligates us to do what we ought."[5] Because rights adhere to individuals, the rights model also encourages selfishness rather than altruism or community-mindedness. Rights discourse thus constricts our opportunity to educate our moral sensibilities and to become less self-regarding and more connected to a community of others.[6] We

3. Individual rights are clearly dependent upon government neutrality on moral choices. *See, e.g.*, A. MACINTYRE, AFTER VIRTUE: A STUDY OF MORAL THEORY 133 (1981) ("[T]he variety and heterogeneity of human goods is such that their pursuit cannot be reconciled in any single moral order and that consequently any social order which . . . enforces the hegemony of one set of goods over all others is bound to turn into a straightjacket . . . ."); *see also* text accompanying notes 39-44.

4. Often the limitations on these beneficial doctrines also derive from notions of individual rights, either because there are limits on what constitutes a right or because competing rights are involved. *See generally* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (suggesting that under current doctrine, equal protection rights are limited to "victim's" rights to be free from the actions of individual "perpetrators" and that this limitation results in the basic failure of antidiscrimination doctrine).

5. Schneider, *Rights Discourse and Neonatal Euthanasia*, 30 U. MICH. QUAD. NOTES 33, 37 (Winter 1986).

6. *See id.* at 39 ("A community that attempts to unite itself largely in terms of the rights each citizen has against the whole has little to stimulate in each citizen concern for the others."); *see also* Schneider, *Moral Discourse in Family Law*, 83 MICH. L. REV. 1803, 1819-22 (1985) (suggesting that family law has changed from prescribing "a standard of behavior not readily attainable" to enforcing "minimal responsibility").

have, in short, lost our virtue.[7]

Perhaps the loss of virtue is outweighed by the gains in individual freedom. It is difficult—and beyond the scope of this essay—to compare an unhappy but moral life with a happy amoral one. Were the moral vacuum the only dark side of the triumph of the rights model, the danger of continued adherence to pure theories of individual rights would be minimal. Unfortunately, the practical consequence—because not only nature abhors a vacuum—is that religious fundamentalists and other members of the new right have rushed in to fill the gap.[8] Legal

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7. For a broad historical description of this loss of virtue, see A. MACINTYRE, *supra* note 3. For a similar description of American history, see J. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM (1984).

8. One recent conservative tract, explicitly seeking to help fundamentalist Christians become more politically influential, notes both the vacuum left by rights theory and the potential for Christianity to fill it:

> [M]orality today is increasingly viewed as a matter of who decides, rather than what is decided. That is, the act of choosing, rather than what is chosen, has become for many the decisive ethical issue.
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> . . .
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> The fact of the matter is, Christianity filled a seldom-noticed vacuum in the political science of the founding fathers. This vacuum may be described as moral . . . .

Eastland, *The Politics of Morality and Religion: A Primer*, in WHOSE VALUES? THE BATTLE FOR MORALITY IN A PLURALIST AMERICA 5, 6, 12 (1985). If the reader is unpersuaded that such a danger from the right exists, some of the other essays in this volume provide frightening glimpses of the society the religious right wishes to create. *See, e.g.*, Sobran, *"Secular Humanism" or "The American Way,"* in WHOSE VALUES? THE BATTLE FOR MORALITY IN A PLURALIST AMERICA 37-51 (1985) ("The judiciary, custodian of the secular humanist ground rules, has served as a theocratic priesthood which, in the name of the American constitution, has successfully circumvented popular politics to realize much of the liberal agenda."); Vitz, *Ideological Biases in Today's Theories of Moral Education*, in WHOSE VALUES? THE BATTLE FOR MORALITY IN A PLURALIST AMERICA 113-38 (1985) (discussing "the deep penetration of a confused moral relativism into the world of American education"). *See also* M. ATWOOD, THE HANDMAID'S TALE (1985).

Some liberal scholars have recognized a similar practical consequence facing the left:

> The left has come to regard common sense—the traditional wisdom and folkways of the community—as an obstacle to progress and enlightenment. Because it equates tradition with prejudice, it finds itself increasingly unable to converse with ordinary people in their common language. Increasingly it speaks its own jargon, the therapeutic jargon of social science and the service professions that seems to serve mostly to deny what everybody knows.

Lasch, *What's Wrong With the Right*, 1 TIKKUN 23, 23 (1986). Rights discourse can be used (as well as replaced) in the service of conservative goals. Right-wing libertarianism carries the notion of individual rights to its logical extreme, also defeating liberal goals. *See generally* R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER

scholars committed to essentially liberal goals and principles thus have two choices. They may commit social suicide by continuing to revise and reformulate the liberal rights model, or they may find new methods of discourse.[9]

Two recent books with a common theme of toleration provide illustrations of both courses of action. Lee C. Bollinger's *The Tolerant Society: Freedom of Speech and Extremist Speech in America*[10] and David A.J. Richards's *Toleration and the Constitution*[11] are two variations on this new theme of tolerance. Written from different perspectives,[12] apparently intended for different audiences,[13] and certainly vastly different in breadth and scope,[14] these two books nevertheless focus on the common topic of tolerance and its place in our constitutional scheme. There is, however, one vital difference between the two books. Bollinger's book is an attempt to provide a new approach to free speech issues that simultaneously provokes further thought on the subject of tolerance. Richards's discussion, in contrast, is an example of the exhaustive and exhausting refinement of the rights model that ultimately does little more than put new labels on old ideas. Part I of this essay will

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OF EMINENT DOMAIN (1985). For an example of the use of this kind of conservative rights model by the judiciary, see Lochner v. New York, 198 U.S. 45 (1905).

9. The Conference on Critical Legal Studies has clearly chosen the latter course. Their deconstructive mode of discourse, however, merely destroys what liberalism does provide, leaving an even larger gap. *See generally* Sherry, *supra* note 2, at 569-74; Boyle, *Modernist Social Theory: Roberto Unger's Passion* (Book Review), 98 HARV. L. REV. 1066, 1081-83 (1985).

10. L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

11. D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

12. Bollinger has written before about first amendment doctrine. *See, e.g.*, Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976). Richards has written mostly in jurisprudential areas. *See, e.g.*, D. RICHARDS, THE MORAL CRITICISM OF THE LAW (1977); D. RICHARDS, SEX, DRUGS, DEATH AND THE LAW: AN ESSAY IN DECRIMINALIZATION AND HUMAN RIGHTS (1982); Richards, *Rights and Autonomy*, 92 ETHICS 3 (1981).

13. Richards explicitly notes that some chapters of *Toleration and the Constitution* are intended for nonlegal audiences. D. RICHARDS, *supra* note 11, at viii (author's preface). To anyone even slightly familiar with legal doctrine, these chapters are simplistic and superficial. *See, e.g., id.* at 3-19, 165-87 (Chapters 1 and 6). Bollinger's *The Tolerant Society* is more consistently aimed at legal scholars, which might make it inaccessible to others. *See* L. BOLLINGER, *supra* note 10.

14. *The Tolerant Society* focuses only on speech, and largely on extremist speech, L. BOLLINGER, *supra* note 10, whereas *Toleration and the Constitution* encompasses religion, speech, and privacy, D. RICHARDS, *supra* note 11.

describe and criticize Richards's *Toleration and the Constitution* on its own terms within the rights model. Part II will similarly evaluate Bollinger's *The Tolerant Society*. Finally, Part III will expand and explore the potential for further discourse offered by Bollinger's ideas.

I.

Richards's *Toleration and the Constitution* is the broader of the two books, discussing not only freedom of speech, but also privacy and the religion clauses. Unfortunately, it is also the less innovative, and therefore the less interesting, of the two. Richards's style and substance are both reminiscent of many earlier works seeking a constitutional superstructure to link diverse constitutional doctrines, and his book suffers from similar flaws.

The first problem with *Toleration and the Constitution* is its style. Richards's prose is so impenetrable that some readers may conclude that he must have something important to say despite their failure to comprehend what it is.[15] Opening the book almost at random yields the following examples of Richards's indescribable style:

> [Saint Augustine's] remarkable interpretive synthesis of complex texts, interpretive techniques (biblical typology), and background philosophical doctrines reveals a distinctively Western style of complex interpretive synthesis, wedded to a linear historical self-consciousness.[16]
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> * * * *
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> Locke and Bayle give conscience a moral interpretation and weight associated with their conception of the proper respect due to the highest-order interest of persons in their freedom (the origination and revisability of claims) and rationality (practical and epistemic rationality). We may say, plausibly, that Locke and Bayle assume the concept of the person of Augustinian philosophical psychology: the freedom, rationality, and unity of the person, which dignify the nature of persons made in the image of an ethical God.[17]

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15. A colleague of mine has suggested that the problem with brilliant scholars is that their ideas cannot be rational or generally persuasive, or they would not be considered unique and therefore brilliant. Farber, *The Case Against Brilliance,* 70 MINN. L. REV. 917, 919-20, 923-24 (1986). Richards's book, if it is well-received, may prove Farber wrong: it is possible for the most commonplace ideas to be considered brilliant, at least if they are presented in the most obfuscating manner possible and accompanied by copious footnotes to dead philosophers. *See* Boyle, *Introduction: A Symposium of Critical Legal Studies,* 34 AM. U.L. REV. 929, 929 (1985).

16. D. RICHARDS, *supra* note 11, at 25-26.

17. *Id.* at 90-91.

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> The specific concern of the antiestablishment clause is that, in contexts of belief formation and revision, the state [may] [sic] not illegitimately (nonneutrally) endorse any one conception (whether religious or secular) from among the range of conceptions of a life well and humanely lived that express our twin moral powers of rationality and reasonableness.[18]

With work, these passages do make comprehensible if unoriginal points: that the distinctively Western style of textual interpretation includes both original texts and later interpretations of them; that making moral choices is part of our culture's conception of the freedom of individuals, a conception with deep religious roots; and that government ought not intervene in individual moral choices unless it does so for reasons that are not themselves value-laden. Ultimately, however, *Toleration and the Constitution* does not reward the effort expended by author and reader alike. That it does not is due not only to Richards's cumbersome style, but to the book's substance.

The implicit promise of the title and some of the introductory material is that *Toleration and the Constitution* will present a new, nonrights perspective on constitutional interpretation. For example, early on, in criticizing the pluralist model of democracy which aggregates the interests of individuals, he suggests: "There is, however, an alternative understanding of American democratic traditions that construes government as properly responsive not only or essentially to private interests as such, but to a conception of the public good and basic rights articulated through public argument and debate."[19] Unfortunately, the book fails to live up to this promise, ultimately offering little change of perspective from the liberal constitutional tradition of the last decades.

First, Richards is conventional in his explicit rejection of what has come to be called noninterpretivism,[20] as well as of the narrowest form of interpretivism.[21] He devotes an entire

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18. *Id.* at 149.

19. *Id.* at 17; *see also id.* at vii-x (author's preface).

20. *Id.* at 14-19. For proposals of noninterpretivism, see Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L. REV. 204 (1980); Ely, *Constitutional Interpretivism: Its Allure and Impossibility,* 53 IND. L.J. 399 (1978); Grey, *Do We Have an Unwritten Constitution,* 27 STAN. L. REV. 703 (1975).

21. D. RICHARDS, *supra* note 11, at 33-45. The only writers who have explicitly adopted the narrowest form, which requires looking at how those who wrote the Constitution would have answered the question at the time, are Raoul Berger and Edwin Meese. *See* R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 77-111 (1982); R. BERGER, GOVERNMENT

chapter[22] to a critique of all current theories of constitutional interpretation and laments that constitutional interpretation "has received little critical attention from students of constitutional law."[23] His criticism of those who would read the Constitution as codifying the narrow and specific intent of the framers is simply a reiteration of his earlier attack on the same target[24] and adds little to the literature. His refutation of those who would ignore history is simply a plea for the use of hermeneutics in constitutional interpretation, an idea that hardly qualifies as original.[25] Richards cites John Ely as a prime example of antihistoricism, a surprising choice in light of their respective positions on the abortion decisions: while Ely castigates the Court for abandoning neutral principles in *Roe*,[26] Richards thinks that antiabortion statutes violate the principle of freedom of moral action and are therefore unconstitutional.[27]

BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363-72 (1977); *Addresses—Construing the Constitution*, 19 U.C. DAVIS L. REV. 1, 22-30 (1985) (reprinting an address of Attorney General Edwin Meese of Nov. 15, 1985 before the Washington, D.C. chapter of the Federalist Society, Lawyers Division).

22. *See* D. RICHARDS, *supra* note 11, at 20-45 (discussing legal interpretation and historiography).

23. *Id.* at vii (author's preface). In fact, constitutional scholars seem almost obsessed with questions of interpretive strategies, *see, e.g., Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981) (symposium); *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983) (symposium); *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981) (symposium); *Law and Literature*, 60 TEX. L. REV. 373 (1982) (symposium), and the debate has recently spilled over into the popular press, *see, e.g., Addresses—Construing the Constitution*, *supra* note 21.

24. *Compare* D. RICHARDS, *supra* note 11, at 34-45 ("Original understandings of application are just that: the way in which one age, in its context and by its lights, construed these abstract intentions." *Id.* at 44.) *with* Richards, *Constitutional Interpretation, History, and the Death Penalty: A Book Review*, 71 CALIF. L. REV. 1372, 1379-83 (1983) ("[I]t is not reasonable to impute to the Founders . . . an intent to bind later interpretation by their applications of the language when . . . the range of such applications is often enormously controversial historically . . . ." *Id.* at 1381.).

25. *See, e.g.*, Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of An Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979); Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What The Law Is,"* 23 ARIZ. L. REV. 581, 584, 595 (1981); *see generally* Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 93 n.28 (1984); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 798-804 (1983).

26. Ely, *The Wages of Crying Wolf: A Comment On* Roe v. Wade, 82 YALE L.J. 920 (1973).

27. D. RICHARDS, *supra* note 11, at 261-69.

Ely's position would seem to be more historically-oriented than Richards's.

Richards's own version of interpretivism, moreover, is as substantive as the theories of any radical indeterminist, insofar as it depends ultimately on persuading the reader that his own view of personhood is correct. Thus, not only has his critique of Ely's "representation-reinforcing" theory—that it is a substantive view masquerading as a procedural doctrine[28]—been made before,[29] but Richards's own analysis suffers from the same problem. Despite Richards's protest that his account of common human needs is "neutral in the sense that it is procedural,"[30] it incorporates a substantive vision of human nature and human desires into its purportedly neutral description of "general goods" and "equal respect."[31]

An examination of Richards's hermeneutic technique shows that he is engaging in the same open-ended, unconstrained noninterpretivism of which he accuses Ely and others. Richards describes his technique as an "attempt to integrate a critical political theory of our constitutional law with a self-understanding of our historical constitutional traditions, and the larger moral, religious, and political ideals they reflect."[32] An example of Richards's method is his treatment of Locke's vision of religious toleration. He suggests that Locke equated religion with ethics,[33] and that Locke's toleration of religion therefore translates into a more general toleration of moral belief in a society that no longer equates religion and ethics.[34] This conveniently enables him to get around such sticky problems as Locke's exception of Catholics and atheists from universal tol-

28. *Id.* at 16.

29. *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship,* 90 YALE L.J. 1063, 1092-95 (1981); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory,* 89 YALE L.J. 1037, 1038 (1980).

30. D. RICHARDS, *supra* note 11, at 134.

31. *Id.* at 137-41 (on equal respect); *id.* at 244-47 (on general goods); *see generally* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). Richards appears to concede this elsewhere, noting that "[t]he vision [of the good], ultimately, is one of persons who, because of the effective exercise of their autonomy, are able to identify their lives as their own, having thus realized the inestimable moral and human good of having chosen one's life as a free and rational being." Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution,* 127 U. PA. L. REV. 1195, 1225-26 (1979).

32. D. RICHARDS, *supra* note 11, at viii (author's preface).

33. *Id.* at 106, 124-27.

34. *Id.* at 133-40.

eration.[35] Richards's argument here is reminiscent of Tushnet's proposal to justify *Brown v. Board of Education* by equating the importance of contract in the nineteenth century with the importance of education in the twentieth.[36] Richards's use of hermeneutics is therefore equally susceptible to Tushnet's criticism that equating contract and education is only one of many possible interpretations.[37] As Tushnet suggests, the hermeneutic method therefore places no neutral constraints on constitutional interpretation.[38]

Toleration and the Constitution's version of "toleration," moreover, is little more than a disguised claim for diversity based essentially on liberalism's two themes of individual autonomy and moral relativism: the government ought not interfere with individual moral decisions except where necessary to protect the moral autonomy of others. Richards's central theme is that protection of freedom of conscience (or toleration of diverse consciences) underlies—or ought to underlie—the three constitutional doctrines of religion, speech, and privacy. He thus identifies a "general constitutional theme of toleration in [these three] spheres—thought, speech, and action."[39]

Richards constructs this theme both philosophically and historically. Building on the work of Dworkin and Rawls, he posits a contractarian "background right" of "equal respect for persons."[40] The link between contractarianism and the princi-

35. *Id.* at 123-25. Richards's preoccupation with the niceties of Locke's theories, and his consequent slighting of more jurisprudential issues, may have a final unfortunate consequence. At the beginning and end of the book, he makes what appears to be a peripheral argument for more integration of legal scholarship with other disciplines, noting that "[l]aw, like music, is an interpretive art; its values are more feelingly experienced when its interpreters bring to bear on its texts humane learning." *Id.* at 305; *see also id.* at 21 (introducing the mistake of disengaging "meaning in law from history and convention"); *id.* at 47 (rejecting positivistic conventionalism for its failure to weigh "other authoritative constructions"). The force of his observation, however, may be diluted by his application of it.

36. Tushnet, *supra* note 25, at 800-01.

37. *See id.* at 801.

38. *See id.* at 801-02.

39. D. RICHARDS, *supra* note 11, at 232.

40. *Id.* at 31, 54, 68-69. Reading the Constitution as protecting rights of individuals to equal respect is a fairly common argument. *See* Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1079-84 (1980); Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 *passim* (1983); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 126-28 (1976); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-11 (1977).

ple of equal respect, however, is not entirely clear. At one point, Richards indicates that contractarianism is based on the principle of equal respect.[41] At another, he suggests that equal respect for persons is an independent principle within the contractarian model, limiting the scope of the contract.[42] Finally, Richards also seems to think that the principle of equal respect necessarily follows from adoption of a contractarian model.[43] Whatever the link between the two, Richards's thesis is that the principles together limit the government to the role of protecting "general goods, those all-purpose goods given interpretive weight and point by all persons as conditions of the more ultimate ends and ambitions of their lives as rational and reasonable beings."[44] This is virtually a restatement of the neutrality of classical liberalism.

Richards's thesis suffers from an even more basic problem than either confusion or lack of originality. However powerful his defense of a principle of equal respect for *persons*, he never explains why such a principle mandates equal respect for their *ideas*. The missing premise from Richards's argument equating respect for persons with respect for ideas, of course, is that treating persons with respect requires allowing them to have (and perhaps act on) their own ideas. Unfortunately, Richards does not explain why equal respect for persons necessarily *includes* respect for ideas, but instead suggests that allowing persons the freedom of forming ideas *follows* as a conclusion from the premise of equal respect for persons: "One kind of demand must, from the rights perspective on treating persons as equals, have priority of place, namely, the demand that the capacity itself for rational freedom must be respected. If we have any rights, we must have this right, the inalienable right to conscience."[45] The central philosophical argument thus becomes

41. *See* D. RICHARDS, *supra* note 11, at 69 ("The Lockean contract is, I shall suggest, a way of expressing a deeper moral thought about treating people as equals: equal respect for persons calls for constitutional constraints which a legitimate government and community must observe.").

42. *See id.* at 62 ("On a contractarian model, . . . the terms of the basic regulative constitutional principles agreed to must dignify the nature of persons as free, rational, and equal.").

43. *See id.* at 102 ("The clearest evidence that constitutional law is contractarian would be the salient weight of the inalienable right to conscience as a background constitutional right, . . . for this right, more than any other, expresses the interpretive moral dignity central to contractarian political theory.").

44. *Id.* at 84; *see also id.* at 103 (suggesting that American constitutional law must be contractarian if it does give priority to the right to conscience).

45. D. RICHARDS, *supra* note 11, at 85; *see also id.* at 138 ("[E]qual respect

tautological. Richards offers no support for the notion that a government dedicated to equal respect for persons must necessarily respect or tolerate all of their moral beliefs, expressions, or actions.

Richards's historical argument—that a background right of equal respect for persons animated the Framers and interpreters of the Constitution (a necessary premise given the way he structures his interpretation arguments)—is similarly weak. After a dense foray into political theory up to the time of the Constitution,[46] Richards devotes a chapter to the "Historiography of the Religion Clauses"[47] and "The Jurisprudence of the Religion Clauses."[48] The former subsection of the chapter purports to show that the framers adopted the religion clauses to protect freedom of conscience as the paradigmatic example of respect for persons;[49] the latter purports to show that the Supreme Court has interpreted the clauses with the same background right in mind.[50]

Selected examples should illustrate the unsuitability of Richards's historical analysis to his conclusions. His first text-based argument for the primacy of religious toleration, and thus of freedom of conscience, betrays an elementary historical error. Richards suggests that "[t]he very place of the religion clauses—the first clauses of the first amendment"—indicates their primacy.[51] In fact, when the Bill of Rights was proposed to the states by Congress, what became the first amendment was actually third. The first two proposed amendments, dealing respectively with apportionment in the House of Representatives and compensation for senators and representatives, were not ratified by the states; the religion clauses were thus first by default.[52] Richards repeats historical dogma of questionable validity: the civics-class view that "Madison is . . . a central architect both of the Constitution and the Bill of Rights."[53] This view is undermined by Madison's notes of the convention, which show him to be uncompromising, and the fact that many

must include all the ways in which persons exercise these twin powers of rationality and reasonableness in conceptions of a life well and ethically lived.").

46. *Id.* at 85-102.

47. *Id.* at 104-28 (discussing religious toleration).

48. *Id.* at 128-62.

49. *Id.* at 111-16.

50. *Id.* at 129-33.

51. *Id.* at 67.

52. *See* 5 THE ROOTS OF THE BILL OF RIGHTS 1164-65 (B. Schwartz ed. 1980) (amendments proposed by Congress in 1789, from Senate Journal).

53. D. RICHARDS, *supra* note 11, at 114.

of Madison's key ideas were largely rejected by the end of the process.[54] Richards brushes aside those who disagree with his history with the deprecating label of "Revisionist Historiography" and little analysis.[55]

Richards's jurisprudential argument—that Supreme Court interpretations of the religion clauses bear out his theory of toleration—is irretrievably compromised by a piece of fancy footwork along the lines of "heads I win, tails you lose":

> Often, the interpretive practices of judicial review will be explained by the kind of interpretive arguments that are, on my view, most defensible. To the extent that my arguments better explain the law, that will be to their credit as explanatory theories of law. Sometimes, however, I shall argue to the effect that a judicial construction of a constitutional issue is an interpretive mistake. If the argument is a sound criticism of the constitutional interpretation judicially imposed, that will be to its credit as part of the normative component of constitutional interpretation.[56]

In other words, where Richards agrees with Supreme Court precedents they support his theory, and where he doesn't . . . well, the Court just made a mistake in not applying his theory correctly. His jurisprudential argument is exactly as promised: he uses precedents on Bible reading or prayer in public schools and on aid to parochial schools to support his theory,[57] then uses his theory to criticize precedents on tax exemptions for churches, legislative chaplains, and creches in public parks.[58]

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54. *See* F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 205-09 (1985). Madison's most significant loss was the adoption of equal representation in the Senate. *See* Mason, *The Constitutional Convention,* in THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES 37, 48-49 (G.S. Wood ed. 1973). This loss is due in part to the nationalists' failure to compromise, a failure they recognized too late. After consistently rebuffing a proposed compromise of compressed proportional representation, *see* J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 87 (June 7), 93 (June 8), 188 (June 25), 232 (July 2) (2d ed. 1985) [hereinafter MADISON'S NOTES], Madison supported the compromise only after true proportional representation in the Senate had failed definitively. *See id.* at 290-91 (July 14). Another important failure was the Convention's rejection of a council of revision, by which Madison wished to join the Supreme Court in the executive veto. Madison refused to let go of this idea, raising it four separate times during the convention although it was soundly defeated each time. *See* MADISON'S NOTES at 66 (June 4, vote postponed), 79-81 (June 6, defeated 8 to 3), 336-43 (July 21, defeated 4 to 3), 461-62 (Aug. 15, defeated 8 to 3).

55. D. RICHARDS, *supra* note 11, at 116-21; *see also id.* at 58 & n.57 (citing Pocock's careful tracing of republican theory from Machiavelli through the founders of the American republic as "a form of mistaken contrast").

56. *Id.* at 64.

57. *Id.* at 150-52.

58. *Id.* at 158-62.

What makes *Toleration and the Constitution* an especially dull and conventional book is that Richards repeats the same self-consciously formulaic reasoning in his discussions of both freedom of expression and privacy. In each discussion, he first unconvincingly suggests that a right to conscience underlies the constitutional protection, then shows how the precedents either support his theory or contradict it—in the latter case suggesting that the precedents are wrong. Moreover, Richards's purportedly neutral and principled analysis of Supreme Court cases reads like a liberal party platform. He supports constitutional protection for subversive or extremist political speech, for group libel, for offensive speech, for obscenity, and for commercial speech.[59] He adopts an expansive definition of the public forum and criticizes *Buckley v. Valeo* by asserting that the limitation on political spending "should be regarded as a fuller realization of [the] principles of equal respect."[60] He rejects laws against contraceptives, against abortion, and against private consensual sexual acts between adults as embodying nonneutral governmental value judgments.[61] Finally, even if this predictable survey of Supreme Court freedom of expression and privacy cases is intended for nonlawyers, it is generally superficial and uninteresting.[62]

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59. *Id.* at 189-95, 203-15.

60. *Id.* at 215.

61. *Id.* at 259-60, 265-67, 272-75.

62. Throughout the case survey, Richards makes the same sort of sloppy logical and historical mistakes that pervade his discussion of the religion clauses. In discussing Holmes's clear-and-present-danger test, Richards repeatedly talks of "shouting fire in a crowded theatre," neglecting the rather important qualification that the cry of fire must be *false*. *Id.* at 179, 185-87. *Cf.* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre . . . ."). Richards bases his defense of *Roe v. Wade* on the assertion that "[a]part from certain religious or other assumptions not reasonably shared at large, the claim that the fetus is a full moral person is unfounded." D. RICHARDS, *supra* note 11, at 263. This assertion not only ignores the large (if minority) segment of the population that does not share this view, but is also of less dispositive relevance than he believes it to be. There may, after all, be valid reasons for protecting even a potential or partial life.

One last point deserves comment. Throughout the book, Richards uses male pronouns generically. Despite a great deal of controversy over this practice, it is certainly not a valid ground on which to criticize the author of a book like *Toleration and the Constitution*. Richards does, however, use female pronouns exactly once: "Thus, the heretic is owed no respect, because her freedom is enslaved by her will and her rationality is at war with herself." *Id.* at 91. I cannot believe this isolated—and clearly derogatory—use of female pronouns was anything other than deliberate.

II.

Lee Bollinger's *The Tolerant Society*, whether measured against *Tolerance and the Constitution* or on its own, is an enlightening, enjoyable book. It finds its genesis largely in dissatisfaction with current theories of freedom of speech. Bollinger thus wisely focuses his claims for tolerance theory as a narrow explanation of the value of protecting extremist political speech, such as that of the Nazis. Indeed, the book suffers noticeably where Bollinger fails to remain consistent to his own limited claims for tolerance theory and instead purports to be reinterpreting all of the law of free speech.[63] When *The Tolerant Society* is read narrowly, however, it makes a significant contribution to first amendment literature.

Bollinger's basic argument is that extremist speech is merely a microcosmic reflection of the demands placed on individuals by the existence of diversity, and that requiring tolerance of such speech is a useful mechanism for teaching the general tolerance our lives require. He thus shifts the focus from the speaker or the extremist speech itself (which he characterizes as "unworthy of protection") to the societal responses to such speech: "[F]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."[64] This single sentence captures Bollinger's two subtle changes in emphasis: from freedom of expression as "unique" to freedom of expression as "exemplary," and from the value of the speech to the value of the response. Together, they represent a truly novel approach to first amendment law. Moreover, despite some flaws in its construction, Bollinger's tolerance theory does in fact offer an insightful and provocative way to look at problems of extremist speech.

Bollinger begins by refuting the traditional justifications for protecting extremist speech. Although some of his arguments have been made by others,[65] he writes clearly and

63. *See infra* note 90 and text accompanying notes 82-90.

64. L. BOLLINGER, *supra* note 10, at 10.

65. For example, Frederick Schauer has suggested that "slippery slope" justifications are invalid. *See* Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 381-82 (1985). Bollinger makes similar arguments in less detail. *See* L. BOLLINGER, *supra* note 10, at 36-39. Bollinger also echoes Bickel in noticing that traditional justifications of free speech underestimate the harm caused by extremist speech (although they reach different conclusions). *Compare id.* at 58-73 (concluding that the community's response to harmful speech is beneficial)

cogently, and the chapters discussing traditional justifications make a powerful argument against protecting such forms of expression as the Nazi march in Skokie. He has a knack for summarizing decades of theoretical and doctrinal refinements in a few pages, sacrificing neither accuracy nor flavor. Here is where the narrow focus on extremist speech proves highly sensible: the traditional emphasis on truthfinding mechanisms in a democratic society is, as Bollinger persuasively demonstrates,[66] insufficient to explain why extremist speech is protected by the first amendment.

Bollinger uses the Nazis as an illustration of the traditional tendency to overestimate the value of extremist speech, and to underestimate the harm it causes. He first shows that Nazi speech cannot be considered to serve what is usually identified as the primary function of freedom of expression—truthfinding.[67] The "remote" chance that Nazi speech may turn out to be "true" makes such speech analogous to false statements of fact; it has no value in first amendment terms.[68] To the argument that even false speech serves the truthfinding function by causing a clearer perception of the truth, Bollinger makes an intuitively correct and unanswerable response:

> Are the uninhibited activities of groups like the Nazis really that important to maintaining a vigorous belief that what they have to say is immoral and wrong? It seems an equally plausible theory as to some ideas, at least, that to regard them as unspeakable is the best method of rejection. Like all human activities, dialogue is not invariably useful under all conditions.[69]

As an example of conditions under which we recognize that dialogue is not useful, he suggests the restrictions on inflammatory or prejudicial comments in front of jurors.[70]

After showing how traditional free speech theory overestimates the value of extremist speech, Bollinger turns to demonstrating how that theory underestimates the harms such speech causes. He suggests that the real harm caused by extremist speech is not merely the offense it causes others, nor the likelihood that it might stir others to action, but rather the silencing

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with A. BICKEL, THE MORALITY OF CONSENT 71-77 (1975) (concluding that we must tolerate a great deal of offensive behavior; the alternative is massive tyranny in the form of government control).

66. L. BOLLINGER, *supra* note 10, at 56-57.
67. *Id.* at 53-57.
68. *Id.* at 54.
69. *Id.* at 55-56.
70. *Id.* at 56.

of our own responses to such speech.[71] Bollinger here again subtly alters traditional views of free expression by suggesting that communities and individuals define themselves not only by the speech they permit but by their intolerant response to speech they abhor. Censorship is itself a form of communication.[72] Thus Bollinger suggests both that there is a human need to be intolerant as a mode of communication, and that tolerance is not always a virtue but sometimes a form of "moral weakness."[73] Toleration of extremist speech thus causes great harm by forcing listeners to violate an essentially moral command toward intolerance. It is this harm that traditional justifications fail to take into account.

Bollinger also criticizes what he labels the "fortress model," a justification present beneath the surface of the more conventional traditional defense of free speech.[74] The fortress model is essentially a stronger version of the slippery slope argument: because there is a strong human tendency toward repression of speech one disagrees with, we need to protect ourselves from our own weakness. The fortress model posits that protection of extremist speech both creates a "buffer zone" to prevent us from repressing more important speech, and serves an educative function by forcing us to think in terms of tolerance rather than intolerance.[75]

Bollinger's refutation of the fortress model contains insights that are both significant and problematic. He makes a powerful case that the model embodies a deeply pessimistic view of human nature: "[I]t tends to postulate a social universe in which the citizenry is alienated from the government, as

71. *Id.* at 61-73.
72. *Id.* at 62.
73. *Id.* at 61-62.
74. *Id.* at 91-95.
75. *Id.* at 86-91. The argument that protection of extremist speech, or first amendment absolutism in general, is of largely educative value has been made before. *See* C.L. BLACK, *Mr. Justice Black, the Supreme Court, and the Bill of Rights,* in THE OCCASIONS OF JUSTICE 89 (1963) (discussing the value of Black's absolutist stance). The converse argument, that we ought to resist absolutist characterizations because they tend to lend too much legitimacy to valueless speech, has also been made. *Cf.* A. BICKEL, *supra* note 65, at 88 (resisting absolutism on the grounds that absolutist ideas do not endure).

Bollinger's recognition that the fortress model is rooted in a universal fear of vulnerability is intriguing: if free speech doctrine permits "us" to suppress "their" speech when "we" are in power, it permits "them" to do the same to "us." This may suggest one reason religious fundamentalists are so often at the forefront of movements to censor expression: with God behind them, they need never fear that potential vulnerability.

well as internally from each other, and to induce a posture that can be unfortunately disingenuous and manipulative."[76] This indictment of the fortress model is unflinchingly accurate, and it reflects a general problem with all theories—including rights theory—that start from an individualistic or atomistic view of human nature. This is an early indication that Bollinger's tolerance theory might offer more than just another version of rights theory.[77] An accurate assessment of the status of his theory, however, requires a careful description of the book's crucial chapter, "The Quest for the Tolerant Mind,"[78] where, having identified the weaknesses of traditional justifications for tolerating extremist speech, Bollinger turns to developing his own justification. He labels that justification "general tolerance theory."[79]

Bollinger's tolerance theory is built on four critical but questionable assumptions. First, Bollinger accepts the fortress model's assumption of a human tendency toward intolerance, although he is less pessimistic about the human capacity for change.[80] Second, he finds that this intolerance impulse manifests itself in both speech and nonspeech areas, although in the nonspeech areas it is labeled "prejudice" rather than "intolerance."[81] Third, he contends that for a self-governing society to function properly, the intolerance impulse must be kept in check, in both speech and nonspeech contexts.[82] Finally, he suggests that insisting on tolerance in the limited area of expression helps to develop and reinforce the generalized capacity for tolerance necessary in a diverse and self-governing society.[83] Thus, tolerance of extremist speech is not, as most scholars (in-

76. L. BOLLINGER, *supra* note 10, at 104; *see also id.* at 91-102. He also criticizes the fortress model for other reasons, in a much more unsatisfying way. For example, he suggests that under the fortress model, judicial legitimacy suffers because an unelected majority is effectively frustrating majority will. *Id.* at 91. In one short paragraph, he implicitly rejects over a decade of more or less successful scholarly attempts to refute the majoritarian paradox. *Id.* Certainly the question of judicial legitimacy is generally beyond the scope of the book, but this cursory treatment undermines the force of his rejection of the fortress model.

77. One reviewer has reached an opposite conclusion, noting that Bollinger's indictment of the fortress theory is applicable to Bollinger's own theory as well. Strauss, *Why Be Tolerant?*, 53 U. CHI. L. REV. 1485, 1499-500 (1986).

78. L. BOLLINGER, *supra* note 10, at 104-44 (Chapter 4).

79. *Id.* at 140.

80. *Id.* at 106-13.

81. *Id.* at 113-17.

82. *Id.* at 117-18.

83. *Id.* at 118-19.

cluding Richards) have thought, a necessary evil, but rather a positive force that is "integral to the central functions of the principle of free speech."[84] What ultimately makes *The Tolerant Society* an exciting and potentially transformative book is that although Bollinger's treatment of each of these four arguments is less than fully satisfying, each opens up wonderful opportunities for further dialogue. The balance of this section focuses on the problems with tolerance theory as Bollinger describes it, and the next section continues the dialogue.

The most serious flaw in Bollinger's construction of his thesis is his effort to link speech and nonspeech. Speech and nonspeech are linked, he suggests, because the basis of our intolerance of diversity is the same in each case, and thus learning to tolerate diverse speech will carry over and transform our ability to tolerate diversity in general. He describes the link:

> We commonly refer to [the nonspeech] form of intolerance as "prejudice" rather than "censorship," but it is usually stimulated by the same underlying psychology. What leads us to react with intolerance is, typically, a concern with the *mind* perceived to be at work—with the way of thinking of the person or persons, whether that be political beliefs or general attitudes or values or whatever one might call it; and, equally important, with the fact that this thinking is essentially being communicated by the actions of those who hold, or appear to hold, these different beliefs, attitudes, or values.[85]

This attempt to equate nonspeech intolerance (whether racial or other prejudice) with the desire to censor speech is unpersuasive because the underlying psychology is in fact different.[86] Bollinger suggests here and earlier that the desire to censor speech, especially extremist speech, is ultimately a rational desire insofar as it is a desire to eradicate beliefs with which one disagrees. Hatred of the Nazis, for example, may be based (for some, at least) on a rational evaluation and rejection of their ideas. Prejudice, by contrast, is largely an irrational reaction,[87] and Bollinger never successfully explains how it in-

84. *Id.* at 133.

85. *Id.* at 111-12.

86. There is, of course, some overlap. Where a speaker is a member of (or otherwise defending) a group that is the victim of prejudice, the desire to censor the speech may stem from the same source as the bias against the speaker. In some cases this may be rational (where the prejudice against the speaker is derived from disagreement with his ideas), and in some cases it may not be (where the disagreement with the speaker's ideas is based on his status rather than his words).

87. Prejudice in fact sometimes interferes with rational thinking, as when an employer refuses to hire black workers and thus closes off a fruitful labor market, or when poor whites identify with wealthy whites rather than with

volves any rational evaluation of the victim's attitudes or values. He describes prejudice as "motivated in large part by a concern with the ideology, or way of thinking, manifested by the victims' behavior (which, unfortunately, for some victims means simply being)."[88] There is too great a disjunction between "ideology" and "being," between thought and mere existence, for this line of reasoning to succeed.

Because censorship (intolerance of speech) and prejudice (intolerance in other areas) do not necessarily stem from the same source, Bollinger's theory that requiring tolerance when faced with one will foster tolerance when faced with the other is left without a needed foundation. Moreover, even if speech and nonspeech intolerance did stem from the same source, Bollinger never adequately explains why we ought to single out speech as the subject of our lesson in tolerance: why is free speech the "limited, or partial, area in which an extraordinary position of self-restraint [should be] adopted by the society as one means of developing a more general capacity with respect to [the intolerance] impulse?"[89] Bollinger's only answers are that extremist speech "causes less individual and social injury than does nonspeech behavior," and that requiring tolerance only of speech allows us to draw a bright-line "upper limit" on what must be tolerated.[90] In light of the earlier discussion of

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poor blacks. *See* Hochschild, *Approaching Racial Equality Through Indirection: The Problem of Race, Class, and Power*, 4 YALE L. & POL'Y REV. 307, 329-30 (1986).

Although an analysis of the psychological causes of prejudice is clearly beyond the scope of this essay, it seems obvious that southern whites did not try to keep black children out of white schools because they were worried about the black children's "political beliefs or general attitudes or values or whatever one might call it." L. BOLLINGER, *supra* note 10, at 112. They did so because, as Eisenhower is said to have stated in a candid moment, they wanted to ensure "that their sweet little girls [were] not required to sit in school alongside some big black bucks." B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 113 (1983). That is not rational disagreement with how another human being's mind works; that is pure irrational emotion.

88. L. BOLLINGER, *supra* note 10, at 112.

89. *Id.* at 120-21. A minor problem with *The Tolerant Society* is Bollinger's tendency to repeat himself; the quotation in the text is repeated in barely altered form at pages 142-43.

90. *Id.* at 124. He later seems to recant his reliance on differences in the amount of harm, stating that no line can be drawn "on the basis of a difference in the *degree* of harm generally sustained when speech and nonspeech acts are tolerated." *Id.* at 209. Instead, he suggests that there is a difference in kind between speech and nonspeech acts and reverses the ordinary description of the difference; he contends that nonspeech acts have a greater communicative impact and therefore evoke a stronger need to respond. *Id.* at 209-11. The

traditional justifications, this explanation for the uniqueness of speech is disappointing. In rejecting the traditional justifications, Bollinger accuses proponents of the classical model of underestimating the individual and social harm that speech causes and discredits "slippery slope" arguments, thus suggesting that bright lines are not inherently valuable. He now appears to adopt the methods he earlier rejected to answer what must be a crucial question about his theory.

The Tolerant Society is disappointing in another way. Despite repeated intimations that there are limits to tolerance,[91] Bollinger, like Richards,[92] ultimately applauds virtually all current Supreme Court doctrine, including protection of the Nazi march through Skokie.[93] His failure to give any examples of the limits of tolerance, or any instances in which tolerance theory yields results that differ from those suggested by more traditional theories, detracts from the very real contribution tolerance theory might make. Tolerance theory becomes just another explanation for judicial behavior, rather than a potentially useful tool for solving free speech dilemmas.

Overall, these weaknesses do not detract significantly from the book's value and are perhaps the inevitable result of the demands of current legal scholarship. Bollinger has suggested a truly novel perspective on what might be termed "marginal" free speech cases: those instances of protected political expression far from the core values of the first amendment. By focusing on society's response to extremist speech rather than on the speech itself, Bollinger has opened a new avenue for discussion. He neither rests content having issued the invitation for further dialogue, however, or offers any in-depth application of his theory to a particular area. Instead, he overstates both the pedigree and the implications of tolerance theory. He tries to argue in Chapter Five ("The Internal Dialectic of Tolerance") that intimations of his tolerance theory appear in the work of both Holmes and Meiklejohn,[94] and in Chapter Six ("Drawing Lines and the Virtues of Ambiguity") that his tolerance theory can be applied to all free speech questions, including content-neutral time, place, and manner regulations.[95]

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analysis of the similarities between speech acts and nonspeech acts is perhaps the weakest part of the book.

91. *See, e.g., id.* at 11, 133, 181, 182, 184-85, 189, 220, 243, 246-47.
92. *See supra* notes 59-61 and accompanying text.
93. L. BOLLINGER, *supra* note 10, at 176-200.
94. *Id.* at 172-74.
95. *Id.* at 175, 200-12.

Both these inflated claims and the occasional sense that he is trying to force cloture on the discussion (by making all the arguments, however weak, and tying up all the loose ends) may derive from the tendency of modern legal scholars to insist on comprehensiveness. Most law review articles, for example, begin with an extended survey of prior law and scholarship, make an incremental contribution to the body of law, and conclude with an extended discussion of the ramifications of the author's incremental contribution.[96] Especially in constitutional scholarship, books, like Bollinger's and Richards's, must provide an integrative theory.[97] *The Tolerant Society* ends with a plea that first amendment scholarship change its focus from concern with narrow doctrinal issues to examining free speech principles as "part of a general social ethic."[98] This, like the best of the remainder of the book, is an invitation to discourse; let us continue the dialogue without demanding finality.

III.

Ultimately, neither Bollinger nor Richards strays far enough from the liberal tradition to offer tolerance theory as a serious substitute for individual rights theories. Richards, despite his opening genuflection to an alternative, less individualist paradigm,[99] adopts an atomistic view of society. It is primarily because individuals are independent and self-sufficient originators of their own ideas and beliefs that they are entitled to respect for those beliefs. *Toleration and the Constitution* thus denies that community values both shape and reflect individual values, contending instead that individual beliefs exist free of cultural contexts. Richards's vision of a tolerant society is identical to the archetypal liberal society described by Kent Greenawalt: "a set of procedures for making political decisions, [which has] nothing to say about why people

96. For criticism of the style and content of law review articles, see Nowak, *Woe Unto You, Law Reviews,* 27 ARIZ. L. REV. 317 (1985) (reiterating Rodell's criticisms in *Goodbye to Law Reviews—Revisited*); Rodell, *Goodbye to Law Reviews—Revisited,* 48 VA. L. REV. 279 (1962) ("[I]t is in the law reviews that a pennyworth of content is most frequently concealed beneath a pound of so-called style.").

97. For other examples of gems of ideas that are less persuasive when enlarged into comprehensive theories, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

98. L. BOLLINGER, *supra* note 10, at 247-48.

99. *See infra* note 19 and accompanying text.

support the political positions they do."[100] *Toleration and the Constitution* adheres to this tradition and merely contends, rather unpersuasively, that tolerance is a necessary part of those procedures.

Richards's commitment to this highly individualist paradigm is evident in his advocacy of an "ethical impartiality of one's moral sense . . . deepened by . . . reflective detachment from early attachments and experience."[101] Similarly, his rejection of contextual cultural influences as a significant force in shaping individual beliefs is illustrated by his distinction between school prayer cases and cases involving special exemptions for religious adherents. School prayer violates the establishment clause because it affects "belief formation"; by contrast, exempting a Sabbatarian from Saturday work requirements affects only "belief expression," because Sabbatarians are "mature and committed believers."[102]

Bollinger's shift in focus from individual speech to societal responses offers much more promise as an alternative to rights theory. Unlike Richards, Bollinger recognizes that individuals are not self-sustaining, but define themselves as members of communities.[103] Once individuals are seen as inevitably part of a community and a social context, both self-knowledge and the structuring of moral values become communal projects. It is thus possible to envision societal goals beyond the mere protection of individual autonomy. To the extent that a community defines itself as more than an aggregation of individuals, its *ethos* can reflect more than a neutrality toward individual goals.

Although this abandonment of neutrality might lead to a revision of notions of the function of government in a self-governing society, Bollinger does not quite suggest that one function of democratic government is to shape as well as reflect community and individual values. He does, however, ascribe a similar function to the toleration of extremist speech: it is "to *create* the capacities in the citizens that they are admittedly

100. Greenawalt, *Religious Convictions and Lawmaking,* 84 MICH. L. REV. 352, 357 (1985).

101. D. RICHARDS, *supra* note 11, at 108.

102. *Id.* at 146-48.

103. *See, e.g.,* L. BOLLINGER, *supra* note 10, at 68, 72. For a more detailed elaboration of the idea that we generally define ourselves as members of communities, see Karst, *Paths to Belonging: The Constitution and Cultural Identity,* 64 N.C.L. REV. 303 (1986).

lacking."[104] This is not such a radical shift as it might appear. Bollinger defends tolerance solely as a mechanism for producing harmony in a diverse and self-governing society. He thus stops short of abandoning the liberal vision of society as merely a collection of warring individuals, and government as a mediating force. For Bollinger, the first amendment's protection of expression serves as a way to minimize unmanageable conflicts between individuals by reducing the friction caused by diversity. Ultimately, therefore, his endorsement of tolerance is simply a pragmatic defense of liberal pluralism.[105]

The premises of Bollinger's theory, however, yield wider possibilities. Bollinger's recognition of the communal nature of individuals suggests, as noted earlier, the possibility that a self-governing community ought to select and shape its own aspirations and values rather than simply serve as a neutral arbiter among competing individual visions. In the context of such a theory—one which accepts shared values as substantively defensible—tolerance can be defended as more than a pragmatic virtue.[106] Bollinger's thesis that governmental or societal responses can serve to cultivate individual habits of mind therefore functions to justify improving the virtue of the citizenry rather than merely its internal harmony.[107]

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104. L. BOLLINGER, *supra* note 10, at 96.

105. This is still at odds with traditional rights-oriented discussions of civil liberties, which tend to suggest that although protecting such rights heightens rather than lessens conflict, conflict is the price we pay for a free society. *See, e.g.,* Cohen v. California, 403 U.S. 15, 24-25 (1971) ("[T]he immediate consequence of . . . freedom [of speech] may often appear to be only verbal tumult, discord, and even offensive utterance."); H. MCCLOSKEY & A. BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES 19 (1983) ("[T]he distribution of individual liberties is bound to remain an important source of conflict in society.").

106. Tolerance may be seen as virtuous in any self-governing society because the demands of good citizenship (making choices on adequate bases) are inconsistent with some forms of intolerance. One might also argue that tolerance is a virtue largely because the American community has defined itself as tolerant. *See* Karst, *supra* note 103, at 368. Finally, tolerance is a virtue in Alasdair MacIntyre's sense insofar as it is a prerequisite to the kind of cooperation that marks members of communities. *See* A. MACINTYRE, *supra* note 3, at 141-43; *see also* Schneewind, *Virtue, Narrative, and Community: MacIntyre and Morality,* 79 J. PHIL. 653, 661 (1982) (discussing MacIntyre's virtue-centered theory).

107. Bollinger's thesis can also be expanded into an argument that not only societal tolerance of speech, but also more affirmative societal actions, may be motivated appropriately by a desire to foster virtue in the citizenry by inculcating appropriate habits of mind. Bollinger intimates that one such habit of mind is a search for truth rather than blind adherence to dogma; he distinguishes "the tolerant mind" from "the obedient mind." L. BOLLINGER, *supra*

Extending Bollinger's argument in this way also gives more substance to his rather ephemeral notion of the limits of tolerance. Even reasoned intolerance creates societal friction, and thus Bollinger's rationale for tolerance seems to have no limits. Once the issue is framed in terms of the habits of mind of a good or moral citizen rather than a socially useful citizen, however, there are obviously some limits to tolerance as a virtue. Tolerance is a virtue to be cultivated primarily as an antidote either to ignorant, unexamined prejudices, or to selfishness, because a good citizen avoids such vices. As Greenawalt has noted, "[A] good citizen has a responsibility to decide what is right, not simply to vote his preference";[108] forbidden preferences may include those based on prejudice as well as whim and selfishness.[109] Giving content to limits on tolerance described in this way is not likely to be an easy task, but identifying tolerance as a pure rather than a pragmatic virtue is a first step because it sets the parameters.

Placing more than theoretical limits on tolerance, however, raises another question, one that Bollinger does not need to reach. Because the thrust of *The Tolerant Society* is to justify tolerance rather than to defend instances of intolerance, Bollinger never has to decide whether justifiable intolerance ought to take the form of governmental or nongovernmental action. As Bollinger recognizes, legal sanctions need not be identical to nonlegal sanctions.[110] Where the appropriate response is tolerance, and government is therefore tolerant, individuals may choose either tolerance or intolerance; the disjunction between

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note 10, at 244-47. This points the way toward solving a number of puzzles beyond free speech, including, for example, explaining why it is appropriate to teach evolution, but not creationism, in public schools. *See, e.g.*, Edwards v. Aguillard, 765 F.2d 1251 (5th Cir. 1985) (striking down Louisiana statute requiring "balanced treatment" in teaching of evolution and creationism and requiring that each be taught as theories rather than scientific fact as law respecting an establishment of religion), *prob. juris. noted*, 106 S. Ct. 1946 (1986). The former is part of a still ongoing scientific process of searching for truth; the latter is an inherited dogma, unchanging and by definition indisputable.

108. Greenawalt, *supra* note 100, at 358.

109. A good model of such responsible citizenship may be the family: good parents "tolerate" grown children who have strayed, both because the parents try to keep open minds and because they love the children anyway (which overcomes any selfish desire to have things their own way). This does not mean that good parents are expected to tolerate and be supportive of any and all choices a grown child might make. Tolerance is neither based on nor equivalent to moral relativism.

110. L. BOLLINGER, *supra* note 10, at 12-13, 28-29, 71-72.

legal and nonlegal sanctions has little relevance. Where the government is *intolerant*, however, individuals no longer have the same choice of tolerance because the behavior to be tolerated will be significantly or entirely repressed as a result of governmental sanctions. Where intolerance is an appropriate response, it therefore becomes crucial to determine whether that intolerance should take the form of governmental sanctions against the speech.

Consistent with using Bollinger's book as the opening move in a continuing dialogue, it is possible to find in it the precursor of a solution to this dilemma. He recognizes that people learn both by example and by contrast, quoting Montaigne on the latter path:

> The horror I feel for cruelty throws me back more deeply into clemency than any model of clemency could attract me to it. A good horseman does not correct my seat as does an attorney or a Venetian on horseback; and a bad way of speaking reforms mine better than a good one. Every day the stupid bearing of another warns and admonishes me. What stings, touches and arouses us better than what pleases.[111]

Bollinger goes on to note that this "healthy recoiling" from extremist speech is not the only possible reaction. He thus leaves unanswered the question why the government response to extremist speech ought to proceed as if listening to extremist speech will always cause the hearer to recoil rather than to believe.[112] The answer lies in the value of nonlegislative responses. Where the government tolerates abhorrent speech, the process of learning by contrast rather than example may be enhanced through nonlegislative methods that point out the abhorrent nature of the speech. In other words, if government

111. *Id.* at 132 (quoting Montaigne's *Of the Art of Discussion*). Daniel Farber has also suggested that this recoil reaction is a reason for protecting extremist speech. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283, 301-02. Farber, however, uses the recoil reaction as a positive reason for allowing the speech, whereas Bollinger uses it only to suggest that it is not necessary to suppress the speech. *See id.*; L. BOLLINGER, *supra* note 10, at 132. In other words, Farber relies primarily on the negative reaction to the speech, while Bollinger relies primarily on the positive reaction to governmental tolerance. Both reactions educate the citizens, but teach different lessons: Farber's lesson is substantive rejection of some ideas, and Bollinger's is the general habit of tolerance.

112. Bollinger's failure to justify the assumption that abhorrent speech will disgust rather than persuade is not a serious omission in the context of his argument. His theory rests primarily on the "tolerance-creating" response, rather than on more specific responses such as disgust or persuasion. *See supra* note 111.

permits intolerable speech but either the government (through education) or individuals demonstrate how the speech is intolerable, the Montaigneian recoil is more likely to occur.

A concrete illustration of this configuration may be found in the current debates over pornography. Except for zoning ordinances, there has still been no successful legislation restricting nonobscene pornography.[113] Attitudes toward pornography *are* changing, however, largely as a result of the educative efforts of feminists and others who have highlighted how pornography degrades women. Examples of this change in attitude include all strata of society. It has now become acceptable, as it was not in the past, for scholars to suggest censorship of pornography.[114] Stores in many areas have stopped selling pornographic magazines.[115] Many political liberals and feminists, who often opposed attempts by traditional moralists to censor pornography, are reexamining their defense of pornography. Governmental tolerance coupled with a principled defense of the reasons for intolerance is thus a valid course of action in practice as well as in theory.

The combination of governmental tolerance and this educative form of societal intolerance is unlike the traditional liberal view toward free speech in several ways. Many liberals do agree that social sanctions may be imposed on speech even where legislative sanctions cannot be. The underlying premise is that only government must remain neutral. Under this version of Bollinger's tolerance theory, however, there is no reason

113. Such legislation, modeled on Catherine MacKinnon's work, has been tried unsuccessfully in Minneapolis where it was vetoed by the mayor, in Indianapolis where it was invalidated by the courts, and in Cambridge where it was rejected by the voters. Governmental sanctions have thus never been imposed.

114. *See, e.g.*, Sunstein, *Notes on Pornography and the First Amendment*, 4 LAW & INEQUALITY 28, 37 (1986) (defending antipornography legislation); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 626-27 (defending antipornography legislation).

115. *See* N.Y. Times, July 4, 1986, § A, at 6, col. 1 (reporting plans of 7-Eleven stores to discontinue sales of *Playboy* and *Penthouse* magazines). There is, of course, some controversy about whether the stores' decisions resulted from a change in attitudes, or the threat of government sanctions. *See id.*; Playboy Enters., Inc. v. Meese, 639 F. Supp. 581, 588 (D.D.C. 1986) (enjoining the Attorney General's Commission on Pornography from including names of corporations selling pornographic material in the Commission's final report). The stores' adherence to their decisions to halt sales after the threat that the Attorney General's Commission on Pornography would publish names of corporations selling pornographic materials in their final report was removed, *Playboy Enters., Inc.*, 639 F. Supp. at 588, suggests at least some change in attitude.

for the government to remain neutral; it need only permit the speech, not condone it through silence.[116] This envisions a more active role for government than does the rights model. Moreover, the underlying framework of the rights model undermines the utility of nonlegislative sanctions, because individuals are encouraged to think in terms of what they and others have a right to do and are thus less deterred or educated by nongovernmental intolerance.[117] Tolerance theory, in contrast, suggests governmental tolerance not because intolerance would interfere with individual rights but rather because in combination with societal intolerance, governmental tolerance is the course most likely to produce the result of a virtuous citizenry. Individuals are thus encouraged to think in terms of virtue, rather than rights.

This essay has suggested, through review of two recent works, how toleration theory can and cannot be used to provide a viable alternative to both moribund liberal ideas and the increasingly successful program of the new religious right. The interpretations of Bollinger's thesis, variations on his theme, are meant only as the next part of the fugue; further variations are expressly invited.

116. The caselaw on abortion provides an example of this type of bifurcated governmental reaction. The government must permit abortions, *Roe v. Wade*, 410 U.S. 113, 163 (1973), but it may discourage them by paying for childbirth but not abortions. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980). This is not to suggest that intolerance of abortion is justified in the first place, but only to suggest that where intolerance is an appropriate reaction, it may take this form of governmental nonneutrality.

117. An example is smokers, who often react hostilely to any requests not to pollute other people's air; their response is likely to be that they have a "right" to smoke.