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PROCEDURAL SAFEGUARDS AGAINST CENSORSHIP: THE LAW AFTER *FW/PBS, INC. v. CITY OF DALLAS*

Despite the Constitution's broad first amendment directive to "make no law . . . abridging the freedom of speech, or of the press,"¹ governmental entities continually search for new methods to regulate speech, particularly in the area of adult entertainment businesses.² In *FW/PBS, Inc. v. City of Dallas*,³ however, the Supreme Court held that a licensing scheme, in a comprehensive city ordinance regulating sexually oriented businesses, was a prior restraint⁴ failing to provide adequate procedural safeguards. Even though the Court attained a six-vote majority on the unconstitutionality of the licensing scheme,⁵ it was unable to agree upon

1. U.S. CONST. amend I.

2. For example, in San Francisco the local government enacted "porn zoning" laws to cope with urban blight caused by adult businesses. The California Supreme Court upheld the ordinance, but found that a single showing of a pornographic film was not enough to bring the theater under the law. Rather, when sex movies account for a "substantial portion" of either the total films shown or the revenue, the city may zone the theater. L.A. Times, June 30, 1989, part 1, at 3, col. 5. In Delaware, the state enacted the Delaware Adult Entertainment Establishment Act, a comprehensive scheme for licensing adult entertainment businesses. The purpose of the act, according to the legislature, was to reduce and prevent obscenity and prostitution, which are facilitated by the abuse of legitimate occupations such as adult entertainment businesses. 56 U.S.L.W. 2403 (Jan. 26 1988). For other examples of specific government attempts to regulate adult businesses, see *infra* notes 12-16, 22-28, 46 and accompanying text.

3. 110 S. Ct. 596 (1990).

4. The doctrine of prior restraint is generally used to deter any form of government action tending to suppress acts of expression instead of punishing them after publication through civil or criminal sanctions. The doctrine presumes that any prior restraint of expression is unconstitutional. There are two types of prior restraints: 1) a government order or court injunction that prevents a person from engaging in certain kinds of communications, see, e.g., *Near v. Minnesota*, 283 U.S. 697, 701-02 (1931); and 2) a rule or ordinance that requires a license or permit before one may engage in a particular type of expression, see, e.g., *Freedman v. Maryland*, 380 U.S. 50 (1965).

For more information concerning prior restraints, see generally Abrams, *Prior Restraints*, Communications Law, PLI Order No. G4-3839, Nov. 9, 1989; Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 59 N.C. L. REV. 1 (1989); Ideological Exclusions: *A Prior Restraint Analysis*, 11 COM. ENT. 335 (1989); *Restraining Prior Restraint, or a Call for Balancing in Evaluating Obscenity Abatement Statutes: City of Paducah v. Investment Entertainment, Inc.* 791 F.2d 463, 82 Nw. U.L. REV. 181 (1987); Arenson, *Prior Restraint: A Rational Doctrine or an Elusive Compendium of Hackneyed Cliches?*, 26 DRAKE L. REV. 265 (1986-87); Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439 (1987); Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984); Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

5. Justice O'Connor wrote an opinion in which Justices Stevens and Kennedy joined; Justice

a single standard for judging the procedural safeguards, thus setting the stage for inconsistency and confusion among the lower courts.

The seminal case establishing procedural protections against prior restraints is *Freedman v. Maryland*.⁶ In *Freedman*, the Supreme Court held that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."⁷ The Court mandated three procedural safeguards against such prior restraints.⁸ First, the burden of proving that the film is unprotected expression must rest on the censor.⁹ Second, any restraint issued

Brennan wrote an opinion in which Justices Blackmun and Marshall joined. Justice Scalia wrote a dissenting opinion and Justice White, joined by Chief Justice Rehnquist, also dissented. This Recent Development and the *FW/PBS, Inc.* opinion focus solely on conduct protected under the first amendment.

6. 380 U.S. 50 (1965).

7. *Id.* at 58.

8. *Freedman*, 380 U.S. at 58, 59. Several commentators have focused on various aspects of the *Freedman* decision. See *Constitutional Law—Freedom of Expression—Permissive Bounds of Prior Restraint of Movies*, 17 DEPAUL L. REV. 597 (1968) (looks primarily at prior restraint as constitutional doctrine and specifically in *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) and *Freedman*); Klein, *Film Censorship: The American and British Experience*, 12 VILL. L. REV. 419 (1967) (extensive general overview of the history of film censorship); Recent Development, *Freedman v. Maryland*, 54 CALIF. L. REV. 1832 (1966) (censorship practices of the United States Customs Officials in light of *Freedman* safeguards); *Motion Picture Censorship and the Doctrine of Prior Restraint*, 3 HOUS. L. REV. 11 (1965) (review of censorship in the motion picture industry, traces history of prior restraint doctrine and analyzes effects of *Freedman*); Recent Development, *Freedman v. Maryland*, 10 ST. LOUIS U.L.J., 142 (1965) (discusses *Freedman* as a logical extension of earlier prior restraint doctrine).

The *Freedman* decision also provided guidelines for numerous cases involving the first amendment and adult entertainment. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (administrative board's procedure failed to include *Freedman* safeguards); *In re Search of Kitty's East*, 905 F.2d 1367, 1372 (10th Cir. 1990) (district court properly exercised its equitable jurisdiction according to *Freedman*); *Miller v. City of South Bend*, 904 F.2d 1081 (7th Cir.) (anti-nude dancing statute is an unconstitutional prior restraint, *cert. granted sub nom.* *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 38 (1990); *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987) (requiring dial-a-porn service to be prosecuted under existing obscenity laws or through a prior review permit system that satisfies *Freedman*), *cert. denied*, 485 U.S. 1029 (1988); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986) (overbroad anti-nude dancing ordinance violates *Freedman* test).

9. *Freedman*, 380 U.S. at 58 ("Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech") (quoting *Speiser v. Randall*, 357 U.S. 513 (1958)). The Court expressed concern that the obstacles involved in appealing a decision would be too great. *Id.* at 59. The exhibitor would not appeal because his stake in any one film would not be great enough to warrant the time and expense. *Id.* The distributor would not appeal an adverse decision because his ability to show the film anywhere else in the country would outweigh the burdens and delays of litigation necessary to show a film in Maryland.

in advance of a final judicial determination must do no more than preserve the status quo for the shortest feasible period.¹⁰ Third, the procedure must provide for a prompt final judicial decision.¹¹

Freedman involved a Maryland law¹² requiring all motion picture exhibitors to submit films to the State Board of Censors before showing the films.¹³ The statute created an invalid prior restraint on a protected form of expression¹⁴ because the initial decision of the Board of Censors effec-

10. *Id.* The Court held that, in effect, the statute endowed the Board's decision with finality. Prior case law states that the only method that properly insures protection of the freedom of expression is a judicial determination in an adversary proceeding. Based on this precedent, the *Freedman* Court stated that only a procedure providing for judicial determination would be sufficient to impose a valid final restraint. *Id.* at 58. See *A Quantity of Books v. State of Kansas*, 378 U.S. 205 (1964) (statute that failed to provide a pre-seizure hearing on the question of whether books were obscene was held to be an unconstitutional prior restraint); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (Rhode Island statute that enabled a commission to determine whether published matter was obscenity was an intolerable restraint because there was no judicial supervision of the commission's findings); *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962) (decision by the judicial officer of the Post Office Department, which disallowed certain mailings that it determined were obscene, was held impermissible to the extent that it depended on a determination that the magazines were obscene); *Marcus v. Search Warrant*, 367 U.S. 717 (1961) (Missouri statute that permitted judge to issue search warrants authorizing police to search for and seize obscene material before any hearing violated the due process clause of the fourteenth amendment).

11. The prompt judicial review would guard against both an administrative refusal to grant the license even after the expiration of a temporary restraint and the deterrent effect of an errant temporary denial of a license. *Freedman*, 380 U.S. at 59.

The Court provided what it believed to be an example of acceptable procedural safeguards in a statutory scheme. The Court explained a New York procedure for preventing the sale of obscene books: "That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing." *Id.* at 60 (citing *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957)).

12. MD. ANN. CODE art. 66A, § 2 (1957) provides:

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board.

13. A Baltimore theater owner challenged the statute by exhibiting the film, "Revenge at Day-break" without first submitting it to the censorship board. The state conceded that the film did not violate the statutory standards and would have been approved had it been submitted. *Freedman*, 380 U.S. at 52.

14. Since its decision in *Roth v. United States*, 354 U.S. 476 (1957), the Court has upheld the distinction between pornography and obscenity. The first amendment protects the former but not the latter, and, thus, the states may regulate obscenity. The Court enunciated a three-part test in *Miller v. California*, 413 U.S. 15 (1973), to determine what material qualifies as obscene:

The basic guidelines for the trier of fact must be:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the

tively barred exhibition of any disapproved film¹⁵ and the exhibitor's sole recourse was a successful appeal to a Maryland court.¹⁶

In subsequent applications of the *Freedman* test, the Court has demonstrated great suspicion for any system of prior restraint.¹⁷ Specifically, the Court strikes down two types of prior restraints¹⁸ on constitutionally protected freedoms:¹⁹ 1) a prior restraint that allows for unbridled discretion on the part of a government official or agency;²⁰ and

applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24. For a recent look at the first amendment and obscenity, see *RICO v. Dealers in Obscene Matter: The First Amendment Battle*, 22 COLUM. J.L. & SOC. PROBS. 71 (1988); *Dial-a-Porn and the First Amendment: The State Action Loophole*, 40 FED. COMM. L.J. 267 (1988); *Constitutional Law: Taking A Soft Look at Probable Cause: An Obscene Result for First Amendment Protections*, 7 LOY. ENT. L.J. 111 (1987); *First Amendment—Freedom of Speech—Child Pornography, Obscene or Not, Possesses No First Amendment Protection*, 23 SANTA CLARA L. REV. 675 (1984).

15. *Freedman*, 380 U.S. at 54.

16. The theater owner's challenge to the statute differed from past challenges to similar obscenity statutes because it focused on the procedures of censorship and their effect on protected expression. *Id.*

The Maryland law did not impose any time limits on the board for its review of the film. See *supra* note 13. If the board disapproved of the film, the exhibitor could appeal the decision and the same board would re-examine the film in the presence of the exhibitor. MA. ANN. CODE art. 66A, § 19 (1957). Upon approval or disapproval, the exhibitor could appeal the board's decision to the Baltimore City Court, and then to the Court of Appeals of Maryland. *Id.*

17. "While prior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes to [the Supreme Court] bearing a heavy presumption against its constitutional validity." 110 S. Ct. 596, 604 (1990) (citing *Southeastern Promotion, Ltd.*, 420 U.S. at 558). See also, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969) (city ordinance making it illegal to participate in any parade, procession, or other public demonstration held to be illegal prior restraint); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (Rhode Island law that failed to provide for judicial determination of Morality Commission's determinations was an unconstitutional prior restraint); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (New Hampshire statute requiring persons to obtain a license before engaging in a parade or procession held an unconstitutional prior restraint); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Connecticut statute that prohibited solicitation of money for charitable, religious, or philanthropic reasons without approval of the Public Welfare Office, and that allowed the Office to determine whether the applicant was bona fide, violated the fourteenth amendment); *Lovell v. Griffin*, 303 U.S. 444 (1938) (city ordinance requiring permit to distribute circulars, handbooks, advertising, or literature was an unconstitutional infringement on freedom of the press).

18. See *supra* note 7 and accompanying text.

19. *FW/PBS*, 110 S. Ct. at 605.

20. *Id.* Justice O'Connor quoted *Shuttlesworth*, 394 U.S. at 605 ("It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms"). See *Lake-wood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (city ordinance giving mayor unbridled discretion over whether to grant annual permits for newsracks was unconstitutional); *Secretary of*

2) a scheme that fails to limit the time within which the decision maker must issue the license.²¹

In *FW/PBS*²² Justice O'Connor, writing for the majority, held that

State v. Joseph H. Munson Co., 467 U.S. 946 (1984) (statute that restricted the percentage of charitable fund-raising expenses was overbroad and therefore unconstitutionally limited first amendment solicitation activities of charities); *Freedman v. Maryland*, 380 U.S. 51 (1965) (Maryland statute that provided for review of films by censorship committee before films could be shown lacked procedural safeguards and was therefore an unconstitutional infringement on film shower's rights); *Cox v. Louisiana*, 379 U.S. 559 (1965) (when highest police officials told defendant he could picket, it was due process violation to convict defendant for picketing); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (city ordinance giving mayor discretion to grant solicitation permits without any controlling guidelines was unconstitutional); *Kunz v. New York*, 340 U.S. 290 (1951) (city ordinance that required people to obtain a permit before holding public worship meetings was unconstitutional because it gave control over the right to speak to city officials without providing appropriate standards); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (in the absence of narrowly drawn standards, statutes that make it unlawful to speak in public places without the prior consent of public officials are unconstitutional); *Saia v. New York*, 334 U.S. 558 (1948) (ordinance requiring permit before use of sound amplification equipment unlawful where no procedural protections for granting permit).

21. *FW/PBS*, 110 S. Ct. at 605 (citing *Freedman*, 280 U.S. at 59; *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (statute that restrained speech for indefinite period held invalid)). Justice O'Connor compared the censorship system in *Freedman* to a licensing scheme and found both situations created the possibility of an unconstitutional suppression of protected speech if the city failed to institute adequate procedural safeguards.

22. 110 S. Ct. 596 (1990). In *FW/PBS* the Dallas City Council enacted an ordinance regulating sexually oriented businesses. *Id.* The purpose of the ordinance was to eradicate the secondary effects of crime and urban blight. *Id.* A sexually oriented business was defined as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." DALLAS, TEX., CITY CODE ch. 41A, Sexually Oriented Businesses § 41A-2(19) (1986). Suits were brought challenging the ordinance by three "groups of individuals and businesses: those involved in selling, exhibiting, or distributing publications, video or motion films; adult cabarets, or establishments providing live nude dancing or films, motion pictures, video cassettes, slides or other photographic reproductions depicting sexual activities and anatomy specified in the ordinance; and adult motel owners." *Id.* at 605.

The district court upheld most of the ordinance in *Dumas v. Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986), striking only four subsections. The district court cited *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969), and found §§ 41A-5(a)(8) and 41A-5(c) invalid because they vested overbroad discretion in the chief of police. In addition, the court cited *United States v. O'Brien*, 391 U.S. 367 (1968), in striking down a provision that imposed civil disability on the basis of an indictment or information, because less restrictive alternatives were available to the city. *Id.* The court also eliminated five crimes from the list of those giving rise to civil disability because they were not sufficiently related to the ordinance's purpose. Subsequently, the city amended the ordinance to conform to the district court's opinion. *Id.*

The Fifth Circuit upheld the district court's decision, viewing the ordinance as content-neutral with regard to time, place, and manner of regulation. *Id.* Furthermore, the court concluded that the *Freedman* procedural safeguards were not necessary in the regulation of an ongoing commercial business. *Id.* The sections of the court's opinion that address whether adult motel owners who rent rooms for less than ten hours must obtain a license and whether the civil disability provisions are valid, are outside the scope of this Recent Development.

the Dallas city ordinance at issue did not meet *Freedman's* procedural safeguards.²³ The ordinance required sexually oriented businesses to submit to an inspection before obtaining a license, whenever the business moved into a new building, the use of the structure changed, the ownership of the business changed, or when the business applied for its annual permit.²⁴ The chief of police must approve the issuance of the license within thirty days of receipt of the application,²⁵ but the permit could not issue before the health department, fire department, and the building official approved the premises.²⁶ The ordinance neither set a time limit within which these inspections had to occur,²⁷ nor provided a means of recourse for the applicants if the license was not issued within the thirty day framework.²⁸

Because the prior restraint lacked the procedural safeguard of a time limit, Justice O'Connor found the Dallas ordinance unconstitutional.²⁹ Nevertheless, O'Connor concluded that the regulatory scheme did not

23. 110 S. Ct. 596 (1990). Justice O'Connor noted that although facial challenges to legislation are generally disfavored, they are acceptable in the first amendment context when legislation permits unbridled discretion by the decisionmaker and when the legislation is challenged as overbroad. *FW/PBS*, 110 S. Ct. at 603. See also *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 & n.15 (1984).

The city argued that the ordinance requires every business, regardless of whether it is protected by the first amendment, to obtain a certificate of occupancy when it moves into a new location or the use of the structure changes. *FW/PBS*, 110 S. Ct. at 604. Indeed, the ordinance applied to some businesses that were not protected by the first amendment: for example, escort agencies and sexual encounter centers. *Id.* However, because the ordinance was specifically targeted to businesses that provided sexually explicit speech and therefore received first amendment protection, the city conceded, for purposes of the case, that the businesses were engaged in protected conduct. *Id.* Cf. *Smith v. California*, 361 U.S. 147, 150 (1959) (bookstore); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (live theater performances are protected conduct); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976) (motion picture theaters showing adult films are protected); *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (nude dancing is protected conduct).

Many ordinances that attempt to regulate adult businesses do so through zoning. In *Renton v. Playtime Theatres, Inc.* 475 U.S. 41, *reh'g denied*, 475 U.S. 1132 (1986) the Court held that a municipal zoning ordinance prohibiting adult movie theaters from being within 1,000 feet of a residential area, church, park, or school did not violate the first amendment. The Court stated that the ordinance was aimed at theaters and their secondary effects, and not at the contents of any particular expression or speech. *Id.*

24. *FW/PBS*, 110 S. Ct. at 604. Businesses that were not sexually oriented had to obtain licenses, but only when they moved into a new structure or when the use of the structure changed. *Id.*

25. DALLAS, TEX., CITY CODE ch. 41A, Sexually Oriented Businesses § 41A-5(a)(6) (1986).

26. *Id.*

27. *FW/PBS*, 110 S. Ct. at 605.

28. *Id.*

29. *FW/PBS*, 110 S. Ct. at 606. See *supra* note 22.

present the “grave ‘dangers of a censorship system,’ ” and, therefore, was not subject to the full protections of *Freedman*.³⁰ According to Justice O’Connor, *Freedman*’s underlying policy provides that a license for a business protected by the first amendment must issue within a reasonable period of time, because undue delay suppresses protected speech.³¹

O’Connor distinguished the ordinance in *Freedman* from the Dallas ordinance in two ways to find that the Dallas ordinance had to satisfy the second³² and third³³ prongs of the *Freedman* test, but that the city did not have to bear the burden of proving the speech was unprotected.³⁴ First, the censor in *Freedman* engaged in direct censorship of particular expressive material. Such regulation is presumptively invalid,³⁵ and therefore requires the censor to bear the burden of justifying its actions.³⁶ In contrast, Dallas did not review the content of or exercise discretion over particular expressive speech; instead, the city examined each license applicant’s overall qualifications.³⁷ Justice O’Connor deemed that this “ministerial action” is not presumptively invalid.³⁸

Second, in *Freedman*, the obstacles to litigating or appealing an adverse decision by the censor were so great that a censor’s refusal was tantamount to complete suppression of speech.³⁹ In Dallas, however, the applicant had more at stake, because the temporary restriction on speech threatened the applicant’s entire livelihood, not merely one movie.⁴⁰ Therefore, O’Connor posited that the Dallas licensing procedure would not deter applicants from appealing a license denial in the courts.⁴¹

Although Justice Brennan concurred in the judgment in *FW/PBS*, he disagreed with O’Connor’s refusal to apply all three prongs of the *Freedman* test. Justice Brennan argued that the procedural protections guar-

30. *Id.* (citing *Freedman*, 380 U.S. at 58).

31. *FW/PBS*, 110 S. Ct. at 606.

32. *See supra* text accompanying note 10.

33. *See supra* text accompanying note 11.

34. *FW/PBS*, 110 S. Ct. at 607. O’Connor stated: “[L]imitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the ‘principle that the freedoms of expression must be ringed about with adequate bulwarks.’ ” *Id.* (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963)).

35. *FW/PBS*, 110 S. Ct. at 606-07.

36. *Id.* at 607.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

anted by *Freedman* do not vary with the facts of each case.⁴² Rather, all three parts of *Freedman* always must be satisfied.

Brennan stressed that the Court has never suggested that the *Freedman* procedural protections vary with the particular facts of the prior restraint.⁴³ In *Riley v. National Federation of the Blind, Inc.*,⁴⁴ the Supreme Court applied all the *Freedman* procedural protections to a licensing scheme requiring only *professional* fundraisers to wait for a determination on their application to solicit.⁴⁵ The regulation did not provide for a specified period of time in which the licensor had to issue the license.⁴⁶ The Court therefore found the regulation unconstitutional because the indefinite delay compelled the speaker's silence.⁴⁷

Justice Brennan found the ordinance in *Riley* indistinguishable from the Dallas ordinance.⁴⁸ First, the Dallas decisionmaker reviewed the entire business, not the content of any particular expression.⁴⁹ Similarly, in *Riley*, the decisionmaker reviewed applications to practice a profession, not the particular content of a solicitation.⁵⁰ Second, in both cases the

42. *Id.* at 612.

43. *Id.* See *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (Court struck down a motion picture ordinance that failed to provide adequate procedural protections under *Freedman*); *Blount v. Rizzi*, 400 U.S. 410 (1971) (Court invalidated postal rules that permitted restrictions on the use of the mails for allegedly obscene materials for not meeting the *Freedman* standards); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (the Court invalidated a city's refusal to rent municipal facilities for a musical because of its content).

Justice Brennan specifically addressed two cases. In *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977), the Supreme Court held that a court-ordered injunction must be stayed if appellate review is not expedited. Furthermore, in *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), the Court invalidated a statute that prohibited for one year the showing of films based on the fact that the same theater had previously shown obscene films. The Court stated that such a determination must follow *Freedman* procedures.

44. 487 U.S. 781 (1988).

45. *Id.* at 801. The North Carolina Charitable Solicitations Act controls professional fundraisers. It defines the reasonable fee a professional fundraiser may charge as a percentage of the gross revenue solicited, requires professional fundraisers to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations, and requires professional fundraisers to obtain a license before engaging in solicitation. *Riley*, 487 U.S. at 784. The statute allowed volunteer fundraisers to solicit immediately upon submitting an application, but prohibited professional solicitors from fundraising until their application was approved. *Id.* at 801. The Court found the statute unconstitutional because it did not set a time limit during which the license must issue. *Id.*

46. *Id.* at 801.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

delay created by the regulatory scheme threatened the applicant's livelihood.⁵¹ In *Riley*, however, the court placed the burden of appealing to the courts on the State, not the applicant.⁵²

The even split in the Court deeply affects the previously clear and uniformly applied *Freedman* protections.⁵³ The split creates confusion as to which standard the Court will follow in the future. Lower courts are left to determine whether the Court will remain with the traditional approach articulated by Justice Brennan,⁵⁴ or will choose to follow Justice O'Connor's novel approach of dividing the *Freedman* protections.⁵⁵

Justice Brennan's inflexible approach of applying all three *Freedman* prongs in any prior restraint situation greatly expands procedural protections against prior restraints. Thus, even when a fact pattern arises that does not warrant such protections, the lower court must still employ them. Conversely, Justice O'Connor's approach severely restricts the procedural safeguards against prior restraints. The absence of one of the three *Freedman* safeguards gives censors an advantage over those whom they censor. Moreover, lower courts will have to determine which of the *Freedman* safeguards are necessary to provide licensees adequate procedural protection: a regulation may need only expedient judicial review, but not a time restriction; or only a time restriction, but no avenue for immediate review.

If lower courts adopt Justice O'Connor's approach, the decisionmaker's initial ruling possibly will stand until the applicant appeals. Consequently, the initial ruling silences the applicant during the interim period. While judicial relief may come swiftly and the period of silence may be negligible, the result is still suppression of protected expression. In the words of Justice Brennan, "In distributing the burdens of initiating judicial proceedings and proof, we are obliged to place them such that we err, if we must, on the side of speech, not on the side of silence."⁵⁶

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51. *Id.*

52. *Id.*

53. *See supra* notes 9-11 and accompanying text.

54. *See supra* notes 42-52 and accompanying text.

55. *See supra* notes 29-41 and accompanying text.

56. *FW/PBS*, 110 S. Ct. at 613 (Brennan, J., concurring).