4. Doctrinal Basics: Content Discrimination

The presumptive impermissibility of content discrimination today constitutes a bedrock of First Amendment doctrine—or, maybe, of doctrinal confusion. This Section makes the following claim. The individual liberty concern of the Speech Clause and the democratic discourse concern that justifies special protection for the press suggest different objections to content discrimination. Given a presumption that when found it is bad, the different objections lead to different methods of identifying content discrimination. While this would not be problematic if the Court was clear about when to use one or the other conception of content discrimination, its failure to explain these different bases of objection has contributed to confusion in this area. Still, case law results (largely) correspond to what a dual Speech/Press Clause perspective suggests.

The modern doctrine condemning content discrimination is normally taken to have been initiated by the 1972 decision of *Police Department of Chicago v. Mosley*, where Chicago had prohibited picketing within 150 feet of a school while the school was in session except for "'peaceful [labor] picketing of any school involved in a labor dispute . . . .'"[79] In invalidating this ordinance, the Court made three arguments (as well as relying on two constitutional provisions—the First Amendment and the Equal Protection Clause, although later cases have made clear that the First Amendment itself encompasses all that is important in the equal protection argument and I will not attempt to separate the elements). First is a neutrality argument. The Court explained, "the ordinance itself describes impermissible picketing . . . in terms of subject matter. The regulation 'thus slip[s] from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted."[80] Second is an objection to *restriction* of speech on the basis of content, which leaves open the possible permissibility of *promotion* on the basis of content. The Court said, "the First

79. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 93 (1972). The application of the exemption only to labor picketing, as indicated by my brackets, was undisputed. *Id.* at 94 n.2.

80. *Id.* at 99 (citation omitted). Neutrality is also suggested by the Court's statement that the government "may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Id.* at 96 (citation omitted). *Cf.* City of Madison Joint Sch. Dist. v. Wisconsin Pub. Emply. Relat. Comm'n, 429 U.S. 167 (1976) (allowing such selection).

Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[81] It further explained, the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[82] Third is a defense of people's speech freedom on the grounds that permitting labor speech shows that a bar on a person's speech is not really required by the state's purpose in its use of this property. The theory is that gratuitous restrictions on speech are unconstitutional.[83] Thus, the Court says:

> Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, . . . Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful. "Peaceful" nonlabor picketing, however the term "peaceful" is defined, is obviously no more disruptive than "peaceful" labor picketing. But Chicago's ordinance permits the latter and prohibits the former.[84]

Thus, the Court offered three different rationales for objecting to content discrimination involving, respectively, principles of neutrality, non-suppression, and speech freedom. Some observations can be made about each.

"Neutrality" has some intuitive appeal but, at least as normally understood, is entirely inconsistent with accepted practice. Periodically, the First Amendment is asserted to require government neutrality in the marketplace of ideas.[85] Such a view, however, would invalidate the accepted and hugely active role of government in engaging in speech,

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81. *Id.* at 95. Along the same lines, the Court argued that "*[a]ny restriction* on expressive activity *because* of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 96 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) (emphasis added).

82. *Id.* at 96.

83. *Id.* at 100.

84. *Id.* (citations omitted). This is the argument that the Court, in one of the deletions above, treats as an equal protection problem and later notes that such disruption can be handled by a more "narrowly tailored" or "narrowly drawn" statute. *Id.* at 101, 102. Interestingly, though citing equal protection cases for the narrowly tailored standard, all the other cases cited to illustrate why the law failed this constitutional standard were First Amendment cases. *See id.* at 101 n.8; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558, 562 (1948).

85. Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 566-67 (1980).

usually to promote the government's views.[86] Topics and views that the government expresses directly or promotes using others' speech have more than an equal status in the field of ideas and more than an equal opportunity to be heard. If "neutrality" refers to a constitutionally-required governmental stance toward the marketplace of ideas, the notion cannot be taken seriously as an aspect of constitutional doctrine. (There is also no available conception of a proper baseline of non-governmentally structured discourse from which to identify deviations from neutrality.)

A constitutional objection to government restrictions on, as opposed to objections to the promotion of, particular content or particular subject matters is more persuasive. Of course, any notion that suppression (treated as unacceptable) differs from promotion (treated as acceptable) also requires a baseline. This baseline, however, can be found through an examination of the purpose or interpretative meaning of the law—and the vitality of this "purpose" inquiry is well established.[87] Objection to suppression makes sense from a marketplace of ideas or a Fourth Estate perspective. Although there may be no standards for a neutral or properly working marketplace, and consequently no objection to any content that is added even when added and promoted by the government, preventing content from entering contradicts the fundamental notion of a free marketplace of ideas. Restrictions of particular content is, at least in many contexts, "censorship in its most odious form," according to Justice Black as quoted by the majority in *Mosley*.[88] In addition, suppression, at least as applied to individual speakers, is also objectionable as unjustified interferences with their liberty. Essentially, the claim here is that the key value of liberalism should be toleration, not neutrality—and suppression, restriction of speech out of objection to its content, is the opposite of toleration. Thus, restrictions as a means to suppress certain content, whether of particular subject matters or viewpoints, should be equally unconstitutional under either an individual liberty speech theory or a Fourth Estate press theory.

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86. *See id.* at 568; MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA (1983); EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA 2 (1988).

87. *See* C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 138-41 (2007). Possibly the dominant reasons to ignore this feature of doctrine reflects, for conservatives, a tendency to adopt economic models and, for liberals, a tendency to be effects or outcome oriented.

88. *Mosley*, 408 U.S. at 98 (quoting Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring)).

The problem with this objection is that it does not fit the facts of *Mosley*. It is very difficult to believe that Chicago wished to suppress discussion of all issues except those involving labor disputes. The exemption of picketing about labor disputes is much better explained by the lobbying power of teachers' unions—they wanted to promote or enable their speech—than by any animosity to all other categories of speech. Surely, Chicago had no animosity to expression promoting the re-election of the mayor, even though the law restricted that expression. Thus, objections to suppression can hardly explain what is significant in the constantly cited case of *Mosley*.

The speech freedom principle provides the most interesting objection to content discrimination. As a matter of individual liberty, there should be a presumption that a person can engage in her chosen expressive activity whenever she chooses—certainly, should generally be able to do so at least in places that she otherwise has a right to be. The Court has held that the streets and parks are such places.[89] Still, despite a person's general right to be at some place, regulation is sometimes justified if her activities, *as activities*, would interfere with other uses to which the government wishes to dedicate the property, other uses that the government considers especially valuable. Given the potential legitimacy of such governmental choices to make use of public property to pursue public goals, the fear is that these reasons will constantly be available to override speech freedom.[90] A practical response is to develop evidentiary doctrines that identify when limits on liberty are best explained by lack of respect for expressive liberty rather than by real needs for the use of the property at issue. Permissible, then, would be regulations reasonably necessary given these government-dedicated uses.[91] Impermissible would be a regulation not necessary to serve the government interest—for example, a limit on leafleting, where the real evil is not leafleting but littering. There the government could (even if predictably less efficiently) simply prohibit littering—the real evil—rather than prohibit leafleting, that is, the speech.[92]

A parallel conclusion—that the government does not really believe its regulation is essential for serving the government needs in respect to the property—presumptively follows if the denial of freedom depends

89. *See, e.g.*, Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939). In modern language, these are traditional public forums.

90. *Mosley*, 408 U.S. at 98-99.

91. This approach interprets scrutiny tests as an aide to interpretation rather than a matter of instrumental rationality.

92. Schneider v. New Jersey, 308 U.S. 147, 162 (1939).

on the content of the expression. The evidentiary question, as the Court in *Mosley* noted, is whether the disallowed speech really interferes with the government's normal use of the property more than does the allowed speech.[93] The rationale of asking this question is not to identify a proper functioning of the marketplace of ideas or to prevent censorship. The specific point is to protect the individual liberty that the regulation would restrict. Thus, the central feature of the only coherent argument that fits the facts of *Mosley* is that content discrimination is often bad because it evidences an unnecessary restriction on individual expressive freedom. The objection exists even without a suppressive aim. No censorious purpose or danger need be shown.

Though the above is the only objection that fits the facts in *Mosley*, two points should be made about the second and third objections to content discrimination, the two that were found to be coherent. First, the speech freedom argument is most obviously relevant to individuals—that is, it is a Speech Clause claim. This is illustrated by its "official" origin in *Mosley* and the common interpretation of the prohibition on content discrimination as an offshoot of time, place, and manner doctrine.[94] Because the requirement relates to limits on people's use of government property, it has no obvious application to issues of media policy or regulation even if these policies are content-based. In contrast, the narrower concern with suppression is relevant in both contexts—that of press regulation and individual freedom. Media policies that suppress, as opposed to promote, speech on the basis of content, that is, policies that engage in censorship, should be invalidated.

This doctrinal distinction is fortunate. History provides a long line of socially desirable governmental attempts to promote quality media content.[95] Promotion of national news, local news, the arts, and educational content for children is constitutionally unobjectionable despite their content basis. In contrast, true attempts to suppress particular content, subjects, or viewpoints are objectionable as censorship. Purposeful suppression interferes both with the press's role in a democratic society and with individual autonomy. But by making

93. *Mosley*, 408 U.S. at 100.

94. Even if identified with *Mosley*, the objection to content discrimination has a longer history. It is implicit in the long recognized reasons to reject standardless permit systems—namely, that they allow "censorship in its baldest form." Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). Again, though not clearly articulated as an objection to content discrimination, the point was generally well recognized before *Mosley*. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 303-04, 371-73 (1970) (public spaces must be made available to all on an equal basis; permit systems must be limited by standards sufficient to prevent uncontrollable authority).

95. *See* Baker, *Turner Broadcasting*, *supra* note 19, at 111.

the "evidence of lack of necessity" argument in *Mosley*, the Court implicitly adopted the liberty theory with respect to individual speakers and implicitly recognized special implications of the Speech Clause.[96]

Second, the two objections naturally suggest different criteria for identifying (presumptively objectionable) content discrimination. The concern with unnecessary restraints on individual expressive liberty is possibly best embodied in the test for content discrimination offered by Justice Brennan: "[A]ny restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it."[97] That is, any time a law applier must examine the content of the speech in order to determine the applicability of a regulation, content discrimination exists. On the other hand, the concern with suppression would suggest an alternative test: "The principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[98]

These two points add up to a third. The narrower test, "because of disagreement with the message," should always provide a basis to invalidate a law except where the government is in some sense the speaker. In particular, suppression—or regulation because of disagreement with the message—is equally objectionable under the Press Clause and Speech Clause analyses. Passing *this* test, however, should not end the inquiry when individual speech freedom is at stake. Then, the other test, "turns on the content of the speech," should also apply. Unfortunately, I cannot show that this is how the tests have been invoked. My sense is that the Court exhibits doctrinal confusion in its

96. *Mosley*, 408 U.S. at 97-98.

97. Boos v. Barry, 485 U.S. 312, 335-36 (1988) (Brennan, J., concurring). Similarly, in finding that a ban on editorializing by noncommercial broadcast stations was a content regulation, Justice Brennan explained that to determine "whether a particular statement by station management constitutes an 'editorial', . . . enforcement authorities must necessarily examine the content of the message." FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984).

98. This test has had a checkered life. It was originally formulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), where the test was designed only to determine whether a facially content-neutral law should be found to be actually content-based. In that context, namely where the challenged law is not content-based on its face, the test makes perfect sense. The test has been used in about ten cases since, almost always in upholding a law after finding it not to be content-based. Interestingly, the Court in *Turner* quoted the *Ward* test but transformed it by adding in brackets around the words "agreement or" before the word "disagreement"—which makes the test seem to require neutrality, not merely suppression. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994). Given that change, the dissent makes a persuasive argument that the must-carry law there was content-based. If, however, the proper test in the media context is, as I have argued, the suppression version of the test, the majority reached the right conclusion. *See* Baker, *Turner Broadcasting*, *supra* note 19, at 127-28.

oscillation between the two.[99] Nevertheless, Court results seem largely in line with what would be called for by an honest application of these tests in the manner recommended here. For example, the government's legitimate aim with its must-carry rules, upheld in *Turner Broadcasting*,[100] was not to suppress content, but to promote the availability of local content, especially local news and cultural or current affairs programming. Likewise, although violations of copyright obviously turn on examining the content of the infringing speech to see if it duplicates copyrighted expression, the legitimate goal of copyright as a media policy regulation is to promote, not suppress, production of quality speech. Often, maybe usually, this legitimate purpose should suffice to defeat challenges by commercial copiers. In contrast, the Speech Clause analysis mandates legal permission for most non-commercial copying. Here, the content regulation—the regulation requires examination and comparisons of content—unnecessarily interferes with individual liberty.[101]

C. Summary

Even if the Speech and the Press Clauses have different rationales and protect different types of agents, their rationales overlap in objecting to any government censorship. Hence, in respect to most core First Amendment issues, the same result follows whether the case involves an individual or the press. Bread and butter First Amendment cases, those involving run of the mill censorship, can be explained on either basis. Censorship equally infringes individual liberty and interferes with the constitutional role of the press—as well as violating any other First Amendment theory that has any judicial traction. Such cases do not test whether the Press Clause has an independent status.

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99. In addition to this oscillation, members of the Court vary greatly in their attitude about the notion of content discrimination. Justice Kennedy, for example, argues that content discrimination should be per se unconstitutional, with no need to additionally flunk the traditional equal protection strict scrutiny test, while Justice Stevens frequently criticizes routine invocation of the doctrine. *See, e.g.*, Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring); Young v. Am. Mini Theatres, 427 U.S. 50, 65-66 (1976). Moreover, all members of the Court agree that the doctrine applies differently in different contexts—e.g., depending on the type of forum at issue. In fact, all members agree that even the most extreme version of content discrimination, namely viewpoint discrimination, is sometimes justifiable without any scrutiny, for example, if the context is "not a forum at all" such as the day-to-day programming of a public broadcaster. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

100. 512 U.S. 622 (1994).

101. For a further discussion of First Amendment implications on copyright laws, see Baker, *First Amendment Limits*, *supra* note 70, at 922-40.