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PRIOR RESTRAINT: A RATIONAL DOCTRINE OR AN ELUSIVE COMPENDIUM OF HACKNEYED CLICHES?

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I. What is a Prior Restraint?

Of the many clauses in that spacious and talismanic document known as the Constitution, perhaps none have engendered more confusion and fragmentation among members of the Supreme Court over the years than the free speech and press guarantees of the first amendment. Flooded with a litany of peculiar doctrines, masked by the expedient use of bankrupt cliches, and steeped in a legacy of discord over the central purpose of the clauses as envisioned by the constitutional Framers, any attempt to fully explore the parameters of free expression would be, at best, a tall order and certainly beyond the scope of the present discussion.

Instead, our discussion will be addressed to the more limited objective of clarifying the definition, rationale, and application of perhaps the most elusive and peculiar of the doctrines associated with the first amendment: the doctrine of prior restraint. The discussion to follow will, insofar as possible, attempt to harmonize the enormous amount of cacophony surrounding the doctrine which is due, in no small measure, to the attempts by many to oversimplify its complexities through the indiscriminate use of sweeping generalities.

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A. *Administrative Censorship*

Although it is an understatement to point out that the case law surrounding the prior restraint doctrine has been anything but clear and consistent,[1] a major underpinning of its genesis and continued vitality is that in a society which reposes an unwavering confidence in the free marketplace of ideas, we prefer to allow people to speak first and later defend their expression as constitutionally protected in a subsequent proceeding at which criminal or civil liability is sought to be imposed.[2] Put another way, the term "prior restraint" is generally used to describe any form of government action which tends to suppress or interfere with speech activity before it is ultimately punished through civil or criminal sanctions in a court of law. By definition, therefore, the doctrine has not been applied to laws, statutory or otherwise, which purport to impose ultimate criminal or civil liability for certain proscribed conduct; some examples are criminal statutes touching upon expressive activity and the typical common law rules that allow an aggrieved party to recover damages in a civil action for defamation of character.[3]

On the other hand, and along these same definitional lines, the doctrine has often been applied to various government schemes that would require a willing speaker to first obtain permission of sorts from an administrative censor as a prerequisite to lawfully engaging in expressive activity.[4] Accordingly, ordinances which require persons to secure a permit from designated executive officials in order to lawfully partake in peaceful demonstrations[5] and a municipality's exercise of discretion in refusing to lease an auditorium

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1. T. Emerson, The System of Freedom of Expression 421 n.1 at 649 (1970); Kelvin, *The Supreme Court—A Forward*, 85 Harv. L. Rev. 332 (1971).

2. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) ("[A] free society prefers to punish the few who abuse the rights of speech *after* they break the law then to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable."); J. Nowak, R. Rotunda & J. Young, Constitutional Law 886-87 (2d ed. 1983) [hereinafter Nowak]; 2 T. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 886 (Carrington 8th ed. 1927) (footnote omitted); 4 W. Blackstone, Commentaries on the Laws of England 151-52 (2d ed. rev. 1872).

3. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 Cornell L. Rev. 245, 264-65 (1982) [hereinafter Mayton] (Professor Mayton seriously questions whether a licensing statute labeled a "prior restraint" is really any different than an ordinary criminal statute interfering with expression.); Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 Cornell L. Rev. 283 (1982) [hereinafter Hunter].

4. *See* Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968); Cox v. New Hampshire, 312 U.S. 569 (1941); Lovell v. Griffin, 303 U.S. 444 (1938).

5. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Niemotko v. Maryland, 340 U.S. 268 (1951).

for the purpose of displaying adult entertainment,[6] have been held to constitute prior restraints.

A primary concern underlying this abhorrence to devices which restrain expression prior to punishment in subsequent proceedings is that courts, because of their responsibility to uphold the law, are more sensitive in safeguarding first amendment freedoms than other types of government bodies.[7] Moreover, it has been suggested by many courts and constitutional scholars that it is only in a court of law, where a first amendment claimant becomes involved in an adversary proceeding with a full panoply of procedural safeguards,[8] that free speech claims can be adequately protected.

As simplistic as this may sound, and taking into account the typical sweeping generalities associated with the prior restraint doctrine, let us now tread on some unsettled waters that not only belie such generalities, but leave us with a host of uncertainties that are likely to emerge on the horizon of future first amendment litigation.

B. *Injunctions*

In a number of decisions, the Supreme Court has held that when a court enjoins speech activity, whether by temporary, preliminary, or permanent injunction, this type of action falls squarely under the rubric of prior restraint.[9] Given the aforementioned rationale which has largely formed the basis of our traditional antipathy for prior restraints, why should injunctions that are issued by judicial bodies themselves be placed in this category?[10] Not only are injunctions necessarily shielded from attack on the ba-

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6. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 546.

7. Freedman v. Maryland, 380 U.S. 51, 57-58 (1965) ("Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression."); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 726 (1978) [hereinafter TRIBE]; Mayton *supra* note 3 at 250, 281.

8. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69-70 (1963); Freedman v. Maryland, 380 U.S. at 58 ("The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."); Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 543 (1970).

9. Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980) (per curiam) ("Nor does the fact that the temporary prior restraint is entered by a state trial judge rather than an administrative censor sufficiently distinguish this case from *Freedman v. Maryland*. . . . That a state trial judge might be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered."); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

10. *See* Mayton, *supra* note 3, at 249-53; *But see* Hunter, *supra* note 3, at 288-92. Professor Hunter argues that judges are not necessarily more responsive to first amendment concerns than non-judicial officials. *Id.* at 288. For example, Professor Hunter points out that many judges are prone to issuing gag orders during criminal proceedings when other less restrictive

sis that non-judicial bodies are less responsive to first amendment protections, but they are often issued in an adversary setting where the procedural due process requisites of notice and a fair hearing must be observed.[11]

One possible explanation for treating injunctions that interfere with expression as prior restraints is that lack of sensitivity on the part of non-judicial bodies to first amendment freedoms, albeit a major concern, has not been the sole rationale expressed over the years in support of the doctrine. Indeed, the United States Supreme Court has on more than one occasion expressed the view that any form of restraint on speech before it is disseminated, no matter how ephemeral, allows the government "to destroy the immediacy of the intended speech, overriding the individual's choice of a persuasive moment or an editor's decision of what is newsworthy; dissemination delayed may prove tantamount to dissemination denied."[12]

Another concern underlying the traditional animus our courts have displayed toward prior restraints was expressed in the fairly recent Supreme Court decision of *Southeastern Promotions Ltd. v. Conrad.*[13] Justice Blackmun, in speaking for the Court, reaffirmed the cardinal tenet that a free society prefers to allow people to speak first and later defend their speech on first amendment grounds in subsequent criminal or civil proceedings and further explained, "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable."[14]

Although crafty minds may differ as to the degree of superficiality in drawing distinctions among the various rationales that have been espoused in support of the doctrine, all share the common thread of confidence in the ability of our citizenry to make sound judgments when exposed to a free marketplace of ideas.[15] The prior restraint doctrine represents a manifestation of this confidence and says, in effect, that a democratic society generally prefers to cope with the noxious effects of unprotected speech after it is uttered rather than run the risk of suppressing protected speech, however briefly, before it is uttered.

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means are available to protect the rights of the accused. *Id.* at 288-89. Moreover, this may result in substantial interference with first amendment freedoms since these orders often go unchallenged. *Id.*

11. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968) (invalidating, as a denial of procedural due process, a ten-day ex parte restraining order prohibiting a group from holding public rallies and meetings).

12. TRIBE, *supra* note 7, at 725-26; *see also* Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 182 (1968); Wood v. Georgia, 370 U.S. 375, 392 (1962); Pennekamp v. Florida, 328 U.S. 331, 346-47 (1946).

13. 420 U.S. 546 (1975).

14. *Id.* at 559.

15. NOWAK, *supra* note 2, at 887.

As appealing as these explanations sound, and fully taking them into account, do they really explain why injunctions are any more inimical to the interests of safeguarding protected speech, in its immediacy or otherwise, than criminal statutes or other laws that purport to impose ultimate criminal or civil liability? Doesn't an injunction, perhaps even more so than a criminal statute, put the person or persons to whom it is directed on notice that their speech activities are proscribed? If a violation of an injunction is punishable through contempt, is it any less likely to have a chilling effect on protected speech than the threat of fine or imprisonment under a criminal statute?[16] To the contrary, a criminal statute should have a far greater chilling effect since it would apply to all persons within its jurisdiction. Finally, with regard to the concern that non-judicial bodies are less responsive than courts in protecting first amendment freedoms, aren't criminal statutes, by definition, the product of non-judicial decision making, and therefore laden with the very same potential for insensitivity to constitutional freedoms?

It appears, therefore, that if there is any acceptable reason for classifying court injunctions as prior restraints, attention should focus less on the generalities commonly offered in support of the doctrine itself, and more on the inherent qualities of an injunction which make its application particularly insidious in the area of free speech. Having said that, we are again forced to deal with the nagging but necessary question of what, if anything, makes an injunction any more repugnant to first amendment protections than, for example, a criminal statute abridging protected speech.

At the outset, it is important to note that injunctions, unlike the initiation of criminal proceedings, are a far more expedient alternative for the government to pursue in regulating speech activities that are in fact unprotected under the first amendment. First, the procedure for initiating an action for injunctive relief is less time-consuming than running the gauntlet of a criminal prosecution. Since an action for injunctive relief generally requires a showing of imminent and irreparable harm, courts are especially sensitive to the need for scheduling a hearing at the earliest possible time to determine whether a preliminary injunction should issue. In sharp contrast, should the government elect to pursue its legitimate interests by instituting criminal proceedings, it is certain to be fraught with the delays and frustra-

16. Mayton, *supra* note 3, at 281. Professor Mayton takes the position that because criminal statutes touching upon expression are particularly susceptible to being vague and overbroad, they actually create a higher risk of chilling protected speech, through self-censorship, than injunctions which are specifically directed at certain individuals. *Id.* Professor Mayton also points out that because criminal statutes are legislative enactments, there is the added danger of non-judicial bodies being less sensitive to first amendment freedoms. *Id.* at 252. Finally, Professor Mayton stresses that the legislative process is not subject to the procedural safeguards that normally attend judicial proceedings. *Id.* at 277-78. *But see* Hunter, *supra* note 3; *see also* TRIBE, *supra* note 7, 726 n.2. Professor Tribe suggests that prior restraints have more of a chilling effect on expression than criminal statutes since they amount to a personal admonition not to speak rather than an impersonal threat. *Id.*

tions that are a natural by-product of the various state and federal safeguards that are afforded an accused in criminal prosecutions: preliminary hearings, grand jury proceedings, and arraignments, to mention only a few.[17] While there is nothing inherently sinister in opting for the most expedient method of pursuing important government interests, this seemingly benign expediency is laden with the potential for abuse when one considers that except in certain instances of criminal contempt, persons who are cited for contempt are generally not entitled to the sixth amendment right of trial by jury as are defendants charged with violations of criminal statutes.[18] Similarly, since equitable proceedings to obtain injunctive relief are non-criminal actions, the defendants in such cases are also stripped of many other constitutional protections enjoyed by defendants in criminal prosecutions such as the sixth amendment right of confrontation,[19] the fifth amendment prohibition against double jeopardy,[20] and the due process mandate of "proof beyond a reasonable doubt."[21]

While all of the foregoing observations have considerable force in explaining why injunctions are a more odious form of restraint than criminal statutes which militates in favor of placing them under the rubric of prior restraint, it is apparent that most of these factors provide little insight or explanation for placing injunctions under this rubric when subsequent punishment occurs in civil rather than criminal proceedings.[22] Yet despite the

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17. NOWAK, *supra* note 2, at 887-88; *Cf.* Mayton, *supra* note 3, at 277, 288. Professor Mayton argues that notwithstanding the special safeguards attending criminal prosecutions, the self-censorship that inevitably results from the very threat of criminal prosecution will often render these safeguards meaningless. *Id.* Thus, to some unknown degree, the threat of subsequent punishment under ordinary criminal statutes may be more pernicious to protected expression than injunctions. *Id.* at 278.

18. Muniz v. Hoffman, 422 U.S. 454, 477 (1975); Codispoti v. Pennsylvania, 418 U.S. 506 (1974); Shillitani v. United States, 384 U.S. 364, 365 (1966). The Court has held that if the length of the sentence is within the judge's discretion rather than mandated by statute, the sixth amendment does not require a jury trial in cases of criminal contempt unless the sentence imposed actually exceeds six months. Muniz v. Hoffman, 422 U.S. at 476. In criminal prosecutions, however, a defendant has a sixth amendment right to trial by jury if the sentence imposed *could* exceed six months. *Id.* Where only fines are involved, the Court has not construed the sixth amendment to require a jury trial whenever the fine exceeds a given sum, as for example, in *Muniz*, when the fine for criminal contempt was $10,000. *Id. But see* 18 U.S.C. § 1(3) (1982) which requires a jury trial in the case of ordinary crimes when the fine could exceed $500.

19. *See* Pointer v. Texas, 380 U.S. 400 (1965) (holding the sixth amendment right of confrontation applicable to the states).

20. *See* Benton v. Maryland, 395 U.S. 784 (1969) (holding the fifth amendment prohibition against double jeopardy applicable to the states).

21. *See In re* Winship, 397 U.S. 358 (1970) (holding the reasonable doubt standard to be constitutionally required in delinquency proceedings).

22. This is not to suggest that all of these considerations have absolutely no force when subsequent punishment occurs in civil proceedings. In certain instances, it may be even more time consuming to run the course of civil litigation than criminal prosecution. While the seventh amendment right of trial by jury in civil actions has been held inapplicable to the states,

conspicuous absence of any attempt by the United States Supreme Court to address this issue, the doctrine has been invoked in situations where injunctions were directed at speech activity and there was no apparent threat of subsequent criminal prosecution.[23] Attention, therefore, must focus once again on the question of what quality inheres in the nature of injunctions which justify their disfavored status as prior restraints. Perhaps if any successful attempt can be made to address this question, attention must focus on the closely related Supreme Court decisions in *Shuttlesworth v. Birmingham*[24] and *Walker v. Birmingham*.[25]

In *Walker*, the Court sustained the criminal contempt convictions of several persons who had violated an ex parte injunction issued by an Alabama court.[26] The injunction was significant not only because it was directed at speech activity, but also because it was worded so as to mirror the language of a Birmingham ordinance making it unlawful to engage in protest marches without a permit and directing city officials to deny such permits if "the public welfare, peace, safety, health, decency, good order, or morals or convenience"[27] required that it be refused. The petitioners in *Walker* had sought to set aside their convictions on the grounds that the injunction was unconstitutionally vague and overbroad.[28]

In writing for a badly divided Court, Justice Stewart authored the following key passages:

> We are asked to say that the Constitution compelled Alabama to allow the petitioners to violate this injunction, to organize and engage in these mass street parades and demonstrations, without any previous effort on their part to have the injunction dissolved or modified . . . .[29]
>
> The breadth and vagueness of the injunction itself would also unquestionably be subject to substantial constitutional question. But the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved . . . .[30]
>
> This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. . . .[31]

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the right is available under various rules of state law. Palko v. Connecticut, 302 U.S. 319, 324 (1937); Walker v. Sauvinet, 92 U.S. 90 (1876).

23. Vance v. Universal Amusement Co., 445 U.S. 308 (1980); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

24. 394 U.S. 147 (1969).

25. 388 U.S. 307 (1967).

26. *Id.* at 320-21.

27. Shuttlesworth v. City of Birmingham, 394 U.S. at 149-50.

28. Walker v. City of Birmingham, 388 U.S. at 307.

29. *Id.* at 315.

30. *Id.* at 317.

31. *Id.* at 318.

Justice Stewart went on to conclude: "[t]his Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets."[32] In short, the Court held that where procedures are available to ensure prompt and meaningful appellate review of an injunction; a person forfeits his right to assert, as a defense to a charge of criminal contempt, whatever constitutional defenses he might have raised had he properly chosen to avail himself of the opportunity to seek judicial review.[33] The thrust of Justice Stewart's opinion is that regardless of the reverence afforded civil liberties in any free society, we are foremost a society of "laws and not of men."[34] Therefore, in attempting to strike a proper balance between these hallowed and sometimes irreconcilable interests, the Court has chosen to favor the need for an orderly society so long as the government has demonstrated a good faith effort to minimize the risk that protected speech will be suppressed by providing an avenue for meaningful and expeditious review.[35]

While such reasoning no doubt bears a certain aura of charm, the fact that four justices dissented from Justice Stewart's majority opinion should serve notice that evil lurks beneath the surface. Why should an order issued by a single member of the judiciary be treated with greater deference than a criminal statute approved and signed into law by a body of elected representatives? When injunctions rather than criminal statutes are involved, is there any greater risk of degenerating into a society of men and not laws if we allow people to speak first and later defend their speech as constitutionally protected?

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32. *Id.* at 321.

33. Walker v. City of Birmingham, 388 U.S. at 318-21; *see* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) (per curiam) (a state court enjoined the Nazi Party from demonstrating, the first amendment required the state to either provide for prompt appellate review, or stay the order pending appeal: "If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards. . . . including immediate appellate review. . . . Absent such review, the State must instead allow a stay."). *See generally* Rendelman, *Free Press—Fair Trial: Review of Silence Orders*, 52 N.C.L. REV. 127 (1973); Selig, *Regulation of Street Demonstrations by Injunction: Constitutional Limitations on the Collateral Bar Rule in Prosecutions for Contempt*, 4 HARV. C. R.—C.L. L. REV. 135, 145 (1968); Comment, *Criminal vs. Civil Contempt*, 23 IND. L.J. 114 (1948).

34. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

35. *Cf.* Poulos v. New Hampshire, 345 U.S. 395 (1953) (where a licensing statute is valid on its face, a person cannot ignore available procedures for judicial review of an unlawful refusal to grant a permit without relinquishing first amendment defenses):

> It must be admitted that judicial correction of arbitrary refusal by administrators to perform official duties under valid laws is exulcerating and costly. But to allow applicants to proceed without the required permits to . . . hold public meetings without prior safety arrangements or take other unauthorized action is apt to cause breaches of the peace or create public dangers . . . . Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning.

Id. at 409; *see generally* Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970).

This point is well illustrated by the Court's decision in *Shuttlesworth v. Birmingham*,[36] decided just two years after *Walker*. In *Shuttlesworth*, petitioner had been convicted under the very same Birmingham parade ordinance that had been copied into the form of an injunction in *Walker*.[37] Although petitioner had chosen to completely ignore the ordinance by taking part in a protest march without attempting to secure a permit from the City Commissioner, the Court displayed no hesitation in reaching the merits of the constitutional issue and held the ordinance invalid on its face.[38] Indeed, the Court accentuated its willingness to decide the merits by adding:

> This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional . . . . And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license . . . .[39]

How does one explain the irony and patent discord in clothing the order of a judge with greater impunity from constitutional attack than statutes which are enacted through a legislative process that serves as the backbone of our tradition of representative government? While the majority opinions in *Walker* and *Shuttlesworth* are curiously devoid of any reasoning to justify such an anomaly, a careful reading of Chief Justice Warren's dissenting opinion in *Walker* is more than illuminating.[40] In that opinion, the Chief Justice directly confronted the majority's assertion that in cases where court orders are violated, forfeiture of constitutional rights is sometimes necessitated by the need to maintain an orderly society that evinces a proper respect for the judicial process. In flouting this assertion, Chief Justice Warren analogizes the situation to cases where litigants are routinely permitted to

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36. *See supra* note 24.

37. *See supra* note 25.

38. Shuttlesworth v. City of Birmingham, 394 U.S. at 159.

39. *Id.* at 150-51. Although the Court did agree that the ordinance was constitutional under a subsequent narrowing construction by the Alabama Supreme Court, the Court nonetheless overturned the conviction on the rationale that at the time of the violations, the statute had been administered as written and not as later construed. *Id.* at 158-59. *But see* Cox v. New Hampshire, 312 U.S. at 575-78, where the Court upheld the convictions of demonstrators under a law that would have been facially invalid except for a subsequent narrowing construction by the New Hampshire Supreme Court. In *Shuttlesworth*, the Court distinguished *Cox* by adding, "[t]his case therefore, is a far cry from *Cox v. New Hampshire* . . . where it could be said that there was nothing to show 'that the statute had been administered otherwise than in the . . . manner which the state court has construed it to require.'" Shuttlesworth v. City of Birmingham, 394 U.S. at 158-59.

40. Walker v. City of Birmingham, 388 U.S. 307, 324-34 (Warren, C. J., dissenting).

ignore criminal statutes, incur prosecution, and later challenge the constitutionality of such statutes.[41] As the Chief Justice points out:

> It has never been thought that violation of a statute indicated such a disrespect for the legislature that the violator always must be punished even if the statute was unconstitutional. On the contrary, some cases have required that persons seeking to challenge the constitutionality of a statute first violate it to establish their standing to sue. Indeed, it shows no disrespect for law to violate a statute on the ground that it is unconstitutional and then to submit one's case to the courts with the willingness to accept the penalty if the statute is held to be valid.[42]

Implicit in the Chief Justice's opinion is the rather unsettling thought that in reality, the only distinction between violation of a statute and violation of an injunction is that the latter is more likely to be perceived as a direct challenge to the competency and authority of the judiciary itself, and consequently is treated by that same judiciary as a particularly odious form of transgression.[43] Though the tacit theme of Chief Justice Warren's opinion does little to enhance the image of our judiciary, it does help to explain the apparent anomaly left in the wake of *Walker* and *Shuttlesworth* and more importantly, sheds light on the fundamental question of why injunctions touching upon first amendment freedoms are so inherently insidious as to warrant their status as prior restraints.

II. Are Prior Restraints Per Se Unconstitutional?

Typically, the ease with which this question is ultimately answered belies its enormous complexity. Although the doctrine of prior restraint can be traced to the oppressions associated with the old English licensing system,[44] it did not become firmly implanted in American jurisprudence until 1931 when the Supreme Court decided the case of *Near v. Minnesota*.[45] *Near* involved a statute that allowed government officials to enjoin, as a public nuisance, publication of any materials found by a court to be a "malicious, scandalous and defamatory newspaper, magazine or other periodical."[46] Pursuant to this law, a county prosecutor had succeeded in enjoining a newspaper from publishing a story that allegedly made false accusations concerning the integrity of local law enforcement officials.[47] In invalidating the injunction and the statute upon which it was based, the Court quickly labeled this

41. *Id.* at 327-29 (Warren, C.J., dissenting).
42. *Id.* at 327 (Warren, C.J., dissenting).
43. Nowak, *supra* note 2, at 888-89.
44. *See generally* L. Levy, Legacy of Suppression (1960); F. Siebert, Freedom of the Press in England (1476-1776) (1965); Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648 (1955).
45. 283 U.S. 697 (1931).
46. *Id.* at 701-02.
47. *Id.* at 704-05.

scheme as a prior restraint on freedom of the press and declared that "it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."[48] The Court then strongly emphasized that while such restraints are not unconstitutional per se, "only in exceptional cases"[49] will they be tolerated under the first amendment. While the exact meaning of "exceptional cases" remains somewhat of a mystery[50] even under the most recent Supreme Court decisions, the *Near* Court did provide some guidance on this issue. The Court indicated that in times of war, prior restraints would be justified in order to prevent disclosure of military deployments or other information that would obstruct the war effort.[51] In addition, the Court was willing to place its imprimatur on the use of prior restraints as an aid to enforcement of obscenity laws.[52] Finally, the Court agreed that such restraints would be permissible when necessary to prevent the incitement of violent acts or the overthrow of the government by force.[53] Accordingly, the Court went on to point out that even if the publication in question had been shown as false and defamatory, this would not have served to justify this form of restraint on first amendment freedoms.[54]

Thus, by describing only three instances where prior restraint would be justified, the Court made plain that this is the least tolerable form of government interference with expressive activity. Though subsequent decisions have only served to buttress the vitality of this statement,[55] it should be noted that the three "exceptional cases" bear a striking resemblance to the "fighting words",[56] "clear and present danger",[57] and "obscenity"[58] doctrines which have undergone significant changes since *Near* was decided. The issue is also clouded by the fact that subsequent to *Near*, the Court has recognized many government interests, apart from those associated with "fighting words", "clear and present danger", and "obscenity", as important enough to justify an infringement of the right of expression.[59] Having cautioned

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48. *Id.* at 713.
49. *Id.* at 716.
50. *See generally* NOWAK, *supra* note 2, at 890-94; TRIBE, *supra* note 7, at 728-32.
51. Near v. Minnesota, 283 U.S. at 716.
52. *Id.*
53. *Id.*
54. *Id.* at 721-23.
55. *Cf.* Nebraska Press Ass'n v. Stuart, 427 U.S. at 556-59; New York Times Co. v. United States, 403 U.S. at 714; Bantam Books, Inc. v. Sullivan, 372 U.S. at 70.
56. Lewis v. New Orleans, 415 U.S. 130, 133 (1974); Cohen v. California, 403 U.S. 15, 28 (1971) (Blackmun, J., dissenting).
57. Dennis v. United States, 341 U.S. 494, 509 (1951); *see generally* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (This case reflects the current state of the "clear and present danger" test.).
58. Miller v. California, 413 U.S. 15, 16, 20-22, 31 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 53, 56 (1973).
59. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 568

against the danger of placing an undue amount of emphasis on *Near*,[60] let us now turn to the question of what, if any, additional meaning has been attached to the words "in exceptional cases" by more recent decisions of the Court.

In addressing this question, a logical starting point is to note that on several occasions following *Near*, the Court has declared that "[a]ny system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity."[61] The government "thus carries a heavy burden[62] of showing justification for the imposition of such a restraint.[63] It should also be noted at the outset that if any clear theme has emerged from post *Near* decisions, it is that the presence of exceptional circumstances justifying the imposition of a prior restraint does not depend solely on the importance of the government interest involved.[64] Indeed, while the Court has invalidated systems of prior restraint where the government's interest was to protect national security [65] or the right of an accused to an impartial jury,[66] it has upheld similar systems where the primary objectives were simply the regulation of obscene materials[67] or deceptive advertising.[68] With the foregoing observation in mind, it is instructive to focus on the Court's decisions in *New York Times Co. v. United States*[69] and *Nebraska Press Association v. Stuart*.[70]

In *New York Times*, the government had persuaded a lower court to enjoin the Times and the Washington Post from publishing various classified documents concerning a study on United States policy in Vietnam.[71] The government sought to justify its action by asserting that publication

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(1980) (holding that when commercial speech is involved, the state's interest in energy conservation may be substantial enough to justify regulations in certain instances); Buckley v. Valeo, 424 U.S. 1, 25-27 (1976) (holding the government's interest in eliminating political corruption or the appearance thereof, sufficient to warrant an interference with expression); Rowan v. Post Office Dept., 397 U.S. 728, 736-37 (1970) (holding the interest of protecting the right of unwilling listeners within the privacy of the home sufficient to justify an interference with expression); Tinker v. Des Moines School District, 393 U.S. 503, 507, 509 (1969) (holding the interest in maintaining proper order and discipline in public schools may be sufficient to justify interfering with expression in certain cases).

60. 283 U.S. 697 (1931).

61. *See, e.g.*, New York Times Co. v. United States, 403 U.S. at 714.

62. Organization for a Better Austin v. Keefe. 402 U.S. 415, 420 (1971).

63. Nebraska Press Ass'n v. Stuart, 427 U.S. at 556-59; Bantam Books Inc. V. Sullivan, 372 U.S. at 70; *See* A. Bickel, The Morality of Consent, at 61 (1975).

64. Tribe, *supra* note 7, at 728-29.

65. New York Times Co. v. United States, 403 U.S. at 713.

66. Nebraska Press Ass'n v. Stuart, 427 U.S. at 539.

67. *See* Times Film Corp. v. Chicago, 365 U.S. 43, 50 (1961).

68. *See* Donaldson v. Read Magazine, Inc., 333 U.S. 178, 189-91 (1948); F.T.C. v. Standard Ed. Soc., 302 U.S. 112, 120 (1937).

69. 403 U.S. 713 (1971).

70. 427 U.S. 539 (1976).

71. New York Times Co. v. United States 403 U.S. at 714.

would supply the enemy with information that would frustrate the war effort and thus fell squarely within one of the three "exceptional cases" described in *Near*.[72]

A highly fragmented Court—with all nine justices writing separate opinions—held by a vote of 6-3, that notwithstanding the great importance of the interest in maintaining military security, the government had failed to meet its heavy burden of overcoming the presumption against the constitutional validity of any prior restraint.[73] While the separate opinions of the six justices forming the majority cannot be fully reconciled, Justices Brennan, Stewart, and White did agree that in order to meet its burden, the government must demonstrate that direct and immediate injury to our society would follow as a result of the publication.[74] Employing this test, each of these three justices characterized the causal relationship between publication of these documents and injury to our military security as too conjectural to warrant the imposition of prior restraint.[75]

Joining in the six member majority, Justices Black and Douglas opined that under no circumstances could a prior restraint on freedom of the press ever be tolerated under the first amendment.[76] Also significant was the dissenting opinion of Justice Harlan, joined by Justice Blackmun, which took the position that decisions made by officials of the executive branch to enjoin publication for national security reasons are within the sphere of foreign affairs and therefore, based upon the principle of separation of powers,[77] judicially nonreviewable;[78] Justices Harlan and Blackmun were prepared to issue a blank check to the executive branch to exercise nonreviewable discretion to decide whether a particular disclosure would so "irreparably impair the national security"[79] as to justify the sanction of prior restraint. Consequently, as viewed by these justices, the sole function of the judiciary was limited to making a determination as to whether the dispute involved an exercise of discretion that properly fell within the inherent power of the President in the area of foreign affairs; only in cases where this question would be answered in the negative should the courts undertake an independent review of the magnitude of the government's interest and the extent to which publication would compromise that objective.[80]

This position seems rather untenable when one considers that it is

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72. *Id.* at 726-27 (Brennan, J., concurring).

73. *Id.* at 714.

74. *Id.* at 726-27, 730, 732.

75. *Id.* at 725-27, 730, 731.

76. *Id.* at 715, 717, 720.

77. *See generally* NOWAK, *supra* note 2, at 135-37; Sharp, *The Classical American Doctrine of "the Separation of Powers,"* 2 U. CHI. L.REV. 385 (1935).

78. New York Times Co. v. United States, 403 U.S. at 756-57.

79. *Id.* at 757 (Harlan, J., dissenting).

80. *Id.* (Harlan, J., dissenting).

nothing more than an application of yet another unsettled area of law;[81] the political question doctrine.[82] Since the political question doctrine is mandated, at least in part, by the article III requirement[83] that the jurisdiction of federal courts be limited to "cases" and "controversies",[84] it is rather odd for Justices Harlan and Blackmun to suggest that a federal court has any alternative but to dismiss an action once it is determined that a political question is involved. Simply put, a court either has jurisdiction or it does not; and if none exists, the court lacks power to further enjoin publication.[85] In addition, Justices Harlan and Blackmun seem to overlook the fact that although the political question doctrine has its roots in article III, there is surely a heightened potential for abuse in any doctrine which effectively immunizes certain decisions of the executive and legislative branches from judicial review, particularly in the areas of free speech and press which play such a vital role in safeguarding the people from those same governmental abuses.

Five years after its decision in *New York Times*, the Court was again confronted with the task of defining the "exceptional cases" exception to the general rule that prior restraints are unconstitutional. In *Nebraska Press Association v. Stuart*,[86] a Nebraska trial court had issued an injunction restraining the press from publishing or broadcasting accounts of various admissions and other inculpatory evidence concerning an accused who was awaiting prosecution for the crime of murder.[87] Petitioners then appealed to the Nebraska Supreme Court which, with slight modifications, affirmed the order based on the rationale the pre-trial publication or broadcasting of this information would jeopardize the right to an impartial jury guaranteed by the sixth and fourteenth amendments.[88]

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81. *See generally* Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 201 (1971); FRANK, POLITICAL QUESTIONS IN SUPREME COURT & SUPREME LAW 36 (Cahn ed. 1954); McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 256 (1981).

82. Powell v. McCormack, 395 U.S. 486, 518 (1969); Baker v. Carr, 369 U.S. 186, 210-11 (1962); *see generally* STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION (1974); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Tigar, *The "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517 (1966).

83. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982); Craig v. Boren, 429 U.S. 190, 196 (1976); C. WRIGHT, LAW OF FEDERAL COURTS 53-83 (4th ed. 1983) [hereinafter WRIGHT].

84. U.S. CONST. art. III, § 2.

85. WRIGHT, *supra* note 83, at 85-89. While courts generally have power to issue orders preserving the status quo pending a determination of whether they have jurisdiction over the subject matter, they lack power to issue subsequent orders once it is determined that jurisdiction is lacking. *Id.*

86. 427 U.S. 539 (1976).

87. *Id.* at 543-44.

88. *Id.* at 545.

In Chief Justice Burger's opinion for the Court, joined by Justices White and Powell, considerable light was shed on the question of the appropriate standard of review to be accorded prior restraints. In reversing the Nebraska Supreme Court and holding the order unconstitutional, the Chief Justice unequivocally recognized the paramount interest in ensuring the right of an accused to a fair and impartial jury and lauded the efforts of the Nebraska courts to protect this interest.[89] Then, noting the obvious tension in the present case between the sixth amendment right to an impartial jury and the first amendment right of a free press, the Chief Justice balked at any attempt to formulate a rule that would place one guarantee on higher constitutional footing than the other in all cases.[90] Chief Justice Burger then went on to hold that in this particular context, the government had not met its "heavy burden" of justification because: 1.) there had not been a showing of more than a mere possibility that dissemination of this information would compromise the defendant's right to an impartial jury (The likelihood that publication would in fact jeopardize the right to a fair trial was too conjectural); 2.) there was an inadequate showing that the order in question would be effective in protecting the right of a fair trial; and 3.) there was no evidence that other less restrictive measures available to the trial court such as a postponement, voire dire, sequestration of potential jurors, and change of venue would not have been effective to safeguard the rights of the accused.[91]

Although there is a conspicuous dearth of language in this opinion to indicate what standard of proof the government failed to meet in demonstrating each of these factors, this seemingly deliberate imprecision points strongly to the magic words "strict-scrutiny."[92] When the Court speaks of the abiding reverence that a free society attaches to the guarantees of the sixth amendment, can anyone doubt that it is describing a "compelling"[93] interest? When the Court expresses its concern that publication of certain information would not necessarily imperil the right to an impartial jury, isn't this another way of describing a regulation which is unnecessary[94] to achieve its stated purpose? And when the Court speaks of an inadequate showing that the order would effectively ensure the right to an impartial jury, isn't it simply using different vernacular to say the same thing? Finally, is there any meaningful distinction between familiar phrases such as "narrowly drawn"[95] or "least restrictive means"[96] and a holding that among

89. *Id.* at 551-56.

90. *Id.* at 561.

91. *Id.* at 561-70.

92. NOWAK, *supra* note 2, at 611; TRIBE, *supra* note 7, at 1000-03.

93. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 257-60, 262 (1974); Shapiro v. Thompson, 394 U.S. 618, 627, 634, 638 (1969); NOWAK, *supra* note 2, at 611; *see also* Palmore v. Sidoti, 466 U.S. 429, 432 (1984); Loving v. Virginia, 388 U.S. 1, 9, 11 (1967).

94. Palmore v. Sidoti, 466 U.S. at 432; Memorial Hosp. v. Maricopa County, 415 U.S. at 262; Shapiro v. Thompson, 394 U.S. at 634.

95. Perry Ed. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Central Hud-

other reasons, an injunction was constitutionally invalid due to a lack of evidence that the government could not achieve its interest through measures short of a prior restraint on free speech?

When Justices Brennan, Stewart, and White spoke of the government's inability to demonstrate the requisite connection between publication of the Pentagon Papers and injury to our military security in *New York Times*,[97] were they saying, in effect, that suppression of that particular speech was unnecessary to further the interest in national security? In fact, one could cogently argue that the holding in *New York Times* is not only consistent with the Court's "exceptional cases" dictum in *Near*, but that the holdings of these cases actually buttress the theory that dating back to its seminal decision in *Near*, the Court has always employed what amounts to a strict-scrutiny analysis in passing on the constitutionality of prior restraints. As one distinguished commentator has pointed out, there is a vital distinction between publication of "the sailing dates of transports or the number and location of troops"[98]—one of the "exceptional cases" enumerated in *Near*—and the publication of classified documents that tend to prolong a war or embarrass the government.[99] While strong government interests in military security are implicated in both situations, only in the former could the government demonstrate with substantial certainty that actual harm would result through publication of the documents. Only in the former instance, therefore, could the government show that it was necessary to regulate the particular speech in order to further its compelling interest. When cast in this perspective, *Near's* dictum and *New York Times* can be seen as instances where the Court probably would have reached opposite results while applying the same constitutional test in two similar but distinct factual settings.

Though it was pointed out earlier that *Near's* "exceptional cases" dictum also included the regulation of obscenity[100] and other forms of expression that today would probably be classified under the "clear and present danger"[101] and "fighting words"[102] doctrines, there was no suggestion in *Near* that the strength of the government's interest in regulating these areas is any less compelling than in cases where military security is implicated. Is it plausible that, although the Court in *Near* hypothesized only three situations where prior restraint would be justified, it would not have found that the government's interest in each of these instances was compelling?

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son Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. at 565.

96. Buckley v. Valeo, 424 U.S. at 27; Memorial Hosp. v. Maricopa County, 415 U.S. at 267; NOWAK, *supra* note 2, at 873.

97. *See supra* note 74.

98. Near v. Minnesota, 283 U.S. at 716.

99. TRIBE, *supra* note 7, at 730.

100. *See* cases cited *supra* note 58.

101. *See* cases cited *supra* note 57.

102. *See* cases cited *supra* note 56.

Though it is certainly true that legal scholars have generally characterized obscenity, "fighting words" and "clear and present danger" speech as unprotected without reference to words like "compelling," "necessary," or "least restrictive means," there can be little doubt that regulations affecting speech within these categories could survive the rigors of strict constitutional scrutiny. Certainly legal minds that are not among the hierarchy of constitutional scholars can appreciate that every component of the strict-scrutiny test is inherently ambiguous.

As *Near*, *New York Times*, and *Nebraska Press Association* illustrate, the necessity of regulating speech in a given case will depend on the extent to which the Court will require the government to demonstrate the causal relationship between the speech in question and the anticipated harm that will result.[103] Moreover, the conspicuous lack of guidance in these decisions as to exactly what standard of certainty would suffice, strongly suggests that the vigor with which the "necessary" component of the test is applied is largely a function of judicial attitude regarding the merits of a particular case. While the requirement that the government demonstrate a "compelling" interest is certainly a component of this test, the Court has never drawn a meaningful distinction between this type of interest and other interests which it has described as "substantial"[104] or "significant"[105] in connection with other constitutional tests. This ambiguity is exacerbated by the fact that the Court has apparently used the words "compelling" and "important" interchangeably in situations where strict constitutional scrutiny was indicated.[106] At last, it usually requires little imagination to conceive of an alternative means of regulation that would place a lesser burden on some constitutionally protected right in a given case.[107] Again, it appears that yet

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103. *See* TRIBE, *supra* note 7, at 729-30. In cases where allegedly obscene materials or deceptive ads are at issue, the government can show the causal relationship with near certainty. *Id.*

104. Central Hudson Gas & Elec. Corp. V. Public Serv. Comm'n of New York, 447 U.S. 557, 564 (1980).

105. Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 45.

106. United States v. O'Brien, 391 U.S. 367, 377(1968), ("[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); *Cf.* Loving v. Virginia, 388 U.S. 9, 11 (holding a Virginia statute prohibiting interracial marriage invalid under the equal protection clause. While the Court held that the statute was subject to the "most rigid scrutiny," it referred only to the state's inability to demonstrate a "permissible" or "legitimate" interest in applying this test; nowhere in the opinion does the Court purport to require that a "compelling" state interest be shown.); Palmore v. Sidoti, 466 U.S. at 432-33 (Invalidating a trial court's decision to award custody of a child based solely on racial considerations. After subjecting the court's award of custody to the "most exacting scrutiny," the Court held that the state had failed to meet its burden of demonstrating that the action was necessary to accomplish a "legitimate" purpose.).

107. *See e.g.*, Sosna v. Iowa, 419 U.S. 393 ,410 (1975) (upholding an Iowa law requiring

another component of the test often boils down to nothing more than the willingness of the Court to indulge its imagination on an ad hoc basis. In this connection, the Court's own perception of the value of the competing government and private interests at stake should not be underestimated as a factor in the degree to which the Court is willing to relax the components of the test in any particular case. Thus, while the government's interest in regulating obscenity is probably regarded with less urgency than, for example, the interest in national security, so too is the speaker's right to disseminate such materials.

Although it may be splitting hairs to argue that the Court has really been applying a strict-scrutiny test with a selective degree of enthusiasm rather than a simple an hoc balancing of competing government and private interests, it appears that the former approach is more in harmony with Supreme Court precedent and lends itself to a more well-defined and prudent constitutional decision-making process.[108] For example, if the Court had used a simple balancing approach in *Nebraska Press Association,* would it not have been forced to decide which of two competing constitutional guarantees should be given priority? Didn't Chief Justice Burger's opinion in that case specifically decline such an invitation?[109] And if the Court had used a balancing approach and accepted the invitation, would it have therefore opted for an approach that is antithetical to the doctrine that the Court should never rule unnecessarily on questions of federal law?[110] Wouldn't the Court have been forced to unnecessarily decide in *New York Times,* for example, whether the right of the press to engage in "political speech" is paramount to the government's interest in military security? And wouldn't the interests served by the doctrines of stare decisis[111] and ex post facto [112] be better served by an articulable three-part test, albeit fraught with potential for bias in its application, than some general and amorphous balancing approach?

Regrettably, the preceding discussion does not fully address the question of when prior restraints can be imposed under the free speech and press

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one year of residency as a condition to filing a divorce action); *but see* Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (holding invalid a statute imposing as a condition of voting, residence in the state for one year and the county for three months prior to an election); Shapiro v. Thompson, 394 U.S. 618. (1969)

108. *Cf.* TRIBE, *supra* note 7, at 728-31.

109. Nebraska Press Ass'n v. Stuart, 427 U.S. at 570.

110. Railroad Comm'n v. Pullman Co., 312 U.S. 469, 501 (1941); *see generally* WRIGHT, *supra* note 83, at 303-05; Field, *Abstention in Constitutional Cases; The Scope of the Pullman Abstention Doctrine,* 122 U. PA. L. REV. 1071 (1974).

111. Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) ("[T]he doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect to a society governed by the rule of law.").

112. U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1; *see generally* TRIBE, *supra* note 7, at 477-84; NOWAK, *supra* note 2, at 477-78.

guarantees of the first amendment. Responsive to the concerns that nonjudicial bodies are inherently suspect in protecting first amendment freedoms[113] and that any prior restraint poses the risk that constitutionally protected speech may be at least temporarily squelched,[114] the Court has held that absent certain procedural safeguards, such restraints are per se unconstitutional.

In *Freedman v. Maryland*,[115] an exhibitor of a motion picture was convicted under a statute making it unlawful to exhibit a film without first submitting it to the State Board of Censors for approval.[116] The statute provided that if permission was denied, the exhibitor was required to seek review by appealing to the Board for reconsideration and if unsuccessful, to take a subsequent appeal to the city court and later the court of appeals,[117] during which time, it should be emphasized, it would have been unlawful to exhibit the film.[118]

In reversing the conviction, the Court opined, "[w]e hold 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."[119] The Court then proceeded to describe those safeguards as follows: First, the censor must bear the burden of showing that the film is a form of unprotected speech.[120] Second, the statute must guarantee, either expressly or by judicial construction, that upon submission, the censor will promptly make a decision to either grant or refuse permission to exhibit the film.[121] Finally, if permission is denied, the system must require the censor, "within a specified brief period," to repair to the courts for a prompt and final judicial determination of whether the speech is protected.[122] Noting that the statute before it was derelict in these respects, the Court held it facially invalid despite the lack of any attempt by the exhibitor to pursue the avenues of review mandated by the statute.[123]

In the subsequent case of *Southeastern Promotions v. Conrad*,[124] the Court reaffirmed these principles by invalidating, for lack of procedural safeguards, a municipality's exercise of discretion in refusing to lease an auditorium to a private business for the purpose of displaying allegedly ob-

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113. *See supra* note 8.
114. *See supra* notes 12 & 14.
115. 380 U.S. 51 (1965).
116. *Id.* at 52.
117. *Id.* at 55.
118. *Id.* at 54.
119. *Id.* at 58.
120. *Id.*
121. *Id.* at 59.
122. *Id.*
123. *Id.* at 59-60.
124. 420 U.S. 546 (1975).

scene materials.[125] In so holding, the Court had little difficulty in finding the government's action to fall within that typical category of prior restraints requiring speakers to first obtain permission from an executive censor as a precondition to engaging in lawful expression.[126] Though it is true that the city's refusal to lease the auditorium does appear to meet these criteria, it is equally true that the implications of branding the refusal as a prior restraint are far reaching indeed.

What is particularly troubling about the Court's decision is that it seems to suggest that the doctrine is implicated whenever the government refuses to lease or otherwise permit its facilities to be used for expressive activity. Did the Court mean to suggest, for example, that when protesters are denied permission to use a county jail as a political forum, that the county then has the burden of going to court to seek a prompt and final judicial determination that the speech is unprotected? If the Court did not intend to suggest this, what meaningful distinction can be drawn between protesters seeking to use a county jail and *Southeastern Promotions*' attempt to lease the auditorium?

While the obvious answer is that the Constitution does not require county officials to comply with the procedures of *Freedman*[127] in order to deny protesters the use of the county jail as a forum for expression, far from obvious is any sound rationale that would explain these opposite results. Keeping in mind the Court's ever increasing emphasis on the use of "forum analysis"[128] in deciding free speech issues, it is helpful in this regard to focus on some rather mysterious language employed by the Court in *Southeastern Promotions*.

In reaching its conclusion that the city's refusal to lease amounted to a prior restraint, the Court repeatedly used words like "forum,"[129] "public places"[130] and "public forum."[131] At one point the Court said, "[w]e hold that respondents' rejection of petitioner's application to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards."[132] At another point, the Court averred:

> Respondents' action here is indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of Supreme Court decisions. . . . In these cases, the plaintiffs asked the Court to provide relief where public officials had forbidden the plaintiffs

125. *Id.* at 547-52.
126. *Id.* at 552-54, 558.
127. *See supra* notes 120-22 and accompanying text.
128. Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 105 S.Ct. 3439, 3448 (1985).
129. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 553.
130. *Id.*
131. *Id.* at 555.
132. *Id.* at 552.

> the use of public places to say what they wanted to say. The restraints took a variety of forms, with officials exercising discretion over different kinds of public places under the authority of statutes. All, however, had this in common: they gave public officials the power to deny the use of a forum in advance of actual expression.[133]

The Court then added the following key passage: "[r]espondents' action was no less a prior restraint because the public facilities under their control happened to be municipal theaters. The Memorial Auditorium and the Tivoli were public forums designed for and dedicated for expressive activities."[134]

Although the Court did not expressly hold that application of the doctrine is necessarily limited to situations where "public forum" property is involved, its characterization of the theaters as such certainly lends credence to that position; it is doubtful that the Court's repeated use of vernacular associated with forum-analysis was mere happenstance. In addition, the fact that the Court opted to characterize the theaters as "public forums" without any apparent necessity for doing so, is another indication that its decision may have turned on the particular character of the government property in question. Indulging this rather curious supposition, a cursory discussion of the evolution of forum-analysis is in order.

On numerous occasions the Court has stressed that a person's right to speak on government property may depend on the particular nature of the property involved.[135] In *Adderley v. Florida*,[136] several demonstrators had been convicted of criminal trespass when they refused a sheriff's request to vacate the grounds of a county jail.[137] In affirming these convictions, the Court distinguished this case from its earlier decision in *Edwards v. South Carolina*[138] when it reversed the convictions of various protesters under similar circumstances. In *Edwards*, the protesters had been convicted under a breach of the peace statute when they assembled on the grounds of the South Carolina Capital.[139] Although *Edwards* was ultimately decided on the issue of whether the statute involved was constitutionally vague and overbroad,[140] the Court emphasized that there is a vital distinction between demonstrations taking place on jailhouse property and those taking place on the grounds of the State Capitol.[141] The Court strongly intimated that in the latter instance, when government property is traditionally open to the general public, first amendment freedoms are at their pinnacle. In contrast, the Court seemed to suggest that where expression seeks refuge on government

133. *Id.* at 552-53.
134. *Id.* at 555.
135. Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 37, 44 (1983).
136. 385 U.S. 39 (1966).
137. *Id.* at 40.
138. 372 U.S. 229 (1963).
139. Edwards v. South Carolina, 372 U.S. at 233-34.
140. *Id.* at 238.
141. Adderley v. Florida, 385 U.S. at 41-42.

property that is not traditionally open to the public, the government "has power to preserve the property under its control for the use to which it is lawfully dedicated,"[142] so long as the restrictions imposed are content-neutral. While the Court did not further expound on this theme, there is little doubt that it has since become the focal point of decisions where the government has sought to restrict various forms of expression on public property: so-called "forum-analysis."

Though most assuredly the final chapter on forum-analysis has yet to be written, a fairly well-defined body of law has crystallized from two very recent Supreme Court decisions.[143] When the government chooses to make its property accessible to the general public for the communication of ideas, the Court refers to this as a "public forum."[144] If the government chooses instead to limit access to its property to certain specified persons, this creates a "limited public forum"[145] as to those persons, but only a "nonpublic forum"[146] as to all others. Depending on which of these three categories is implicated, the Court will apply drastically different standards of constitutional protection to the expression at issue. If the expression involves the use of a public forum, or perhaps even a limited public forum, the Court will employ a heightened standard of review [147] which generally requires, with some variations, that the government demonstrate a compelling or significant interest and that regulation of the speech at issue is both necessary to and the least restrictive means of achieving that interest. If the speech concerns the use of only a nonpublic forum, the level of review is relaxed to the point where the government may restrict expression in any manner that is content-neutral and consistent with the intended use of the property including, where appropriate, the total exclusion of those seeking access to the premises.[148]

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142. *Id.* at 47.

> There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to what was being said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses.

Id.

143. Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 105 S. Ct. 3439 (1985); Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

144. Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 105 S. Ct. at 3449-50; Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 45-46.

145. Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 47-48.

146. *Id.* at 49, 53; Cornelius v. NAACP Legal Defense & Education Fund, Inc., 105 S. Ct. at 3448-51.

147. Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 105 S.Ct. at 3448; Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 45-46.

148. Cornelius v. NAACP Legal Defense & Ed. Fund Inc., 105 S. Ct. at 3448, 3451. Perry Ed. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. at 46.

> There is, however, no indication that the School Board intended to discourage one

With this perspective in mind, was the Court correct in *Southeastern Promotions* when it depicted the theaters as "public forums designed for and dedicated for expressive activities"?[149] When the city refused to lease the theaters for use in displaying adult entertainment, did this necessarily require that the government use it for any other purpose where it would be open to the general public? At the time the government was in a position to lease these facilities, is it accurate to say that even then they were open to the general public? Assuming arguendo that the public forum label was appropriate, does *Southeastern Promotions* stand for the proposition that when expression involves the use of public property, the prior restraint doctrine is inapplicable unless the property can fairly be described as a public or limited public forum?

Spanning more than a half-century of cases following the Court's seminal decision in *Near*, it is apparent that the doctrine has yet to be applied in any situation where expression sought to take place on public property that today would not be classified as a public or limited public forum; barring, of course, the possibility that *Southeastern Promotions* inaccurately depicted the theaters as falling under the rubric of public forum. Though far from exhaustive of the jurisprudence in this area, the cases of *Adderley v. Florida*,[150] *Perry Education Association v. Perry Local Educators' Association*,[151] and *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*[152] serve well to buttress this theory.

Although one should caution that *Adderley* was decided during the incipient stages of forum-analysis, there is no doubt that the demonstrators who sought to use the jailhouse property as a forum for political expression would not qualify as claimants seeking to exercise first amendment rights in a public or limited public forum. It is therefore noteworthy that the Court's opinion in *Adderly* is conspicuously silent on the issue of prior restraint; this despite the fact that just as *Southeastern Promotions* was denied permission to use the premises for live entertainment, so were these protesters denied permission to use the jailhouse grounds for political protest.

In *Perry*, a local board of education had entered into a collective bargaining agreement with a teachers' union which excluded a rival union from

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> viewpoint or advance another. We believe it is more accurate to characterize the access policy as based on the status of the respective unions rather than their views. Implicit in the concept of a nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended use of the property.

Id. at 49.

149. Southeastern Promotions, Ltd v. Conrad, 420 U.S. at 547.

150. 385 U.S. 39 (1966).

151. 460 U.S. 37 (1983).

152. 105 S. Ct. 3439 (1985).

access to the interschool mailing system.[153] In concluding that the interschool mailing system was only a nonpublic forum as to the rival union,[154] the Court never addressed the issue of whether the refusal to allow access to this public property for expressive purposes constituted a prior restraint.

In *Cornelius*, the Court was asked to decide whether, consistent with the first amendment, the federal government could exclude legal defense and political advocacy organizations from participating in a charity drive (CFC or Combined Federal Campaign) that was to be conducted in the federal workplace, during working hours, and through the voluntary efforts of federal employees.[155] Consonant with the "forum-analysis" approach,[156] the Court first addressed the question of which type of forum was created relative to the various groups seeking access to the CFC.[157] In a fashion nearly identical to *Perry*, the Court concluded that a nonpublic forum was involved[158] and notably avoided the topic of prior restraint.

It appears, therefore, that when expression entails access to property which is classified as a nonpublic forum, the Court has been unwilling to apply the doctrine in situations that would otherwise qualify under the administrative censorship category of prior restraint. The apparent rationale for such an exception would emanate from the very same considerations that led to the adoption of the three-tiered forum-analysis approach. In stressing the critical distinction between what are now referred to as public and nonpublic forums, Justice Black's majority opinion in *Adderley*[159] espoused the principle that the government should enjoy the same right as any private individual to maintain its property in a manner compatible with its lawful and intended use.[160] Similar sentiments were also echoed by the Court in *United States Postal Service v. Council of Greensburgh Civil Association*:[161] "the first amendment does not guarantee access to property simply because it is owned or controlled by the government."[162] And in the leading case of *Perry Education Association*, Justice White's opinion for the Court further refined this theme:

> Implicit in the concept of a nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone

153. Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 37.
154. *Id.* at 46-54.
155. Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 105 S. Ct. at 3443-44.
156. *Id.* at 3448.
157. *Id.* at 3448-51.
158. *Id.* at 3451.
159. Adderley v. Florida, 385 U.S. 39 (1966).
160. *See supra* note 142.
161. 453 U.S. 114 (1981).
162. *Id.* at 142.

> for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.[163]

Thus, it is evident that the tripartite system of analysis was born out of a recognition that although the first amendment requires the government to bear a greater responsibility than private owners in making its property accessible to willing speakers, it does not require the government to forfeit its option of limiting access to public property in the interest of ensuring that essential government services are performed without disruption. Though it is entirely conceivable that a nonpublic forum may provide the most effective means of expression in a particular situation, the Court has apparently made a considered judgment that in the context of a nonpublic forum this interest must be subordinate to the government's need for continuity and effective operation of the vital services it performs. To the extent that this approach strikes a reasonable balance between these interests, it should also follow that the government be excused from the procedural requirements of *Freedman*[164] when it decides to limit access to public property in a manner that comports with its lawful and intended use. Since the protections accorded free speech and press are at a minimum in the milieu of a nonpublic forum, many of the concerns that lie at the core of our traditional abhorrence to prior restraints should likewise be attenuated. When the right of expression is at its lowest level of protection, isn't there a commensurate reduction in the danger that protected speech will be suppressed by nonjudicial officials lacking the proper sensitivity to first amendment freedoms?[165] If the requirements of *Freedman* are designed to ensure the utmost brevity of interferences with protected speech, are these onerous procedures justified when the Constitution allows the government such wide latitude in restricting expression? On balance, should the county in *Adderley*, the Board of Education in *Perry*, and the federal government in *Cornelius* have been forced to initiate court proceedings for a prompt and final resolution of whether the speech was protected?

There remain three final issues that merit discussion in attempting to unravel the prior restraint mystery. First, what is the constitutional status of statutory licensing schemes that purport to grant censoring bodies certain discretion in granting or refusing permits? Second, when such a scheme is unconstitutional on its face, can a person forego prior challenge and totally ignore it without forfeiting his first amendment claim? Finally, if such a law is not invalid on its face, can a person who is wrongfully denied a permit ignore available procedures for review and violate the statute without forfeiting his constitutional claim?

On numerous occasions, the Court has held that a licensing scheme in-

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163. Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 49.
164. *See supra* notes 120-22 and accompanying text.
165. *See* cases cited *supra* note 8.

fringing upon first amendment rights is facially invalid if it allows the executive licensor unbridled discretion to grant or refuse a license.[166] In *Lovell v. Griffin*,[167] a constitutional attack was made on an ordinance which prohibited distribution of "circulars, handbooks, advertising, or literature of any kind . . . without first obtaining written permission from the City Manager."[168] In holding the statute invalid on its face, the Court explained that the law allowed the City Manager total discretion to ban all literature, and not simply the kind that was inimical to the public order or safety;[169] in effect, making the City Manager a one-man system of censorship. The Court further held that since the statute was unconstitutional on its face,[170] the appellant was free to completely ignore the law and later test its validity without having made any previous attempt to obtain a permit.[171]

In *Cox v. New Hampshire*,[172] challenge was made to a similar statute which provided that "no parade or procession upon any public street or way . . . shall be permitted unless a special license therefore shall first be obtained"[173] from local officials. In distinguishing this case from *Lovell*, the Court stressed that the New Hampshire Supreme Court had given the statute a narrowing construction that authorized denial of a license only with regard to time, place, and manner considerations that would further the interests of traffic safety and convenience.[174] Noting that the statute so construed would not vest the licensing authority with the type of unfettered discretion that so often provides refuge for discrimination and other illicit considerations,[175] the Court upheld the law as a valid restriction on the time, place, and manner of expression.[176]

What is especially significant here is that appellants who were convicted under a statute that was later upheld were permitted to raise their constitutional claims despite having never applied for a permit.[177] While at first glance this appears to be inconsistent with the holding in *Lovell*, it is apparent that at the time of appellants' violations, and prior to the New Hampshire Supreme Court's narrowing construction,[178] the statute would have suffered from the same constitutional infirmity found in *Lovell*. Since *Lovell*

166. *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Staub v. Baxley, 355 U.S. 713 (1968); Cox v. Louisiana, 379 U.S. 536 (1965); Niemotko v. Maryland, 340 U.S. 268 (1951).

167. 303 U.S. 444 (1938).

168. *Id.* at 447.

169. *Id.* at 450-51.

170. *Id.* at 451.

171. *Id.* at 452-53.

172. 312 U.S. 569 (1941).

173. *Id.* at 571.

174. *Id.* at 576-77.

175. *Id.* at 576.

176. *Id.* at 576-78.

177. *Id.* at 573.

178. *Id.* at 575.

did not suggest that a person confronted with a facially invalid statute must first seek a narrowing construction before violating the law in order to preserve his constitutional claim,[179] there appears to be no inconsistency in these decisions.

The implications of licensing statutes granting executive officials unfettered discretion was also alluded to earlier in *Shuttlesworth v. Birmingham.*[180] There too, the Court held the statute unconstitutional on its face, and emphatically declared that persons are free to completely ignore such laws without fear of relinquishing their constitutional defenses in a subsequent prosecution.[181]

In the aftermath of these decisions, a question arises as to why the Court chose to invalidate these statutes on their face rather than as applied to the particular conduct in question. To be sure, the Court has typically confined itself to holding that a statute is invalid "on its face" in only two situations: where the statute would be unconstitutional in every possible application; or where a statute interferes with such a broad range of protected speech that a litigant is allowed standing to challenge its constitutionality despite the fact that his own expression is actually unprotected.[182] The rationale being that the mere existence of such statutes will necessarily have such a chilling effect on the protected speech of others that it is justifiable to allow a party whose speech is unprotected to challenge the statute in its entirety.[183] It is this latter example of facial invalidity that the Court has commonly referred to as the overbreadth doctrine.[184]

Since not every conceivable expression punishable under the statutes in *Lovell* and *Shuttlesworth* could be properly characterized as protected, the Court was apparently relying on the overbreadth doctrine in holding those statutes facially invalid.[185] This is significant in light of the Court's recent tendency to restrict the number of situations where the doctrine may be applied.

The Court's dissatisfaction with the overbreadth doctrine first surfaced in its landmark decision in *Broadrick v. Oklahoma.*[186] In *Broadrick*, the

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179. *See also* Shuttlesworth v. Birmingham, 394 U.S. 147, 153 (1969), where the Court left open the question of whether, when prompt and meaningful judicial review is available, persons are required to seek a narrowing construction of a facially invalid statute in order to preserve their first amendment claims. *Id.*

180. 394 U.S. 147 (1969).

181. *See supra* note 39.

182. City Council v. Taxpayers for Vincent, 466 U.S. 789, 796-802 (1984).

183. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

184. Bates v. State Bar of Arizona, 433 U.S. 350, 380-81 (1977); Broadrick v. Oklahoma, 413 U.S. at 612, 615 (1973); *see generally* NOWAK, *supra* note 2, at 867-71; TRIBE, *supra* note 7, at 710-14.

185. For a different perspective on application of the overbreadth doctrine to statutes granting administrative censors broad discretion to grant or refuse permits, *see* TRIBE, *supra* note 7, at 733-34.

186. 413 U.S. 601 (1973).

Court held, without a great deal of clarity, that when a statute purports to regulate conduct as distinguished from "pure speech,"[187] the overbreadth of the statute must be "substantial"[188] in order for the claimant to avail himself of this doctrine.[189] Curiously, the Court made no attempt to refine the meaning of such key phrases as "pure speech" and "substantial overbreadth," and subsequent decisions have provided little guidance on these questions. Perhaps the Court's present attitude toward the overbreadth doctrine is best illustrated by reference to a critical passage from Justice White's majority opinion in *Broadrick*:

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort.[190]

The post-*Broadrick* era has witnessed little change in the Court's open hostility to the doctrine. In *Bates v. State Bar of Arizona*,[191] the Court simply declared the overbreadth doctrine inapplicable to regulations affecting commercial speech.[192] In *Federal Communications Commission v. Pacifica Foundation*,[193] the Court declined to expound on the meaning of "substantial overbreadth" and while conceding that a certain amount of expression covered by the regulation "may be protected,"[194] the Court disposed of this issue by concluding:

> Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613. We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.[195]

Pacifica's holding is even more foreboding for the future of the overbreadth doctrine when one considers that the challenged regulation purported to deal with expression falling under the ill-defined heading of "pure speech." If a regulation banning radio broadcasters from using "any obscene, indecent, or profane language" cannot be characterized as "pure speech," then what can?

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187. *Id.* at 615.
188. *Id.*
189. *Id.*
190. *Id.* at 613.
191. 433 U.S. 350 (1977).
192. *Id.* at 380-81.
193. 438 U.S. 726 (1978).
194. *Id.* at 743.
195. *Id.*

In *New York v. Ferber*,[196] the Court affirmed a conviction for violating a New York statute that prohibited distribution of materials depicting sexual performances of children under the age of 16.[197] Although it was conceivable that the statute could be applied to various forms of protected expression falling outside the realm of obscenity or hard-core child pornography, the Court conveniently glossed over the question of the extent to which the law encroached upon protected expression and refused to apply the doctrine.[198]

Although reasonable minds may differ as to what *Broadrick*, *Bates*, *Pacifica*, *Ferber*, and similar cases portend for the future of the overbreadth doctrine, it appears that at the very least, the rule has been severely emasculated, and particularly so in the areas of obscenity/quasi-obscenity, commercial speech, and perhaps where the broadcast media is involved. If decisions such as *Lovell* and *Shuttlesworth* were predicated on the overbreadth principle of facial invalidity, then how would these cases be decided today in the post-*Broadrick* era? If one is forced to conjecture as to the meaning of "substantial overbreadth," is it still true that one can completely ignore such laws with impunity? Did the Court indicate in *Broadrick*, or at any other time, exactly what is meant by the words "pure speech"?[199] And isn't it arguable that *Bates* and *Pacifica* represent instances where the Court even refused to apply overbreadth analysis to statutes purporting to regulate "pure speech"? While no doubt the Court has expressed the view that in the areas of commercial speech,[200] obscenity,[201] and electronic broadcasting,[202] special concerns may militate in favor of less first amendment protection, the post-*Broadrick* era must be seen for what it is: an attempt to progressively limit the application of the doctrine and perhaps eliminate it altogether. Accordingly, a cautious practitioner should pause before advising a client to completely ignore the type of licensing statutes held facially invalid in *Lovell*, *Shuttlesworth*, and similar cases.

There remains the question of whether a person wrongfully denied a permit under a facially valid licensing scheme can ignore available procedures and violate the law without forfeiting his first amendment claim. In *Poulos v. New Hampshire*,[203] a Jehovah's Witness was convicted under a statute providing that "no open air public meetings . . . shall be permitted

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196. 458 U.S. 747 (1982).

197. *Id.* at 749.

198. *Id.* at 766-73.

199. Broadrick v. Oklahoma, 413 U.S. at 615 (1973); Cox v. Louisiana, 379 U.S. 536, 555 (1965); *see generally* TRIBE, *supra* note 7, at 598-601.

200. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980) "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.*

201. Young v. American Mini-Theatres, Inc., 427 U.S. 50, 69-70 (1976).

202. F.C.C. v. Pacifica Foundation, 438 U.S. at 748-49 (1978).

203. 345 U.S. 395 (1953).

unless a license therefore shall first be obtained from the City Council."[204] Approximately six weeks in advance of scheduled religious services in a public park, Poulos had applied for and was refused a license under this provision.[205] Although the law provided for appellate review of an unlawful refusal to grant a license,[206] Poulos opted to forego this procedure and conducted the services in violation of the statute.

In affirming the conviction, the Court first held the statute, as construed by the New Hampshire courts, valid on its face as a nondiscriminatory regulation of the time, place, and manner of speech in public streets and parks.[207] So construed, the Court found that the City Council had no discretionary power[208] to withhold a license and therefore, the statute did not allow for the type of unbridled discretion found in *Lovell* and *Shuttlesworth*. The Court further held that although the license had been wrongfully denied, Poulos had relinquished any first amendment defenses by failing to seek redress through judicial review as required by state law.[209] In rejecting Poulos' contention that pursuing the remedy of judicial review would entail unnecessary and protracted interference with protected speech,[210] the Court declared:

> Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning. Nor can we say that a state's requirement that redress must be sought through appropriate judicial procedure violates due process. . . .[211]

Taking this passage in isolation, why shouldn't the same rationale have been used to bar adjudication of first amendment claims in *Lovell*, *Shuttlesworth*, and similar cases? While it is true, for example, that the Court found the statute in *Shuttlesworth* invalid on its face, was there any indication that adequate state procedures were not available to contest the constitutional validity of the statute or the refusal to grant a permit? It is apparent, therefore, that the result in *Poulos* did not rest entirely on the theme that an orderly society demands a proper respect for law and order.[212]

Apparently cognizant of the rather obvious flaw in this reasoning, the *Poulos* Court referred to two earlier decisions[213] where licensing statutes

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204. *Id.* at 397 n.2.
205. *Id.* at 397.
206. *Id.* at 400-01.
207. *Id.* at 400-08.
208. *Id.* at 404.
209. *Id.* at 409.
210. *Id.*
211. *Id.*
212. *See supra* notes 29-32. For a well-developed discussion of the administration of facially valid permit systems, *see* Blasi, *Prior Restraints On Demonstrations*, 68 MICH. L. REV. 1482 (1970).
213. Poulos v. New Hampshire, 345 U.S. 395, 412-13 (1952). The two earlier decisions

were held facially invalid and further explained:

> It is clear to us that neither of these decisions is contrary to the determination of the Supreme Court of New Hampshire. In both of the above cases the challenged statutes were held unconstitutional . . . . The statutes were as though they did not exist. Therefore, there were no offenses in violation of a valid law. In the present prosecution, there was a valid ordinance, an unlawful refusal of a license, with remedial state procedure for the correction of the error. The state had authority to determine, in the public interest, the reasonable method for correction of the error, that is, by certiorari. Our Constitution does not require that we approve the violation of a reasonable requirement for a license to speak in public parks because an official error occurred in refusing a proper application.[214]

While it is certainly true that there is a critical distinction between statutes which are totally void and those which are invalid only as applied in a given circumstance, the question must be raised as to whether there should be any constitutional distinction between punishing protected speech under one type of statute as opposed to the other. Although the aforementioned passage is somewhat ambiguous on this point, the distinction between facially valid and invalid statutes is not merely technical, but involves the extent to which the very existence of the statutes would have a chilling effect on protected speech. It is axiomatic that a statute which can never be constitutionally applied to any expression will have an immeasurably greater chilling effect than a statute which is only invalid as applied in a particular situation. When viewed in this perspective, the law and order theme expressed earlier in the Court's opinion becomes an integral part of the holding. It is not a question of whether society's reverence for law and order summarily vanishes in the face of a law which is void in its entirety, but rather a question of balancing the ever present need for an orderly society against the danger that constitutionally protected speech will be suppressed.

It should be emphasized that *Poulos* was decided some twelve years before *Freedman*, and its progeny. Sensitive to the concerns which eventually led to the decision in *Freedman*, Justice Frankfurter's concurring opinion in *Poulos* expounded on the issue of whether the available procedures for review would provide for a prompt and meaningful judicial resolution.[215] Justice Frankfurter pointed out that the record was devoid of any evidence that the remedy available to Poulos was illusory or so time-consuming that it would effectively destroy the right to speak; particularly since the record indicated that Poulos was denied a license on May 4 for meetings that were not to be held until late June and early July.[216] It appears, however, that if

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were *Thomas v. Collins*, 323 U.S. 516 (1945) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

214. Poulos v. New Hampshire, 345 U.S. at 413-14.

215. *Id.* at 419-20 (Frankfurter, J., concurring).

216. *Id.*

Poulos had been decided in the post-*Freedman* era, the Court would have found the statute procedurally defective since it did not require the state, upon refusing the license, to promptly initiate judicial proceedings and bear the burden of showing that the expression was unprotected.[217]

217. *See supra* notes 120-22. It should be pointed out that Cox v. New Hampshire, 312 U.S. 569 (1941) was also decided prior to *Freedman* and therefore, it appears that the opposite result would have been reached in the post-*Freedman* era.