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CONSTITUTIONAL LAW: THE MEANING OF
PROMPT JUDICIAL REVIEW UNDER THE PRIOR
RESTRAINT DOCTRINE AFTER *FW/PBS V.*
*CITY OF DALLAS*¹

INTRODUCTION

Of all the rights afforded by the United States Constitution, perhaps none is more valued than an individual's First Amendment right to freedom of speech and expression.² The passion this hallowed right engenders is surpassed probably only by the heated debate concerning the parameters of state control of individual expression.³ While some strongly advocate the government's interests in regulating certain types of offensive expression in favor of order and morality,⁴ others recognize the right to this type of expression as the cornerstone of American freedom and democracy.⁵ This fundamental dis-

¹ 493 U.S. 215 (1990).

² See *Kovacs v. Cooper*, 336 U.S. 77, 88-96 (1949) (Justice Reed's majority opinion and Justice Frankfurter's concurring opinion discussing the First Amendment's "preferred position"); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (asserting that the freedom of speech represents an individual right which is superior to others); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds* by *Benton v. Maryland*, 395 U.S. 784 (1969) (Justice Cardozo describing the freedom of speech as the "indispensable condition [] of nearly every other form of freedom").

³ See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36, at 734 n.12 (1978) (noting the "confusion" in the Supreme Court's case law regarding prior restraints); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROBS.* 648, 649 (1955) (stating that "despite an ancient and celebrated history," the doctrine of prior restraints "remains today curiously confused and unformed").

⁴ See, e.g., *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1063 (N.D. Tex. 1986) (noting that zoning and licensing laws operate to preserve the moral character of the majority, while first amendment rights operate to protect the minority from those interests), *aff'd sub nom.* *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part, rev'd in part*, 493 U.S. 215 (1990).

⁵ See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (noting that America's "distaste for censorship—reflecting the natural distaste of a free people—is deep-written into our law"); THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF*

agreement over the appropriate amount of government limitation of expression is at the heart of the debate over the federal courts' interpretations of the Supreme Court's decision in *FW/PBS v. City of Dallas*.⁶

In *FW/PBS*, the Supreme Court addressed the problems that arise when unfettered discretion rests in the hands of state and city officials. Through licensing, zoning, and inspection requirements, administrative officials design ordinances to curtail the availability of licenses to controversial enterprises. More often than not, these ordinances focus on the adult entertainment industry, but they also operate to impose restrictions on a wide variety of controversial expression.⁷ As the Supreme Court has recognized, these licensing schemes, by limiting speech prior to dissemination, can have a chilling effect on speech.⁸

Given the problems associated with licensing schemes, the Supreme Court has adopted exacting procedural requirements to ensure that first amendment rights are not compromised.⁹ Through these procedural rules, all materials are presumptively protected by the First Amendment, and prior restraints on expression are prohibited without either a showing of extreme danger or instituting judicial procedures.¹⁰ In *Freedman v. Maryland*,¹¹ the Court identified three procedural safeguards which must be adhered to in order to find a licensing scheme constitutional: (1) that the state bear the burden of instituting

THE STATES OF THE AMERICAN UNION 886 (Walter Carrington ed., 8th ed. 1927).

⁶ 493 U.S. 215 (1990).

⁷ See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (regulation of commercial advertising of casinos); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (judicial "gag" orders against the press in criminal cases); *Southeastern Promotions*, 420 U.S. 546 (1975) (denying access to a public forum); *Blount v. Rizzi*, 400 U.S. 410 (1971) (denying mail privileges); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961) (licensing requirement in film industry); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (permit requirement to use public places for expressive activities).

⁸ *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); see ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 61 (1975) (stating that while a criminal statute "chills," a prior restraint "freezes"); *infra* notes 44-60 and accompanying text.

⁹ *Speiser v. Randall*, 357 U.S. 513, 517 (1958) (noting that procedural safeguards play an important role in protecting free expression; indeed, they "assume an importance fully as great as the validity of the substantive rule of law to be applied").

¹⁰ *Near v. Minnesota*, 283 U.S. 697, 721-22 (1931).

¹¹ 380 U.S. 51 (1965).

judicial procedures and that it carry the burden of proof in court; (2) that the governing authority decide whether to issue a license within a reasonable time while maintaining the status quo; and (3) that the statute provide for "prompt judicial review."¹² Courts and scholars alike have lauded these procedural requirements as providing perhaps the most effective protection of free expression.¹³

The Supreme Court's decision in *FW/PBS*,¹⁴ however, seriously eroded the procedural requirements first articulated in *Freedman*. In *FW/PBS*, the Court held that the first *Freedman* requirement—that the administrator bear the burden of proof—was unnecessary in the context of licensing schemes.¹⁵ In addition, although Justice O'Connor never explicitly addressed the issue, the opinion contained language that could be construed as modifying *Freedman's* prompt judicial review requirement.¹⁶

In fact, since *FW/PBS* a number of federal courts have siezed on the language in Justice O'Connor's opinion as justifying a less restrictive approach to the requirement. While the Supreme Court has never explicitly defined prompt judicial review, the safeguard had been interpreted in prior decisions to require a judicial *decision* within a specified, brief time.¹⁷ Mere access to judicial review had never been held sufficient to satisfy the requirement.¹⁸ However, it could be argued that,

¹² *Id.* at 58-60.

¹³ *Blount v. Rizzi*, 400 U.S. 410, 416 (1970) (noting that the procedures are "built-in safeguards against curtailment of constitutionally protected expression"); see generally Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

¹⁴ 493 U.S. 215 (1990).

¹⁵ *Id.* at 229-30.

¹⁶ *Id.* at 228-30.

¹⁷ See, e.g., *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 n.22 (1968) (noting that a final judicial decision includes the trial stage); *United States v. Book Bin*, 306 F. Supp. 1023, 1026-28 (N.D. Ga. 1969) (holding a federal statute authorizing the Postmaster General to detain mail unconstitutional because the interim judicial restraint falling short of a final determination of obscenity failed to alleviate the prolonged threat of an adverse administrative decision and thus was "a severe restriction on the exercise of defendant's First Amendment rights"), *aff'd sub nom.* *Blount v. Rizzi*, 400 U.S. 410 (1971).

¹⁸ See, e.g., *TRIBE*, *supra* note 3, § 12-36, at 735 n.9 (stating that "[i]t is clear that it is the decision, and not merely the hearing, which must be prompt"); Monaghan, *supra* note 13, at 534 n.61 (noting that the Supreme Court's earlier jurisprudence required a "speedy resolution of the merits" and describing it as a

based on Justice O'Connor's language in *FW/PBS*, the post-*FW/PBS* Court envisions something less than a judicial determination as satisfying the requirement. For example, in her opinion Justice O'Connor noted that it is the "possibility of," or the provision of "an avenue for," prompt judicial review that is the essence of the safeguard.¹⁹

Not surprisingly, Justice O'Connor's ambiguous references to the requirement has led to a split of interpretation in the circuits. At least three courts of appeals have interpreted prompt judicial review as requiring only access to judicial review within a brief period, rather than a judicial determination on the merits. The Seventh Circuit, for example, has held that the availability of a state's common law writ of certiorari is sufficient to meet the prompt judicial review requirement.²⁰ The First and Fifth Circuits, meanwhile, have held that where an applicant is denied a license, the ordinance need only provide access to a judicial proceeding.²¹

The Fourth, Sixth and Eleventh Circuits, on the other hand, have rejected the interpretation that *Freedman's* prompt judicial review requirement was modified by *FW/PBS*. Accordingly, they have held that ordinances providing only access to judicial review do not sufficiently protect first amendment rights to freedom of expression.²²

This Note argues that the Supreme Court's decision in *FW/PBS* did not modify the prompt judicial review requirement as it was first articulated in *Freedman*. It also argues that the lack of a definitive explanation as to when a judicial determination must be sought creates the danger of further

"salutory limitation"); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 62 (1984) (arguing that prior restraints are especially disfavored when they are imposed "prior to a full and fair hearing in an independent judicial forum to determine whether the challenged expression is constitutionally protected").

¹⁹ *FW/PBS*, 493 U.S. at 227-28.

²⁰ See *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993), cert. denied, 114 S. Ct. 1837 (1994).

²¹ See *Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d 1068, 1070 (5th Cir. 1994); *TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 709 (5th Cir. 1994); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993).

²² See *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 999-1000 (4th Cir. 1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.), cert. denied, 116 S. Ct. 277 (1995).

erosion of *Freedman's* procedural requirements. Accordingly, this Note proposes that, in order to prevent the unwarranted suppression of expression through licensing schemes, the procedural requirement be explicitly interpreted as requiring a judicial determination on the merits, rather than simple access to a judicial forum.

Part I of this Note provides a brief history of first amendment rights in the context in which these disputes often arise—obscenity cases. This Part also outlines the historical development of the doctrine of prior restraint and the procedural requirements designed to curb the inherent dangers associated with them. Finally, this Part examines various courts' interpretations of prompt judicial review in other contexts, including the Supreme Court's decision in *FW/PBS*. Part II discusses the split that has developed in the circuit courts over whether *FW/PBS* did in fact alter the meaning of prompt judicial review. Finally, Part III focuses on the plurality decision of *FW/PBS* and argues that neither the language nor policy considerations in Justice O'Connor's opinion suggest an intent to modify *Freedman's* prompt judicial review requirement. This Part also articulates a proposed definition of prompt judicial review and concludes that, at least in the first amendment context, prompt judicial review requires a judicial determination.

I. THE FIRST AMENDMENT AND THE PRIOR RESTRAINT DOCTRINE IN THE OBSCENITY CONTEXT BEFORE *FW/PBS*

A full understanding of the issues requires an examination of the relevant constitutional guarantees under the First Amendment, the historical development and reasons behind the doctrine of prior restraint, and the development of procedural due process requirements to protect first amendment interests in the context of obscenity.

A. *Constitutional Guarantees under the First Amendment and Obscenity*

The United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . ." ²³ Central to the freedoms protected by the Constitution, the freedom of speech and thought is the "indispensable condition [] of nearly every other form of freedom."²⁴ Accordingly, the Supreme Court affords speech significant protection from suppression. Because of the importance of the right of free expression, even unpopular ideas are usually afforded constitutional protection.²⁵ Persons do not, however, enjoy an absolute right to express all ideas in every context.²⁶ State and city officials often have a strong interest in regulating certain types of expression.²⁷ For example, the Supreme Court has recognized that protected speech can be subject to reasonable time, place and manner restrictions within a public forum.²⁸ In order to prevent wrongful suppression of speech, any regulation on the

²³ U.S. CONST. amend. I.

²⁴ *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

²⁵ *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943) (prohibiting community suppression of ideas merely because they are "unpopular, annoying or distasteful").

²⁶ *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975) (noting that the Supreme Court has consistently rejected the proposition that the First Amendment's protection "includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture") (quoting *Times Film Corp. v. Chicago*, 365 U.S. 43, 46-47 (1961)); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.7(b), at 942-43 (4th ed. 1991) (explaining that while the First Amendment appears to be written in absolute terms, the position that all expression is absolutely protected has never been adopted by the Supreme Court).

²⁷ *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (deeming ordinance responsive to valid government interest of curtailing problems associated with adult theaters); *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (holding city's interest in regulating commercial property outweighed impact of locational restriction); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (stating regulation justified if it furthers important government interest).

²⁸ *See Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (stating that government entities do have limited power to curb speech in public places).

part of the government must be content neutral, narrowly tailored to serve a significant government interest, and leave open alternative opportunities for communication.²⁹

Other types of speech are not afforded any protection under the Constitution. Expression of ideas that pose "a clear and present danger" of producing lawless action or imminent dangers,³⁰ and "fighting words" which "tend to incite an immediate breach of the peace"³¹ are not protected. In addition, in *Roth v. United States*, the Supreme Court explicitly held that obscenity was not constitutionally protected speech.³² There, the Court defined obscene material as that which "to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to prurient interest."³³ This became the leading standard for determining whether speech was obscene and, thus, unprotected.

The Supreme Court further refined the *Roth* test for obscenity in *Miller v. California*.³⁴ After affirming the principle in *Roth* that obscene speech is unprotected, the Court established a three-part test for obscene speech:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³⁵

Although *Miller* was subjected to minor clarifications in later decisions, it continues to be the guideline used to determine whether certain forms of expression are obscene. Each component of the test must be satisfied for the speech to be classified as obscene.³⁶ Consequently, any speech found to be obscene pursuant to the test in *Miller* is not constitutionally protected.

²⁹ *United States v. Grace*, 461 U.S. 171, 177 (1983).

³⁰ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

³¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

³² 354 U.S. 476 (1959), *overruled by Miller v. California*, 413 U.S. 15 (1973).

³³ *Id.* at 489.

³⁴ *Miller*, 413 U.S. at 15.

³⁵ *Id.* at 24 (citing *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)) (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)).

³⁶ *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980).

B. *The Prior Restraint Doctrine Prior to FW/PBS*

According to the Court, obscenity is not within the realm of constitutional protection because the Court considers it to lack any social importance.³⁷ Until such speech or expression is found obscene, however, it must be afforded a degree of protection from censorship or limitation.³⁸ This requirement represents an important tenet embodied in the doctrine of prior restraint.³⁹ Broadly defined, a prior restraint is any "scheme which gives public officials the power to deny use of a forum in advance of its actual expression."⁴⁰ It prohibits authorities from stopping speeches, published works, or other types of expression from being made or delivered until the courts can decide whether the expression is illegal.⁴¹ Once a type of speech or material or undertaking has been determined to be unprotected, prior restraint of the particular activity may occur.⁴² All speech, even that which on its face is patently offensive and lewd, falls within the protective sphere of the doctrine.⁴³ Governmental authorities, therefore, cannot summarily limit such questionable expression.

³⁷ *Roth v. United States*, 354 U.S. 476, 489 (1967).

³⁸ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983) ("[T]he Court begins with the presumption that the first amendment protects all communication and then creates areas of nonprotection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the first amendment.").

³⁹ The prior restraint doctrine has its origins in the English system of licensed printers. *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931). Beginning about the time of the introduction of the printing press, the British civil and ecclesiastical governors by law retained the power of prior approval over all printers. *Id.* These laws expired in 1695, and thereafter freedom from licensing and prior approval became a recognized right in the common law. *Id.* For a more comprehensive study of the English history of press restraint, see FRED S. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776* (1952).

⁴⁰ BLACK'S LAW DICTIONARY 1194 (6th ed. 1990); see Emerson, *supra* note 2, at 648 (explaining that the doctrine of prior restraint "holds that the First Amendment 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").

⁴¹ Emerson, *supra* note 3, at 648-49.

⁴² Emerson, *supra* note 3, at 648-49.

⁴³ *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556-57 (1975).

The impetus behind the doctrine lies in the profound effect prior restraints can have on speech. Subjecting speech to scrutiny can often have "censoring effects," chilling speech before it is expressed.⁴⁴ While all laws regulating speech are to some extent designed to deter persons from engaging in constitutionally unprotected speech,⁴⁵ prior restraints are regarded as a particularly invidious and effective form of restricting speech.⁴⁶ Of major concern in cases of prior restraint is the increased prospect for self-censorship.⁴⁷ Rather than get themselves involved in the regulatory morass associated with obtaining a license, individuals may engage in self-censorship to an extensive and undesirable degree, possibly altering the true message the speaker intended to convey.⁴⁸ The time, effort

⁴⁴ Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 25 (1981). As Blasi has commented:

Once a communication is disseminated it becomes to some extent a fait accompli. The world is a slightly different place; perceptions regarding what is tolerable are altered. Not only can the effects of the speech not be undone, views regarding the desirability of those effects will be influenced by the common, human tendency to find virtue in the status quo.

Id. at 51.

⁴⁵ See *TRIBE*, *supra* note 3, § 12-36, at 734 (noting that "all regulatory systems permit some administrative discretion").

⁴⁶ Commentators often attempt to illustrate the chilling effects of prior restraints by comparing them with the threat of subsequent punishment. They argue that while subsequent punishment may act as a deterrent to some actors, at least the speech may appear in public. See *BICKEL*, *supra* note 8, at 61; *Redish*, *supra* note 18, at 57. Other authors have focused on the litany of disincentives that accompany a legislative body's attempt to enact a criminal statute, noting that Committee deliberation, passage by both houses of the legislature, and the prospect of executive veto all provide obstacles to enacting legislation imposing criminal penalties for speech. See *Blasi*, *supra* note 44, at 59-60; see also *BICKEL*, *supra* note 8, at 61. As a result of these institutional differences, "[t]he Court has indicated a marked preference for the ordinary criminal prosecution as a judicial vehicle for determination of obscenity." *Monaghan*, *supra* note 13, at 543.

⁴⁷ See, e.g., *Pittsburg Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 390 (1973) (Justice Powell stating that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment").

⁴⁸ See *Blasi*, *supra* note 44, at 25. Blasi goes on to note: "Speakers, listeners, and society at large all suffer when the peculiar features of a regulatory scheme have a 'chilling' effect on persons that causes them to forgo protected expression rather than get themselves enmeshed in the scheme." *Blasi*, *supra* note 44, at 24. Even when a speaker perseveres, one may never know in such a case whether "the speaker change[d] a few passages in order to placate the censor or expedite the process of prior approval." *Blasi*, *supra* note 44, at 67.

and money required to vindicate one's right may also contribute to an undesirable amount of self-censorship, especially when contrasted with the ease with which licensing officials are able to deny permits.⁴⁹

In addition to censorship concerns, a licensing system's own bureaucratic dynamics may encourage unwanted or unwarranted regulation.⁵⁰ Since licensing officials are often appointed based on their knowledge and concern over a particular social interest, they can be expected to perform their duties with a predisposition to regulate speech.⁵¹ When they do so they assume the role not of impartial adjudicator, but that of expert, "a role which necessarily gives an administrative agency a narrow and restricted viewpoint."⁵² Others have argued that because regulatory agencies are primarily political bodies, political accountability may encourage officials to regulate in response to "momentary public passions or political preferences that are not widely shared or deeply felt."⁵³

It is generally agreed that such systemic dangers do not plague the functioning of a judicial forum. First, courts do not suffer from the "institutional tunnel vision" inherent in licensing systems.⁵⁴ Courts regularly deal with a wide variety of issues, giving them a broad perspective that no administrative agency can have.⁵⁵ Second, judges are protected in large part from external political pressures by their lifetime tenure.⁵⁶ This insulation encourages impartial decisionmaking and

⁴⁹ See Blasi, *supra* note 44, at 46 (noting that permits are denied with little more than "the stroke of a pen").

⁵⁰ See TRIBE, *supra* note 3, § 12-36, at 734 (noting that the evils of licensing systems are "to some extent an endemic problem").

⁵¹ See Emerson, *supra* note 3, at 659 (stating that "[t]he function of the censor is to censor. He has a professional interest in finding things to suppress."); Redish, *supra* note 18, at 76-77 (noting that "nonjudicial administrative regulators of expression exist for the sole purpose of regulating; this is their *raison d'être*" and thus they "will likely feel the obligation to justify their existence by finding some expression constitutionally subject to regulation").

⁵² Monaghan, *supra* note 13, at 523. Monaghan goes on to note that such a restricted viewpoint "is particularly pernicious in the obscenity area; those constantly exposed to the perverse and the aberrational in literature are quick to find obscenity in all they see." Monaghan, *supra* note 13, at 523.

⁵³ Blasi, *supra* note 44, at 60; see Monaghan, *supra* note 13, at 523 (noting that administrative agencies "are often seen primarily as political organs").

⁵⁴ Monaghan, *supra* note 13, at 523.

⁵⁵ Monaghan, *supra* note 13, at 523.

⁵⁶ Monaghan, *supra* note 13, at 522-23.

makes judges less inclined to be affected by immediate political passions.⁵⁷ In light of these institutional differences, the Supreme Court has repeatedly emphasized that courts alone are competent to decide whether speech is constitutionally protected.⁵⁸

A final concern regarding the concept of prior restraint is the delay caused by licensing and regulatory schemes.⁵⁹ Courts have recognized that the value of various forms of speech depends largely on the immediacy of the idea being expressed.⁶⁰ Consequently, any delay in the presentation of these ideas can detract from the meaning of the particular speech.⁶¹

The Framers of the First Amendment clearly intended to outlaw prior restraint, and the doctrine has never seriously been challenged.⁶² In 1931, in *Near v. Minnesota*, the Supreme Court formally endorsed the doctrine and presented it as a working principle of constitutional law.⁶³ The *Near* case involved a government attempt to stop further publication of a newspaper pursuant to state law.⁶⁴ The newspaper had been found guilty of publishing "malicious, scandalous, and defamatory" materials.⁶⁵ The Supreme Court disallowed the injunc-

⁵⁷ Monaghan, *supra* note 13, at 523; see Emerson, *supra* note 3, at 658 n.34 ("Courts alone are institutionally able consistently to discern, and to apply, the values embodied in the constitutional guarantee of freedom of speech.")

⁵⁸ *Manual Enter. v. Day*, 370 U.S. 478 (1962); see *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965) (stating that because "it is the duty of the censor to censor, there inheres the danger that [a nonjudicial decisionmaker] may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression").

⁵⁹ Blasi, *supra* note 44, at 64 (noting that "the process of adjudication can delay dissemination of the speaker's message to a time when audience interest has waned or opportunities to act upon the speaker's advice have passed").

⁶⁰ Monaghan, *supra* note 13, at 541.

⁶¹ Monaghan, *supra* note 13, at 541.

⁶² THOMAS I. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 504 (1970). In fact, some have argued that the Framers enacted the First Amendment exclusively to protect against prior restraints. See, e.g., *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Justice Holmes stating that "the main purpose of [freedom of speech and freedom of the press] is 'to prevent all such previous restraints upon publications as had been practiced by other governments'").

⁶³ 283 U.S. 697 (1931).

⁶⁴ *Id.* at 702.

⁶⁵ *Id.*

tion and, through Chief Justice Hughes, stated that the prior restraint doctrine was subject to limitation "only in exceptional cases."⁶⁶

More importantly, *Near* established the principle that a system of prior restraint upon first amendment rights bears a heavy presumption against its validity.⁶⁷ At the core of this presumption lies a basic principle deeply rooted in American law: that a free society should punish those few persons who abuse the rights of free speech only after the abuse rather than "throttle [the abusers] and all others beforehand."⁶⁸

The first application of the prior restraint doctrine to an obscenity case occurred in *Kingsley Books, Inc. v. Brown*.⁶⁹ There the Justices all agreed, contrary to *Near*, that the prior restraint doctrine did apply to obscenity cases. The Court disagreed, however, on the construction of the facts and thus left the situation unresolved.⁷⁰ In 1961 the Court, facing the same issue in *Times Film Corp. v. City of Chicago*,⁷¹ held in a five to four decision that the prior restraint doctrine did not require "complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."⁷² Justice Clark, writing for the majority, limited the scope of the decision to its facts, stating: "[W]e are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record."⁷³ The four dissenters, led by Chief Justice Warren, vigorously argued that the ordinance was a prior restraint and created a system of licensing and "censorship in its purest and most far-reaching form."⁷⁴

⁶⁶ *Id.* at 716. In his opinion, Chief Justice Hughes noted several "exceptional" cases where prior restraints may be used: (1) restraints during wartime to prevent disclosure of military deployments or obstruction of military effort; (2) enforcement of obscenity laws; and (3) enforcement of laws against incitement to acts of violence or revolution. *Id.*

⁶⁷ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

⁶⁸ *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

⁶⁹ 354 U.S. 436 (1957).

⁷⁰ The case dealt with a complex regulation which was construed by some justices to be more like a prior restraint, and by others to be more like subsequent punishment for commission of a crime.

⁷¹ 365 U.S. 43 (1961).

⁷² *Id.* at 46.

⁷³ *Id.* at 50.

⁷⁴ *Id.* at 55 (Warren, C.J., dissenting).

Shortly thereafter, the Supreme Court decided another movie censorship case and revived the prior restraint doctrine by melding it with notions of procedural due process. In *Freedman v. Maryland*,⁷⁵ the Court struck down a state movie censorship statute for lack of procedural safeguards protecting expression. Justice Brennan noted that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of the censorship system."⁷⁶ The requirements formulated there and applied elsewhere include: (1) placing on the censor the burden of proving that the film is unprotected expression; (2) a procedure requiring the censor to either issue a license or go to court within a specified brief period; and (3) prompt and final judicial review of administrative decisions.⁷⁷

In subsequent applications of the *Freedman* test, the Court demonstrated great suspicion for any system of prior restraint. The Supreme Court has employed *Freedman* to protect a wide variety of expression, including: the granting of licenses to businesses,⁷⁸ licenses to put on theatrical performances,⁷⁹ licenses for marches and demonstrations,⁸⁰ and licenses to solicit at airports.⁸¹ More, specifically, the Court has differentiated and struck down two types of prior restraint systems: schemes that allow unbridled discretion on the part of a governmental official or agency,⁸² and schemes that fail to limit the time within which the decision maker must decide whether

⁷⁵ 380 U.S. 51 (1965).

⁷⁶ *Id.* at 58.

⁷⁷ *Id.* at 58-60.

⁷⁸ *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

⁷⁹ *Southeastern Promotion Ltd., v. Conrad*, 420 U.S. 546 (1975) (holding that an administrative body charged with managing a city auditorium had too much discretion when it prevented the production of the musical *Hair*).

⁸⁰ *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147 (1969) (holding a statute authorizing the denial of the right to march on Easter Sunday unconstitutional because it gave too much discretion to an administrative official without requiring immediate review by the judiciary).

⁸¹ *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982) (holding ordinance seeking to keep the Hare Krishna from soliciting in the Dallas/Ft. Worth Airport unconstitutional).

⁸² *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (holding unconstitutional city ordinance giving mayor unbridled discretion over whether to grant annual permits for newsracks); *Shuttlesworth*, 394 U.S. 147 (1969); *Freedman v. Maryland*, 380 U.S. 51 (1965).

to issue a license.⁸³ In both types of prior restraint systems, strict conformity with the procedural requirements of *Freedman* has been required.

Moreover, the Supreme Court's treatment of the prompt judicial review requirement after *Freedman* indicates that the Court paid heed to *Freedman's* express requirement of a judicial determination in a timely fashion.⁸⁴ In *Blount v. Rizzi*,⁸⁵ for example, the Court struck a Chicago film ordinance that permitted the General Counsel of the U.S. Postal Service to begin administrative proceedings to withhold mail from any person upon evidence satisfactory to the Postmaster General that the person was using the mails to distribute obscene matter.⁸⁶ Any person whose mail was withheld could obtain judicial review on the question of the obscenity of the material only after lengthy administrative proceedings, and "then only by [their] own initiative."⁸⁷ As the Court saw it, the fatal flaw in this procedure was that it failed "to require that the Postmaster General seek to obtain a prompt judicial determination of the obscenity of the material."⁸⁸

In 1975, the Court struck down a similar ordinance in *Southeastern Promotions v. Conrad*.⁸⁹ In *Southeastern Promotions*, an administrative board responsible for managing a city theater refused to allow the production of the musical *Hair* on the grounds that it was "obscene."⁹⁰ The Court struck down the statute for failing to satisfy the procedural safeguards of *Freedman*.⁹¹ In particular, the Court held that the board's

⁸³ See, e.g., *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (holding invalid statute restraining speech for indefinite period).

⁸⁴ In *Freedman*, the Court stated that "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to . . . the shortest fixed period compatible with sound judicial resolution." 380 U.S. at 59. In explaining the need for a judicial determination, the Court quoted from *Speiser v. Randall*, 357 U.S. 513, 525 (1958): "[Since] the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools"

⁸⁵ 400 U.S. 410 (1971).

⁸⁶ *Id.* at 413-14.

⁸⁷ *Id.* at 421.

⁸⁸ *Id.* at 418.

⁸⁹ 420 U.S. 546 (1975).

⁹⁰ *Id.* at 548.

⁹¹ *Id.* at 562.

ensorship system did not adequately provide for prompt judicial review where a judicial decision on the merits could not be obtained for five months.⁹²

In *United States v. Thirty-Seven Photographs*,⁹³ the Court considered the constitutionality of a federal customs law after customs agents seized photographs from an individual returning from vacation abroad.⁹⁴ As enacted, the statute did not contain any of the requisite time limits mandated in *Freedman*, *Blount* or *Southeastern Promotions*.⁹⁵ The Court declared the statute facially invalid, and held that for purposes of examining goods imported into the United States, forfeiture proceedings must be commenced within fourteen days of seizure of the items.⁹⁶ In assessing judicial review, the Court noted that delays in a "judicial determination" as long as three months could not be sanctioned, and thus held that the statute must provide for a judicial decision within sixty days for it be constitutionality valid.⁹⁷

Thus, in the decisions since *Freedman*, the Supreme Court had demanded strict conformity with *Freedman's* procedural requirements. In doing so, the Supreme Court recognized the procedural aspect of the doctrine of prior restraint to be one of the most important legal impediments to official censorship of controversial expression.⁹⁸ By recognizing the continued viability of the doctrine of prior restraint and applying it consistently, the Court, at least until its decision in *FW/PBS*, had indicated its agreement with the principle first articulated in *Near*—that expressive materials are presumed to be protected until it is demonstrated otherwise in a judicial proceeding.

⁹² *Id.* at 561-62.

⁹³ 402 U.S. 363 (1971).

⁹⁴ *Id.* at 365-66.

⁹⁵ See 19 U.S.C. § 1305(a) (1988).

⁹⁶ *Thirty-Seven Photographs*, 402 U.S. at 373-74.

⁹⁷ *Id.* at 374.

⁹⁸ See, e.g., *Schad v. Mount Ephraim*, 452 U.S. 61, 79 (1981) (Blackmun, J., concurring) (noting that the procedural requirements of *Freedman* are crucial in the protection they afford minorities against the "standardization of ideas" by dominant political and minority groups); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971) (reiterating the value of the *Freedman* requirements); *TRIBE*, *supra* note 3, § 12-35, at 733-34 (stating that the problem of excessive administrative discretion is a problem "most consistently dealt with by demanding strict procedural safeguards as a precondition for any valid prior restraint of activities linked with the First Amendment").

C. FW/PBS v. Dallas

In *FW/PBS v. City of Dallas*, the Supreme Court once again addressed the regulation of sexually oriented businesses. In *FW/PBS*, three groups brought suit challenging the constitutionality of an ordinance passed by the Dallas City Council.⁹⁹ The ordinance regulated sexually oriented businesses through a zoning and licensing scheme that was targeted at reducing the secondary effects of urban blight and criminal activity.¹⁰⁰ Under the ordinance, businesses could not operate without obtaining a license.¹⁰¹ In addition, existing businesses were required to obtain licenses and submit to inspection when they relocated to a new building, the use of a structure changed, or the ownership of the business changed.¹⁰² The ordinance required the Chief of Police to approve license issuance within thirty days after receipt of the application,¹⁰³ but licenses could not be issued without prior approval by health, fire, and building officials.¹⁰⁴ The ordinance provided no time limits for inspections,¹⁰⁵ nor did it offer a means of recourse for applicants whose licenses had not been issued within the thirty day time period.¹⁰⁶

Suit was brought in the Northern District of Texas alleging that the ordinance lacked the requisite procedural safeguards mandated by *Freedman*.¹⁰⁷ The district court upheld the vast majority of the ordinance, objecting only to the ordinance's vesting too much discretion in the Chief of Police.¹⁰⁸ The Court of Appeals for the Fifth Circuit affirmed,¹⁰⁹ concluding that the *Freedman* safeguards did not apply because the ordinance, like that in *City of Renton v.*

⁹⁹ *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990).

¹⁰⁰ *Id.* at 220.

¹⁰¹ *Id.* at 221.

¹⁰² *Id.* at 227.

¹⁰³ DALLAS, TEX., CITY CODE, ch. 41-A-5(a)(8) (1986) (repealed).

¹⁰⁴ *Id.*

¹⁰⁵ *FW/PBS*, 493 U.S. at 218.

¹⁰⁶ *Id.*

¹⁰⁷ *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986), *aff'd sub nom. FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part, rev'd in part*, 493 U.S. 215 (1990).

¹⁰⁸ *Id.*

¹⁰⁹ *FW/PBS*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part, rev'd in part*, 493 U.S. 215 (1990).

Playtime Theatres, Inc.,¹¹⁰ regulated only the secondary effects of sexually oriented businesses.¹¹¹ Accordingly, the Fifth Circuit held that the only relevant question was whether the regulation was a content-neutral time, place and manner restriction.¹¹²

The Supreme Court granted certiorari and reversed.¹¹³ In a plurality opinion authored by Justice O'Connor, the Court found that the licensing scheme did not provide adequate procedural safeguards under the test established in *Freedman*.¹¹⁴ The plurality concluded, however, that the first prong of the *Freedman* test—that the censor bear the burden of proof once in court—is not required in the context of licensing schemes.¹¹⁵ Although Justice O'Connor recognized that the Court had never before variously applied the *Freedman* requirements, she noted two distinguishing factors in determining that the censor need not bear the burden of proof in *FW/PBS*. First, the censor in *Freedman* engaged in direct censorship of expressive material.¹¹⁶ This type of censorial action is presumptively invalid because it passes judgment on the particular content of speech,¹¹⁷ and thus merits the censor bearing the burden of proof.¹¹⁸ In contrast, in *FW/PBS* the city did not review the content of any particular speech;¹¹⁹ rather, it only examined the applicant's general qualifications for a license, a "ministerial action that is not presumptively invalid."¹²⁰

¹¹⁰ 475 U.S. 41 (1986). Many ordinances that attempt to regulate adult businesses do so through zoning. In *City of Renton*, the Court held that a municipal zoning ordinance prohibiting adult movie theaters from being within 1000 feet of a residential area, church, park or school did not violate the First Amendment. The majority stated that the ordinance was aimed at theaters and their secondary effects, and not at the content of any particular expression or speech. *Id.* at 51.

¹¹¹ *FW/PBS*, 837 F.2d 1298 (5th Cir. 1988).

¹¹² *Id.*

¹¹³ *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990).

¹¹⁴ *Id.* (O'Connor, J., plurality opinion joined by Stevens and Kennedy, JJ.).

¹¹⁵ *Id.* at 229-30.

¹¹⁶ *Id.* at 229.

¹¹⁷ *Id.*

¹¹⁸ *FW/PBS*, 493 U.S. at 229.

¹¹⁹ *Id.*

¹²⁰ *Id.*

Second, the plurality noted that the claimant in *FW/PBS*, unlike the claimant in *Freedman*, would have "every incentive" to pursue a license denial through the courts.¹²¹ Because the financial stake in *Freedman* was minimal, the Court reasoned that the distributor lacked any financial incentive to challenge the legislative authority's decision.¹²² Having no incentive to challenge, the censor's decision resulted in the total suppression of speech.¹²³ In *FW/PBS*, however, the license applicants had a strong stake in the outcome since a license was required to operate a business.¹²⁴ Based on the license applicant's "strong incentive" to challenge the ordinance, the Court reasoned that there was little reason to require the licensor to bear the burden of going to court to effect the license denial.¹²⁵

Despite dropping the first *Freedman* requirement, the plurality reversed on the grounds that the scheme did not limit restraint prior to judicial review to a "specified brief period" and it failed to offer an applicant "expeditious judicial review" of an adverse decision.¹²⁶ In discussing the remaining two requirements, the Court noted that while licensing schemes do not present the same "grave dangers" of direct censorship, a licensing scheme creates the possibility that speech will be infringed upon unless there are adequate safeguards ensuring prompt review.¹²⁷ "Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion."¹²⁸

¹²¹ *Id.* at 229-30.

¹²² *Id.*

¹²³ *FW/PBS*, 493 U.S. at 229.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 226-27. Justice O'Connor's decision to drop the requirement that the censor bear the burden of proof in the context of licensing schemes has drawn extensive criticism. Most of the criticism centers around the Court's summary dismissal of the practical obstacles a denied license applicant faces in litigating a claim, see Grace F. Woods, *Constitutional Law: Procedural Safeguards Required in First Amendment Prior Restraint Context*, 42 FLA. L. REV. 399 (1990), and the perceived negative effect on the principle that a prior restraint bears a heavy presumption against its validity. See Jordan D. Oelbaum, *FW/PBS v. Dallas: The Severance of the Freedman Rule*, 1990 DET. C.L. REV. 1119.

¹²⁷ *FW/PBS*, 493 U.S. at 228.

¹²⁸ *Id.* at 227.

Accordingly, the Court found the two remaining safeguards—requiring a specified brief period of administrative review and prompt judicial review—to be “essential.”¹²⁹

The plurality failed, however, to offer any further elucidation on the meaning of prompt judicial review other than its vague directive that “[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of speech.”¹³⁰ Justice O’Connor did, however, mention the prompt judicial review requirement three times in her opinion. In each case Justice O’Connor referred to the safeguard as requiring “the possibility of,” or “an avenue for,” or “availability of” prompt judicial review.¹³¹ Other than the above express language, the plurality failed to further define or discuss the meaning of prompt judicial review.¹³²

II. THE SPLIT IN THE CIRCUITS SINCE *FW/PBS*

The ambiguous language in Justice O’Connor’s opinion has created a split in the circuits over the meaning and scope of prompt judicial review. The First, Fifth and Seventh Circuits have all interpreted *FW/PBS* to require that a statute provide only access to judicial review.¹³³ The Fourth, Sixth and Elev-

¹²⁹ *Id.* at 228.

¹³⁰ *Id.*

¹³¹ *Id.* at 228-30.

¹³² In a separate concurrence authored by Justice Brennan, three other justices concluded that all three of the *Freedman* safeguards applied to invalidate the scheme. *FW/PBS*, 493 U.S. at 239. Justice Brennan’s concurrence alluded to the variety of contexts in which the Court had previously applied the *Freedman* safeguards, noting that never before had the Court suggested that the *Freedman* requirements might vary with the particular facts of each prior restraint. *Id.* Justice Brennan found the ordinance in *FW/PBS* indistinguishable from that in *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). *FW/PBS*, 493 U.S. at 241. As in *FW/PBS*, the censor in *Riley* reviewed the entire business rather than the particular content of the speech. *Id.* Yet in *Riley*, the Court placed the burden of proof on the censor and not on the license applicant. *Id.* With regard to prompt judicial review, Brennan’s only reference to that requirement was that a “prompt judicial determination must be available.” *Id.* at 239.

In dissent, Justice White and Chief Justice Rehnquist interpreted the licensing scheme as a content-neutral time, place and manner restriction, and thus held that none of the procedural safeguards were needed.

¹³³ See *Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d 1068, 1070 (5th

enth Circuits, on the other hand, have explicitly rejected any modification of *FW/PBS* and maintain that a judicial determination is necessary to satisfy the requirement.¹³⁴ A discussion of these interpretations follows.

A. *The First, Fifth and Seventh Circuits' Interpretation of FW/PBS and Prompt Judicial Review*

The First Circuit has determined that providing access to a judicial proceeding is all that is required by *FW/PBS* and *Freedman*. In *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority* ("MBTA"),¹³⁵ plaintiffs challenged the constitutionality of MBTA guidelines prohibiting non-commercial expressive activity in designated areas of some Boston subway stations and requiring prior authorization to engage in such activity in other stations.¹³⁶ The district court held the complete ban on expressive activities and the prior authorization requirements invalid.¹³⁷ The U.S. Court of Appeals for the First Circuit agreed with the district court that the ban on expressive activity in designated areas was overbroad, but disagreed with the district court's finding regarding the prior authorization requirement.¹³⁸ In upholding the latter, the First Circuit noted that even though the prior restraint in this case was content neutral, the city regulations must contain the two post-*FW/PBS* procedural safeguards;¹³⁹ namely, they must

Cir. 1994); *TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 709 (5th Cir. 1994); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993).

¹³⁴ See 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 58 F.3d 988, 999-1000 (4th Cir. 1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir. 1995).

¹³⁵ 984 F.2d 1319 (1st Cir. 1993).

¹³⁶ *Id.* at 1321-22. The conduct prohibited or requiring authorization included "the following activities for political or non-profit purposes . . . : solicitation of signatures; distribution of printed materials; handshaking or greeting individual transit patrons or members of the public; or publicly addressing transit patrons at a noise level greater than 85 decibels." *Id.* at 1321. The compelling governmental interest was public safety. *Id.* at 1322.

¹³⁷ *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 783 F. Supp. 1500, 1503-04 (D. Mass. 1991).

¹³⁸ *Jews for Jesus*, 984 F.2d at 1327.

¹³⁹ *Id.* It is interesting that the Court failed even to acknowledge the prior existence of the third *Freedman* requirement, that the censor bear the burden of proof. The rationale for eliminating that requirement surely does not apply here.

"limit the time for issuing authorization and . . . permit prompt judicial review."¹⁴⁰ Because the MBTA responded to each applicant's request at the time it was made, there was no question that the regulations satisfied the specified brief period for issuing a decision requirement.¹⁴¹ In interpreting prompt judicial review, however, the court summarily concluded that because the regulations provided that an applicant could appeal a denial of authorization, and that because Massachusetts law entitled a claimant to a hearing by filing an appeal, the procedural regulations satisfied the prompt judicial review requirement.¹⁴²

Subsequent to the First Circuit's decision in *Jews for Jesus*, the Fifth Circuit addressed the constitutionality of a similar ordinance in *TK's Video, Inc. v. Denton County, Texas*.¹⁴³ In *TK's Video*, an adult book and video store brought an action challenging the county's licensing requirements for adult businesses.¹⁴⁴ The district court held that the county ordinance provided adequate procedural safeguards under *Freedman* and *FW/PBS*.¹⁴⁵ The Court of Appeals for the Fifth Circuit reversed in part because the ordinance authorized officials to shut down existing businesses pending annual review of their licenses and thus violated the *Freedman* mandate that the regulating agency maintain the status quo pending judicial review.¹⁴⁶

Individuals and groups in subway stations seeking signatures, passing out leaflets and publicly addressing patrons hardly have the financial stake that would prompt them to litigate suppression of their activity, thus warranting elimination of the third requirement. Indeed, the fact that the statute regulates only "noncommercial" activity suggests that they would have little in the way of incentive to litigate. Such apparent misapplication of *FW/PBS* speaks to the uncertainty created by the Court's varying views on the applicability of the *Freedman* requirements.

¹⁴⁰ *Id.* The court cited no authority or rationale in concluding that the regulation need only "permit" judicial review other than summarily listing the requirements as being "construed" that way in *FW/PBS*.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 24 F.3d 705 (5th Cir. 1994).

¹⁴⁴ *Id.* at 707.

¹⁴⁵ *TK's Video, Inc. v. Denton County, Tex.*, 830 F. Supp. 335 (E.D. Tex. 1993).

¹⁴⁶ *TK's Video*, 24 F.3d at 707-08. The court rejected, however, TK's argument that the ordinance should provide for an automatic stay pending appeal of an administrative decision denying an original application for a license. *Id.* at 709-09. The court noted that maintaining the status quo means little in that context, unlike in the case of already existing businesses, because there is "nothing to stay

The court upheld, however, the ordinance's provisions regarding specified brief time periods for issuance and judicial review.¹⁴⁷ In doing so, the court grappled with the question of whether a "specified, brief period" includes completion of judicial review. Under the statute, a rejected license applicant could seek judicial review within thirty days before the order became final.¹⁴⁸ However, there were no provisions for a judicial determination. Despite the "uncertainty in the language of Justice O'Connor's opinion" and language to the contrary in Justice Brennan's opinion,¹⁴⁹ the Fifth Circuit held that *FW/PBS* requires only that the state provide an applicant reasonably brief administrative resolution of a claim and access to the courts within a brief period.¹⁵⁰ The court additionally noted that to interpret a brief time period as requiring that all "judicial avenues [be] exhausted would be an oxymoron."¹⁵¹ Accordingly, because the ordinance provided a license applicant with a prompt judicial hearing in the form of thirty days to appeal to a district court, the availability of prompt judicial review satisfied the requirements of *FW/PBS* and *Freedman*.¹⁵²

Following its decision in *TK's Video*, the Fifth Circuit reaffirmed its interpretation of the *FW/PBS* procedural requirements in *Grand Brittain, Inc. v. City of Amarillo, Texas*.¹⁵³ There, the court applied the *Freedman* requirements to the revocation of an existing business' license. Despite striking down portions of a city ordinance for failing to maintain the status quo,¹⁵⁴ the court upheld the ordinance's provisions for judicial review.¹⁵⁵ As in the *TK's Video* case, the statute provided that an applicant could appeal to a district court follow-

except the denial of a license." *Id.* The court reasoned that this was not "unduly restrictive [] given the availability of expeditious judicial review." *Id.* at 709.

¹⁴⁷ *Id.* at 708. Based on precedent in other jurisdictions, the court found that 60 days was a sufficiently reasonable period of time in which to render an administrative decision.

¹⁴⁸ *Id.* at 709.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *TK's Video*, 24 F.3d at 709.

¹⁵² *Id.*

¹⁵³ 27 F.3d 1068 (5th Cir. 1994).

¹⁵⁴ *Id.* at 1069-70.

¹⁵⁵ *Id.* at 1070-71.

ing revocation, but the ordinance contained no provision for a swift judicial decision.¹⁵⁶ The court again held that this was sufficient to satisfy *FW/PBS* and *Freedman*.¹⁵⁷ In doing so, the court noted the discrepancy between Justice Brennan's language in *Freedman* and Justice O'Connor's language in *FW/PBS*. While recognizing that in *Freedman* Justice Brennan had "stated that a challenged ordinance must guarantee a specified brief period 'in advance of a final judicial determination on the merits,'" the Fifth Circuit argued that Justice O'Connor "variously recast this standard as a specified brief period 'prior to judicial review' and as a specified brief period 'prior to the issuance of a license.'"¹⁵⁸ The court again concluded, based on this language, that *FW/PBS* compels "only access to the courts within a specified brief period."¹⁵⁹

In *Graff v. City of Chicago*,¹⁶⁰ the Seventh Circuit advanced an even more restrictive view of the requirement. In *Graff*, a news vendor brought an action challenging the constitutionality of an Illinois ordinance governing the licensing of city newsstands.¹⁶¹ Under the statute, within a specified period after denial of a permit, the aggrieved party could appeal to the commissioner of transportation.¹⁶² Unlike all of the other statutes analyzed here, however, the ordinance contained no provision at all concerning the role of the judiciary in reviewing a commissioner's denial of a permit. Thus, the fate of the news vendor's livelihood was left "solely in the hands of the commissioner of transportation."¹⁶³

In a sharply divided en banc court, *Graff* generated a majority opinion, two concurring opinions and a dissenting opinion. In holding that the procedural safeguards were sufficient despite the lack of any explicit provision authorizing judicial review, the majority found the availability of the state's common law writ of certiorari sufficient to provide an aggrieved party with an adequate means of judicial review.¹⁶⁴ While

¹⁵⁶ *Id.* at 1070.

¹⁵⁷ *Id.* at 1071.

¹⁵⁸ *Grand Britain*, 27 F.3d at 1070.

¹⁵⁹ *Id.*

¹⁶⁰ 9 F.3d 1309 (7th Cir. 1993).

¹⁶¹ *Id.* at 1311.

¹⁶² *Id.*

¹⁶³ *Id.* at 1312.

¹⁶⁴ *Id.* at 1325. The court began its discussion by noting that "it is not clear

recognizing that the Supreme Court in other cases had "seemed to require an ordinance to provide for judicial review, even when the writ of common law certiorari was available,"¹⁶⁵ the court stated that the Supreme Court "has not been presented directly with the argument that certiorari was in itself sufficient review."¹⁶⁶ Accordingly, the majority felt

why *Freedman*" requires that a statute explicitly provide for prompt judicial review. *Id.* at 1324. The court continued:

A person always has a judicial forum when his speech is allegedly infringed. Neither Graff nor the City argues that the judiciary cannot hear challenges to this ordinance simply because it does not have a specific provision designating a review process. The lack of these additional procedural safeguards does not in any way increase the threat of censorship.

Id. As argued *infra* notes 166, 232-34 and accompanying text, this view misses the entire point of providing procedural safeguards in the context of licensing schemes. The issue is not jurisdictional; rather, it is the length of time government officials can properly restrain speech during the interim period between a final administrative ruling and the onset (or completion) of review by the judiciary.

¹⁶⁵ *Graff*, 9 F.3d at 1325.

¹⁶⁶ *Id.* It is worth noting that Illinois law posed a unique problem for the court, providing it with added incentive to diverge from Supreme Court precedent in this area. According to the court, under Illinois law municipal officials in "home rule units" were not authorized to provide for judicial review of administrative agency decisions. *Id.* at 1324. In particular, the Seventh Circuit noted that the Supreme Court of Illinois had rejected municipal attempts to determine the judiciary's jurisdiction to review administrative decisions or to review "the procedure to be followed in seeking judicial review of those determinations." *Id.* (quoting *Nowicki v. Evanston Fair Hous. Review Bd.*, 338 N.E.2d 186, 187 (1975)). Accordingly, the Seventh Circuit stated that the City of Chicago "lacks the separate authority to make available" prompt judicial review. *Id.* at 1325. This is a rather spurious justification for ignoring Supreme Court precedent, however. A municipality's lack of authority to set forth expedited judicial procedures in no way limits the judiciary's authority to review the constitutionality of the administrative scheme. Indeed, the Supremacy Clause of the U.S. Constitution dictates that such state law provisions must give way should they come into conflict with constitutional mandates. See *Zwickler v. Koota*, 398 U.S. 241, 247 (1967).

In *Chesapeake B&M, Inc. v. Harford County, Md.*, 831 F. Supp. 1241 (D. Md. 1993), *modified*, 58 F.3d 1005 (4th Cir. 1995), the court reasoned similarly when it upheld a county ordinance's provision for judicial review despite the lack of any set time limit for review by the judiciary. In denying relief to the plaintiff, the court noted that under the Maryland Constitution it did not have the power to alter the procedures of the state judicial system unless the plaintiff named the State of Maryland, as opposed to a particular county, as a party to the suit. *Id.* at 1251 n.3. Had the plaintiff in that suit properly named the State of Maryland as a party defendant, the court implied that it might have decided the case differently because it could then properly address the constitutionality of Maryland's judicial procedures in this context. *Id.* In doing so, the *Chesapeake B&M* court implicitly recognized the impropriety of the Seventh Circuit's conclusion that it lacked the authority to address the constitutionality of that state's judicial procedures.

free to depart from Supreme Court precedent requiring an explicit provision for prompt judicial review because state procedural law provided an aggrieved applicant with adequate means of judicial review through a procedure that the state "makes . . . the current common practice."¹⁶⁷ Accordingly, the court held the review procedures adequate to protect the interests of the license applicant.¹⁶⁸

B. *The Fourth, Sixth and Eleventh Circuits' Interpretation of FW/PBS and Prompt Judicial Review*

In *East Brooks Books, Inc. v. City of Memphis*, the Sixth Circuit interpreted the procedural safeguards of *FW/PBS* quite differently.¹⁶⁹ In *East Brooks*, the court considered the constitutionality of a Memphis ordinance that regulated sexually oriented businesses through a licensing and zoning scheme.¹⁷⁰ The statute's only provision for judicial appeal of an adverse decision was through Tennessee's common law writ of certiorari.¹⁷¹ Although Tennessee law authorized review of administrative decisions through the state vehicle of certiorari, the court found that there was no guarantee of prompt judicial review because no time limits were placed on the administrative body's compliance with the many state procedural requirements associated with the writ.¹⁷² The court found particularly troublesome the fact that even if a claimant were to comply with the procedural requirements, the appeal could not be heard for at least ninety days, and even that time frame was not guaranteed.¹⁷³ Thus, the court noted that while, under state law, this type of appeal takes precedence over other matters, an applicant could still face a minimum of five months delay for judicial review.¹⁷⁴ Based on the Supreme

¹⁶⁷ *Graff*, 9 F.3d at 1325.

¹⁶⁸ *Id.*

¹⁶⁹ 48 F.3d 220 (6th Cir. 1995).

¹⁷⁰ *Id.* at 222.

¹⁷¹ *Id.* at 223.

¹⁷² *Id.* at 224-25.

¹⁷³ *Id.* at 225.

¹⁷⁴ *East Brooks Books*, 48 F.3d at 225.

Court's holdings in *Southeastern Promotions* and *FW/PBS*, the court found these potential delays of up to five months to be an impermissible prior restraint on speech.¹⁷⁵

The Eleventh Circuit also interpreted prompt judicial review to require a prompt judicial determination. In *Redner v. Dean*,¹⁷⁶ the court considered the constitutionality of a Florida ordinance that regulated adult entertainment establishments. While the case did not directly pose a prior restraint problem,¹⁷⁷ the court held that the ordinance was facially invalid in that it imposed a prior restraint without providing for adequate time limits on the decisionmaker or prompt judicial review.¹⁷⁸ In holding the ordinance's provisions for prompt judicial review constitutionally inadequate, the court noted that in *Southeastern Promotions*, a federal district court had held hearings but ultimately denied the claimant's motion for a preliminary injunction.¹⁷⁹ The Eleventh Circuit found persuasive the fact that the Supreme Court held that the system in *Southeastern Promotions* did not provide an adequate means of judicial review, even though the district court in that case had actually heard the merits of the action for an injunction within five months.¹⁸⁰ Accordingly, the Eleventh Circuit concluded that "[t]he Court thus implied that a state's statutory or common-law mechanisms for review of administrative decisions does not satisfy the procedural requirements of *Freedman*."¹⁸¹

¹⁷⁵ *Id.*

¹⁷⁶ 29 F.3d 1495 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1697 (1995).

¹⁷⁷ Unlike all of the other cases discussed in this Note, the claimant in *Redner* sought federal habeas corpus relief after he was convicted of violating the Florida ordinance.

¹⁷⁸ *Redner*, 29 F.3d at 1500-02.

¹⁷⁹ *Id.* at 1502 n.9.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* In addition, the court in *Redner* noted the apparent discrepancy between its analysis and that advanced in *Graff*. The court avoided, however, criticizing that decision, instead simply concluding that "our Circuit seems to adhere to the [judicial determination] school of thought." *Id.* The court cited and briefly discussed two other Eleventh Circuit cases in which it had held an ordinance's provisions for judicial review unconstitutional, but conceded that "[i]n neither case [] did we directly confront whether Florida's statutory or common-law means of judicial review were adequate procedural safeguards." *Id.* The court thus missed a golden opportunity to articulate its reasons for requiring a prompt judicial determination and expeditious judicial procedures to effect it.

The most recent and thorough interpretation of the prompt judicial review requirement came in the Fourth Circuit's decision in *11126 Baltimore Boulevard, Inc. v. Prince George's County, Maryland*.¹⁸² In *11126 Baltimore Boulevard*, the court struck a county zoning ordinance that regulated adult bookstores on the ground that it lacked the procedural safeguards identified in *Freedman* and *FW/PBS*.¹⁸³ The statute provided a period of 150 days for a final administrative decision.¹⁸⁴ In addition, although the ordinance itself failed to provide for judicial review, an administrative law judge for the Circuit Court of Prince County issued an administrative order requiring a limited form of judicial review. The order provided that each case be assigned to a specific judge who would hear oral argument within five days after the date for filing a reply memorandum under Maryland Rules, and required the judge to render a decision within five days after the conclusion of oral argument.¹⁸⁵

Based on the administrative order, the County asserted that prompt judicial review was available to the aggrieved party because an applicant denied a license could seek judicial review of the denial of an application immediately after an administrative decision was rendered.¹⁸⁵ According to the County, based on Justice O'Connor's express language in *FW/PBS*, this was all that the Supreme Court's decision in *FW/PBS* required.¹⁸⁷

The Court of Appeals for the Fourth Circuit, however, reversed, holding that the ordinance failed to satisfy the constitutionally mandated safeguards of *FW/PBS*.¹⁸³ In addition to

¹⁸² 58 F.3d 988 (4th Cir. 1995).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 992.

¹⁸⁵ *Id.* at 992-93.

¹⁸⁵ *Id.* at 998.

¹⁸⁷ *11126 Baltimore Blvd.*, 58 F.3d at 998.

¹⁸³ *Id.* at 1000. As an initial matter, the court concluded that, based on the precedent of other jurisdictions, 150 days was not the shortest time period in which an administrative decision reasonably could be completed. *Id.* at 1001.

determining that the date from application to judicial resolution was not a "specified brief period,"¹⁸⁹ the court discussed in detail the ordinance's provisions for judicial review.

Initially, the court noted that under Maryland law 110 days would typically be required to obtain a judicial ruling after a final administrative denial.¹⁹⁰ When adding that period to the potential 150-day period for rendering a final administrative decision, an applicant could face up to an eight and one-half month delay before being granted a license.¹⁹¹ Thus, the court concluded that because the ordinance itself failed to provide any explicit means of judicial review and Maryland procedures only provided for a three and one-half month time period to reach a judicial decision, the ordinance failed to provide for a prompt judicial determination on the merits.¹⁹²

In addition, the court addressed in detail the county's argument that *FW/PBS's* plurality opinion modified *Freedman's* prompt judicial review requirement.¹⁹³ The Fourth Circuit rejected the county's argument outright. First, the court noted that, other than Justice O'Connor's language asserting that a statute must provide for the "possibility of," or the provision of "an avenue for," prompt judicial review, she made no explicit or, for that matter, implicit allusions to modifying the requirement.¹⁹⁴ Second, the court noted that the Supreme Court, in applying the prompt judicial review requirement since *Freedman*, has used the phrases "prompt judicial review" and "prompt judicial decision" interchangeably.¹⁹⁵ Given this, the court reasoned that it was unreasonable to construe Justice O'Connor's statements that there must be "an avenue for" or "the possibility of" prompt judicial review to mean that mere access to a judicial forum satisfies *Freedman*.¹⁹⁶ Finally, the court noted that while the licensing scheme in *FW/PBS* did not explicitly provide for judicial re-

¹⁸⁹ *Id.* at 997-98. The court compared the Maryland ordinance's 150-day time limit for completing administrative review to the time limitations imposed in other jurisdictions.

¹⁹⁰ *Id.* at 998.

¹⁹¹ *Id.*

¹⁹² *11126 Baltimore Blvd.*, 58 F.3d at 1001.

¹⁹³ *Id.* at 998-1000.

¹⁹⁴ *Id.* at 999.

¹⁹⁵ *Id.* at 999-1000.

¹⁹⁶ *Id.* at 1000.

view, judicial review in the form of an appeal to the judiciary was available under Texas law.¹⁹⁷ Yet, despite the possibility that immediate judicial review was available, the Court in *FW/PBS* concluded that there was no "avenue for prompt judicial review."¹⁹⁸ The Fourth Circuit thus concluded that *FW/PBS* cannot be read to relax the prompt judicial review of *Freedman*, and accordingly held the statute to be an invalid prior restraint on speech.¹⁹⁹

III. ANALYSIS

Based on the express language of Justice O'Connor's plurality opinion, the First, Fifth and Seventh Circuits have all interpreted prompt judicial review to require only that admin-

¹⁹⁷ *11126 Baltimore Blvd.*, 58 F.3d at 1000.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1001-02. In a partial dissent, Judge Niemeyer concluded that, based on Justice O'Connor's "express language" in *FW/PBS*, an ordinance incorporating a licensing scheme need only provide access to prompt judicial review. *Id.* at 1003. In addition, Judge Niemeyer stated that the majority misinterpreted the "essence of the safeguard" by requiring the rendering of a judicial decision to satisfy the requirement. *Id.* at 1004. "The essence of the safeguard is the review and not the result Since there are no external checks on the judiciary's review, the scope of the safeguard of necessity ends with access to the judicial branch." *Id.* Despite satisfying the prompt judicial review requirement, Judge Niemeyer concurred in the judgment on the ground that the county ordinance failed to limit its administrative decision to a specified brief period. *Id.* at 1002.

It is worth noting that the remaining circuits have yet to adopt a definitive interpretation of prompt judicial review. In the Second Circuit, recent case law discussing the issue is sparse. Older district court cases suggest the need for a judicial determination in certain types of obscenity cases. In *United States v. One Carton Positive Motion Picture Film Entitled '491'*, 247 F. Supp. 450 (S.D.N.Y. 1965), *rev'd on other grounds*, 367 F.2d 889 (2d Cir. 1966), a district court addressed the adequacy of a federal seizure statute's provision for judicial review. The case spoke approvingly of other cases where the ordinance explicitly provided for a judicial determination, and noted *Freedman's* citation to *Kingsley Books v. Brown*, which required a judicial determination to be made within two days of trial. *Id.* at 459 (citing *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957)). In addition, the court noted that the Supreme Court has "commented unfavorably as to the fact that in [*Freedman*] the decision on appeal as to the issue of obscenity took six months," and that in *Marcus v. Search Warrant of Property*, 367 U.S. 717 (1961), the Court "spoke disapprovingly of the fact that in that case over two months had elapsed between the seizure and judicial decision." *One Carton*, 247 F. Supp. at 459. Despite the problems associated with the judicial review procedures, however, the court refused to hold that a delay of eight to ten weeks in reaching a judicial decision denied the claimant prompt judicial review "in the absence of authoritative pronouncements by the United States Supreme Court." *Id.* at 462.

istrative officials provide applicants facing license denials prompt access to a judicial forum.²⁰⁰ This interpretation, however, fundamentally misapprehends the nature and policies underlying the *Freedman* safeguards. In addition, Supreme Court precedent in this area strongly dictates against such a reading. Accordingly, the only effective means of avoiding the wrongful suppression of speech in the context of licensing schemes is to require a statutorily imposed judicial determination on the merits.

At the outset, it should be noted that there is little doubt that the *Freedman* Court construed prompt judicial review as requiring a judicial determination. While the Supreme Court has yet to define explicitly prompt judicial review, the language of *Freedman* illustrates that the Court envisioned more than mere access to a judicial forum:

[B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. . . . [T]he procedure must . . . assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.²⁰¹

The cases upon which *Freedman* relied, particularly *Kingsley Books, Inc. v. Brown*,²⁰² also suggest that the propriety of any prior restraint should depend on the applicant's having received a timely adversary hearing. The Court spoke kindly of the procedure in *Kingsley*, noting that it "postpone[d] any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing."²⁰³ In other cases involving analogous situations,²⁰⁴ the Supreme

²⁰⁰ See *supra* notes 133-168 and accompanying text.

²⁰¹ *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).

²⁰² 354 U.S. 436 (1957).

²⁰³ *Freedman*, 380 U.S. at 60. The statute provided for a hearing one day after joinder of issue; the judge was required to enter a decision within two days after termination of the hearing. *Id.*

²⁰⁴ The first manifestation of the Court's concern over the availability and type of judicial relief needed to impose a valid prior restraint came in cases involving procedures permitting *ex parte* seizure of materials. In *Marcus v. Search Warrant of Property*, 367 U.S. 717 (1961), the Court invalidated a Missouri procedure

Court's preoccupation with the type of judicial proceeding a prospective applicant must receive also suggests that some type of determination on the merits is necessary before restraint can occur.²⁰⁵

The Supreme Court's discussion and application of prompt judicial review after *Freedman* also suggests that a judicial determination is needed to satisfy the requirement. The Supreme Court's decisions in *Southeastern Promotions, Blount* and *Teital* all found ordinance provisions invalid for failure to provide a prompt judicial "determination" of obscenity.²⁰⁶ In addition, in a footnote to the Court's opinion in *Interstate Circuit v. City of Dallas*,²⁰⁷ the Court explicitly contemplated a procedure's provision for judicial review. The Court rejected the appellant's claim that *Freedman* requires a procedure providing for swift appellate review, but did so on the grounds that "the assurance of a 'prompt final judicial decision' is made here, we think, by the guaranty of a speedy determination by the trial court."²⁰⁸ Although the Court did not explain exactly

which allowed police officers to seize materials using a vague, ex parte search warrant. The Court struck the procedure because it left too much discretion in the arresting officers. Likewise, in *Quantity of Books v. Kansas*, 378 U.S. 205 (1964), the Court held that a procedure permitting the seizure of books prior to an adversary hearing was an impermissible intrusion upon free expression. Although both cases involved ex parte seizure procedures, there is little reason to distinguish ex parte seizures of materials from ex parte restraints against speech; both should require "a prior adversary hearing." Monaghan, *supra* note 13, at 533 (noting that "[e]x parte seizures are closely akin to ex parte restraints against speech").

²⁰⁵ In the early seizure cases, the Court articulated its reasons for requiring a judicial determination on the merits. In *Quantity of Books*, the Court noted that an adversarial hearing on the merits is important because it can direct the judge to the relevant legal considerations. 378 U.S. at 210-11; see *Marcus*, 367 U.S. 717 (1961). In addition, adversary hearings help ensure that any injunctive order will "be tailored as precisely as possible to the exact needs of the case." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968). The Court's citation to some of these cases in *Freedman* strongly suggests that they had similar concerns in cases involving ex parte restraints against speech.

²⁰⁶ *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975) (in outlining the *Freedman* requirements, the Court stated "a prompt final judicial determination must be assured"); *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (defining prompt judicial review as "a final determination on the merits within a specified, brief period"); *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (striking a Chicago ordinance because it "failed to require that [the legislative authority] obtain a prompt judicial determination of the obscenity of the material").

²⁰⁷ 390 U.S. 676, 690 n.22 (1968).

²⁰⁸ *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51, 59 (1965)). The Maryland procedure in question required a judicial determination within nine days of the

what type of judicial proceeding is required to satisfy *Freedman*, the fact that the determination had to be "speedy" demonstrates that the Court intended to incorporate the period of judicial review into the requirement.

But perhaps the best indication of the Court's post-*Freedman* understanding of prompt judicial review came in *United States v. Thirty-Seven Photographs*. There, the Court explicitly held that it is within the judiciary's power and discretion to determine the "speed with which prosecutorial and judicial institutions can, as a practical matter, be expected to function . . ." ²⁰⁹ That holding paved the way for the Court to address its primary concern—which was not the adequacy of the federal statute's provision for access to judicial review ²¹⁰—but rather the length of time in which judicial proceedings had to be completed. ²¹¹ Since judicial proceedings might not be completed for up to seven months, ²¹² the Court held that the

final administrative action.

²⁰⁹ *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 372 (1971).

²¹⁰ Underlying the controversy in the circuits over the meaning of prompt judicial review are the circuit courts' varying views on the judiciary's authority to determine the adequacy of its own judicial procedures. As is the case with the U.S. Constitution, each state constitution mandates that this determination is a legislative prerogative. See Monaghan, *supra* note 13, at 547 (noting that "[t]here is considerable support for the view that both Congress and the states possess wide discretion in shaping their own remedial systems"). However, *Thirty-Seven Photographs* suggests that the judiciary does have some power to alter judicial procedures as long as it is consistent with the legislative purpose of the statute. See TRIBE, *supra* note 3, § 12-27, at 717. If the federal courts do have the inherent authority to determine the adequacy of their own procedures, as *Thirty-Seven Photographs* suggests, the circuit courts' reliance on this argument as a justification for not requiring a judicial determination is ill-founded. Moreover, even in a case where the judiciary lacks authority to take remedial action, this in no way limits its authority to review the constitutionality of a proposed scheme. See *infra* note 234 and accompanying text.

The issue becomes relevant because the question posed in *Thirty-Seven Photographs* and the circuit court cases, see *supra* notes 93-97 and accompanying text, is slightly different from that considered in *Freedman*. In *Freedman* and the subsequent Supreme Court cases considering prompt judicial review, the question posed to the Court concerned the adequacy of the time period for the onset of judicial review, without explicitly addressing the adequacy of judicial means and time periods by which a decision on the merits must be reached. The Supreme Court's decision in *Thirty-Seven Photographs*, however, strongly suggests that the Court intended the period of judicial review to be included in the mix when considering the adequacy of a particular statutory provision.

²¹¹ *Thirty-Seven Photographs*, 402 U.S. at 371-72.

²¹² *Id.* at 372. The Court cited three district court cases in which judicial proceedings took anywhere from three to seven months. *Id.*

statute's provision for judicial review was inadequate and set forth a specific time limit of sixty days in which a judicial determination on the merits must be rendered. In doing so, the Court emphasized that the possibility of lengthy judicial proceedings "was clearly inconsistent with the concern for promptness . . . frequently articulated."²¹³

Thus, following Supreme Court precedent in the area, the only means by which a court might find that mere access to judicial review is sufficient is to construe Justice O'Connor's plurality opinion as authorizing it. The Fifth Circuit, while recognizing that the *Freedman* Court required a "final determination," argues that the express language of Justice O'Connor's opinion in *FW/PBS* indicates that she "variously recast this standard as a specified brief period 'prior to judicial review.'"²¹⁴ The First Circuit makes a similar argument, stating that Justice O'Connor "construed" the prompt judicial review requirement as requiring only access to the judiciary within a specified, brief period.²¹⁵ The Seventh Circuit, although not specifically relying on Justice O'Connor's express language in *FW/PBS*, implicitly makes the same argument by

²¹³ *Id.* In addition to the Supreme Court's jurisprudence on the issue, it is worth noting that district courts of the First, Fifth and Seventh Circuits, each of which now subscribes to the mere access view, had at one time interpreted prompt judicial review as requiring a judicial decision and, where necessary, expedited procedures to effect it. *See, e.g., Progressive Labor Party v. Lloyd*, 487 F. Supp. 1054, 1056-57 (D. Mass. 1980) (noting that the procedural mechanism in cases of state censorship requires an expedited judicial procedure "like that in *Freedman*," but refusing to apply the "strict" *Freedman* interpretation of the requirement on the grounds that the censoring action was "ministerial" in nature and the ordinance was predominantly facially neutral); *Universal Film Exchanges, Inc. v. City of Chicago*, 288 F. Supp. 286, 290 (N.D. Ill. 1968) (holding constitutional a movie censorship ordinance which provided for a final judicial determination within eight days after an administrative decision had been rendered, exclusive of actual trial time, but refusing to strike the statute for failure to provide for expedited appellate court procedures because "[t]he assurance of a 'prompt final judicial decision' . . . is made here, we think, by the guarantee of a speedy determination by the trial court"); *Interstate Circuit v. City of Dallas*, 247 F. Supp. 906, 911 (N.D. Tex. 1965) ("There being no provision in the Texas statutes for prompt judicial review in the trial and appellate courts, and experience being that risk of delay is built into the Texas procedure, the [o]rdinance in question lacks sufficient procedural safeguards designed to obviate the dangers of a censorship system.").

²¹⁴ *Grand Britain, Inc. v. City of Amarillo, Tex.*, 27 F.3d 1068, 1070 (5th Cir. 1994).

²¹⁵ *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993).

recognizing that its decision departs from "other Supreme Court cases [which] seemed to require an ordinance provide for judicial review."²¹⁶

As an initial matter, it is not altogether clear that the express language of *FW/PBS* indicates that access to a judicial forum is adequate to satisfy the prompt judicial review requirement. Justice O'Connor's statements requiring legislative authorities to provide "an avenue for prompt judicial review" could just as easily be construed to mean that they must provide an avenue for a "prompt judicial determination." Indeed, as the Fourth Circuit noted in *11126 Baltimore Boulevard*, when applying the safeguard the Supreme Court has often used the phrase "prompt judicial review" interchangeably with the phrase "prompt judicial decision."²¹⁷ Considering the Supreme Court's synonymous usage of the terms in past decisions, the circuit court's reliance on the "express language" of *FW/PBS* as a basis for modification appears dubious at best.²¹⁸

Justice O'Connor's more general articulation of the principles underlying the *Freedman* requirements also suggests that she had no intention of relaxing the prompt judicial re-

²¹⁶ *Graff v. City of Chicago*, 9 F.3d 1309, 1312 (7th Cir. 1993). In addition, the dissent in *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 998, 1002-04 (4th Cir. 1995), relies on Justice O'Connor's language in *FW/PBS* as justification for concluding that prompt judicial review does not require a judicial determination.

²¹⁷ See *11126 Baltimore Blvd.*, 58 F.2d at 999-1000 (noting that "other decisions prior to Justice O'Connor's in *FW/PBS*, including *Freedman*, used the phrase 'prompt judicial review' to mean a prompt judicial determination"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561-62 (1975) (holding that the board's licensing system "did not provide a procedure for prompt judicial review" where a "judicial decision on the merits" was not obtained for five months); *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (stating that *Freedman* requires that the statute provide for "prompt judicial review"—a final judicial determination on the merits within a specified, brief period"); see also *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367-70 (1971) (using the phrase "prompt judicial review" interchangeably with the phrase "prompt judicial decision").

²¹⁸ Of course, this argument cuts both ways. Synonymous usage of the terms in past decisions undermines any claim that the Court's earlier mention of the phrase "prompt judicial determination" in and of itself establishes that the Court intended to incorporate the period of judicial review into the *Freedman* requirement. Regardless, the Court's explicit holding in *Interstate Circuit v. City of Dallas*, 390 U.S. 676 (1968), and the reasoning of *Thirty-Seven Photographs* suggest that the Court intended that the determination, rather than simply the hearing, be prompt.

view requirement. First, in dropping the first *Freedman* requirement, Justice O'Connor stated that the remaining two *Freedman* requirements—that an ordinance provide for a swift administrative decision and that it provide for prompt judicial review—are “essential.”²¹⁹ Justice O'Connor reaffirmation of the necessity of prompt judicial review and subsequent citation to *Freedman* strongly suggests that she adopted *Freedman's* interpretation of the safeguard, and it is unmistakable that the Court required a “final determination on the merits.”²²⁰

Second, in discussing the unique dangers licensing schemes pose to protected speech, Justice O'Connor stated that the failure of a licensing scheme “to provide for definite limitations on the time within which the licensor must issue the license” renders it invalid because it “contains the same vice as a statute delegating excessive administrative discretion.”²²¹ In most cases, however, a license will not “issue” until a final determination is rendered.²²² During the interim period between the onset of judicial review and final determination, therefore, the applicant's speech is still suppressed. Thus, providing mere access to judicial review prior to a judicial determination does nothing to alleviate the wrongful suppression of speech. The only logical corollary to Justice O'Connor's statement, therefore, is that protected speech will only be vindicated upon issuance of a license, which in turn can only be ensured through a judicial determination that it is or is not obscene.

Moreover, the deficiencies in providing access to judicial review become apparent when considering the prompt judicial review requirement in conjunction with the second *Freedman* requirement—that the state provide a final administrative

²¹⁹ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990).

²²⁰ *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965); see *supra* notes 200-204 and accompanying text.

²²¹ *FW/PBS*, 493 U.S. at 226-27.

²²² Under all the ordinances considered in this Note, a prospective licensee is denied a license to operate pending a judicial determination. While both *Freedman* and *FW/PBS* require that the administering body preserve the status quo pending judicial resolution of the claim, this offers an applicant who is making an initial application for a license no relief because there is nothing to stay except the denial of the license itself. Obviously, granting a stay pending a judicial decision can be an effective means of protecting first amendment interests in cases involving license renewals for existing businesses.

decision within a reasonably brief period. In determining the reasonableness of the time period for administrative review, the circuit courts in all of the above mentioned cases compared the time requirements of the ordinance in question with those in other jurisdictions.²²³ However, it makes little sense to use a comparative approach to determine the reasonableness of the time period for rendering administrative decisions if the time periods for and procedures associated with judicial review vary from state to state. For example, in *11126 Baltimore Boulevard*, the court noted that under Maryland procedures it usually takes three and one-half months for a judicial decision to be rendered following the onset of the case.²²⁴ In *Thirty-Seven Photographs*, however, the Court noted other jurisdictions in which judicial proceedings might not be completed for up to seven months.²²⁵ It is quite possible, using the comparative approach, that an ordinance providing for a greater time period for rendering an administrative decision, say ninety days, but a quicker judicial procedure, say forty-five days, could be found unconstitutional despite the fact that the total time period during which speech is suppressed is far less than say, an ordinance providing for a forty-five day administrative review period but judicial proceedings are not completed for several months.

Thus, the fallacy that access rather than a determination is sufficient to protect first amendment interests is exposed when considering the two requirements together. Indeed, Justice O'Connor seemed to recognize that the time requirements for administrative decision and judicial review are really two sides of the same coin when she stated that "[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech."²²⁶

²²³ See, e.g., *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 32 F.3d 109 (4th Cir. 1995) (finding that 150 days was not a reasonably brief period within which to render an *administrative* decision, based on precedent in other jurisdictions upholding statutory provisions requiring that administrative review be completed in time frames varying from 44 to 90 days).

²²⁴ *Id.* at 113.

²²⁵ *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 372 (1971).

²²⁶ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990). Other commenta-

Thus, while policy and Supreme Court precedent indicate that a judicial decision should be the preferred course, this does not end the matter. The question remains: To what extent must the judicial process be completed before the time period becomes unreasonable? Must an ordinance provide for completion of review at both the trial and appellate levels, or is an initial judicial determination sufficient? Indeed, as the First Circuit noted, to require that "all judicial avenues be exhausted would be an oxymoron,"²²⁷ and may be inconsistent with *Freedman's* suggestion that review be provided in a manner "compatible with sound judicial resolution."²²³

What the teachings of *Freedman* and the Supreme Court's subsequent jurisprudence do make clear is that judicial review is best accomplished through a judicial determination on the merits.²²⁹ At a minimum, such review would require an evidentiary proceeding, with the protections of counsel, confrontation and cross-examination.²³⁰ In this sense, the use of the extraordinary writs as a means of providing a determination

tors have stated the core policy of *Freedman* somewhat differently, but with the same import. See Monaghan, *supra* note 13, at 532 (noting that the requirement of judicial review seems in part "predicated on the belief that delay in the availability of judicial relief differs only in degree, and sometimes not at all, from the complete absence of judicial review"); Redish, *supra* note 18, at 77-78 (arguing that "nonjudicial restraint of expression prior to ultimate judicial review is the only form of judicial restraint appropriately subjected to a special negative presumption. This is true even if the nonjudicial restraint is imposed merely on an interim basis pending ultimate judicial resolution. During that time period a prima facie abridgement of speech is taking place.").

²²⁷ *TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 709 (5th Cir. 1994).

²²³ *Freedman v. Maryland*, 380 U.S. 51, 60 (1965).

²²⁹ See, e.g., *Vance v. Universal Amusement Co.*, 445 U.S. 303 (1980) (holding that injunctive procedures that base their holdings on a finding of probable cause of obscenity do not amount to a judicial determination on the merits). At least at one time there appears to have been general agreement that *Freedman* requires an adversarial hearing before a competent judicial tribunal, and that the standard to be employed should be that employed in *Miller v. California*, 413 U.S. 15 (1973); see, e.g., *Clark v. City of Fremont, Neb.*, 377 F. Supp. 327, 341 (D. Neb. 1974).

²³⁰ Indeed, this type of adversary hearing may be necessary in order to preserve an appeal. See Douglas Rendleman, *Free Press—Fair Trial: Review of Silence Orders*, 52 N.C. L. REV. 127, 132-33 (1982) (noting that in a case where "the merits of a case are decided or substantial rights [are] affected, orders are generally appealable" and that "the lack of adversary procedure could be used to deny an appeal").

on the merits is plainly inappropriate. Although they may have the advantage of speed, they are discretionary in character and lack an orderly procedure.²³¹

Moreover, and perhaps more importantly, any licensing system must contain time restricted processes and explicit provisions making access to a judicial decision available.²³² In the absence of available administrative initiatives, state legislatures may very well need to take action to remedy deficient judicial review procedures in cases of prior restraint.²³³ While this might be the more cumbersome option, the Supreme Court has long held that to the extent that procedures affect constitu-

²³¹ See generally Rendleman, *supra* note 230, at 135-38. Rendleman goes on to conclude that the writs are an inappropriate means of deciding first amendment cases because they involve "matters of judgment and discretion [that] are frequently concealed by a fog of arcane doctrine and archaic over-conceptualism." Rendleman, *supra* note 230, at 137.

²³² Most jurisdictions do not prevent a municipality from specifying an expedited procedure or from petitioning the state legislature for a minor change in the law. As the court noted in *11126 Baltimore Blvd.*, state and city officials can always impose on themselves "more limited time restraints for filing the administrative record and responsive pleadings and memoranda than those provided under [state] procedure." *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 32 F.3d 109 (4th Cir. 1994).

²³³ Indeed, several states have adopted special procedural rules for use in first amendment cases. The Pennsylvania Rules of Civil Procedure provide: "When a preliminary or special injunction freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decision shall be filed . . . within twenty-four (24) hours after the close of the hearing." PA. R. CIV. P. 1531(f)(1). An explanatory note states that the three-day period is a maximum and that "in particular cases, a shorter period may be required." For application of the Pennsylvania safeguards, see *Grove Press v. 807 Liberty Ave.*, 288 A.2d 750 (Pa. 1972); *Commonwealth v. Guild Theatre, Inc.*, 248 A.2d 45 (Pa. 1968).

Texas also at one time had special procedures for dealing with obscenity cases, which set forth not only time limits but also required the impaneling of three judges at hearings. See Texas Penal Code of 1925, art. 527, § 13 (repealed 1973). As part of the Fifth Circuit, both the Texas courts and the legislature at least at one time recognized the inadequacy of Texas procedures for dealing with obscenity cases. See, e.g., *Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 (5th Cir. 1978) (noting that Texas judicial procedure as it existed at the time failed "to treat obscenity with the kid gloves the [F]irst [A]mendment requires"); see also *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906, 911 (N.D. Tex. 1965) (holding that because "delay is built into the procedure" of the Texas courts at both the trial and appellate levels, the Texas statute lacked the procedural safeguards "designed to obviate the dangers of a censorship system").

tional rights, the Supremacy Clause of the U.S. Constitution demands that state and local procedure give way to first amendment concerns.²³⁴

While some form of a judicial determination on the merits is essential at the trial level, what is less clear is whether prompt judicial review should be construed to encompass any period of appellate review.²³⁵ Indeed, it may be a mistake to conclude that the First Amendment is always safe in the hands of the trial courts. There is always the possibility that a trial court will misinterpret or misapply it,²³⁶ and there are even occasions where the courts can violate it.²³⁷ Considering the possibility of error at trial, compounded by the fact that the normal stages of the appellate process—notice, briefing, submission and decision—frequently take several months,²³⁸ it could be argued that a period of additional intensive judicial review at the appellate level should be included in any definition of prompt judicial review.²³⁹

²³⁴ See *Zwickler v. Koota*, 398 U.S. 241, 247 (1967) (noting that the federal courts are the "primary and powerful reliances for vindicating every right given by the Constitution"); *TRIBE*, *supra* note 3, § 12-30, at 724 ("In close cases, government must leave speech ample room to breathe. How best to do that is properly left to the majoritarian branches; when it must be done is a judgment properly enforced by the judiciary.") (emphasis added).

²³⁵ Rendleman, *supra* note 230, at 134-35 (noting that expeditious appellate review could be provided for in several ways, including by accelerated appeal as provided by appellate rule, suspending the rules, or by motion to stay or suspend an order or injunction).

²³⁶ See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 269 (1985) (noting that some commentators believe that the first amendment procedural rules "are simply too indeterminate to be left for application by a trier of fact, even an article III district judge").

²³⁷ Injunctions and ex parte judicial orders are prime examples. See, e.g., *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (reversing a trial court's injunction because the court employed an improper standard of review); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (invalidating a judicially imposed prior restraint); *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (reversing a conviction in state court for contempt for violating an ex parte order against holding a demonstration because the court failed to consider the litigant's claim that the order was unconstitutional).

²³⁸ Rendleman, *supra* note 230, at 134; see Monaghan, *supra* note 13, at 534 n.61 (noting the inherent delays associated with the appellate process).

²³⁹ Several commentators have argued that the appellate process should be included in assessing the promptness of review. See, e.g., Monaghan, *supra* note 13, at 534 n.61 (stating that while the "dangers to first amendment interests posed by interim [restraints] are substantially reduced when quick decisions on the merits are forthcoming," they are "by no means eliminated [] because the appeal

But to include the period of appellate review in the prompt judicial review requirement may be unwarranted and, in any event, unlikely to occur in light of Supreme Court precedent. First, the requirement of a prior adversary hearing does much to mitigate the erroneous administrative denial of a permit. While the applicant's right to free expression would still be denied in the interim, at least an impartial and politically insulated judge, rather than a politically appointed licensing official, has made the decision.²⁴⁰ Second, despite arguments to the contrary, there is little evidence to suggest that trial judges wrongly decide first amendment cases to an "intolerable" degree.²⁴¹ Finally, it is highly unlikely that the Supreme Court would conclude that provisions for an expedited appellate procedure are necessary under *FW/PBS* when in their earlier holding in *Interstate Circuit*, the Court explicitly held that prompt judicial review does not require anything beyond a speedy determination by the trial court.²⁴² Other Supreme Court holdings also counsel against a rule requiring review beyond the trial stage.²⁴³ Thus, even if an expedited appellate

process is necessarily time consuming. Accordingly, an expedited appeal process is also necessary if restraint is sought during the appeal."); Redish, *supra* note 18, at 89 (arguing that an opportunity for an appeal may be "advisable because the opportunity for appellate review is important to the fairness of the judicial process and may do much to preserve the legitimacy of that process in the eyes of litigants"); see also *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977) (holding in a brief per curiam opinion that injunctions against speech must be stayed if they are not subject to expeditious appellate review, and citing *Freedman*, perhaps suggesting that the Court now reads *Freedman* to require expeditious appellate review). But see Blasi, *supra* note 44, at 31 (arguing that *Freedman* does not require an expedited appellate process despite the fact that aggrieved applicants "can face indefinite delays").

²⁴⁰ See *supra* notes 44-58 and accompanying text.

²⁴¹ "Neither the empirical nor the normative reference points for [the argument that trial courts wrongly decide an intolerable number of first amendment cases] are obvious It is a long way from accepting this set of propositions to a conclusion that we will end up with an 'intolerable' degree of chilling effect unless all appellate courts are required to redetermine every instance of first amendment law application." Rendleman, *supra* note 230, at 268-69.

²⁴² *Interstate Circuit v. City of Dallas*, 390 U.S. 676, 690 n.22 (1968). Moreover, the Court's pronouncement on the issue of judicial review is more than mere dicta. The Court's interpretation of prompt judicial review came in direct response to the appellant's assertion that the city ordinance in that case violated *Freedman* "because it [did] not secure prompt state appellate review." *Id.* The Court's notation should, therefore, have precedential effect.

²⁴³ See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (concluding that the right to appeal to an appellate court is not of constitutional significance); *Poulos v. New*

procedure were advisable, it is unlikely the Court would include it as part of a prompt judicial determination on the merits.

It could be argued that all of this concern over timing and procedures is a waste of judicial resources and that, in most cases, the actual timing of communication will be of little consequence to the speaker. Indeed, absent an attempt by the speaker to express views about a current political or social event, one could reasonably conclude that the relatively limited time restraints involved amount only to a de minimus restriction on the right to freedom of expression.²⁴⁴

Such a conclusion would be inappropriate, however, for two reasons. First, it is an unfortunate fact of life in the modern court system that it may take years, and cost a plaintiff a great deal of money, before his or her complaint receives a hearing on the merits. Given current docket delays and the extensive time period needed to conduct a full adversarial hearing on the merits, the time restraints can hardly be characterized as de minimus. Rather, it would seem that forcing a purveyor of first amendment materials to wait months, if not years, for a court to pass judgement on his or her case is anathema to prior restraint law.

Second, and perhaps more importantly, such a view undermines the values served by the prior restraint doctrine and strikes at the heart of core first amendment values. It has long been recognized that the protective sphere of the First Amendment extends beyond the content of the speaker's statement.²⁴⁵ The time, place and manner of an individual's ex-

Hampshire, 345 U.S. 395 (1953). In *Poulos*, an aggrieved applicant for a permit noted that long delays, possibly lasting years, would be required before his rights could be fully adjudicated. The Court dismissed this concern, stating that "[d]elay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning." *Id.* at 409. In concurrence, Justice Frankfurter, possibly as a precursor to the Court's later decision in *Freedman*, limited his agreement with the above statement to cases where prompt judicial review is available to minimize the wrongful denial of a permit. *Id.* at 420.

²⁴⁴ See, e.g., *TRIBE*, *supra* note 3, § 12-33, at 730-31 (arguing that, in most cases, concerns regarding the timing of speech are simply not relevant in the context of licensing schemes); *Blasi*, *supra* note 44, at 30-33 (making a similar argument).

²⁴⁵ See generally *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939).

pression are themselves an integral part of expression and thus remain inevitably intertwined with the exercise of first amendment rights. The matter of an individual's chosen timing, therefore, implicates not only questions of procedural due process, but extends beyond notions of due process to affect the substantive character of an individual's right to free expression. While practical realities demand that individuals cannot in all cases retain complete control over the timing and manner of their expression, courts must remain vigilant in preserving those aspects of first amendment rights.

Despite these considerations, courts since *FW/PBS* continue to express confusion as to exactly what *Freedman* and *FW/PBS* require.²⁴⁶ In this sense, Supreme Court definition of prompt judicial review is crucial. Without it, federal district and appellate courts will continue to apply the judicial review requirement in a haphazard manner. The Seventh Circuit's resolution of this issue is an excellent example of the confusion the Supreme Court's silence has created, and represents perhaps the furthest departure from the safeguards set forth in *Freedman*. Not only does the Seventh Circuit miss the boat in failing to insist upon a judicial determination, but it has not even ensured prompt access to judicial review.²⁴⁷ To suggest

²⁴⁶ See, e.g., *Graff v. City of Chicago*, 9 F.3d 1309, 1333 (conceding that the Court's opinion in *FW/PBS* "is the source of our difficulty").

²⁴⁷ While the *Freedman* Court was unclear as to exactly what type of judicial review was required, in later cases the Court made clear that the statute, regulation or ordinance itself must explicitly provide for prompt judicial review. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561-62 (1975). Only the *Graff* decision is at odds with this specific mandate. The *Redner* case provided an excellent example of why the Supreme Court requires that an ordinance explicitly provide the means by which an applicant could seek judicial review. There the district attorney argued that the statute should not be declared facially invalid based on its judicial appellate process because the claimant could simply "forgo the appellate process provided by the statute and proceed immediately to Florida state court via Florida's common-law writ of certiorari." *Redner v. Dean*, 29 F.3d 1495, 1502 (11th Cir. 1994). The Eleventh Circuit rejected the argument on two grounds: First, the court noted that an applicant in such a case runs the risk of dismissal for failing to exhaust administrative remedies because, as is the case in most jurisdictions, "exhaustion is a question of judicial policy, not jurisdiction." Second, the court noted the inherent unfairness of such a procedure, stating

we find it repugnant to the principle of due process that a county ordinance could set such a trap for the unwary applicant. To hold that an aggrieved applicant who follows the appellate procedure provided by the Ordinance risks foreclosing his opportunity. *Id.*

that a discretionary vehicle such as a state's common law writ of certiorari stands as an adequate substitute for an explicit system of swift judicial review set out in the licensing law defies credibility.²⁴⁸ Assuming *Freedman* applies to these cases, these ordinances defy *Freedman's* clear demand for a specialized system of prompt judicial review on the merits.

CONCLUSION

Both the policy behind the *Freedman* safeguards and Justice O'Connor's opinion in *FW/PBS* provide support for the proposition that the prompt judicial review safeguard requires a judicial decision. An ordinance which contains no provision for a judicial determination offers the legislative body too great an opportunity to suppress speech by manipulating loose standards or by delaying action. As it stands now, while judicial relief may come swiftly in some states and the period of silence may be negligible, in other states the period may be more substantial. In either case, the result is still suppression of protected expression. This grave risk can only be abated by time-restricted processes and explicit provisions making access to a prompt judicial determination available.

J. David Guerrero

²⁴⁸ See *supra* note 231 and accompanying text (criticizing the use of extraordinary writs as a means of providing judicial review in prior restraint cases).

