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## Kenneth Karst's *Equality as a Central Principle in the First Amendment*

Geoffrey R. Stone†

In 1975, Kenneth Karst published his groundbreaking article, *Equality as a Central Principle in the First Amendment*,<sup>1</sup> as part of a symposium celebrating the life and contributions of Harry Kalven, one of the great First Amendment thinkers of the twentieth century.

Karst was one of the first scholars to recognize a fundamental shift in First Amendment jurisprudence.<sup>2</sup> Until the Supreme Court's 1972 decision in *Police Department of Chicago v Mosley*,<sup>3</sup> the Court had not articulated the principle of equal liberty of expression in Supreme Court decisions.<sup>4</sup> That is, before *Mosley*, the question in First Amendment cases was typically whether the government had impermissibly denied an individual the right to engage in a particular activity—speech. As Karst noted, in *Mosley* the Court began thinking also in terms of equality.<sup>5</sup>

This was, of course, a natural development in the law in light of the Court's emphasis throughout the 1950s and 1960s on the constitutional value of equality. But what does it mean to say that equality is a “central meaning of the First Amendment”? What makes the equality claim different from the standard First Amendment claim? For the first fifty years of the Supreme Court's First Amendment jurisprudence, the Court framed First Amendment questions as follows: does the government have sufficient justification to restrict an individual's desire to speak? The Court explored many different standards and

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<sup>1</sup> 43 U Chi L Rev 20 (1975).

<sup>2</sup> Interestingly, Karst and I identified this shift at almost exactly the same time. See Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 S Ct Rev 233, 274–80 (explaining the disparate holdings in *Police Department of Chicago v Mosley*, 408 US 92 (1972), and *Lehman v City of Shaker Heights*, 418 US 298 (1974), with regards to equal protection and the First Amendment).

<sup>3</sup> 408 US 92, 95–96 (1972) (describing the essence of forbidden censorship under the First Amendment as “content control” and basing the objection to preferred positions on the Equal Protection Clause).

<sup>4</sup> See Karst, 43 U Chi L Rev at 26–27, 29 (cited in note 1).

<sup>5</sup> *Id.* at 26–27.

tests for analyzing this question, ranging from “bad tendency”<sup>6</sup> to “clear and present danger”<sup>7</sup> to “balancing”<sup>8</sup> to “reasonableness”<sup>9</sup> to identifying various categories of “unprotected” or “low value” speech.<sup>10</sup> When the dust settled, however, the Court was always attempting to weigh the government’s interest in restricting speech against the individual’s interest in speaking.

The first clear intimation of the equality conception of the First Amendment was four years before *Mosley*, in *Schacht v United States*<sup>11</sup>—a seemingly trivial decision in which the petitioner, who had participated in a skit expressing opposition to America’s involvement in Vietnam, was convicted of violating 18 USC § 702,<sup>12</sup> which prohibited the unauthorized wearing of an American military uniform.<sup>13</sup> Citing *United States v O’Brien*,<sup>14</sup> the Court observed that § 702 “is, standing alone, a valid statute on its face.”<sup>15</sup> The Court noted, however, that another statute, 10 USC § 772(f),<sup>16</sup> authorized the wearing of an American military uniform in a theatrical production “if the portrayal

<sup>6</sup> See, for example, *Debs v United States*, 249 US 211, 215–16 (1919). See also Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test in Free Speech*, 2002 S Ct Rev 411, 414–15, 432–33 (describing the origin and the Court’s application of the test invoked by zealous federal prosecutors to transform the Espionage Act of 1917 into “a full-scale prohibition of seditious utterance”); Zechariah Chafee, *Free Speech in the United States* 86–87 (Harvard 1941) (discussing the Court’s use of “bad tendency” and presumed intent as a test for criminality in *Debs*).

<sup>7</sup> See, for example, *Schenck v United States*, 249 US 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”).

<sup>8</sup> See, for example, *New York Times v Sullivan*, 376 US 254, 279–80 (1964) (holding that a public official who makes a statement “with knowledge that it was false or with reckless disregard of whether it was false or not” is not protected from recovery of defamatory damages by the First Amendment), 303 (Goldberg concurring) (“As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.”). See also Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Cal L Rev 935, 942–43 (1968) (arguing that the Court in *New York Times* implicitly balanced competing policy concerns).

<sup>9</sup> See, for example, *Dennis v United States*, 341 US 494, 505–06 (1951) (evaluating the constitutionality, based on reasonableness, of a New York statute that criminalized advocating “the necessity or propriety of overthrowing” organized government).

<sup>10</sup> See, for example, *Chaplinsky v New Hampshire*, 315 US 568, 571–72 (1942) (noting that there exists a narrow class of speech of slight social value, including obscenity and “fighting words,” the restriction of which “has never been thought to cause any Constitutional problem”).

<sup>11</sup> 398 US 58 (1970).

<sup>12</sup> 18 USC § 702 (1964).

<sup>13</sup> See *id.* at 59–60.

<sup>14</sup> 391 US 367, 369–70, 386 (1968) (upholding a federal law prohibiting any person from knowingly destroy a draft card, as applied to an individual who burned his draft card as a symbolic expression of opposition to the war in Vietnam).

<sup>15</sup> *Schacht*, 398 US at 61.

<sup>16</sup> 10 USC § 772(f) (1964).

does not tend to discredit [the armed forces].”<sup>17</sup> Finding that petitioner’s skit constituted a “theatrical production” within the meaning of § 772(f), the Court concluded:

[The petitioner’s] conviction can be sustained only if he can be punished for speaking out against the role of our Army and our country in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech. The final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like [petitioner] to prison for opposing it, cannot survive in a country which has the First Amendment.<sup>18</sup>

This seems straightforward. But the essence of the Court’s reasoning was novel. The government could constitutionally prohibit the “unauthorized wearing of an American military uniform” for expressive purposes. Thus, the petitioner had no First Amendment right to wear the uniform in a “theatrical production.” A *neutral* statute would have been valid “on its face.” What made the law unconstitutional in *Schacht* was that it treated different speakers *unequally* because of the content of their expression.

As *Schacht* illustrates, the core of the equality claim under the First Amendment is one of underinclusion. That is, the equality claim arises when the government has sufficient justification to restrict the individual’s speech under traditional First Amendment analysis, but the government creates a separate and distinct equality issue if it decides voluntarily to restrict *less* speech than it is constitutionally entitled to restrict. That is, by allowing more speech than it is constitutionally required to allow, the government creates an inequality that cases like *Schacht* and *Mosley* hold must be independently justified.

At first blush, this might seem anomalous because an appropriate solution to the inequality objection might be for the government to restrict *more* speech. In *Schacht*, for example, the government could have solved the constitutional problem either by prohibiting anyone from wearing the uniform in a theatrical production or by prohibiting no one from wearing the uniform in a theatrical production. What it could not constitutionally do was treat differently those who participated in theatrical productions that opposed the war and those who participated in theatrical productions that supported the war.

*Mosley* was similar. In *Mosley*, the Court invalidated a Chicago ordinance that prohibited any person to picket within 150 feet of a

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<sup>17</sup> Id at 59–60 (quotation marks omitted).

<sup>18</sup> Id at 63.

school while the school was in session, except for “peaceful picketing of any school involved in a labor dispute.”<sup>19</sup> Although the Court assumed that a ban on all picketing near a school would be constitutional, it held the unequal treatment of labor and other picketers unconstitutional.<sup>20</sup> As in *Schacht*, the government could have solved the problem either by allowing all peaceful picketing or by allowing no peaceful picketing. What it could not constitutionally do was to treat picketers differently from one another without a sufficient justification for the distinction.

As Karst recognized, this was a truly revolutionary development in the evolution of First Amendment doctrine. It provided a completely new framework for analyzing such diverse issues as the public forum,<sup>21</sup> hate speech,<sup>22</sup> symbolic expression,<sup>23</sup> the acquisition and retention of library books,<sup>24</sup> government subsidies for the arts,<sup>25</sup> other forms of government support for expression,<sup>26</sup> and government speech.<sup>27</sup> Without some form of equality analysis, how would a court decide whether the government can constitutionally grant campaign subsidies to Democrats but not Republicans? Whether it can allow political but not religious groups to meet on school property? Whether it can remove library books that are anti-American but not those that are pro-American? Whether it can provide arts funding to artists who celebrate capitalism but not those who celebrate commu-

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<sup>19</sup> 408 US at 92–93 (quotation marks omitted).

<sup>20</sup> *Id.* at 95–96.

<sup>21</sup> See, for example, *Perry Education Association v Perry Local Educators’ Association*, 460 US 37, 45 (1983) (holding that a content-based restriction in a public forum is impermissible unless it is “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end”).

<sup>22</sup> See, for example, *R.A.V. v City of St. Paul*, 505 US 377, 391 (1992) (striking down a hate speech ordinance prohibiting particular types of “fighting words” but not others).

<sup>23</sup> See, for example, *Spence v Washington*, 418 US 405, 413–15 (1974) (holding that a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material encroached on protected expression and was unconstitutional as applied to a student who hung a privately owned flag upside down with a peace symbol attached).

<sup>24</sup> See, for example, *Board of Education v Pico*, 457 US 853, 872 (1982) (holding that school officials cannot remove library books “simply because they dislike the ideas contained in those books”).

<sup>25</sup> See, for example, *National Endowment for the Arts v Finley*, 524 US 569, 586–87 (1998) (holding that a statute requiring that the NEA judge applications by artistic excellence and merit did not inherently interfere with First Amendment rights).

<sup>26</sup> See, for example, *Rosenberger v Rector and Visitors of the University of Virginia*, 515 US 819, 845–46 (1995) (holding that a state university could not withhold funds from a student religious publication because to do so would be a denial of the right of free speech and would risk “fostering a pervasive bias or hostility to religion”).

<sup>27</sup> See, for example, *Legal Services Corp v Velazquez*, 531 US 533, 548–49 (2001) (holding that even though Congress was not required to fund attorneys to represent indigent clients, once it had done so, Congress could not exclude funding for certain theories and ideas).

nism? In all of these situations, the First Amendment claimant, like the petitioner in *Schacht*, has no First Amendment right to use school property or have his book in the library or receive a government grant. The First Amendment interest in these situations is grounded in a claim of impermissibly unequal treatment.

This raises two important questions. First, why do we care about the inequality in these cases if there is otherwise no First Amendment violation? Second, how much justification must the government offer in order to withstand the challenge of inequality?

With respect to the first question, Karst rightly predicted that the central concern would turn out to be inequality based on the content of the message. As Karst observed, “[j]ust as the prohibition of government-imposed discrimination on the basis of race is central to the equal protection analysis, protection against governmental discrimination on the basis of speech content is central among first amendment values.”<sup>28</sup> Of course, since *Schacht* and *Mosley* we have learned that understanding all the nuances of content discrimination is far more complex than anyone at first imagined. There are viewpoint-based restrictions,<sup>29</sup> subject matter restrictions,<sup>30</sup> language-based restrictions,<sup>31</sup> image-based restrictions,<sup>32</sup> restrictions based on communicative impact,<sup>33</sup> symbolic speech restrictions,<sup>34</sup> speaker-based restrictions,<sup>35</sup> and “secondary effect” regulations,<sup>36</sup> all of which fall loosely under the

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<sup>28</sup> Karst, 43 U Chi L Rev at 35 (cited in note 1).

<sup>29</sup> See, for example, *Rosenberger*, 515 US at 827, 845–46 (invalidating a state university’s attempts to refuse funding to a student religious publication based on religious editorial viewpoint).

<sup>30</sup> See, for example, *Lehman*, 418 US at 301–02 (upholding the constitutionality of a municipal policy that refused advertising space on public transportation for political advertising but allowed space for other types of advertising).

<sup>31</sup> See, for example, *FCC v Pacifica Foundation*, 438 US 726, 745–46 (1978) (plurality) (holding that the FCC’s attempts to regulate language it designates as “patently offensive” for content did not violate the First Amendment).

<sup>32</sup> See, for example, *Erznoznik v City of Jacksonville*, 422 US 205, 211–12 (1975) (upholding a challenge to the facial validity of an ordinance prohibiting the showing of films containing nudity by a drive-in movie theatre when its screen is visible from a public street or place).

<sup>33</sup> See, for example, *United States v Eichman*, 496 US 310, 317–18 (1990) (holding that the Flag Protection Act of 1989, which criminalized the communicative act of flag burning, constituted a prohibited regulation of content).

<sup>34</sup> See, for example, *Virginia v Black*, 538 US 343, 362–63 (2003) (holding that even though cross burning is a communicative symbol, a statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate because the practice is a particularly virulent form of intimidation).

<sup>35</sup> See, for example, *Perry*, 460 US at 46 (stating that access to public property for public communication may be restricted where the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view).

<sup>36</sup> See, for example, *City of Renton v Playtime Theatres, Inc.*, 475 US 41, 54–55 (1986) (upholding a prohibition on adult motion picture theatres located “within 1,000 feet of any residential zone, single- or multi-family dwelling, church, park, or school,” the intent of which was to

heading of “content-based” restrictions. Moreover, in some circumstances, the Court treats the same types of content-based inequality differently because of the nature of the context.<sup>37</sup> All of this complexity has produced volumes of scholarly commentary, debate, and controversy over the reasons why inequality matters, why content inequality matters especially, and why various types of content inequality are more dangerous to First Amendment values than others.<sup>38</sup> All of this was well beneath the surface when Karst recognized equality as “a central principle in the First Amendment.”

The second question—what standard governs?—has proved similarly vexing. In 1975, all Karst could suggest was that the principle of equality in the realm of free speech demands “a showing of substantial necessity.”<sup>39</sup> Since then, however, a broad range of different standards has emerged, depending on such considerations as whether the inequality is content-neutral or content-based, whether it occurs in a public forum or a nonpublic forum, whether it involves a subsidy or a direct restriction of expression, and whether the challenged distinction draws a line based on viewpoint, subject matter, image, speaker identity, language (for example, profanity), and so on. The standards range all the way from rational basis review to the most rigorous form of strict scrutiny.<sup>40</sup>

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regulate the “secondary effects”—such as crime and decreased property value—of the theatres, not the content of the films shown).

<sup>37</sup> See *Perry*, 460 US at 56–57 (noting that a school board is free to restrict access to a private forum in a way that would be impermissible in the context of a public forum).

<sup>38</sup> See, for example, Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-based and Content-neutral: The Emerging Constitutional Calculus*, 79 Ind L J 801, 860–61 (2004) (supporting a balancing approach to difficult First Amendment cases that would bolster the traditional content-based and content-neutral analysis but noting that viewpoint discrimination should continue to be per se unconstitutional); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal L Rev 297, 301–02, 368–69 (1997) (identifying a trend within the Court’s jurisprudence toward an increased focus on the ends that the government seeks to advance with its actions and suggesting that the Court adopt “constitutionally-rooted purpose scrutiny” to properly invalidate “improperly-motivated legislation or regulation”); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U Pa L Rev 615, 616–22 (1991) (arguing for a broader interpretation of the content discrimination principle beyond government purpose and proposing a doctrinal approach based on recognition of the various types of content discrimination); Geoffrey R. Stone, *Subject-matter Restrictions*, 54 U Chi L Rev 46, 117–18 (1987) (arguing for a more structured approach to reviewing content-neutral restrictions that would make clear both the lines between content-based and content-neutral review and the approach the Court takes toward content-neutral restrictions on speech); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 251–52 (1983) (examining the nature of the distinction between content-based and content-neutral jurisprudence and the scope and substance of content-based review).

<sup>39</sup> Karst, 43 U Chi L Rev at 28 (cited in note 1).

<sup>40</sup> Compare *Cornelius v NAACP Legal Defense and Education Fund, Inc.*, 473 US 788, 805–06 (1985) (applying a reasonableness standard in evaluating the government’s decision to restrict access to a the Combined Federal Campaign, a nonpublic forum), with *Lamb’s Chapel v Center*

Although Karst's groundbreaking article accurately foresaw many of the implications of the Court's new emphasis on First Amendment equality, it also predicted developments that did not ensue. Three of these predictions are especially worth noting. First, Karst expected the equality principle to bring about the "dismantling" of the "two-level" theory of speech.<sup>41</sup> That is, he anticipated that the emphasis on content equality would extinguish the treatment of certain categories of expression, such as obscenity, libel, and fighting words, as "unprotected" by the First Amendment.<sup>42</sup> This has not come to pass. Although the Court has in some instances tightened its protection of "low-value" speech, especially in the realm of commercial advertising,<sup>43</sup> the "two-level" theory still holds.<sup>44</sup> Whatever else the Court has read into the equality concept, it has not viewed it as "radically inconsistent"<sup>45</sup> with the two-level theory of free expression.

Second, Karst predicted that the new focus on First Amendment equality would lead the court to invalidate even "formally content-neutral" restrictions that "have unequal effects on various types of messages."<sup>46</sup> Karst expected "de facto content discrimination" to be deemed "presumptively invalid under the . . . equality principle."<sup>47</sup> Although there have been a few decisions along these lines, they have been few and very far between. In *Brown v Socialist Workers '74 Campaign Committee (Ohio)*,<sup>48</sup> the Court invalidated a federal law compelling the disclosure of campaign contributions as applied to the Socialist Workers Party (SWP) because disclosure would likely have a devastating impact on "a minor political party which historically has been the object of harassment by government officials and private

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*Moriches Union Free School District*, 508 US 384, 393-94 (1993) (holding that denial of access to a nonpublic forum is impermissible when the decision is based on the speaker's viewpoint); *Riley v National Federation of the Blind of North Carolina, Inc.*, 487 US 781, 795 (1988) (treating a solicitation restriction that required fundraisers to disclose particular information as a content-based regulation subject to strict scrutiny because it "necessarily alter[ed] the content of the speech"); *Mosley*, 408 US at 98-99 (stating that 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").

<sup>41</sup> Karst, 43 U Chi L Rev at 30 (cited in note 1).

<sup>42</sup> *Id.*

<sup>43</sup> See, for example, *City of Cincinnati v Discovery Network, Inc.*, 507 US 410, 428 (1993) ("In the absence of some [relevant] basis for distinguishing between 'newspapers' and 'commercial handbills' . . . we are unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on news racks dispensing 'commercial handbills.'").

<sup>44</sup> See, for example, *Black*, 538 US at 358-59 ("[W]e have long recognized that the government may regulate certain categories of expression consistent with the Constitution.").

<sup>45</sup> Karst, 43 U Chi L Rev at 31 (cited in note 1).

<sup>46</sup> *Id.* at 36.

<sup>47</sup> *Id.* at 37.

<sup>48</sup> 459 US 87 (1982).



parties.”<sup>49</sup> And in *Boy Scouts of America v Dale*,<sup>50</sup> the Court invalidated a New Jersey public accommodation that prohibited discrimination on the basis of sexual orientation as applied to the Boy Scouts because the law could “significantly burden the Boy Scouts’ desire to not ‘promote homosexual conduct as a legitimate form of behavior.’”<sup>51</sup> But apart from a smattering of such decisions, the Court has generally eschewed the idea of de facto inequality under the First Amendment just as it has under the Equal Protection Clause.

Third, Karst predicted that the First Amendment equality principle would have a profound impact in right to vote cases and, particularly, in the realm of political gerrymandering.<sup>52</sup> Such gerrymandering, he reasoned, “presents an obvious discrimination by government against political expression on the basis of its content.”<sup>53</sup> This, too, has not come to pass. Rather, under both the Equal Protection Clause and the First Amendment, the Court has continued to take a highly deferential approach to such practices.<sup>54</sup>

I hasten to add that these failed predictions say nothing at all about Karst as a legal scholar. There was nothing wrong with his logic. What he could not have predicted in 1975 were the outcomes of presidential elections over the past thirty years and the consequent appointments to the Supreme Court. Indeed, the inaccuracy of these predictions highlights the contingency of constitutional law and the extent to which it is possible to imagine alternative constitutional universes based not on legal principle but political outcome.

The genius of Karst’s *Equality as a Central Principle in the First Amendment* was his recognition at a very early moment of the profound import of what at the time seemed to most commentators a minor blip in the evolution of constitutional doctrine. What Karst brilliantly foresaw was that the equality principle would become “a pre-

<sup>49</sup> Id at 87. See also Geoffrey R. Stone and William P. Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 S Ct Rev 583, 592–93 (discussing the Court’s rationales for exempting the SWP from disclosure but arguing that they do not satisfactorily explain the decision as consistent with First Amendment jurisprudence generally).

<sup>50</sup> 530 US 640 (2000).

<sup>51</sup> Id at 653 (“As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”).

<sup>52</sup> Karst, 43 U Chi L Rev at 58–59 (cited in note 1) (“[T]he first amendment’s equality principle will produce results in apportionment cases similar to those reached under the equal protection clause.”).

<sup>53</sup> Id at 59.

<sup>54</sup> See, for example, *League of United Latin American Citizens v Perry*, 126 S Ct 2594, 2607 (2006) (discussing the continuing uncertainty over the appropriate substantive standard to apply in evaluating equal protection challenges to political gerrymandering); *Vieth v Jubelirer*, 541 US 267, 305 (2004) (plurality) (concluding that the Equal Protection Clause provides “a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting”).

ferred ground for decision.”<sup>55</sup> By identifying the potential power of the principle, Karst helped give it an impetus that has shaped the law ever since. *Equality as a Central Principle in the First Amendment* is thus a classic example of a work of scholarship that both insightfully identifies a subtle shift in the law and defines that shift to give it new power, intellectual credibility, and influence.

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<sup>55</sup> Karst, 43 U Chi L Rev at 66 (cited in note 1) (noting the principle's importance for permitting the Court to protect First Amendment activity “without making a frontal attack on the legitimacy of the interest by which the state seeks to justify its regulation”).

