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Constitutional Law: Procedural Safeguards Required in First Amendment Prior Restraint Context

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CONSTITUTIONAL LAW: PROCEDURAL SAFEGUARDS REQUIRED IN FIRST AMENDMENT PRIOR RESTRAINT CONTEXT*

FW/PBS, Inc., d/b/a Paris Adult Bookstore II v. City of Dallas, 110 S. Ct. 596 (1990)

Petitioners[1] filed suit to challenge respondent's ordinance regulating sexually oriented businesses. The ordinance, which included a licensing scheme,[2] was designed to eradicate secondary effects of crime and urban blight.[3] Under the ordinance, petitioners could not operate

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1. Three groups brought three separate suits: "those involved in selling, exhibiting, or distributing publications, video or motion picture films; adult cabarets, or establishments providing live nude dancing or films, motion pictures, video cassettes, slides or other photographic reproductions depicting sexual activities and anatomy specified in the ordinance; and adult motel owners." FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 602 (1990).

2. *Id.* The ordinance also included zoning and inspection requirements and a civil disability provision prohibiting individuals convicted of certain crimes from obtaining a license for a specified period of years. *Id.* The Court granted certiorari on the issue of whether the licensing scheme constituted a prior restraint and did not review the zoning aspects of the ordinance. *Id.* at 603. Since the Court found that none of the petitioners had demonstrated standing to challenge the civil disability provision of the ordinance, the Court did not reach the merits of their challenges to this provision. *Id.* at 608-09.

3. *Id.* at 602. Section 41A-1(a) of the ordinance reads:

> It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

Dallas, Tex., City Code, ch. 41A, § 41A-1(a) (1986).

Despite this disclaimer of intent, and similar disclaiming statements from members of both the City Commissioners and City Council who adopted the ordinance, the public supporters of the ordinance backed the ordinance because of its suppression of speech. Dumas v. City of Dallas, 648 F. Supp. 1061, 1064-65 & n.11 (N.D. Tex. 1986). It is difficult to imagine eradicating the secondary effects of crime and urban blight associated with the sexually oriented businesses without first eradicating the businesses themselves. It is also difficult to imagine that the City Council and City Commission members would not be influenced in their purpose for adopting the ordinance by the public that elected them. *See id.*

their businesses without obtaining a license.[4] Petitioners alleged that the licensing scheme constituted a prior restraint upon activity protected by the first amendment and that the licensing scheme did not include the necessary procedural safeguards required for such regulations.[5] The district court upheld the majority of the ordinance,[6] and the court of appeals affirmed,[7] concluding that the three procedural safeguards[8] previously required in first amendment cases were "less important when regulating 'the conduct of an ongoing commercial enterprise.'"[9] The Supreme Court granted certiorari,[10] and HELD, that the ordinance is a prior restraint on freedom of speech that fails to provide adequate procedural safeguards.[11] The Court, however, disagreed on which procedural safeguards were appropriate. The opinion written by Justice O'Connor stated that the first amendment to the United States Constitution does not require the respondent to bear either the burden of initiating judicial proceedings to deny a license application or the ultimate burden of proof in court.[12]

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4. *FW/PBS*, 110 S. Ct. at 604.

5. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1300 (5th Cir. 1988). In their initial suit, petitioners also attacked the ordinance on the grounds that the provisions are vague and overbroad, that the ordinance vests overbroad discretion in the chief of police, and that the ordinance is not sufficiently related to the city's objectives. *Dumas*, 648 F. Supp. at 1067.

6. *FW/PBS*, 110 S. Ct. at 602. The district court struck down two subsections of the ordinance that vested overbroad discretion in the chief of police. *Id.* The court also struck down the provision imposing a civil disability merely on the basis of an indictment or information because less restrictive alternatives were available to achieve the city's goals. *Id.*

7. *Id.* at 602.

8. *See infra* notes 31-32 and accompanying text.

9. *FW/PBS*, 110 S. Ct. at 603 (quoting *FW/PBS*, 837 F.2d at 1303).

10. *Id.* For the reason the Court granted certiorari, see *supra* note 2.

11. *FW/PBS*, 110 S. Ct. at 606. Although disagreeing on the number of procedural safeguards required in the instant case, Justice Brennan, joined by Justices Marshall and Blackmun, agreed in his concurring opinion with Justices O'Connor, Stevens, and Kennedy that the ordinance failed to provide adequate safeguards. *Id.* at 611. Thus, a majority of the Court held that the ordinance was unconstitutional for failure to provide adequate procedural safeguards.

12. *Id.* at 607. The Court did not have a majority opinion in deciding to apply only two of the three procedural safeguards set out in Freedman v. Maryland, 380 U.S. 51 (1965); *see infra* notes 31-32 and accompanying text. However, Justice White, joined by Chief Justice Rehnquist, wrote a separate opinion in which he concluded that *none* of the three procedural safeguards that the Court established in *Freedman* were applicable. *FW/PBS*, 110 S. Ct. at 615. In so concluding, Justice White relied in part upon the same reasoning used by Justice O'Connor in refusing to apply the third procedural safeguard from *Freedman*, which required a licensor to initiate judicial proceedings or bear the burden of proof in judicial proceedings to deny a license. *Id.* at 616. Because of this similarity in reasoning, and because Justice White (by concluding that none of the procedural safeguards should be applied in the instant case) implicitly agreed with Justice O'Connor's decision not to apply the third *Freedman* procedural safeguard, this

Historically, American courts have held that a system of prior restraint upon first amendment rights bears a heavy presumption against its validity.[13] At the core of this presumption is the principle, basic to American law, that a free society should punish those few persons who abuse the rights of speech after the abuse rather than throttle both abusers and innocent persons beforehand.[14] This heavy presumption against the validity of prior restraints has led courts to require strict procedural safeguards in almost all prior restraint cases.[15]

In *Speiser v. Randall*,[16] the Supreme Court articulated both policy and practical considerations for requiring strict procedural safeguards in first amendment prior restraint cases. The applicants in *Speiser* applied for a veterans' property tax exemption.[17] A California statute required applicants for the exemption to file an annual application form with the local tax assessor.[18] The form included an oath requiring applicants to pledge their allegiance to the United States government.[19]

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comment has focused only upon the Court's reasoning in eliminating the third procedural safeguard. Thus, wherever the Court's decision is discussed hereafter in this comment, the reference will be to the decision written by Justice O'Connor.

13. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); *see also* Staub v. City of Baxley, 355 U.S. 313, 321 (1958) (statute invalid on its face under prior restraint doctrine for subjecting freedom of speech to the uncontrolled will of an official); Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (statute, while authorizes prior restraint upon the exercise of the guaranteed freedom by judicial decision after trial, contravenes the United States Constitution); Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938) (city ordinance invalid on its face under prior restraint ordinance doctrine for subjecting freedom of the press to license and censorship); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (statute unconstitutional for imposing prior restraint on publication of newspaper).

14. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975); *see also* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 648 (1955) (outlining the history of the prior restraint doctrine).

15. *See* Blount v. Rizzi, 400 U.S. 410, 416-17 (1971); *Bantam Books*, 372 U.S. at 66; *see also Southeastern Promotions*, 420 U.S. at 559. *Near* set forth some exceptions to the general rule that there shall be no prior restraint on speech. These exceptions included: when the country is at war, when obscenity is involved, and when incitements to acts of violence and the overthrow by force of the government are involved. *Near*, 283 U.S. at 716. As Emerson points out, the *Near* Court's reasons for distinguishing the second two exceptions were vague and the case did not completely resolve which exceptions to the prior restraint doctrine should be recognized. Emerson, *supra* note 14, at 660-61.

16. 357 U.S. 513 (1958).

17. *Id.* at 514-15.

18. *Id.* at 515.

19. *Id.* Section 32 of CAL. REV. & TAX. CODE provided:

> Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority,

Using discretion, the tax assessor could deny the exemption if the claimants did not qualify in any respect.[20] The statute then required claimants to bear the burden of proving the assessor's determination incorrect on judicial review.[21] Each of the appellants in *Speiser* refused to sign the required oath, and the respective tax assessors denied the exemption, based solely on their refusals.[22]

The Court held that the statute requiring the oath violated the due process requirements which accompany first amendment rights.[23] The Court also gave policy reasons for requiring procedural safeguards in connection with prior restraints upon freedom of speech.[24] First, the Court emphasized the transcendent value of speech as one of the most highly valued rights essential to the workings of a free society.[25] The Court also recognized the fine line between unconditionally guaranteed speech and speech that may be legitimately regulated, suppressed, or punished.[26] Because of the value placed on free speech and the difficulty in determining whether particular speech is pro-

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board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution.

CAL. REV. & TAX. CODE § 32 (1954).

20. *Speiser*, 357 U.S. at 517.

21. *Id.*

22. *Id.* at 515.

23. *Id.* at 529. The first amendment to the United States Constitution states, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The doctrine of prior restraint holds that "the [f]irst [a]mendment forbids the Federal Government to impose any system of prior restraint, with certain limited exceptions, in any area of expression that is within the boundaries of that Amendment. By incorporating the [f]irst [a]mendment in the [f]ourteenth [a]mendment, the same limitations are applicable to the states." Emerson, *supra* note 14, at 648. Thus follows the principle that the first amendment requires due process procedural safeguards.

24. *Speiser*, 357 U.S. at 520-21.

25. *Id.* at 521, 526.

26. *Id.* at 525. The Court stated: "The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied." *Id.*

tected, the Court further reasoned that due process requires the party seeking restraint to bear the burden of persuasion.[27]

Turning next to the practical reasons for requiring procedural safeguards, the *Speiser* Court noted that the outcome of a lawsuit frequently depends upon the factfinder's appraisal of the facts rather than the applicable law.[28] Since a margin of error always exists in litigation due to error in factfinding, the Court reasoned that the margin should be reduced in favor of the party who has an interest of transcending value at stake.[29] Thus, to reduce the margin of error in favor of free speech, the party seeking to restrain free speech should bear the burden of proof. Accordingly, the Court required the state to bear the burden of proof, rather than the *Speiser* petitioners.[30]

Placing the burden of proof upon the restraining party was one of the three procedural safeguards established in *Freedman v. Maryland*.[31] The *Freedman* Court also required that prompt judicial review be available to the restrained party and that any restraint imposed in advance of a final judicial determination be limited to preservation of the status quo for the shortest period compatible with sound judicial resolution.[32] In *Freedman*, appellant, the owner of a Baltimore theatre, exhibited a film in his theatre without first submitting the motion picture to the State Board of Censors, as required by Maryland law.[33] The *Freedman* Court, in reversing appellant's conviction under the censorship statute, held that the statute unconstitutionally impaired freedom of expression.[34]

The Court based its decision upon the failure of the statute to provide procedural safeguards to obviate the dangers of a censorship system.[35] The *Freedman* Court discussed the dangers peculiar to a

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27. *Id.* at 525-26.

28. *Id.* at 520.

29. *Id.* at 525.

30. *See id.* at 525-26.

31. 380 U.S. 51 (1965).

32. *See id.* at 58-59. The Court left open for interpretation what period of time in each case will be "compatible with sound judicial resolution." *See id.*

33. *Id.* at 52. Section 2 of article 66A of the statute provided:

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

MD. ANN. CODE art. 66A, § 2 (1957) (rendered constitutional in 1965 by repealing and reenacting § 19 of article 66A to institute the procedural safeguards required by *Freedman*).

34. *See Freedman*, 380 U.S. at 60.

35. *Id.*

motion picture censorship system.[36] First, the censorship proceeding puts the initial burden on the exhibitor or distributor.[37] Second, the censor may be less responsive than an independent branch of government, such as a court, to the interests in free expression.[38] Finally, if, by reason of delay or otherwise, it is unduly onerous to seek judicial review, the censor's determination may in actuality be final.[39]

The *Freedman* Court quoted *Speiser*, stating simply that due process requires the state to bear the burden of proof when the transcendent value of speech is involved.[40] Further justifying all three procedural safeguards,[41] the Court pointed out that, particularly in the case of motion pictures, the censored party may lack motivation to challenge the censor's decision.[42] The Court reasoned that the censored party may risk only a small financial stake in the censored speech.[43] The exhibitor could show other films and the distributor could freely exhibit the censored film throughout other areas of the country.[44] If the exhibitor and distributor have no motivation to challenge the censor's decision, the decision could become final, resulting in total suppression of speech. Thus, the *Freedman* appellant's small stake in the litigation outcome provided an additional reason for requiring the censor to bear the burden of instituting judicial proceedings.[45]

Unlike the *Freedman* appellant, the appellant in *Riley v. National Federation of the Blind of North Carolina*[46] did not lack motivation to challenge a prior restraint decision. In *Riley*, a North Carolina statute[47] required professional fundraisers to await a determination

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36. *Id.* at 57-59.

37. *Id.* at 57.

38. *Id.* at 57-58; *see also* Emerson, *supra* note 14, at 656-59.

39. *Freedman*, 380 U.S. at 58.

40. *Id.* (quoting *Speiser*, 357 U.S. at 526).

41. *See supra* notes 31-32 and accompanying text.

42. *See Freedman*, 380 U.S. at 59. The procedural safeguard of requiring a prompt, final judicial decision reduces "the deterrent effect of an interim and possibly erroneous denial of a license." *Id.*

43. *See id.*

44. *Id.*

45. *See id.* Although it did not so state explicitly, the Court may have been considering as one factor the high costs of initiating litigation compared to the relatively low return for one film when it made the following statement: "[I]f it is made unduly onerous, by reason of delay *or otherwise*, to seek judicial review, the censor's determination may in practice be final." *Id.* at 58 (emphasis added).

46. 487 U.S. 781 (1988).

47. *Id.* at 786-87 n.4. Section 131C-6 of the statute provides: "Any person who acts as a professional fund-raising counsel or professional solicitor shall apply for and obtain an annual

regarding the issuance of their license before engaging in solicitation.[48] Since the statute conceivably affected the professional fundraisers' entire livelihoods, the fundraisers had great motivation for instituting judicial proceedings of their own accord.[49]

Despite the fundraisers' motivation, the *Riley* Court struck down the licensing provision because the provision did not require the licensor to initiate court proceedings within a specified period to effect a license denial.[50] The *Riley* Court primarily focused on the *Freedman* language requiring a specified time limit for the determination. However, the Court also affirmed the *Freedman* language requiring the restraining party to go to court if it did not issue a license.[51] Thus, even in a licensing scheme applied to licensees with a strong incentive to initiate judicial proceedings, the Supreme Court required the burden of going to court to remain with the restraining agency.

In contrast, the Supreme Court in the instant case did not require the respondent licensor to either initiate judicial proceedings to effect the license application denial or to bear the burden of proof once in court.[52] The Court initially acknowledged that it had struck down the *Riley* licensing scheme for failure to provide adequate safeguards.[53] However, the Court then stated that *Riley* did not address the proper scope of procedural safeguards in a licensing scheme.[54] The Court

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license from the Department [of Human Resources], and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license." N.C. GEN. STAT. § 131C-6 (1986).

48. *See Riley*, 487 U.S. at 784.

49. *See FW/PBS*, 110 S. Ct. at 613 (Brennan, J., concurring in the judgment) (pointing out the similarities between the fundraisers in *Riley*, who needed licenses to maintain their fundraising abilities, and thus, their livelihoods, and the petitioners in *FW/PBS*, who needed licenses to maintain their sexuality businesses, which also represented the petitioners' entire livelihoods).

50. *Riley*, 487 U.S. at 802.

51. *See id.*

52. *FW/PBS*, 110 S. Ct. at 607. As previously noted in this comment, *supra* note 11 and accompanying text, although the instant Court did not require the third *Freedman* procedural safeguard in evaluating the Dallas licensing scheme, the Court did find the licensing scheme unconstitutional for failure to meet the first two safeguards of *Freedman*. *FW/PBS*, 110 S. Ct. at 606. The Court found that the licensing scheme did not provide for an effective time limitation within which the licensor's decision must be made and did not provide an avenue for prompt judicial review to minimize suppression of speech in the event of a license denial. *Id. But see supra* note 12 and accompanying text (discussing Justice O'Connor's plurality opinion, which rejects the third prong of the *Freedman* test, and Justice White's dissenting opinion, which stated that the entire three-part *Freedman* test was inapplicable to the instant case).

53. *FW/PBS*, 110 S. Ct. at 606; *see also id.* at 612 (Brennan, J., concurring in the judgment).

54. *Id.* at 606.

proceeded to set the scope in the instant case.[55] Based on its assessment that the licensing scheme in the instant case did not present the grave dangers of a censorship system,[56] the Court limited the procedural safeguards to two of the three safeguards set out in *Freedman*.[57] The Court required only an effective limitation on the time within which the licensor's decision could be made and an avenue for prompt judicial review of the licensor's decision.[58]

To explain its departure from the *Freedman* procedural safeguards, the instant Court drew distinctions between the prior restraint in *Freedman* and the prior restraint in the instant case.[59] First, *Freedman* involved the direct censorship of particular expressive material, which is presumptively invalid.[60] The instant case did not involve the direct review and censorship of the content of any protected speech.[61] Instead, the review of the general qualifications of the license applicants, a ministerial action, constituted the prior restraint.[62] Hence, the Court found that the licensing scheme in the instant case was not presumptively invalid.[63]

The second distinction the Court made between *Freedman* and the instant case focused on the incentive for the restrained party to challenge the decision to suppress the speech.[64] Since the financial stake in *Freedman* was minimal, the Court reasoned that the distributor lacked the incentive to challenge the censor's decision. Thus, the cen-

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55. *Id.*

56. *Id.*

57. *See id.*; *see also id.* at 616-17 (White, J., concurring in part and dissenting in part).

58. *Id.* at 606.

59. *See id.*; *see also id.* at 614-17 (White, J., concurring in part and dissenting in part).

60. *Id.* at 606-07.

61. *Id.* at 607.

62. *Id.* Justice O'Connor seems to be suggesting that the reviewing party had no discretion regarding the Dallas ordinance because the city is reviewing the general qualifications of the applicants for licensure. *See id.* However, it is difficult to envision any situation in which a governmental entity has power to review the qualifications of an applicant where the reviewing entity is not afforded some degree of discretion.

63. *Id.* The Court made this finding that the ministerial action of reviewing the applicants' general qualifications was not presumptively invalid despite its earlier finding that the licensing scheme is a prior restraint. *See id.* at 604. These findings appear contrary to one another, given the long-established rule that *"[a]ny* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (emphasis added); *see also* Vance v. Universal Amusement Co., 445 U.S. 308, 316 n.13, 317 (1980) (quoting *Bantam* and adding emphasis to word "any"); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (quoting *Bantam*).

64. *FW/PBS*, 110 S. Ct. at 607.

sor's decision resulted in total suppression of speech.[65] In contrast, the license applicants in the instant case had a great deal at stake since the applicants needed a license to obtain and maintain a business.[66] Because of the strong incentive on the part of the applicants in the instant case to challenge the license denial, the Court saw no reason for the licensor to bear the burden of going to court to effect the license denial.[67]

Although concurring in the judgment that held the licensing scheme invalid, Justice Brennan wrote a separate opinion because he believed that *Riley* mandated application of all three *Freedman* procedural safeguards in the instant case.[68] His concurrence pointed out the wide variety of contexts in which the Court previously had required the *Freedman* safeguards, never before suggesting that the requirements might vary with the particular facts of the prior restraint.[69] In particular, Justice Brennan analyzed the similarities between *Riley* and the instant case.[70] Both involved general licensing prior restraints, not content-based censorship prior restraints,[71] and both involved applicants with their entire livelihoods at stake.[72] These same two factors led the plurality to distinguish the instant case from *Freedman* and to eliminate the requirement that the licensor, rather than the applicant, go to court.[73] However, Justice Brennan pointed out that *"neither ground distinguishes [the instant case] from Riley."*[74]

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65. *Id.* The Court's reasoning appears to be based on the assumption that incentive to litigate is always financial. *See id.* Incentive to litigate, however, is not always financial, as in *Southeastern Promotions*, where the "Hair" promoter continued suit to United States Supreme Court, despite the elapse of four years between the time of the controversy and the Court's decision, and despite the promoter's ability to take the production elsewhere for financial gain. *See Southeastern Promotions*, 420 U.S. at 547-52. The principle of freedom of speech may be incentive.

66. *FW/PBS*, 110 S. Ct. at 607.

67. *Id.*

68. *Id.* at 611 (Brennan, J., concurring in the judgment).

69. *Id.* at 612-13. Justice Brennan gave two examples of varying contexts in which the Court required *Freedman* procedural safeguards. *Id.* at 612. In National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977), a court-ordered injunction was stayed because appellate review was not expedited. *Id.* at 44. In Vance v. Universal Amusement Co., 445 U.S. 308 (1980), a general public nuisance statute could not be applied to enjoin future exhibitions of films, based on a presumption that the films would be obscene because previous films had been obscene, since such a determination could be made only in accordance with *Freedman* procedural safeguards. *Id.* at 317.

70. *FW/PBS*, 110 S. Ct. at 612-13 (Brennan, J., concurring in the judgment).

71. *See id.* at 613.

72. *Id.*

73. *See id.*

74. *Id.* (Brennan, J., concurring in the judgment) (emphasis in the original).

Justice Brennan further noted that the danger of a licensing scheme lies in its potentially unlawful stifling of speech.[75] He reasoned that since the transcendent value of speech was at stake in the instant case, just as in *Freedman*, the same heavy presumption against the validity of prior restraints exists in both cases.[76] Accordingly, this presumption required placing the burdens of initiating judicial proceedings and proving the validity of the license denial on the licensor, so that any error would be made on the side of speech, not silence.[77]

The instant Court's decision diverged from past case law that required strict procedural safeguards in all prior restraint contexts with a few narrow exceptions.[78] The Court in the instant case eliminated the necessity of the licensor bearing the burden of going to court and the burden of proof in court.[79] In so doing, the Court has drawn a distinction between cases involving prior restraints through direct content censorship and cases involving prior restraints through the use of general licensing qualifications.[80]

As Justice Brennan recognized in his concurrence, the distinction drawn by the instant Court is a distinction in method of prior restraint only.[81] The result is the same. Whether the restraint results from content censorship or licensing regulations, the danger posed in both settings is the same unlawful stifling of speech.[82] Despite this same resulting danger, and the need to protect the same interest in freedom of expression, the plurality opinion in the instant case nevertheless narrowed the scope of procedural safeguards required in the licensing context.[83]

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75. *Id.*

76. *See id.*

77. *Id.* Although Justice Brennan does not refer to *Speiser*, his idea of erring on the side of speech echoes the reasoning articulated by the *Speiser* Court. That is, the idea that an evidentiary problem is involved, since the way the facts are presented will make a tremendous difference in the factfinding, and thus, will affect the outcome of the litigation. Since the outcome of the litigation is almost invariably effected by the way the evidence is presented, placing the burdens of initiating judicial proceedings and proof on the restraining entity is a way to ensure that any error is in favor of free speech. *Speiser*, 357 U.S. at 520-21.

78. *FW/PBS*, 110 S. Ct. at 606-07; *see also Speiser*, 357 U.S. at 523; *supra* notes 31-32 and accompanying text.

79. *FW/PBS*, 110 S. Ct. at 607; *see also id.* at 614-15 (White, J., concurring in part and dissenting in part).

80. *Id.* at 607-08.

81. *See id.* at 612-13 (Brennan, J., concurring in the judgment).

82. *Id.* at 613.

83. *See id.* at 606-07 (plurality opinion); *id.* at 612-13 (Brennan, J., concurring in the judgment).

The Court justified the more narrowly defined scope of procedural safeguards because the dangers of the censorship system were not present in the licensing scheme.[84] In distinguishing *Freedman* and the instant case, however, the Court overlooked the danger of total suppression of speech present in the instant case. Since the danger of total suppression is a major factor in requiring procedural safeguards in prior restraints cases, this was an important oversight on the part of the instant Court.[85]

In *Freedman*, the danger of total suppression existed in the possibility that the exhibitor and distributor of the censored motion picture would have little incentive to pursue judicial review of the censor's decision. The censor's decision would become final, thereby totally suppressing the showing of the film.[86] In its concern to stop total suppression of speech, the Court in *Freedman* gave this low incentive as reason for requiring the censor to go to court and bear the burden of proof.[87]

In the instant case, the petitioners had their entire livelihoods at stake.[88] Therefore, the petitioners possessed a strong incentive to seek judicial review of license denials. Accordingly, the instant Court viewed the procedural safeguard of requiring the licensor to bear the burden of going to court and the burden of proof once in court as unnecessary.[89] This reasoning, however, contravenes the very purpose for requiring strict procedural safeguards in first amendment cases: the greater the interest at stake, the more protection the legal system should afford before taking away that interest.[90]

Furthermore, the possibility of total suppression of speech, which was the reason the *Freedman* Court required the agency to bear the

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84. *Id.* at 606 (quoting *Freedman*, 380 U.S. at 58); *see also id.* at 616-17 (White, J., concurring in part and dissenting in part).

85. *See id.*; *see also Freedman*, 380 U.S. at 58-59 (deterrence from challenging licensor's decision tantamount to complete suppression of speech); FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1309 (5th Cir. 1988) (Thornberry, J., concurring in part and dissenting in part) (argument that the more severe the infringement on a person's first amendment rights, the less protection that person deserves, defies common sense).

86. *See Freedman*, 380 U.S. at 59. In *Freedman*, the danger of total suppression of the motion picture was confined to total suppression of the film within the state of Maryland. As the Court noted, the film could be exhibited freely in most of the rest of the country. *Id.* at 59 & n.5.

87. *Id.* at 59.

88. *FW/PBS*, 110 S. Ct. at 607.

89. *See id.*; *see also id.* at 616-17 (White, J., concurring in part and dissenting in part).

90. *See id.* at 613 (Brennan, J., concurring in the judgment); *see also* FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1309 (5th Cir. 1988) (Thornberry, J., concurring in part and dissenting in part) (foreshadowing Justice Brennan's departure from the plurality opinion).

burden of going to court and burden of proof,[91] still existed in the instant case, although via a different avenue. The danger of total suppression arose not from low incentive to litigate, but from the fact that the applicant was unable to obtain and maintain a business without a license.[92] Without the opportunity to obtain and maintain a business, the applicant's protected speech is jeopardized.[93] Thus, the license denial would totally suppress the applicant's avenue of communication, the same result the *Freedman* Court sought to avoid.[94]

In addition, by eliminating the burden of going to court and burden of proof safeguards, the instant Court ignored its own decision in *Riley*. The petitioners in *Riley*, like the petitioners in the instant case, had their entire livelihoods at stake, and thus, had high incentive to litigate.[95] In *Riley*, however, the Court chose not to narrow the required procedural safeguards[96] as it did in the instant case. The instant Court failed to provide a legitimate reason for its departure from *Riley*.[97]

The instant Court also ignored an important practical aspect of the litigation process by eliminating the third *Freedman* procedural safeguard. As the *Speiser* Court noted, the way the evidence is presented will often affect the factfinder's appraisal of the facts.[98] Because there is always a margin of error implicit in factfinding, the burden of proof is often instrumental in deciding the outcome of the case.[99]

This practical consideration led both the *Speiser* Court and the *Freedman* Court to require the restraining party to bear the burden of proof.[100] Again, the high value placed on freedom of expression in our society warrants this procedure.[101] The instant Court, in shifting the burden of proof to the restrained party, shifted the margin of error in favor of the restraining party, thereby ignoring the practical ramifications upon freedom of expression.[102]

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91. *Freedman*, 380 U.S. at 58-59.

92. *FW/PBS*, 110 S. Ct. at 607.

93. *See FW/PBS*, 837 F.2d at 1309 (Thornberry, J., concurring in part and dissenting in part).

94. *See id.* at 1309-10.

95. *See Riley*, 487 U.S. at 784, 801.

96. *See id.* at 802.

97. *See FW/PBS*, 110 S. Ct. at 613 (Brennan, J., concurring); *see also supra* notes 49-50 and accompanying text.

98. *See Speiser*, 357 U.S. at 520.

99. *Id.* at 525.

100. *Id.* at 526; *Freedman*, 380 U.S. at 58.

101. *See Speiser*, 357 U.S. at 526 (majority opinion); *id.* at 530 (Black, J., concurring); *Freedman*, 380 U.S. at 57-58; *see also* Emerson, *supra* note 14, at 655.

102. *See FW/PBS*, 110 S. Ct. at 613 (Brennan, J., concurring in the judgment).

In placing more emphasis upon distinctions drawn on methods of prior restraint rather than on the resulting danger of unlawful suppression of speech, the instant Court limited the scope of procedural safeguards required in licensing schemes that act as prior restraints.[103] The Court's decision attempted to balance the long-established principle of punishing wrongdoers after they abuse freedom of speech — rather than suppressing all speech — against the principle of allowing governing bodies to regulate and promote health, safety, and welfare. The instant decision, by eliminating the requirement that the licensor bear the burden of initiating judicial proceedings and the burden of proof once in court, has the practical effect of restraining freedom of expression in favor of government regulation. The instant Court restrained freedom of expression to a greater degree than ever before allowed in prior restraint licensing cases. Consequently, the instant case may be used as a stepping stone to erode procedural safeguards in other prior restraint contexts as well.

Grace F. Woods

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103. *Id.* at 606.