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Constitutional Law

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CONSTITUTIONAL LAW

I. First Amendment Privilege of the Press in Juvenile Cases

The South Carolina Supreme Court recently held, in *State ex rel The Times and Democrat*[1], that statutory provisions restricting publication of information identifying a juvenile subject to family court jurisdiction were unconstitutional insofar as they prevented the truthful publication by the media of information lawfully obtained concerning a juvenile charged with a crime. Although the court did not expressly invalidate section 14-21-30 of the South Carolina Code,[2] it did conclude that the provisions in question violated the appellants' first amendment rights.

In *State ex rel The Times and Democrat*, a reporter for the *Times and Democrat* visited a murder scene and photographed a juvenile in police custody. The reporter's photograph and an accompanying story were subsequently published by the *Times and Democrat* and other media sources. A South Carolina circuit court found that those media sources which had published the material were in violation of section 14-21-30 and held them in contempt. The court also imposed a sanction against the *Times and Democrat*, since the trial judge determined that only its publication had caused prejudice to the juvenile.[3]

On appeal, the parties cited for contempt contended that the statute violated their rights under the first and fourteenth amendments to the United States Constitution.[4] Emphasizing the youthfulness of the offender, the State argued that preserving the juvenile's anonymity would promote rehabilitation, and

1. 276 S.C. 26, 274 S.E.2d 910 (1981).

2. S.C. Code Ann. § 14-21-30 (1976)(*repealed* May 1981) provided, in pertinent part: "The name or picture of any child under the jurisdiction of the court shall not be made public by any newspaper, radio or TV station, except as authorized by order of the court. . . ." This section was repealed as part of a total reorganization of provisions dealing with family, domestic, and juvenile matters. The new provision, however, codified as § 20-7-830, is substantially the same as that declared unconstitutional in *State ex rel The Times and Democrat*. 1981 S.C. Acts 170, No. 71.

3. 276 S.C. at 28, 274 S.E.2d at 911.

4. *Id.* at 27, 274 S.E.2d at 911.

that such purpose constituted sufficient State interest to abridge the appellants' first amendment right of publication.[5] The South Carolina Supreme Court did not agree with the State's reasoning, however, as it found the relevant statutory provisions unconstitutional and reversed the contempt citations.[6]

The South Carolina Supreme Court first recognized the constitutional rights of the press as a defense to invasion of privacy charges in *Meetze v. Associated Press*,[7] in which it held that matters of "legitimate public interest" necessarily limited the right of privacy.[8] Subsequently, a United States District Court for the District of South Carolina interpreted South Carolina law as recognizing official action in criminal proceedings as a matter of general public interest.[9] Nevertheless, section 14-21-30 purported to withhold this privilege in cases concerning juveniles.

In reaching its decision in *State ex rel The Times and Democrat*, the court cited the United States Supreme Court's decision in *Smith v. Daily Mail Publishing Co.*[10] for the proposition that "the State may not punish a newspaper for the publication of truthful information, lawfully obtained, about a matter of public significance, except when necessary to further a State interest of the highest order."[11] In *Smith*, the Supreme Court declared unconstitutional a West Virginia statute similar to section 14-21-30.[12] The statute at issue in *Smith* applied only to newspapers,[13] however, and Justice Rehnquist suggested that the outcome of *Smith* might have been different had the statute applied uniformly to all media sources.[14] The South Carolina Supreme Court did not address this distinction in *State ex rel The Times and Democrat*, however.

State ex rel The Times and Democrat declared unconstitutional the clause in section 14-21-30 of the South Carolina Code

5. *Id.* at 28-29, 274 S.E.2d at 911.
6. *Id.* at 29, 274 S.E.2d at 911.
7. 230 S.C. 330, 95 S.E.2d 606 (1957).
8. *Id.* at 337, 95 S.E.2d at 609.
9. Frith v. Associated Press, 176 F. Supp. 671 (D.S.C. 1959).
10. 443 U.S. 97 (1979).
11. 276 S.C. at 28, 274 S.E.2d at 911.
12. 443 U.S. at 105-06.
13. *Id.* at 104-05.
14. *Id.* at 107, 110.

that prohibited the publication of the identity of a juvenile subject to the jurisdiction of the family court, a result likely in accord with the United States Supreme Court's decision in *Smith*. Although the South Carolina decision leaves the remainder of the statute intact, it raises questions about the degree of confidentiality that remains in family court proceedings concerning juveniles.

Danny R. Collins

II. ADULT ADOPTEE'S RIGHT TO CONFIDENTIAL ADOPTION RECORDS

The South Carolina Supreme Court made its initial determination of an adult adoptee's right to confidential adoption records in *Bradey v. Children's Bureau of South Carolina*.[15] Interpreting the controlling South Carolina statute,[16] which allows disclosure of identifying information upon a showing of good cause, the court held that "good cause" requires a demonstration of compelling need for the identifying information and that personal desire, even when accompanied by some emotional instability, is not sufficiently compelling.[17] Although the court discussed the natural parents' constitutional rights to privacy, it based its decision on public policy considerations.[18] This deci-

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15. 275 S.C. 622, 274 S.E.2d 418 (1981). Litigation over an adoptee's right to information about his natural parents has increased dramatically in the last decade. *Symposium on Children and the Law*, 12 U.C.D.L. REV. 350 (1979)[hereinafter cited as *Symposium*].

The typical case involves an adult adoptee who, for medical or psychological reasons, desires information from sealed court records. *E.g.*, Chattman v. Bennett, 57 A.D.2d 618, 393 N.Y.S.2d 768 (App. Div. 1977)(medical reasons); *In re* Linda F. M., 95 Misc. 2d 581, 409 N.Y.S.2d 638 (Sur. Ct. 1978) (psychological reasons).

16. S.C. CODE ANN. § 15-45-140(c)(1976)(current version at § 20-7-180(c)(Supp. 1981)) states:

> All files and records pertaining to the adoption proceedings in the Children's Bureau in the State of South Carolina, or in the Department of Social Services of the State of South Carolina, or in any authorized agency, shall be confidential and withheld from inspection except upon order of court for good cause shown.

17. 275 S.C. at 629, 274 S.E.2d at 422. Disposition of adoptees' requests for information frequently turns on whether the information sought is nonidentifying or identifying. Nonidentifying information such as medical records or the parents' ethnic background may be obtained more easily than information that would identify the natural parents.

18. For a further discussion of public policy considerations underlying good cause, see *Domestic Relations, Annual Survey of South Carolina Law*, 34 S.C.L. REV. 125, 139

sion places South Carolina in the mainstream of judicial thinking on the subject.[19]

Max Bradey's natural mother placed him for adoption with the Children's Bureau of South Carolina when he was an infant. Although Bradey enjoyed a congenial relationship with his adoptive mother,[20] he wanted to know the identity of his natural parents. His requests for information from the Children's Bureau had yielded all of the nonidentifying information in his file,[21] but no identifying information could be released without a court order pursuant to section 15-45-140(c) of the South Carolina Code. In a petition for an order to release the identifying information, Bradey alleged that his unsuccessful search for his parents' identity had caused him "mental anguish and emotional turmoil."[22] The trial court found that his desire to know the

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(1982).

19. *See, e.g.*, Alma Society, Inc. v. Mellon, 459 F. Supp. 912 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 1225 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1979); *In re* Roger B., 85 Ill. App. 3d 1064, 407 N.E.2d 884 (App. Ct. 1980); *In re* Maples, 563 S.W.2d 760 (Mo. 1978); Mills v. Atlantic City Dept. of Vital Statistics, 148 N.J. Super. 302, 372 A.2d 646 (Super. Ct. Ch. Div. 1977).

20. Record at 23. Bradey's adoptive father was deceased at the time of the hearing. His adoptive mother lived with him at the time of the trial and had consented to his search for his natural mother.

21. *Id.* at 35. Only South Carolina and Connecticut have statutes allowing access to nonidentifying information without a court order. These statutes lead what may become a trend toward freer disclosure of information. S.C. CODE ANN. § 15-45-140(d)(Supp. 1980)(current version at § 20-7-1780 (Supp. 1981)) provides:

> The provisions of this section shall not be construed to prevent any adoption agency from furnishing to adoptive parents, biological parents or adoptees nonidentifying information when in the sole discretion of the chief executive officer of the agency such information would serve the best interests of the persons concerned either during the period of placement or at a subsequent time nor shall be the provisions of this chapter be construed to prevent giving nonidentifying information to any other person, party or agency who in the discretion of the chief executive officer of the agency has established a sufficient reason justifying the release of that nonidentifying information. As used in this subsection "nonidentifying information" may include but is not limited to the following:
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> 1. the health of the biological parents;
> 2. the health of the child;
> 3. the child's general family background without name references;
> 4. the length of time the child has been in the care and custody of the adoptive parents.
>
> The release of other nonidentifying information shall be made at the discretion of the chief officer of the adoption agency.

See generally Symposium, supra note 15, at 355-59.

22. Record at 3.

truth and his emotional distress were good cause within the meaning of section 15-45-140(c) and ordered disclosure of the information.[23]

The South Carolina Supreme Court reversed and held that the trial judge, in determining that Bradey had a compelling need for the identifying information, had given insufficient consideration to the natural parents' right to privacy. The court found that even though Bradey had a sincere desire to know his parents' identity and had suffered some emotional insecurity, he had not demonstrated a compelling need to know his parents' identity. The court noted the absence of any need for medical treatment, disruption in employment, or instability in family life that might have indicated a compelling need.[24]

The *Bradey* court reasoned that statutory sealing of adoption records serves all parties to an adoption. Insulating the newly formed adoptive family meets the needs of adoptees and adoptive parents. Confidentiality also serves the interests of natural parents and society by ensuring a fresh start for the natural parents and providing an incentive for using the state's adoption process instead of less desirable means.[25] The court held, therefore, that any determination of the rights of an adoptee must also include a consideration of the rights of these other parties.

Although *Bradey* is consistent with other decisions on adoptees' rights,[26] the South Carolina Supreme Court did not fully examine the constitutional issues that are inherent in a case such as this. On appeal, Bradey raised the issue that denying adoptees access to their adoption records denied them equal protection of the law,[27] but because this claim had not been presented at trial, the court summarily rejected it.[28] In addition, other adoptees have argued that denial of access to adoption records abridged their constitutional rights to privacy and access to information, though Bradey did not argue this.[29] The Children's Bureau argued that releasing natural parents' names would violate the parents' substantive due process right to pri-

23. Record at 14.
24. 275 S.C. at 629, 274 S.E.2d at 423.
25. *Id.* at 626, 274 S.E.2d at 420.
26. *See, e.g.*, cases cited *supra* note 19.
27. Brief for Respondent at 5.
28. 275 S.C. at 629, 274 S.E.2d at 422.
29. *See infra* note 35 and accompanying text.

vacy.[30] An analysis of both sides of the due process issue reveals that neither the natural parents' nor the adoptees' fundamental rights are violated, regardless of whether adoption records are closed or open.

Justice Harwell, writing in *Bradey* for a unanimous court, relied heavily on the decisions in *Alma Society, Inc. v. Mellon*,[31] *In re Maples*,[32] and *Mills v. Atlantic City Department of Vital Statistics*.[33] In these cases[34] adoptees unsuccessfully advanced two theories in support of their claim that they have a fundamental constitutional right to know who their parents are.

The first theory is that sealed-record statutes violate the adoptees' right to privacy in family matters.[35] However, no court has yet agreed that constitutional guarantees of personal privacy encompass a right to self-actualization.[36]

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30. Brief for Appellant at 3.

31. 601 F.2d 1225 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1979).

32. 563 S.W.2d 76 (Mo. 1978).

33. 148 N.J. Super. 302, 372 A.2d 646 (Super. Ct. Ch. Div. 1977).

34. *See also* Yesterday's Children v. Kennedy, 569 F.2d 431 (7th Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); *In re* Roger B., 85 Ill. App. 3d 1064, 407 N.E.2d 884 (App. Ct. 1980); *In re* Gilbert, 563 S.W.2d 768 (Mo. 1978); Chattman v. Bennett, 57 A.D.2d 618, 393 N.Y.S.2d 768 (App. Div. 1977); *In re* Linda F.M., 95 Misc. 2d 581, 409 N.Y.S.2d 638 (Sur. Ct. 1978).

35. For detailed discussions of the theories advanced by adoptees, *see generally*, Klibanoff, *Genealogical Information in Adoption: The Adoptee's Quest and the Law*, 11 FAM. L.Q. 185 (1977); Levin, *The Adoption Trilemma: The Adult Adoptee's Emerging Search for His Ancestral Identity*, 8 U. BALT. L. REV. 496 (1979); *Symposium*, *supra* note 15; Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196 (1975); Note, *The Current Status of the Right of Adult Adoptees to Know the Identity of Their Natural Parents*, 58 WASH. U.L.Q. 677 (1980); Comment, *Breaking the Seal: Constitutional and Statutory Approaches to Adult Adoptees' Right to Identity*, 75 NW. U.L. REV. 316 (1980); Comment, *Discovery Rights of the Adoptee—Privacy Rights of the Natural Parent: A Constitutional Dilemma*, 4 SAN. FERN. V.L. REV. 65 (1975); Comment, *Confidentiality of Adoption Records: An Examination*, 52 TUL. L. REV. 817 (1978).

36. *See, e.g.*, Mills v. Atlantic City Dept. of Vital Statistics, 148 N.J. Super. at 310, 372 A.2d at 650. One writer has developed a theory of a right to privacy based on the "blood tie" between parent and child. Though untried, the argument may be persuasive in future cases. *See* Comment, *Breaking the Seal*, *supra* note 35, at 327-29.

The right to privacy in matters of marriage and family was first recognized by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965). The Court indicated that privacy in the marriage relationship is implicitly protected by the penumbras of the first, third, fourth, fifth, and ninth amendments. *Id.* at 484-85. In Roe v. Wade, 410 U.S. 113 (1973), the Court clarified the parameters of constitutional protection for personal privacy: "[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in the guarantee of personal privacy." *Id.* at 152. Hence citizens have a constitutionally protected right to exercise their fundamental

The second theory is that sealed-record statutes violate the adoptees' right to receive information.[37] The United States Supreme Court has recognized a right to receive information as a corollary of the first amendment guarantee of free speech;[38] however, the right to receive information assumes that information is available from a willing source.[39] The assumption is not valid as applied to adoptees and their natural parents since natural parents are usually unwilling to have their identity revealed to their children,[40] and those parents who do desire to meet the children they placed for adoption have other means available.[41] Even if adoptees could succeed in demonstrating a fundamental right to identifying information about their natural parents, that right would still not be absolute, since even fundamental rights must yield to a compelling state interest.[42] Courts considering the question have generally justified keeping adoption records sealed because of the state's interests in protecting the privacy of the natural parents and preserving the adoption process.[43]

The natural parents have two separate rights to privacy to be protected in these cases. They have the right to be free from government intrusion and the right to be free from intrusion by individuals. For the proposition that parents have a fundamental right to be free from governmental intrusions into their pri-

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rights free from governmental intrusion. This guarantee, to the extent that it is derived from the Bill of Rights, is applicable to the states through the fourteenth amendment and is also found in that amendment's concept of personal liberty. Courts have recognized constitutional protection from governmental intrusion only in the most intimate areas of marital and personal privacy. *See, e.g.*, Mills v. Atlantic City Dept. of Vital Statistics, 148 N.J. Super. at 310, 372 A.2d at 650. Adoptees argue that denying them information about their natural parents prevents them from becoming whole persons. *See, e.g.*, Alma Society, Inc. v. Mellon, 601 F.2d at 1231. The adoptees' contentions are supported by recent psychiatric research such as Sorosky, Baran & Pannor, *The Effects of the Sealed Record in Adoption*, 133 AM. J. PSYCH. 900 (1976).

37. *See supra* note 35.

38. *E.g.*, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); Gotkin v. Miller, 379 F. Supp. 859 (E.D.N.Y. 1974), *aff'd*, 514 F.2d 125 (2d Cir. 1975).

39. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

40. *See* Klibanoff, *supra* note 35 at 195; Note, *Current Status of the Right of Adult Adoptees, supra* note 35, at 682-83. *But see, Symposium, supra* note 15, at 353.

41. Organizations such as the Adoptees' Liberty Movement Association (ALMA) and Yesterday's Children offer adoptees assistance in locating their natural parents.

42. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973).

43. *See* cases cited *supra* note 19.

vacy, courts have uniformly cited *Stanley v. Georgia*.[44] The parents' right to be free from intrusions by individuals is similar to the right to be free from governmental intrusions, but the general right to privacy is protected by state statutes and public policy, not by the Constitution.[45]

Besides having an interest in preserving the natural parents' right to privacy, the State has a public policy interest in preserving confidentiality in the adoption process. Many of the children given up for adoption are illegitimate,[46] and society's strong disapproval of illegitimacy encourages statutory sealing of adoption records to protect the innocent children.[47] In addition, parents of illegitimate children generally desire anonymity, and the state's adoption process provides it.[48] If the adoption process were not confidential, parents of illegitimate children might use less desirable means to give them up, and the children could suffer because of it.[49] The state's interest in preserving the adoption process is a strong one, benefitting both natural parents and adoptees. Some courts have found this state interest to be compelling.[50]

Competing with the state's interest in preserving the adoption process and protecting the natural parents right to privacy

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44. 394 U.S. 557, 564 (1969). In *Stanley*, the Court made it clear that the privacy right it recognized applied to governmental intrusions: "[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy" and (quoting Brandeis, J. dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1928)) " '[t]he makers of the Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.' " The South Carolina Supreme Court's failure to distinguish between the constitutionally protected right to privacy and the general right to privacy protected by the states may be attributable in part to appellant counsel's misquotation of *Stanley* in his brief: "In *Stanley*, the Court put forth the view that the makers of the Constitution, in order to secure conditions favorable to the pursuit of happiness, conferred upon the American people, 'the right to be let alone—and it guarantees a person's general rights to privacy and freedom from unwarranted intrusions.' " Brief for Appellant at 3.

45. Katz v. United States, 389 U.S. 347, 350-51 (1967).

46. Levin, *supra* note 35, at 502.

47. Klibanoff, *supra* note 35, at 188.

48. *See Id.* at 195; Note, *Current Status of the Right of Adult Adoptees, supra* note 35, at 682-83.

49. For a detailed description of "black market" adoption see L. MCTAGGART, THE BABY BROKERS: THE MARKETING OF WHITE BABIES IN AMERICA (1980).

50. Alma Society Inc. v. Mellon, 459 F. Supp. at 917 (compelling interest); *aff'd*, 601 F.2d at 1234 (important interest); Mills v. Atlantic City Dept. of Vital Statistics, 148 N.J. Super. at 316, 372 A.2d at 653 (compelling interest).

is its interest in the physical and psychological health of the petitioning adoptee. For reasons related to his health or welfare, an adoptee may have a serious need to know his natural parents' identity.[51] It is because of this potential need that many legislatures, including South Carolina's, have written sealed records statutes to allow release of information if an adoptee shows good cause.[52] These statutes attempt to balance the competing policies by requiring an adoptee to demonstrate a compelling need for identifying information before the state's interest in his welfare will outweigh the combined interests in protecting the natural parents' privacy and preserving the adoption process.[53] While this standard is not unwarranted, neither is it mandated by the Constitution.

The point at which the state's interest in the health of the adoptee outweighs its interests in protecting the natural parents' privacy and preserving the adoption process depends upon the court's ability to determine the effects on the adoptee of not learning his parents' identity and the effects on his parents and society of disclosing it. Available information indicates that the South Carolina Supreme Court has wisely set a high standard for adoptees to meet before adoption agencies may disclose identifying information.[54] Nevertheless, as psychological techniques for measuring the effect on adoptees of not knowing their origins become more sophisticated and as society's attitude toward illegitimacy becomes more tolerant, the balance may shift in favor of disclosure.[55]

III. FREE EXPRESSION AND PARADE PERMIT ORDINANCES

In *City of Chester v. Addison* and *City of Chester v. Allen*,[56] the South Carolina Supreme Court reviewed the appellants' convictions for violating an allegedly unconstitutional

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51. *See* Comment, *Breaking the Seal*, *supra* note 35, at 316.

52. *Symposium*, *supra* note 15, at 355-56; Note, *The Current Status of the Right of Adult Adoptees*, *supra* note 35, at 684; Comment, *Confidentiality of Adoption Records*, *supra* note 35, at 821.

53. 275 S.C. at 627, 274 S.E.2d at 420-21.

54. For a similar ruling, *see, e.g.*, *In re* Maples, 565 S.W.2d 760 (Mo. 1978).

55. *See* Levin, *supra* note 35, at 516.

56. ___ S.C. ___, 284 S.E.2d 579 (1981). Addison was one of thirty-five appellants who were tried together. Allen was tried separately but the court consolidated the two cases on appeal. *Id.* at ___, 284 S.E.2d at 579-80.

parade permit ordinance.[57] In its first review of such an ordinance in nearly twenty years,[58] the court affirmed the appellants' convictions, holding that the ordinance was constitutional on its face and as applied.[59] Although this holding is consistent with an earlier decision, the court did not consider the implications of the recent United States Supreme Court free speech decisions.

During the last half of 1979, the Southern Christian Leadership Conference (SCLC) and the Chester Movement for Justice obtained parade permits[60] and conducted several marches in the City of Chester. These marches were in protest of the alleged failure of Chester County officials to fully investigate the death of a young black resident.[61] Although the marches were peaceful,[62] Chester residents were outraged[63] when members of the Communist Party participated in the third march organized by

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57. CHESTER, S.C., CODE §§ 27-201 to -203 (1962) provide:

§ 27-201. Permit required to stage parade; exceptions.

It shall be unlawful for any person or organization to stage a parade or procession on any of the streets in any other public places within the City without first having applied for and secured a special permit from the Council to do so, excepting funeral processions, the armed forces of the U.S. Army or Navy, the military forces of this State and the force of the police and fire departments of the City.

Ord. 1-8-62.

§ 27-202. Application for permit; insurance of permit.

Such application shall contain the following information:

(1) The time of such proposed parade or procession,

(2) The streets to be used,

(3) The number of persons or vehicles to be engaged, and

(4) The purpose of such parade or procession.

Upon receipt of such application, the Mayor or Council shall, in his or its discretion, issue a permit subject to the public convenience and public welfare.

Ord. 1-8-62.

§ 27-203. Penalties to violate §§ 27-201 and 27-202.

Anyone violating the provisions of §§ 27-201 and 27-202 shall upon conviction be imprisoned for a period not to exceed thirty days or fined in an amount not to exceed one hundred dollars.

Ord. 1-8-62.

58. *See* City of Florence v. George, 241 S.C. 77, 127 S.E.2d 210 (1962); City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961).

59. ___ S.C. at ___, 284 S.E.2d at 580.

60. Record at 1, *Allen.*

61. Brief for Appellant at 3, *Allen.*

62. Record at 17, *Allen.*

63. Record at 68, *Addison.*

SCLC Field Secretary Golden Frinks.[64] After the march, Chester Mayor James Funderburk issued a statement to the local newspaper saying that the Chester City Council would consider permit requests by Chester citizens, but that there would be " 'no more permits issued where Golden Frinks or the Communist Party is allowed to be involved.' "[65]

Golden Frinks subsequently applied for a permit to hold a parade on November 11, 1979.[66] The parade was to end at the County Courthouse. On November 10, 1979, the City Council voted to deny the permit to avoid a conflict[67] with a Veteran's Day assembly scheduled near the courthouse[68] on the same day. When the marchers entered Chester on November 11, 1979, they were arrested for parading without a permit.[69] Their subsequent convictions in the City of Chester Recorder's Court were affirmed on appeal by the trial court and the South Carolina Supreme Court, both courts finding that the Chester parade permit ordinance was constitutional on its face and as applied.[70]

In finding the Chester ordinance constitutional on its face, the South Carolina Supreme Court determined that the ordinance was virtually identical to one previously upheld in *City of Darlington v. Stanley*.[71] In *Stanley*, the court held that an ordinance does not grant unlimited discretion to a public body when the standards to be applied are "obvious from the purpose of the ordinance" and the complexity of the activity to be regulated makes it impractical to develop a comprehensive regulation.[72] The supreme court found that the Darlington statute contained an inherent limitation requiring the City Council to issue parade permits based on the "safety, comfort, and convenience of per-

64. Record at 1, *Allen*.

65. Record at 68, *Addison*.

66. *Id.* at 69.

67. The trial court's finding that the permit was denied to avoid having two groups meet at the same time and place, Record at 150, *Allen*, was supported by the record. *Id.* at 57-58. Nevertheless, the evidence also supports the view that the permit was denied because of the potential for a physical conflict between the two groups. *See Id.* at 17, 57, 147.

68. Although the trial court found that the Veteran's Day assembly was "in the path of the proposed march," Record at 151, *Allen*, the record indicates that the assembly was to be held inside the Memorial Building adjacent to the courthouse. *Id.* at 62.

69. *Id.* at 71.

70. ___ S.C. at ___, 284 S.E.2d at 580.

71. 239 S.C. 139, 122 S.E.2d 207 (1961).

72. *Id.* at 147, 122 S.E.2d at 210.

sons using the streets."[73] The court applied the same construction to the Chester ordinance, distinguishing it from the ordinance which the United States Supreme Court found unconstitutional in *Shuttlesworth v. City of Birmingham.*[74] The Birmingham ordinance was invalid because it allowed public officials to deny parade permits based on their own opinions of "decency," "good order," or "morals." The Chester ordinance was deemed not as broad and, therefore, was held to be constitutional as written.[75]

The court further held that the Chester ordinance was constitutionally applied because the reason stated for denying the permit for the November 11 parade was to avoid a conflict with a previously scheduled assembly near the courthouse. This finding was strengthened by the fact that the same groups were subsequently issued a permit for a parade on December 1, 1979.[76] The supreme court thus concluded that the denial of a parade permit had not infringed upon the constitutional rights of appellants and affirmed their convictions.

Because denying the parade permit in *Addison* and *Allen* was an official action that prevented free expression from occurring, it was a form of prior restraint.[77] Although prior restraint is justifiable in some instances, the United States Supreme Court has held that any system of prior restraint is presumed to violate the first amendment.[78] Recent cases suggest that a regulatory scheme that imposes prior restraint on free expression is unconstitutional on its face unless it contains substantive standards for limiting the regulatory body's discretion and procedural safeguards for insuring prompt judicial review of the regulatory body's decision.[79]

The substantive standards in the Chester ordinance were satisfied by the court's construction of the ordinance. This construction interpreted the local authorities' discretion as being

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73. *Id.*.

74. 394 U.S. 147 (1969).

75. ___ S.C. at ___, 284 S.E.2d at 580.

76. *Id.* at ___, 284 S.E.2d at 580.

77. Emerson, *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROBS. 648 (1955).

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

79. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1974); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1968) (Harlan, J., concurring).

limited to insuring the safety, comfort and convenience of those on city streets. The court concluded that the ordinance did not enable the authorities to censor the content of the marchers' words or signs.[80]

The South Carolina Supreme Court did not consider, however, whether the Chester ordinance contained procedural safeguards. Although the United States Supreme Court has not yet invalidated a parade permit regulation for failing to incorporate necessary procedural safeguards, *Southeastern Promotions Ltd. v. Conrad*[81] indicates that such safeguards must be present in any system of prior restraint that might deny persons access to a public forum.[82] Further, the Court's opinion in *Freedman v. Maryland*[83] enumerated the procedural safeguards that a statute or ordinance must contain: the burden of initiating judicial proceedings must rest on the body that imposes the prior restraint; prior restraints may be imposed only during the brief period before a hearing can be held; and a final decision must promptly be reached.[84] No such safeguards accompanied the Chester ordinance. While both *Southeastern Promotions* and *Freedman* were obscenity cases and, therefore, concerned with "pure speech," *Shuttlesworth* suggests that some form of procedural safeguards may also be required in regulating picketing or marching. This is true even though picketing and marching do not constitute pure speech.[85]

Although it is a form of prior restraint, a parade permit licensing scheme has been held constitutional if licenses are granted or denied according to neutral time, place, and manner criteria.[86] The City Council's decision to avoid traffic problems

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80. ___ S.C. at ___, 284 S.E.2d at 580 (quoting Darlington v. Stanley, 239 S.C. at 147, 122 S.E.2d at 211.

81. 420 U.S. 546 (1974).

82. *Accord*, Widmar v. Vincent, 102 S. Ct. 269, 273 (1981); Shuttlesworth v. City of Birmingham, 294 U.S. at 162-64 (1968)(Harlan, J., concurring); Fernadez v. Limmer, 663 F.2d 619, 628 (5th Cir. 1981); Collin v. Chicago Park Dist., 460 F.2d 746, 756 (7th Cir. 1972); LeFlore v. Robinson, 434 F.2d 933, 948 (5th Cir. 1970); *vacated on other grounds*, 446 F.2d 715 (5th Cir. 1971); Marco Lounge Inc. v. City of Fed. Heights, ___ Colo. ___, 625 P.2d 982 (1981). *See* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482 (1970); Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970); Wexler, *Dissent, The Streets and Permits: Chicago as Microcosm*, 2 URB. L. 350 (1970).

83. 380 U.S. 51 (1965).

84. *Id.* at 58-59.

85. 394 U.S. 147, 152, 155 n.4.

86. *E.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941).

that might have occurred had the marchers met the Veteran's Day assemblage at the courthouse was apparently considered a valid restriction on the time, place, and manner of appellants' speech.[87]

Appellants' argument in *Addison* and *Allen* that the mayor's statement indicated the City Council's discriminatory intent was based on *Shuttlesworth*, in which the United States Supreme Court ruled that discriminatory statements made by Birmingham's Commissioner of Public Safety when denying parade permits indicated that both he and the City Council held an overly broad view of their powers under Birmingham's parade ordinance.[88] Because the Birmingham ordinance contained no language limiting the authorities' discretion and because their official words and actions gave no indication that they administered the ordinance according to the narrow construction subsequently adopted by the Alabama Supreme Court, the Supreme Court held that the ordinance was unconstitutionally applied.[89] Unlike the Commissioner's statements in *Shuttlesworth*, Mayor Funderburk's statements were not official responses to permit requests and did not express the City Council's view of its powers under the Chester ordinance. Consequently, discriminatory intent of the City Council, the body that actually denied the permit request, was not inferred from the Mayor's statements.

In holding that the Chester ordinance, as narrowly construed, was constitutional on its face and as applied, the South Carolina Supreme Court was not called upon in *Addison* or *Allen* to consider whether the ordinance contained proper procedural safeguards. Consideration of this issue may not have changed the results in these cases. However, had appellants vigorously asserted that the Chester ordinance lacked the procedural safeguards required by recent United States Supreme Court

87. *See supra* note 67. Although it is clear that one's right to free speech cannot be curtailed solely because of the possibility that onlookers may react violently, *see* Beckerman v. City of Tupelo, 664 F.2d 502 (5th Cir. 1981)(collecting cases); Blasi *supra* note 82, it appears that speech may be regulated when the purpose of avoiding possible violence is coupled with an otherwise valid time, place, or manner restriction.

88. 394 U.S. at 157-58.

89. *Id.*.

decisions, their chances of having the ordinance declared unconstitutional would have substantially increased.

R. Scott Tewes