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Parades and Protest Demonstrations: Punctual Judicial Review of Prior Restraints on First Amendment Liberties

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NOTES

PARADES AND PROTEST DEMONSTRATIONS: PUNCTUAL JUDICIAL REVIEW OF PRIOR RESTRAINTS ON FIRST AMENDMENT LIBERTIES

In *Shuttlesworth v. Birmingham,*[1] the Supreme Court has served notice that the constitutional validity of local parade ordinances henceforth will depend on the presence of provisions for speedy judicial review. This decision represents a significant contraction of what constitutes permissible prior restraint on first amendment liberties. It heralds a licensing system designed to protect legitimate state interest while foreclosing the opportunity for arbitrary official action.

The case, the legal climax of a 1963 prosecution of civil rights leaders for protest activities in Alabama,[2] was presented in a manner designed to

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1. 281 Ala. 542, 206 So. 2d 348, *rev'd* 394 U.S. 147 (1969).

2. Fred Shuttlesworth and other civil rights leaders were convicted in the Recorder's Court of Birmingham, Ala., for failure to procure a permit before engaging in mass street parades and processions, as required by § 1159 of the Birmingham City Code which provides:

> It shall be unlawful to organize or hold, or to assist in organizing or holding or take part or participate in any parade or procession or public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.
>
> . . . The commission shall grant a written permit for such parade, procession or public demonstration prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, morals or convenience require that it be refused.

The case was appealed to the Court of Jefferson County where a *de novo* jury convicted Shuttlesworth, sentencing him to ninety days in jail and fining him seventy-five dollars. The Alabama Court of Appeals subsequently reversed the latter decision, holding that the petitioners' activity was merely peaceful picketing and not subject to regulation by the Birmingham parading ordinance.

The Supreme Court of Alabama reversed this decision, finding that this type of conduct was subject to regulation under the parading ordinance. The court attempted to narrow sufficiently the discretion of the granting official in order to deter the U.S. Supreme Court from striking the ordinance down as conferring unbridled discretion on the licensing official. The U.S. Supreme Court had earlier said in Cox v. New Hampshire that there should be "systematic, consistent, and just order of treatment, with reference to the convenience of the public use of the streets." 312 U.S. 569, 576 (1941). The Court did not require that New Hampshire incorporate a more specific standard for official behavior in its parade ordinance. The ordinance was construed, therefore, to give a licensing official no discretion to deny permits once even-handed methods were used to ensure that the safety, comfort and convenience of the public in the use of the streets would not be unduly disturbed. Furthermore, the Alabama Court said that there was no evidence that the ordinance had been enforced discriminatorily.

In a companion case, Walker v. Birmingham, 279 Ala. 53, 181 So. 2d 493, *aff'd* 388 U.S. 307 (1967), the civil rights leaders were found in contempt for disobeying an injunction, issued by an Alabama circuit court at the request of local officials, forbidding them to engage in such demonstrations without first receiving the required permit.

tempt the Court to strike down a Birmingham parade ordinance as void on its face. To this end, it was not alleged that the petitioners had previously applied for a permit to parade nor that officials had arbitrarily denied them the permit, nor was the Court asked to base its holding on the grounds that the ordinance was enforced discriminatorily. Instead, the issue presented to the Court was whether the ordinance ever could be enforced validly.[3] In the past, the Court always has upheld a state's right to employ a system of prior restraints on parading.[4] Standing to test the constitutionality of a parading ordinance traditionally has required prior application for a permit, since the local interest in regulating street

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Two days remained between the issuance of the injunction and marches scheduled for Good Friday and Easter Sunday. In those two days, no attempt was made to have the injunction dissolved, and no requests for permits were made. Authorities were informed, however, of prospective parade routes and times. Both protest marches took place as planned and were conducted in a peaceful manner. Protesters marched two-abreast on sidewalks and did not obstruct vehicles or pedestrians. The only reported incident of violence was rock-throwing by three bystanders. March leaders were arrested both days a few blocks from the starting points. Shuttlesworth was among those arrested on each occasion. The march leaders tried to argue that both the parade ordinance on which the injunction was based and the injunction were void; however, the circuit court considered only the questions of notice and violation of the order because Alabama procedure required that the validity of injunctive orders be tested by motions to dissolve and not in collateral proceedings. The issue ultimately raised by the case was whether a state procedural rule validly can deny standing to a marcher to assert in a contempt proceeding the unconstitutionality of the ordinance on which the injunction is based when the marcher had sufficient time to test the validity of the injunction through an approved state procedure. The Supreme Court held that a state could preclude such standing and, therefore, review of the federal claims. Several strong dissents followed in which four justices argued that it was patently unjust to convict someone of contempt when the ordinance had been administered to discriminate against petitioners and when both the injunction and the ordinance on which it was based were unconstitutional.

Petitioners in *Walker* were not allowed to prove discriminatory enforcement of the ordinance. Some attempt had been made in the hearing to show cause that the marchers tried to secure permits to parade, but the evidence was held inadmissible. Chief Justice Warren, in his dissent, says, however, that discrimination in law enforcement in Birmingham is a matter of public record. He cites the REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 114 (1963), which found abuse of civil rights protestors by Birmingham police. City Safety Commissioner Eugene "Bull" Connor, a self proclaimed white supremist, was the official who denied early requests for permits and also requested that the injunction issue.

The Court in *Shuttlesworth* used evidence of prior discrimination in the issuance of permits to protestors to reverse the Alabama Supreme Court. The Court is free in cases involving first amendment freedoms to make its own determination of ultimate facts. *See e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

3. Another case in which the issue was framed in the same manner is Times Film Corp. v. Chicago, 365 U.S. 43 (1961), where the Supreme Court held that since the movie exhibitor had not applied for a permit to show his film, the question of the constitutionality of the censoring ordinance was unripe. The Court said that the only question presented was whether there ever could be a valid prior restraint of a showing under the ordinance in question.

4. The parading area has been given some first amendment protection, but a significant state interest in regulating conduct also has been recognized. Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

demonstrations and parades is deemed sufficiently strong to preclude the courts from striking down such statutes in the abstract. Thus, courts allow a state to deny standing to challenge the constitutionality of a parade ordinance if the challenger has not applied for a permit.[5]

The dilemma facing the Court in *Shuttlesworth* was whether to upset the tradition of treating ordinances imposing prior restraints on conduct and only incidentally regulating speech differently from those imposing prior restraints on pure speech or, in effect, to affirm a system of arbitrary local restraint on first amendment rights.[6] The Court solved the dilemma by using facts from *Walker v. Birmingham* to reframe the issues.[7]

In *Walker* evidence tended to prove that, in the week before the injunction was issued, the civil rights group had made two attempts to secure a permit for its protest activities. First, a woman representative was refused such a permit by Safety Commissioner Eugene "Bull" Connor.[8] Later Shuttlesworth sent a telegram to Connor requesting a permit. Connor replied that only the entire city commission could grant permits.[9] In addition, an offer of proof was made in *Walker* that Connor usually referred the matter of parade applications to a traffic clerk, not to the entire commission.[10] The Court felt that the evidence indicated that the ordinance was discriminatorily applied against the petitioners. Thus the Alabama Supreme Court's finding of no discriminatory enforcement was reversed.

There has always been a requirement that there be consistent en-

5. The only cases which have allowed testing the constitutionality of an ordinance which places a prior restraint on first amendment rights without first showing that such conduct was not properly subject to regulation have been in the pure speech area. *See e.g.*, Staub v. City of Baxley, 355 U.S. 313 (1958); Thomas v. Collins, 323 U.S. 516 (1945); Lovell v. Griffin, 303 U.S. 444 (1938). The Court in *Shuttlesworth* says that the valid inquiry in a case involving an ordinance regulating conduct and only incidentally regulating speech is whether the ordinance in fact was enforced discriminatorily.

6. In other words, as the issue was presented, the Court either could strike the ordinance down as void on its face or say that the only issue presented to the Court was whether there could ever be a valid refusal to issue a permit under the parading ordinance. The N.A.A.C.P. legal defense was hoping the Court would find the ordinance void on its face. In the past, some members of the Court have expressed the opinion that no permit systems should be allowed in the first amendment area. See the dissenting opinion in Times Film Corp. v. Chicago. 365 U.S. 43, 50 (1961).

7. The Court suggested that it was able to take "judicial notice" of the facts found in *Walker,* since common parties were involved in both cases. 394 U.S. at 157, *citing* National Fire Ins. Co. v. Thompson, 281 U.S. 331, 336 (1930).

8. Walker v. Birmingham, 388 U.S. at 317 n. 9, 325, 335, 339. Harlan, J., concurring in *Shuttlesworth,* objects to the use of these facts, because they were held inadmissible by the trial judge. 394 U.S. at 160 n.1.

9. 388 U.S. at 318 n.10, 325, 335-36.

10. *Id.* at 325, 326, 336, 340.

forcement of parading statutes.[11] Had the Court simply restated this standard, its opinion would have been relatively insignificant; however, there are several aspects of *Shuttlesworth* differentiating it from prior cases involving discriminatory enforcement. First, the Court allowed petitioners to circumvent the state system of orderly review. Next, the Court suggested that special circumstances in the parading situation made it impossible to safeguard the petitioners by providing federal standards for official behavior. Finally, the Court extended to the parading situation standards formerly applied in movie censorship cases. This note will treat and evaluate each of these subjects sequentially.

The Supreme Court in *Shuttlesworth* said that the petitioners did not need to appeal the official denial of their request for a permit to march.[12] The defendants were not required to follow an appellate system established by the state for orderly review. The Supreme Court held, in effect, that a state could not deny the marcher's standing to assert the unconstitutional denial of a permit as a defense to a prosecution for marching without such a permit.

According to the Court, support for not requiring the petitioners to appeal this denial in the Alabama court system may be found in the fact that the petitioners had no way of knowing whether the Alabama Supreme Court would give the ordinance an adequately narrow construction.[13] Apparently the Court meant that, since the statute was not construed until after the Easter weekend marches, the petitioners could not be considered recipients of the later narrow construction. When the defendants acted, the ordinance remained vague. The case law of lower federal courts is in accordance with this result; in the absence of interpretation by the highest state court, such parading ordinances are void.[14]

Justice Harlan, concurring in *Shuttlesworth,* suggests that petitioners be required to follow normal review procedures unless those procedures are so time-consuming as effectively to deny first amendment rights.[15]

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11. The Supreme Court allowed the New Hampshire court to permit an official to refuse to license a march if "[t]here is no evidence that the statute has been administered otherwise than in a fair and non-discriminatory manner which the state court has construed it to require." Cox v. New Hampshire, 321 U.S. 569, 577 (1941).

12. 394 U.S. at 158.

13. *Id.*

14. In Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967), a similar Louisville parading ordinance was held to be void on its face. In Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967), a similar Mississippi parade ordinance was held to be void on its face even though the Mississippi Supreme Court had construed a similar ordinance as granting the official in charge no unconstitutional discretion.

15. Justice Harlan says:

> The right to ignore a permit requirement should, in my view, be made to turn on something more substantial than a minor official's view of his authority under the governing statute.

He points out that Alabama has no provision for speedy review of official denials of parade permits and that the ordinance does not stipulate a time period during which the commission must make the original decision.[16] Consequently, he argues, years could pass before a decision finally is made on a case. Justice Harlan states, however, that when measures for speedy review of official decisions are provided, protesters must be required to follow state procedures for review or the states' ability to control conduct on their streets will be hampered seriously.[17] Situations easily could arise in which demonstrators arbitrarily denied permits to march would begin parading in downtown areas, disrupting traffic. Traffic tie-ups in large cities can last for several hours and cause angry crowds of motorists to clash with protesters.[18] If, after causing a major disruption, such protesters were allowed to assert the arbitrary denial of the permit as a defense to prosecution for marching without a permit, when means for correcting the official decision were readily available, the state's ability to keep streets open for the benefit of the public would be impaired.

The Alabama Supreme Court construed the parading ordinance so that officials had no discretion to deny permits after assuring that the safety, comfort and convenience of the public in the use of the streets would not be disturbed unduly. However, the Alabama court indicated that actually incorporating standards for official behavior into the statute would be useless, since individual factual situations vary greatly.[19] The

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> Simply because an inferior state official indicates his view as to a statute's scope, it does not follow that the State's judiciary will come to the same conclusion. Situations do exist, however, in which there can be no effective review of the decision of an inferior state official.

394 U.S. at 160.

16. 394 U.S. at 160-61.

17. *Id.* at 159-60. Other opinions dealing with the question of state procedural grounds indicate that where a state supplies an adequate means of reviewing official decisions, the state system of orderly review must be followed. In Poulos v. New Hampshire, 345 U.S. 414 (1953), the Court upheld New Hampshire's refusal to allow a Jehovah's Witness to assert the wrongful denial of a permit to gather in the open as a defense to a prosecution for marching without a permit. The Court said:

> In the present prosecution there was a valid ordinance, an unlawful refusal of a license, with remedial procedures for correction of that error. The state had the authority to determine in the public interest, the reasonable measure for correction of error. . . .

345 U.S. at 396.

18. The recent tie-ups in Philadelphia resulting from protests against discriminatory hiring practices are a good example of this. *See* N.Y. Times, Aug. 27, 1969 at 1, col. 1.

19. 281 Ala. at 545, 206 So.2d at 350. The situation involving a vague parade ordinance resembles in some ways that in Baggit v. Bullit, 337 U.S. 360 (1964) and Dombrowski v. Pfister, 380 U.S. 479 (1965). Of course, there is no issue of abstention present in *Shuttlesworth;* however, the inability of the state supreme court construction to change the issue in the litigation is present. One could argue that the U.S. Supreme Court should strike down the parade ordinance in spite of the attempted narrowing construction, because the mere incorporation of general standards for official behavior in the ordinance will in no way impede the ability of the officials to discriminate without check. Therefore, the

U. S. Supreme Court did not reach the question of whether the attempted limiting construction saved the ordinance but remarked that

> [t]he validity of this assumption [the ordinance's constitutionality] would depend upon, among other things, the availability of expeditious judicial review of the commission's refusal of a permit.[20]

This statement implicitly recognizes that the narrowing construction or incorporation of general standards for official behavior will in no effective way limit the power of local officials to discriminate against groups espousing unpopular views.[21] The real issue in every case will remain the same, even after construction: good faith local enforcement.[22]

Prior decisions merely required that parade ordinances embody standards for official conduct comparable to those enunciated by the court.[23] Inherent in the Court's refusal to regard the construction as sufficient is a recognition of the special nature of the parading situation: a local official effectively can deny permission to exercise a first amendment right. Seldom is a great deal of money at stake in the parading situation; therefore, denial of a permit usually is not appealed. Even if valuable intangible rights are at stake, as in a civil rights march, timing is of the essence, and a lengthy appeal would virtually preclude the march from being conducted.[24] As a result, the group is forced to abandon the parade or face prosecution for marching without a permit. Furthermore, the group will have no defense for the wrongful denial of the permit in the prosecution if the state is allowed to deny it standing. Consequently,

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construction is useless, because it is unable in any way to solve the issue in any case arising under the ordinance: good faith enforcement. However, one also could argue that the mere possibility of erroneous application of the statute does not amount to the irreparable injury necessary to justify the disruption of orderly state proceedings. Cameron v. Johnson, 390 U.S. 611, 621 (1968).

20. 394 U.S. at 155 n.4. The Court then cited Justice Frankfurter's concurring opinion in Poulos v. New Hampshire, 345 U.S. 395, 420 (1953); Freedman v. Maryland, 380 U.S. 51 (1965) and Justice Harlan's concurring opinion in *Shuttesworth*. Harlan suggested the additional requirement be imposed that the commission have to make its decision within a specific amount of time. 394 U.S. at 160-61.

21. See note 19 *supra*.

22. In order for the Court to take a significant step toward the elimination of discrimination by local officials, it had to suggest that states set up a system of checks more efficient than the one in which the Supreme Court decides the factual issue of discrimination. Very little overt discrimination remains in the law; therefore, questions of application are the ones which will appear. Minority groups feel that most discrimination that blocks their access to wealth and power comes from local government officials, institutions and hiring practices. *See* J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS 28 (1968). Case-by-case approach is a tedious way to obtain results.

23. Edwards v. South Carolina, 372 U.S. 229 (1963); Poulos v. New Hampshire, 345 U.S. 395 (1953).

24. *See* 394 U.S. at 160-61. (Harlan, J., concurring).

the official decisions go unchecked. The knowledge that aggrieved minority groups are most often without money, power and popular support leaves the granting official practically free from the threat of legal action, political pressure or public censure as a result of denying access to the streets. The very reasons that some would give for making the public forum available to such groups encourage the official to deny them use of the streets.[25] The mere existence of these parade ordinances under which such official behavior is sanctioned has a stifling effect on the exercise of first amendment freedoms.[26]

The Supreme Court took two steps in *Shuttlesworth* to minimize the potential danger in local parade ordinances. First, the Court liberalized the standing requirement for Supreme Court review to make it clear that states cannot convict paraders who attempt to comply with the permit system and are denied permits wrongfully. Secondly, municipalities were warned that failure to incorporate provisions for speedy judicial review of their decisions regarding parade permits might bring subsequent action by the Court against the parading ordinances.[27]

When the Court, in note four of the opinion, made future validity of a parade permit system depend upon the presence of provisions for quick review, it referred to another area of the law, that of motion picture censoring, in which similar ordinances have been struck down as the result of comparable deficiencies. Many cities have ordinances which require film exhibitors to submit films to a board of censors before showings are permitted. In *Freedman v. Maryland,* the Supreme Court said that no prior restraint could be imposed in this area in the absence of speedy judicial review of the censor's decision.[28]

Aside from the strong suggestion in footnote four of *Shuttlesworth* that states should look for guidance to the case of *Freedman v. Maryland* and Frankfurter's concurrence in *Poulos v. New Hampshire,* there is no clear indication in *Shuttlesworth* of what the Court believes to constitute a valid parade ordinance.[29] It appears, however, that in light of the Court's references to these film censorship cases, an official who wishes to deny some group the use of the streets to parade will either have to go to court immediately afterwards to justify his action or seek an injunction against

25. *See* Kalven, *The Concept of the Public Forum,* 1965 S. Ct. Rev. 1, 11; Adderly v. Florida, 385 U.S. 39, 48 (1966) (Warren, Brennan, Douglas and Fortas, dissenting).

26. *See* Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967), and Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967), in which federal courts took jurisdiction without abstaining because of Dombrowski v. Pfister.

27. See note 20 *supra.*

28. 380 U.S. 51, 58 (1965).

29. See note 20 *supra.*

the group marching.[30] It is not clear what power, if any, an ordinance can give to officials over time and route, because such power can result in effective denial of the right to parade; a group march, for example, might be relegated to a late hour or a side street if such powers are too broad.[31] It is, however, clear from past decisions that one does not have an unfettered right to maximum exposure of his ideas or even to their expression in what he considers the most meaningful manner.[32] Perhaps, therefore, cities could enact ordinances that forbid all parades, marches and demonstrations on busy thoroughfares at times of heavy traffic.

The Supreme Court sets no standards for state judicial review of official decisions, because no case yet has arisen in which a parade ordinance has been struck down. The Court simply may wish to protect citizens from decisions of non-judicial officers regarding their right to exercise first amendment freedoms.[33] Nothing that the Court has said would lead one to believe that an official could not validly refuse a permit simply because the normal flow of traffic would be disturbed unduly or that the police had reasonable fear that violence would erupt. In contrast, in *Terminello v. Chicago,* the Court held that fear of violent reaction to a speaker's words was not sufficient reason to deny him the right to speak.[34]

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30. *Cf.* Freedman v. Maryland, 380 U.S. at 58. Kingsley Books Inc. v. Brown, 354 U.S. 436 (1957) upheld a New York ordinance providing for an injunction to maintain the status quo while the question of whether a book dealer was selling obscene literature was being litigated. This same type of procedure could be utilized to prevent a street demonstration while a court was examining the refusal of a permit.

31. In Cox v. New Hampshire, the Court said that, if a municiaplity was going to control the use of its streets, then it should be allowed to give consideration without unfair discrimination to time, place and manner in relation to proper use for the streets. 312 U.S. at 576. It appears that perhaps an official without judicial sanction could preclude the use of certain streets at busy times.

32. United States v. O'Brien, 391 U.S. 367 (1968) (draft card burning); Kovacs v. Cooper, 336 U.S. 77 (1949) (loud speaker) and People v. Radich 53 Misc. 717, 279 N.Y.S. 2d 680 (1967), *aff'd* 294 N.Y.S. 2d 285 (1968) (obscene sculpture) lend support to the idea that one is not free to express an idea in the manner which would have greatest impact. Considerations of public comfort and state interest in prohibiting certain types of conduct militate against even peaceful symbolic conduct.

33. This idea is supported by the fact that in *Walker* the Court upheld the state's right to require the petitioners to test the injunction through the procedure for review provided by Alabama. One reason for that holding is that, theoretically, a petitioner's rights are more carefully guarded when a judicial officer decides to restrict their exercise.

34. 337 U.S. 1, 4 (1949). There has been a recognition of the special danger presented by mass demonstrations which militates against the Court treating the parade area like the pure speech area. Justices Black, Harlan and White say in Bell v. Maryland:

> A great purpose of freedom of speech and press is to provide a forum for settlement of acrimonious disputes peaceable [sic], without resort to intimidation, force or violence. The experience of ages points to the inexorable fact that people are frequently stirred to violence when property which the law recognizes as theirs is forcibly invaded or occupied by others. . . . Force leads to violence, violence to mob conflicts, and those to rule by the strongest groups with control of the most deadly weapons.

Whether the Court will in fact impose the same requirements on parade ordinances as on movie censoring ordinances is a matter of conjecture. It is true that the two areas are somewhat analagous and that both activities are entitled to some first amendment protection. In both situations, the person denied a permit to exercise his right effectively has been denied this right by a low level, non-judicial official. However, the two areas also differ significantly, and thus the respective state regulations perhaps should be allowed to vary accordingly. The possible effect on the public of the exhibition of an objectionable film is obviously far different from the possible effect of an unauthorized march. At most, one could say that concern about a film exhibition is limited to the desire to prevent the corruption of young children. An adult who finds a film objectionable simply can leave the theater. No one need watch a film that he does not wish to see, and its exhibition does not interfere with his rights. On the other hand, a parade or protest demonstration in the streets can tie up traffic for hours.[35] A relatively insignificant cause can bring as much disruption as an important one. All persons using the streets and sidewalks are subjected to a spectacle promoting something for which they may have extreme antipathy. The probability of violence occurring in reaction to and in the course of a mass demonstration is thus much greater. It would seem, then, that local officials perhaps should be given broader powers to control parading activities than movie exhibitions.[36] However, the Court draws no distinction between the two areas in its brief encounter with the problem of official discrimination. It is possible that the Court will follow through with its threat to strike down parading statutes only when the petitioner wrongfully has been denied a permit. The Court certainly seems to threaten, however, that it will strike down as void on their face those parading ordinances which are not accompanied by, or do not incorporate provisions for, speedy review.[37] Thus, a group which deliberately did not apply for a permit could conduct

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378 U.S. 226, 346 (1964) (dissenting opinion).

Some recent articles on the subject of peaceful protest activities have attributed the Court's failure to extend more protection to peaceful activities to the frequent use of obstructive and violent conduct by minority groups to gain objectives. *See* Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520 (1968). Louis Lusky goes so far as to say that when groups employ techniques of obstructive conduct in a society which relies on voluntary compliance with the law, the society contracts some of the previously given protection in the free speech area. Lusky, *The King Dream; Prophecy or Fantasy*, 68 COLUM. L. REV. 1029 (1968).

35. See note 18 *supra*.

36. Some authority suggests that a different conclusion might be warranted if the liberties at stake in the parading situation were decidedly superior to those in motion picture exhibition. Regulations suppressing political expression, for example, might be subject to closer scrutiny than those governing less consequential behavior. *Cf.* Carolene Products v. United States, 320 U.S. 760 (1923).

37. 394 U.S. at 155.

a disruptive march and then challenge successfully the constitutionality of such a parade ordinance, even though their conduct was a proper subject of regulation.[38] This result would go too far in denying legitimate state interests, such as protection of protestors and anticipation of possible traffic problems. Municipalities which heed the *Shuttlesworth* warning, however, will not have this problem, for they will incorporate in their parade ordinances provision for prompt judicial review.

The narrowest possible interpretation of the Court's holding in the *Shuttlesworth* case is that § 1159 of the Birmingham City Code was discriminatorily and hence unconstitutionally applied to the petitioners. The Court, in reversing Shuttlesworth's conviction, implicitly holds that one wrongfully denied a permit to parade can assert that wrongful denial as a defense in a prosecution for parading without a permit. Thus, as the law now stands, local officials may prosecute a person who has not applied for a permit to march under a parade ordinance similar to Birmingham's only at the risk of subsequent judicial reversal. For the *Shuttlesworth* Court threatens to strike down in the future these ordinances containing no measures for quick judicial review of official decisions.

The significance of the *Shuttlesworth* case lies in its expansion of the scope of federal appellate review. By allowing the protester to assert the wrongful denial of a parade permit itself, the Court has vested in the federal courts the right to decide the question of discriminatory application on appeal. By urging states to reform their parading ordinances through the addition of provisions for quick review, the Supreme Court recognizes also the limited power of the conventional appeals system to alleviate official misconduct. The Supreme Court implies that the federal court system is not the most efficient place to check discriminatory enforcement, since a case-by-case approach will never control local widespread unequal treatment. Therefore, it urges states to check their own officials.

In spite of the legal prohibitions against discrimination, minority groups still receive unequal treatment, indicating that discrimination is not precluded through fair laws but through unbiased official action best checked quickly and efficiently on the local level. If there is any conclusion

38. When a statute purports to regulate the dissemination of ideas, proof of an abuse of official power has never been held requisite to testing its constitutionality. Staube v. Baxley, 355 U.S. 313 (1948); Sneider v. State, 308 U.S. 147, 162 (1939); Hague v. C.I.O., 307 U.S. 496, 576 (1939); Lowell v. Griffin, 303 U.S. 444, 457 (1936). The Birmingham parade ordinance, on the other hand, purports only to regulate conduct. Serious questions exist whether the act of parading is necessarily expressive and entitled to any protection apart from protection given to peaceful picketing and the right to associate. *See* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

to be drawn from this case, it is that arbitrary action by an official easily can undermine the clearest of legislative standards.

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