Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Public Property

---

Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972)

Earl Mosley during the fall of 1967 began a seven-month solitary picket outside of Jones Commercial High School in Chicago. Mosley's protest was peaceful and directed at what he believed was race discrimination in school policies. On March 26, 1968, Chicago passed an ordinance that declared that persons would be guilty of "disorderly conduct" if they

> *Picket[] or demonstrate[] on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute. . . .'*

When informed he would be arrested if he continued to picket Jones High, Mosley asked the local federal court for an injunction prohibiting local officials from enforcing the above regulation. The district court refused to grant the injunction, but that decision was reversed by the Court of Appeals for the Seventh Circuit. Chicago officials then appealed to the Supreme Court of the United States.

Justice Marshall's opinion claimed that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment. What contribution does the First Amendment make to this analysis? Do you think Mosley is better understood as a First Amendment case or an equal protection case? How does the relevant constitutional clause influence your analysis, if at all?

JUSTICE MARSHALL delivered the opinion of the Court.

. . .

The city of Chicago exempts peaceful labor picketing from its general prohibition on picketing next to a school. The question we consider here is whether this selective exclusion from a public place is permitted. Our answer is "No."

Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests; the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing. As in all equal protection cases, however, the crucial question is whether there is all appropriate governmental interest suitably furthered by the differential treatment.

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any 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." . . .

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, 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. And it 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. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

. . .

This is not to say that all picketing must always be allowed. We have continually recognized that reasonable "time, place and manner" regulations of picketing may be necessary to further significant governmental interests. . . . Similarly, under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. Conflicting demands on the same place may compel the State to make choices among potential users and uses. And the State may have a legitimate interest in prohibiting some picketing to protect public order. But these justifications for selective exclusions from a public forum must be carefully scrutinized. Because picketing plainly involves expressive conduct within the protection of the First Amendment, . . . discriminations among pickets must be tailored to serve a substantial governmental interest.

In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but 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. . . .

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, under the Equal Protection Clause, 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. . . .

Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. . . . Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes. No labor picketing could be more peaceful or less prone to violence than Mosley's solitary vigil. In seeking to restrict nonlabor picketing that is clearly more disruptive than peaceful labor picketing, Chicago may not prohibit all nonlabor picketing at the school forum.

. . .

JUSTICE BLACKMUN and JUSTICE REHNQUIST concur in the result.

CHIEF JUSTICE BURGER, concurring.

. . .