PERMIT SCHEMES: UNDER CURRENT JURISPRUDENCE, WHAT PERMITS ARE PERMITTED?

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I. INTRODUCTION

The propriety of permit schemes that regulate expression—either directly or indirectly—is a rapidly developing area of First Amendment

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jurisprudence deserving of much clarification and explanation.[1] Permit schemes, as a form of prior restraint, routinely require groups and individuals to obtain governmental permission before they can engage in protected speech, even in a public forum.[2] As a tool that empowers a governmental entity to decide whether a particular message can be heard in the public arena, permit schemes represent a significant threat to free speech, fueling more and more controversy about their validity.[3]

Tension exists with such measures because of the competing interests at work. On one hand, a scheme that regulates access and use of public places has seemingly legitimate purposes, the most prominent being the assurance of public safety and order.[4] On the other hand, protected speech in a public forum is a core constitutional guarantee that must be insulated from undue governmental encroachment.[5] Arriving at a resolution of this

1. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. The types of permits vary. *See, e.g.*, CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1281–82 (11th Cir. 2006) (Atlanta ordinance requiring ninety day notice before holding an outdoor festival); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1027 (9th Cir. 2006) (Santa Monica ordinance requiring a permit for three categories of community events: (1) parades, processions, or marches, (2) any activity involving 150 people or more, and (3) any activity or event on public property that requires a tent or canopy); Paulsen v. Lehman, 839 F. Supp. 147, 152 (E.D.N.Y. 1993) (New York scheme requiring a permit to distribute literature).

3. Commentators have not been silent on the topic. *See, e.g.*, William E. Lee, *Modernizing the Law of Open-Air Speech: The Hughes Court and the Birth of Content-Neutral Balancing*, 13 WM. & MARY BILL RTS. J. 1219, 1257–65 (2005) (discussing the discriminatory effects of facially-neutral schemes and insensitivity to the symbolic importance of open-air speech); Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMENDMENT L. REV. 201, 220–31 (2007) (pointing out the impropriety of permits that allow private parties to exclude other citizens from public property).

4. For example, the government may constitutionally regulate speech that takes place during rush hour on busy streets, produces dangerously high levels of sound through loud speakers, or involves duplicate uses of public property. Grayned v. City of Rockford, 408 U.S. 104, 115–16 (1972).

5. A well-recognized concept is that every individual has the right to speak his or her peace in the public square. This right does not fade away just because some may find the message offensive. Cox v. Louisiana, 379 U.S. 536, 551–52 (1965). As the United States Supreme Court explained:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition

tension ought to be the jurisprudential goal of any court evaluating permit schemes. Regrettably, though, legal doctrines and analysis concerning prior restraints is "increasingly derided by legal scholars and frequently misunderstood by the Court itself" because of the unrest surrounding this area of law.[6] Prior restraints have been treated in such a myriad of ways that the term itself "has become largely a legal misnomer, and the doctrine a source of confusion and controversy."[7] This confusion has even led one legal scholar to conclude that the "[prior restraint] doctrine is so far removed from its historic function, so variously invoked and discrepantly applied, and so often deflective of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis."[8]

Thus, the vital importance of a clear and universal understanding of the precedent governing the prior restraint doctrine and the permissible scope of permit schemes cannot be overstated. Nothing less than the fundamental right to free speech hangs in the balance.[9] And this concern only continues to mount. As revealed in recent cases, there is a growing trend among government bodies to promulgate and utilize permit schemes that effectively preempt protected expression on public ways.[10] It has

> of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Id. (citations omitted).

6. Michael I. Meyerson, *Rewriting* Near v. Minnesota*: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1087–88 (2001). Professor Meyerson fears under the current doctrine that attorneys are prone to cry "prior restraint" concerning any law subject to challenge. *Id.* at 1089–90.

7. Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989).

8. John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 437 (1983).

9. While the difference between an outright ban on speech and regulations that burden speech may be rhetorically comforting, in reality, there is no bright division between the two. As this Article demonstrates, almost any regulation on speech—unless well-crafted and tailored—risks full suppression.

10. *See* Edward L. Carter & Brad Clark, *Death of Procedural Safeguards: Prior Restraint, Due Process and the Elusive First Amendment Value of Content Neutrality*, 11 COMM. L. & POL'Y 225, 238–39 (2006) (noting seventeen licensing-

become common for public universities to impose permit requirements on individuals who wish to speak on open grounds of the campus, regardless of the type of speech in which they engage.[11] Similarly, municipalities are passing ordinances that require governmental approval for anyone who wants to use public streets and sidewalks for expressive purposes, whether it be large organizations, small groups, or even individuals.[12] Because such schemes invoke advance notice, they effectively eliminate spontaneous expression.[13] Moreover, many of these permit schemes even assess fees for the mere opportunity to engage in protected expression in a public forum, begging the question of whether free speech is actually free.[14]

The goal of this Article is to navigate through the bewildering jurisprudence of permit schemes and to supply a definitive and concrete explanation of the current state of the law governing constitutionality of content-neutral permit schemes in public fora.[15] It will explain why the

scheme cases in appellate courts from 2002 to date of article).

11. *E.g.*, Bowman v. White, 444 F.3d 967, 972 (8th Cir. 2006) (stating university's policy requiring non-university individuals to obtain a permit three days prior to using public university areas "regardless of the use that will be made of the space, whether that use be speaking, carrying signs, handing out literature, or sitting silently"). *See generally* Nathan W. Kellum, *If It Looks Like A Duck . . . Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L.Q. 1, 1–2 (2005) (specifying common restrictions on speech that are taking place on public university campuses).

12. *E.g.*, Cox v. City of Charleston, 416 F.3d 281, 283 (4th Cir. 2005) (city passing ordinance that required large groups, small gatherings, and even sole protestors to acquire permit before "'participat[ing] in any parade, meeting, exhibition, assembly or procession of persons and/or vehicles on the streets or sidewalks of the city'" (quoting TRAVELERS REST, S.C., ORDINANCE § 7.16.020)).

13. Imposition on spontaneous speech is a "pernicious effect" of a permit scheme. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166 (2002).

14. *See, e.g.*, CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1265 (11th Cir. 2006) (referencing an Atlanta ordinance that conditions permit on applicant obtaining $1.6 million in liability insurance coverage and paying fee based on the size and the nature of festival). *See generally* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257 (1985) (addressing question of who bears the cost for free speech).

15. Although this Article discusses some of the ramifications of content analysis in recent cases involving prior restraints, content-based prior restraints are essentially analyzed in the same manner as any other governmental infringement on content in public fora. Such actions are strictly scrutinized as to whether a compelling governmental interest exists and whether the burden on the speech in question is the least restrictive form of regulation possible. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

presumption against the validity of any form of prior restraint should be affirmed and how the question merits separate First Amendment analysis.[16] Tracking and analyzing major decisions flowing out of the Supreme Court on this issue,[17] this Article will further set forth the legal boundaries for permit schemes.[18] And in consideration of binding precedent, this Article will also address lingering unanswered questions about permit schemes, namely the legality of unlimited time decisions[19] and the consideration due to religious and patriotic scruples.[20]

II. SCRUTINY ATTACHED TO PERMIT SCHEMES

Prior restraints are far from constitutional novelties.[21] The development of jurisprudence governing prior restraints is rooted in the nation's formation, preceding the First Amendment itself. Some of the earliest applications of prior restraints, in fact, concern English statutory laws authorizing a licenser to prevent treason by screening written material prior to being published.[22] Parliament's passage of the Regulation of Printing Acts in post-restoration England during the early 1660s granted broad governmental discretion to determine which ideas would be fit for publication and to whom permission would be granted to print and distribute ideas.[23] In 1694, Parliament chose to let these Acts expire,[24] marking an early victory for free speech and shaping what would later be

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

20. *See infra* Part VI.

21. A "prior restraint" refers to a regulation "that operate[s] to forbid expression before it takes place." 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 15:1 (2007). It is to be contrasted with "subsequent punishments," which are not imposed until the speech actually occurs. *Id.*

22. Lovell v. City of Griffin, 303 U.S. 444, 451–52 (1938); *see* William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 247–49 (1982) (setting forth historical basis of "The English Experience" regarding prior restraints).

23. Mayton, *supra* note 22, at 248.

24. The English Parliament cited the vagueness of the English Licensing Act in allowing it to expire. *See* 11 H.C. JOUR. (1695) 306 (act prevents "offensive" books without specifying what that is). The statute expired not so much out of opposition to principle, but in "absurdities and inequities of its administration." Jeffries, *supra* note 8, at 412. Over the course of the next century, however, freedom from such restraints became an established right for all Englishmen. *Id.*

known as the prior restraint doctrine.

Eventually, as articulated by Sir William Blackstone,[25] English common law expressly condemned the concept of pre-emptive restrictions on speech, particularly within the context of publications:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[26]

Carrying this principle "across the pond," the First Amendment of the U.S. Constitution contemplates the undesirability of the "prior restraint."[27] Being keenly aware of this concern, courts in the United States have had a "historic antipathy toward prior restraint."[28]

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25. An eighteenth century English barrister, judge, and law professor who penned the *Commentaries on the Laws of England*, adopted, in large part, from his own lectures on the same subject matter at All Souls College in Oxford, England. ROBERT D. STACEY, SIR WILLIAM BLACKSTONE AND THE COMMON LAW: BLACKSTONE'S LEGACY TO AMERICA 41–42 (Jeffery J. Ventrella ed., 2003). Stacey attests to the significance of Blackstone and his commentaries: "[Blackstone's] thorough yet readable introduction to . . . common law served as the basic learning tool for countless aspiring lawyers in Britain and America from its first publication to the end of 1800s." *Id.* at 61.

26. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (University of Chicago Press 1979) (1769). Sir William Blackstone, as reflected in this characterization of common law, thought of freedom of the press as encompassing a right to be free from prior restraint, which he termed "previous restraint." As to subsequent punishment, though, Blackstone thought one publishing anything "improper, mischievous, or illegal" must "take the consequence of his own temerity." *Id.* at 152. His comparison between restrictions imposed before and after the publication underscores the importance to which he viewed the prohibition against prior restraints as a matter of common law.

27. In fact, borrowing heavily from Blackstone, the First Amendment of the United States Constitution encompasses a clear prohibition against prior restraints. Taucher v. Rainer, 237 F. Supp. 2d 7, 12 (D.D.C. 2002). First Amendment jurisprudence evolved to address other speech restrictions besides prior restraints. "Yet, while it is no longer true that freedom of speech and of the press mean only protection from prior restraint, prior restraints continue to be regarded as more serious incursions on First Amendment freedoms than subsequent punishment." 1 SMOLLA, *supra* note 21, § 15:2.

28. Lee, *supra* note 3, at 1237 (explaining the impact of the Hughes Court on governmental regulation of open-air speech).

This antipathy came to a head in the 1880s during the active days of the Salvation Army.[29] This group commonly engaged in massive parades and assemblies that became the target of municipal licensing ordinances.[30] Consequently, a series of cases percolated through state courts in Michigan, Kansas, Illinois and Wisconsin pertaining to the validity of ordinances that required a permit prior to engaging in rallies. For the most part, the appellate courts of these states acknowledged the constitutional invalidity of the prior restraint.[31]

Subsequently, in 1931, the Supreme Court confirmed the First Amendment's derision of such prior restraints to speech in the landmark

29. The Salvation Army was founded in 1878 by Reverend William Booth as an evangelical religious movement. RICHARD COLLIER, THE GENERAL NEXT TO GOD: THE STORY OF WILLIAM BOOTH AND THE SALVATION ARMY 54–56 (1985). Reverend Booth referred to himself as General and his followers as a volunteer army. *Id.* at 54, 56. Booth and the Salvation Army initiated their activities in Booth's home country of England, but they were often not well received. *Id.* at 57–58, 94–95. "In one year alone—1882—669 Salvation Army soldiers were knocked down or brutally assaulted. Sixty buildings were virtually wrecked by the mob. Even 1,500 police doing extra duty every Sunday seemed powerless to protect Booth's troops." *Id.* at 94. In bringing their message to America, the reception was mixed, as Collier elaborates:

> The Army's standing in the United States was a paradox in itself. As early as March, 1886, . . . President Grover Cleveland became the first U.S. President to receive . . . a group of Salvationists at the White House—the forerunner of a dozen Presidents who have since endorsed their work. Yet still in many American towns the police, as unfriendly as Switzerland's own, waged a bitter war of attrition against The Army. Boston, governed by Irish liquor-dealers, allowed only Sunday marches conducted in total silence. New York [Salvation Army] officers had to attend daily on the city's officials to receive a permit for the day's march. Permits were not granted a day in advance or a week, or even sent courteously through the mail. They had to be fetched, daily, cap in hand.

Id. at 149. Collier adds: "Strong-arm tactics were commonplace." *Id.*

30. *See* Rachel Vorspan, *"Freedom of Assembly" and the Right to Passage in Modern English Legal History*, 34 SAN DIEGO L. REV. 921, 950–62 (1997) (discussing permit laws linked to Salvation Army activities).

31. *See, e.g.*, City of Chi. v. Trotter, 26 N.E. 359, 360 (Ill. 1891) (striking down a criminal conviction for marching through city streets without a permit); Anderson v. City of Wellington, 19 P. 719, 723 (Kan. 1888) (striking down a permit requirement premised on the consent of mayor); Frazee's Case, 30 N.W. 72, 74 (Mich. 1886) (striking down a permit requirement for march or parade); *In re* Garrabad, 54 N.W. 1104, 1107–08 (Wis. 1893) (striking down a permit requirement giving mayor arbitrary power). *But see* Mashburn v. City of Bloomington, 32 Ill. App. 245, 246 (1889) (upholding a drum-beating conviction because the only issue was whether the defendant frightened horses).

case of *Near v. Minnesota ex rel. Olson*.[32] The *Near* Court held that a Minnesota law permitting the government to obtain a court order abating what was adjudged to be defamatory newspapers created an unconstitutional prior restraint.[33]

Although the initial line of cases before the United States Supreme Court dealing with prior restraints addressed the issue in terms of the freedom of the press, the Court's instruction on the practice has developed far beyond the realm of the printed word and covers any form of public expression in general.[34] Under current jurisprudence, "[a] prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials."[35] Permit schemes represent the most egregious, and perhaps the most popular, version of a prior restraint, whereby speakers are required to secure governmental permission in order to speak.[36]

The dilemma regarding prior restraints is that they serve to preclude speech from entering the public arena before the discussion can even begin.[37] As means for the government to screen (and likely squelch) ideas, prior restraints fly in the face of protections afforded by the First

32. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931). Chief Justice Hughes writing for the majority offered that "it has been generally, if not universally, considered that it is the chief purpose of the guaranty [of liberty of the press] to prevent previous restraints upon publication." *Id.* at 713; *see also* Meyerson, *supra* note 6, at 1090–92 (providing thorough analysis of *Near* and depicting the decision as a "near-great" attempt to create a comprehensive definition of prior restraint).

34. *Near*, 283 U.S. at 722–23.

34. *See* Scordato, *supra* note 7, at 2 ("[T]he Supreme Court in the years since *Near* has affixed the prior restraint label to an exceptionally diverse group of laws, regulations, and government actions."); Jordan D. Oelbaum, Note, FW/PBS v. Dallas*: The Severance of the* Freedman *Rule*, 1990 DET. C.L. REV. 1119, 1122 ("Following the *Near* decision, the Court expanded the types of cases subject to prior restraints.").

35. Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097, 1100 (9th Cir. 1998) (citing *Near*, 283 U.S. at 713).

36. *See* Cox v. City of Charleston, 416 F.3d 281, 284 (4th Cir. 2005) ("An ordinance that requires individuals or groups to obtain a permit before engaging in protected speech is a prior restraint on speech."); Jeffries, *supra* note 8, at 421 ("Of the various things referred to as prior restraint, a system of administrative preclearance is the most plainly objectionable. Under such a system, the lawfulness of speech or publication is made to depend on the prior permission of an executive official.").

37. One scholar describes this as an effort by the government to "drive out the message." Beth Waldock Houck, Comment, *Spinning the Wheel After Roulette: How (and Why) to Overturn a Sidewalk Sitting Ban*, 32 ARIZ. ST. L.J. 1451, 1454 (2000).

Amendment.[38] Proponents of such schemes argue that the goal is not to restrain speech; rather, they believe laws of this sort are needed to preserve public safety and order.[39] Despite these laudable concerns, the Supreme Court views such goals with much skepticism, given the potential for censorship inherent with prior restraints.[40]

This is because a prior restraint reflects an "'[inversion of] the order of things; . . . instead of obliging the State to prove the guilt in order to inflict the penalty, it [is] to oblige the citizen to establish his own innocence to avoid the penalty.'"[41] Consequently, and necessarily, there is a "heavy presumption" against validity of a prior restraint.[42]

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory

38. Thomas v. Collins, 323 U.S. 516, 540 (1945) ("We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.").

39. *See, e.g.*, Cindy Lee Meyer, Recent Development, D.C. Circuit Review, *Free Speech v. Public Safety within Public Forum Analysis*, 59 GEO. WASH. L. REV. 1285, 1310 (1991) (concluding that unique safety considerations of mass transit require less-rigid application of First Amendment).

40. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("[A] State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."); Schneider v. New Jersey, 308 U.S. 147, 162 (1939) ("We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.").

41. Speiser v. Randall, 357 U.S. 513, 534 (1958) (quoting ALEXANDER HAMILTON, A SECOND LETTER FROM PHOCION (1784), *reprinted in* 4 THE WORKS OF ALEXANDER HAMILTON 269 (Fed. ed., 1904)). Hamilton had every reason to consider the issue extensively. As an opponent of the Bill of Rights, Hamilton believed there was no definition of "liberty of the press" that would fully protect that right; the right instead, Hamilton believed, depended on "'the spirit of the people and of the government.'" Anthony L. Fargo, *The Concerto Without the Sheet Music: Revisiting the Debate Over First Amendment Protection for Information Gathering*, 29 U. ARK. LITTLE ROCK L. REV. 43, 47 (2006) (quoting THE FEDERALIST NO. 84, at 476–77 (Alexander Hamilton) (Isaac Kramnick ed., 1987)).

42. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70–72 (1963) (holding that the practice of sending notices to publishers of books and advising them that their book is on a list distributed to local police departments violated First Amendment). Dean Smolla advises that "[t]he heavy presumption against prior restraints is deeply imbedded in First Amendment history and firmly ensconced in contemporary First Amendment doctrine." 1 SMOLLA, *supra* note 21, § 15:8 (footnote omitted).

> deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.[43]

From a practical standpoint, permit schemes serve as a deterrent to the very exercise of speech.[44] The tedium of adhering to extensive bureaucratic requirements before freely expressing a viewpoint is a disincentive for anyone engaging in an activity that the Constitution guarantees as a right.[45] Individuals who merely desire to speak their mind in a public place are dissuaded from doing so by the highly-involved and intimidating process of approaching a government official and filling out the necessary paperwork.[46] Also, as the Supreme Court recognizes, there

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43. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975). The Court held that the vote of a local theater board to deny access to their facilities to the producers of "Hair" constituted a prior restraint on speech. *Id.* at 552. To pass constitutional muster, the State must show that it has complied with rigorous procedural safeguards and the constitutional presumption against them. *Id.* at 561.

44. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 162 (1969) (Harlan, J., concurring) (recognizing the danger of "requiring persons to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of expression").

45. *Id.* at 162–63.

46. *Id.* This has been aptly described as "self-censorship":

> 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. While all laws regulating speech are to some extent designed to deter persons from engaging in constitutionally unprotected speech, prior restraints are regarded as a particularly invidious and effective form of restricting speech. Of major concern in cases of prior restraint is the increased prospect for self-censorship. 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. The time, effort 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.

J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After* FW/PBS v. City of Dallas, 62 BROOK. L. REV. 1217, 1225–26 (1996) (footnotes omitted).

exists a "deterrent effect [from] an interim and possibly erroneous denial of a license."[47] The prospect of undergoing the review process for a permit is discouraging to those seeking to engage in public, protected speech, especially if the time needed for seeking permission detracts from the purpose of the speech.[48]

Accordingly, prior restraints are considered "the most serious and the least tolerable infringement on First Amendment rights."[49] Prior restraints are not per se unconstitutional, but close.[50] While the Supreme Court

47. Freedman v. Maryland, 380 U.S. 51, 59 (1965).

48. This unfortunate situation results from a combination of the logistical strains on the judicial system and a lack of understanding of the time-sensitive nature of certain speech:

> [I]t 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 judgment on his or her case is anathema to prior restraint law.
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> Second, and perhaps more importantly, such a view [that does not consider the time-sensitive nature of some speech] 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. The time, place and manner of an individual's expression 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.

Guerrera, *supra* note 46, at 1257–58 (footnotes omitted).

49. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). In *Stuart*, the Court overturned a "restrictive order" enjoining media from "'the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced'" in the murder trial of man accused of killing all six members of his immediate family in a town of 850. *Id.* at 542 (quoting language from the restrictive order).

50. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975). Dean Smolla, in his treatise on free speech, concludes that the burdens for justifying prior restraints "are so onerous that in application the 'prior restraint doctrine' amounts to a 'near-absolute' prohibition against such restraints." 1 SMOLLA, *supra* note 21, § 15:2. According to Smolla, the high burden is only appropriate: "A prior restraint is almost

recognizes that governmental entities may have a legitimate interest in some form of legislation for regulating property use,[51] "precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights."[52] In order to overcome the presumption of unconstitutionality, any permit scheme has a significant hurdle to clear.

III. PRECEDENT AND PARAMETERS FOR PERMIT SCHEMES

The United States Supreme Court has laid out certain legal boundaries for permit schemes in five crucial cases. Although no single decision supplies a comprehensive explanation of how such a system can be judged, these five cases spanning over the last three decades—*Freedman v. Maryland*,[53] *Shuttlesworth v. City of Birmingham*,[54] *Forsyth County v. Nationalist Movement*,[55] *Thomas v. Chicago Park District*,[56] and *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*[57]—when read together, point toward an integrated approach and supply a lucid framework for assessment.

A. Freedman v. Maryland

Freedman's primary contribution to the permit scheme jurisprudence is the Court's enumeration of mandated procedural safeguards that a statute must have in order to avoid "constitutional infirmity."[58] The

always a more draconian act of censorship than a subsequent punishment. A prior restraint prevents the speech from reaching the marketplace, while post-publication penalties allow the speech to be disseminated, and merely force the speaker to bear the consequences." *Id*. § 15:10.

51. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) ("[T]he Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally." (citation omitted)); *see also* Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 162–63 (2002) (noting that a town has a legitimate interest in regulating door-to-door canvassing for protection of villagers' privacy and prevention of burglary and fraud).

52. *Watchtower*, 536 U.S. at 163.

53. Freedman v. Maryland, 380 U.S. 51 (1965).

54. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

55. Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

56. Thomas v. Chi. Park Dist., 534 U.S. 316 (2002).

57. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002).

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

petitioner, a theater owner in Baltimore, was convicted of violating an ordinance that required movie theaters to submit a motion picture to the State Board of Censors for licensing before it could be viewed publicly.[59] The theater owner failed to submit a film before showing it in his facility, and subsequent to his conviction, he brought a suit to challenge the constitutionality of the statute, contending that it "impaired freedom of expression."[60] The Supreme Court declared the statute unconstitutional.[61] At the heart of the decision, the Court expressed a concern that the censorship board would not be sensitive to First Amendment concerns without explicit protections:

> Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.[62]

In order to avoid the dangers of such a censorship system, the Court set out three procedural safeguards that must be present for any system of prior restraint to be deemed constitutionally valid.[63] First, the burden of initiating judicial proceedings and proving that the speech may be

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59. *Id.* at 52–53.

60. *Id.* at 53.

61. *Id.* at 60.

62. *Id.* at 57–58; *see also* Oelbaum, *supra* note 34, at 1124 ("[D]espite the compelling state interest, the [censorship board] system of administering these licenses failed to provide adequate safeguards against the detrimental effect such licensing requirements could have on protected speech."); Kathryn F. Whittington, Note, *The Prior Restraints Doctrine and the* Freedman *Protections: Navigating a Gigantic Labyrinth*, 52 FLA. L. REV. 809, 813 (2000) (stressing the significance of *Freedman*'s procedural requirements in the jurisprudence of prior restraint).

63. Shortly after the *Freedman* decision was handed down, the Court expanded the application of these safeguards in other contexts:

> The procedural safeguards expounded in *Freedman* were not confined to the context of film censorship. The Court subsequently applied them to the regulatory schemes that resulted in seizure of photographs by U.S. customs agents, seizure of mail by U.S. postal officials, and rejection of an application to stage a musical in a municipal theater. The procedural safeguards also were applied to a nuisance statute, a professional licensing scheme for charity fund raising, and a licensing system for adult businesses.

Carter & Clark, *supra* note 10, at 231 (footnotes omitted).

restricted must rest on the state.[64] Second, the government cannot impose restraints prior to judicial review without a specific brief time period.[65] Allowing the state to do this "would lend an effect of finality" to its determination and, especially for time-sensitive matters, effectively suppress speech.[66] Such temporary restraints must have the express purpose of "preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."[67] Lastly, the speaker must be assured of "a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."[68] This

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

65. *Id.* The Court clarified that it "[did] not mean to lay down rigid time limits or procedures, but to suggest considerations in drafting legislation to accord with local exhibition practices." *Id.* at 61. It is only reasonable that the time-period requirement be based on the nature of the speech involved and the effect of an extended time limit to the efficacy of the message.

66. *Id.* at 58.

67. *Id.* at 59.

68. *Id.* After *Freedman*, there existed some considerable doubt as to the meaning of "prompt judicial determination." In *FW/PBS, Inc. v. City of Dallas*, Justice O'Connor wrote that *Freedman* required only "the possibility of prompt judicial review." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 228 (1990). Subsequently, several federal courts of appeals used this language and concluded that prompt judicial resolution only means review. *See* Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1255–57 (11th Cir. 1999) (immediate review by state circuit court); TK's Video, Inc. v. Denton County, 24 F.3d 705, 707–08 (5th Cir. 1994) (right to de novo review by state district court); Graff v. City of Chi., 9 F.3d 1309, 1324–25 (7th Cir. 1993) (en banc) (availability of common law writ of certiorari). Following *FW/PBS*, other circuits held that actual judicial resolution was still the rule. *See* Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 892 (6th Cir. 2000) ("[T]heoretical possibility of expeditious judicial review is not constitutionally sufficient. A guarantee of prompt judicial review is necessary . . . ."); Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1102 (9th Cir. 1998) ("[B]ecause the City's ordinance fails to provide for a prompt hearing and prompt decision by judicial officer, it fails to provide for prompt judicial review . . . ."); 11126 Balt. Blvd., Inc. v. Prince George's County, 58 F.3d 988, 1001 (4th Cir. 1995) (en banc) ("[W]e cannot conclude that a delay in excess of three months for judicial decision, following 150-day time frame for an administrative decision, ensures a sufficiently prompt judicial review."). The Supreme Court ultimately concluded that the protection of speech requires nothing less than actual judicial resolution, and not just review. City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 781 (2004). For further discussion of the evolution of this issue, see Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 532 (1970) ("The other major teaching . . . is that . . . judicial review must either precede final governmental action or expeditiously follow it."); *see also* Carter & Clark, *supra* note 10, at 237 (commenting that the purpose of the judicial review requirement is to disallow "executive branch censors to make a final determination of whether speech may be constitutionally restrained before it is expressed").

deterrence of speech is a result of a situation in which "even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the [speech] is unprotected, may have a discouraging effect on the [speaker]."[69] The existence of these three safeguards prevents permit schemes from becoming systems of censorship. These "rigorous" requirements are "'but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.'"[70]

B. Shuttlesworth v. Birmingham

Set against the backdrop of the Civil Rights Movement, *Shuttlesworth* called into question the constitutional validity of a Birmingham municipal ordinance requiring anyone wishing to engage in public demonstration to acquire a permit from the City Commission prior to doing so.[71] Per the ordinance, the commission was empowered to allow or deny applications for permits based on its own "'judgment [of] the public welfare, peace, safety, health, decency, good order, morals or convenience'" of the community.[72] Only funeral processions were exempted from appealing to the commission's subjective judgment.[73] The plaintiff, an African-American minister, challenged this ordinance after being convicted of a violation for participating in a civil rights march that was denied permission.[74] In considering the matter, the Court determined whether governmental entities could legitimately exercise speech-suppressing authority "guided only by their own ideas of 'public welfare . . . or convenience.'"[75] The Court unanimously held that such discretion could

69. *Freedman*, 380 U.S. at 59.

70. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 561 (1975) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963)).

71. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 148 (1969).

72. *Id*. at 149 (quoting GEN. CODE OF BIRMINGHAM § 1159 (1963)).

73. *Id.* at 150 (citing GEN. CODE OF BIRMINGHAM § 1159 (1963)).

74. *Id.* at 148–49.

75. *Id.* at 150. The lack of objectiveness is the basis for the concern about a restriction of this nature:

> It is a fundamental requirement of due process that regulations of speech must be clearly delineated. The due process doctrine of vagueness . . . incorporates two basic principles. First, the regulation must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Second, the regulation must provide explicit standards for those charged with its enforcement to prevent discriminatory application. These interests are served by regulations that contain terms

not withstand constitutional scrutiny.[76]

> This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, *without narrow, objective, and definite standards to guide the licensing authority*, is unconstitutional.[77]

The Supreme Court pointed out that the "virtually unbridled and absolute power" supplied by the ordinance to the commission made the constitutional guarantee of freedom of speech contingent upon "'uncontrolled will,'" and acted as an invitation for censorship.[78] While recognizing that statutes may be enacted to "'prevent[] serious interference with normal usage'" of public ways, the Court stressed that "a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission . . .according to their own opinions . . . ."[79] According to the *Shuttlesworth* Court, licensing decisions

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> susceptible of objective measurement.
>
> > The Supreme Court repeatedly has emphasized that the vagueness doctrine applies with particular force in relation to regulations of constitutionally protected speech.

Jonathan Bloom, *A Funny Thing Happened to the (Non)Public Forum:* Lebron v. National Railroad Passenger Corporation, 62 BROOK. L. REV. 693, 715 (1996) (internal quotation marks and citations omitted).

76. *Shuttlesworth*, 394 U.S. at 153.

77. *Id.* at 150–51 (emphasis added).

78. *Id.* (quoting Staub v. Baxley, 355 U.S. 313, 322 (1958)).

79. *Id*. at 153 (quoting Kunz v. New York, 340 U.S. 290, 293–94 (1951)). This holding was in line with previous Supreme Court decisions. *See, e.g.*, Largent v. Texas, 318 U.S. 418, 422 (1943). As the Court stated in *Largent*:

> The mayor issues a permit only if after thorough investigation he 'deems it proper or advisable.' Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form. It abridges the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment.

Largent, 318 U.S. at 422; Schneider v. New Jersey, 308 U.S. 147, 163 (1939) ("[T]he public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) ("The privilege of a citizen . . . to use the streets and parks for communication of views . . . may be regulated in the

must be dictated by narrow and objective standards, and not the whims of licensing authorities.[80] Finding that the Birmingham ordinance gave extensive authority to the commission "on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks," the Court held the ordinance unconstitutional and reversed the conviction of the petitioner.[81]

C. Forsyth County v. Nationalist Movement

The Supreme Court continued to emphasize the unconstitutionality of unfettered discretion in *Forsyth County v. Nationalist Movement*.[82] This case involved an ordinance that, aside from requiring permits for public demonstrations and parades, required applicants to pay a fee for each day such activities were to take place.[83] Significantly, the ordinance also allowed the county administrator to adjust the amount of the fee to meet the expense of maintaining public order in connection with the licensed activity.[84] The contention against the ordinance's validity pertained to the absence of standards and guidelines directing the administrator in setting the amount of the fee, permitting him to make that determination in an arbitrary fashion.[85] The respondent, the Nationalist Movement, wanted to conduct a rally opposing the Martin Luther King, Jr. holiday, and was subjected to a $100 fee by the county.[86] Because the group refused to pay the fee, it was not allowed to conduct its proposed rally and subsequently brought a challenge against the ordinance.[87]

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interest of all; . . . but it must not, in the guise of regulation, be abridged or denied.").

80. *See* Bloom, *supra* note 75, at 716 ("[U]ndisclosed standards fail to provide notice of what is prohibited, invite arbitrary enforcement and chill protected speech. Vague standards likewise fail to safeguard free speech rights and pose a threat of prior restraint.").

81. *Shuttlesworth*, 394 U.S. at 153, 159. For an insightful discussion of the vital role of *Shuttlesworth* in the Civil Rights movement, see David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Acts of 1964*, 29 U.S.F. L. REV. 645, 650–54 (1995).

82. Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

83. *Id.* at 126.

84. *Id.* at 127.

85. *Id.* at 130.

86. *Id.* at 127. The county could predict with some degree of certainty that a rally of this sort would be a difficult chore to handle. Two years before, the county hosted a civil rights demonstration that attracted 1,000 counterdemonstrators and required 3,000 police authorities for containment. *Id.* at 125–27.

87. *Id.* at 127.

In analyzing the ordinance, and following the logic set forth in *Shuttlesworth*, the Supreme Court held that the First Amendment prohibited the vesting of such unbridled discretion to the county administrator for setting the fee amount:

> The decision how much to charge . . . or even whether to charge at all—is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees.[88]

The Court's reasoning was premised on the impropriety of giving an administrator the freedom to assess fees based on his own "measure of the amount of hostility likely to be created by the speech based on its content."[89] The ordinance was enacted as a result of two previous demonstrations, one costing more than $670,000 in police protection, from which the county paid a portion.[90] From this experience, the commission justified the fee assessment scheme of the ordinance as corresponding to "'the cost of necessary and reasonable protection of persons participating in or observing said parades . . . .'"[91] The county administrator was given the authority to "'adjust the amount to be paid in order to meet the expense incident . . . in the matter licensed.'"[92] The constitutional concern, as explained by the Court, related to the scheme permitting the administrator to "estimate the response of others" to the activity "and judge the number of police necessary to meet that response."[93]

88. *Id.* at 133. Allowing discretion brings about the risk that government officials will discriminate against unpopular viewpoints by charging higher fees arbitrarily. *Id.* at 130. If the permit scheme involves appraisal of facts, exercise of judgment, and formation of opinion, the danger of censorship is simply too great to be permitted. *See id.* at 130 (stating that the permit scheme may not delegate broad discretion to government officials).

89. *Id.* at 134.

90. *Id.* at 126. The exact cost incurred by the county is unknown. The State of Georgia paid an estimated $579,148 toward the expense. *Id.* at 126 n.4.

91. *Id.* at 126 (quoting Application to Petition for Certiorari at 100, No. 91-538).

92. *Id.* at 127 (quoting Application to Petition for Certiorari at 119, No. 91-538).

93. *Id.* at 134.

The Court ultimately ruled that the reaction of an audience as a gauge for calculating fees "is not a content-neutral basis for regulation."[94] It was deemed improper for speech to be penalized just because of the mere possibility of offense.[95] Even though there was a cap on the amount that the government could assess, the Supreme Court readily surmised that "no limit . . . can remedy these constitutional violations."[96] Nor was the Court swayed by the amount charged, opining that even nominal fees could be assessed in a content-based manner.[97] The Supreme Court insisted on content-neutrality in the permit scheme.[98] A fee included in a scheme of prior restraints is only permissible if it is plainly content-neutral and serves a legitimate state interest directly connected to the ordinance itself, and not a separate end, such as generating revenues.[99]

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94. *Id.* In other words, the scheme allowed for a heckler's veto, a process whereby individuals hostile to speech—known in legal and lawyer terms as "hecklers"—are able to restrict or preclude the speech altogether by committing violent acts or merely espousing opposing viewpoints. Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299–1300 (7th Cir. 1993). Heckler's vetoes are inconsistent with the fundamental right to free speech, and, for this reason, are uniformly held constitutionally invalid. *E.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910–11, 932–34 (1982) (State may not bar public gatherings merely because they are coercive, intimidating, and offensive to others); Coates v. City of Cincinnati, 402 U.S. 611, 611, 616 (1971) (ordinance that prohibits conduct "annoying to persons passing by" held to violate the right to free speech); Bachellar v. Maryland, 397 U.S. 564, 567 (1970) (protestors cannot be punished because of their resentment of spectators).

95. *Forsyth County*, 505 U.S. at 134–35; *see also* Terminiello v. City of Chi., 337 U.S. 1, 4–5 (1949) (finding mere offense is not enough).

96. *Forsyth County*, 505 U.S. at 137.

97. *Id*. at 136. "A tax based on the content of speech does not become more constitutional because it is a small tax." *Id.*

98. In a nutshell:

> To summarize the holding in *Forsyth*, a county ordinance may not permit a government administrator to vary the fee for assembling to estimate the cost of maintaining public order in the absence of narrow, objective and definite standards to guide the fee determination. An administrator is also prohibited from examining the content of a speaker's message to estimate public response and the cost of police services necessitated by the assembly. Finally, a $1,000.00 cap on a parade permit fee does not render an otherwise invalid ordinance constitutional.

Ericka Kelsaw, Comment, Forsyth County, Georgia v. The Nationalist Movement *No Pay, No Say-Is This the USA?: Permit Fees Continue to Restrict First Amendment Rights*, 19 T. MARSHALL L. REV. 117, 142 (1993).

99. *See, e.g.*, U.S. Satellite Broad. Co. v. Lynch, 41 F. Supp. 2d 1113, 1116,

D. Thomas v. Chicago Park District

Prior to *Thomas*, the Supreme Court relied primarily on the existence of the procedural safeguards enumerated in *Freedman* and the placement of objective and narrow standards for granting permits as required by *Shuttlesworth* to assess whether a permit scheme was constitutional.[100] The distinction between content-based regulations and content-neutral regulations had not yet worked itself into the Court's prior restraint framework, except for the issue of fees contemplated in *Forsyth County*.[101] Hence, many lower courts viewed procedural safeguards as determinative in judging validity of permit schemes, regardless of whether the restrictions in question happened to be content-based or content-neutral.[102] The *Thomas* decision though, ushered content analysis into the Court's calculus.[103]

The case revolved around a city ordinance requiring public demonstrations consisting of more than fifty people to obtain a permit

1122–23 (E.D. Cal. 1999) (holding tax on pay-per-view to be an unconstitutional guise for raising revenue).

100. *See, e.g.*, Deja Vu of Nashville v. Metro. Gov't of Nashville, 274 F.3d 377, 400–401 & n.5 (6th Cir. 2001) (holding, at a minimum, the court is bound to assess whether a decision to grant license is made within specified brief time period and whether status quo is preserved pending final judicial determination); Beal v. Stern, 184 F.3d 117, 127–29 (2d Cir. 1999) (using *Freedman* factors in judging permit scheme); Chesapeake B & M, Inc. v. Harford County, 58 F.3d 1005, 1011–12 (4th Cir. 1995) (determining *Freedman* procedural safeguards are needed for all prior restraints); Million Youth March, Inc. v. Safir, 18 F. Supp. 2d 334, 344 (S.D.N.Y. 1998) (following *Shuttlesworth* and holding that rules could not validly permit "officials to make licensing decisions guided only by their own ideas of what constitutes the good of the community" (internal quotation marks omitted)); United States v. Rainbow Family, 695 F. Supp. 294, 311–12 (E.D. Tex. 1988) (concluding, pursuant to *Shuttlesworth,* that "clear and present danger to public health and safety" as grounds for denial of permit is unconstitutionally "standardless").

101. Under the Supreme Court's body of law governing content analysis, content-based restrictions of speech bring a presumption of invalidity and are subject to strict scrutiny, which calls for the government to prove it has a compelling interest in regulation and that such restrictions are narrowly drawn to serve that interest. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983). A content-neutral restriction on speech is merely subjected to intermediate scrutiny, which requires the government regulation to further a substantial government interest, be narrowly drawn, and leave ample alternative channels for communication. *Id.*

102. *See, e.g.*, *Beal*, 184 F.3d at 127–29 (using *Freedman* factors to assess a content-neutral permit ordinance applied to assemblies and rallies in city parks).

103. Thomas v. Chi. Park Dist., 534 U.S. 316 (2002).

from the Chicago Park District.[104] The ordinance also provided that a grant or denial of permission be made within fourteen days of the receipt of the permit application.[105] An applicant had seven days after the denial of a license to file a written appeal to the Park District Superintendent, who had to act on the appeal within seven days.[106] If the appeal was unsuccessful, the applicant could then file for review in court by common-law certiorari.[107]

Petitioners sought to hold rallies in the park advocating the legalization of marijuana.[108] They filed suit against the Park District contending that the ordinance should contain a time limit for judicial review of a challenge to a permit denial and that the Park District should be required to initiate litigation with every denial, all pursuant to the procedural safeguards of *Freedman*.[109] The Supreme Court rejected this plea and based its reasoning on the content-neutrality of the ordinance in question:

> [T]he licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum. The . . . ordinance does not authorize a licensor to pass judgment on the content of speech . . . but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event. . . .
>
> We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*.[110]

104. *Id.* at 318.

105. *Id.*

106. *Id.* at 319.

107. *Id.*

108. *Id*. at 319–20. The group operated under the banner of "Ad Hoc Coalition for Drug Law Reform." Robert H. Whorf, *The Dangerous Intersection at "Prior Restraint" and "Time, Place, Manner": A Comment on* Thomas v. Chicago Park District, 3 BARRY L. REV. 1, 2 (2002).

109. *Thomas*, 534 U.S. at 320, 322. Justice Scalia, in penning the opinion, framed the issue this way: "This case presents the question whether a municipal park ordinance requiring individuals to obtain a permit before conducting large-scale events must, consistent with the First Amendment, contain the procedural safeguards described in *Freedman* . . . ." *Id.* at 317.

110. *Id.* at 322.

With this holding, the Court distinguished the analysis between content-based prior restraint schemes and their content-neutral counterparts.[111] The procedural safeguards of *Freedman*—so clarified by the Court—are required only if the law applies a content-based prior restraint to the expressive use of a public forum.[112] Such safeguards were deemed unnecessary for content-neutral regulations with existing objective and narrow standards.[113] Ultimately, the Court ruled that the ordinance in question did not abridge one's constitutional free speech right and was valid on its face.[114]

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111. The Court expounds on this reasoning: "*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum." *Id.* This distinction drawn by the Court has been criticized, however, as potentially being unworkable:

> [T]he idea that content-neutral prior restraints are presumptively constitutional may be unworkable. Distinguishing between content-based and content-neutral regulation is not an easy task with clear results even when speech already has taken place. When the determination must be made before the speech has been communicated, however, the task becomes even more difficult. The problem is that in the prior restraint context, it is unclear what effect a particular regulation has on speech and, therefore, the only alternative is to look to legislative intent for guidance. But . . . legislative intent is not always discernible and, even if it were, it would not be the *sine qua non* of deciding whether a particular regulation is constitutionally suspect. Thus, regulators, speakers and judges are left to guess about whether a regulation that has yet to be applied is content neutral with respect to a hypothetical form of expression.

Carter & Clark, *supra* note 10, at 238.

112. *Thomas*, 534 U.S. at 322–23. Notwithstanding, the Court recognized that content-neutral time, place, and manner regulations could still be used in a manner that abridges First Amendment rights, and therefore confirmed that such restrictions must still "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.* at 323.

113. *Id.* at 322. Despite the outcome, the Court was sure to affirm the concerns addressed in *Shuttlesworth* and *Forsyth County*.

> Of course even content-neutral time, place and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.

Id. at 323.

114. *Id.* at 325. Justice Scalia's opinion in *Thomas* enjoyed unanimous support from the Court, but not from academia. *See, e.g.*, Carter & Clark, *supra* note 10, at 253

E. Watchtower v. Village of Stratton

Watchtower involved the activity of door-to-door canvassing and an ordinance that forced individuals to register with and acquire a permit from a government official prior to engaging in such public expression.[115] The petitioners consisted of members of Jehovah's Witnesses, a religion that encourages proselytizing through door-to-door canvassing.[116] The Court had to answer the question of whether the local ordinance that governed this means of public expression was constitutionally valid and consistent with the First Amendment. While recognizing a legitimate interest in some form of regulation, the Court found fault with the subject scheme.[117]

The Court's analysis focused on the breadth of the expression covered by the ordinance and whether there was an "appropriate balance between the affected speech and the governmental interests that the

(criticizing *Thomas* for eroding procedural safeguards based on a problematic belief that guarding against content-discrimination will protect speech); Whorf, *supra* note 108, at 13 (expressing frustration over *Thomas* and the Court's prior restraint doctrine: "[T]he Court found no First Amendment violation, but it did little to clarify the continuing blurry relationship between two long-standing and pivotal free speech concepts—those of 'prior restraints' and 'time, place, manner restrictions.' . . . [T]he Court's jurisprudence lacks a clear definition of prior restraint doctrine.").

115. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 153–56 (2002).

116. *Id.* at 153. Jehovah's Witnesses are no strangers to litigation regarding prior restraints and their door-to-door canvassing. *E.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 106–07 (1943) (sale or soliciting without license). The *Watchtower* Court, highlighted the influence of Jehovah's Witnesses in this area of the law:

> It is more than historical accident that most of these cases involved First Amendment challenges brought by Jehovah's Witnesses, because door-to-door canvassing is mandated by their religion. . . . Moreover, because they lack significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvas door-to-door.

Watchtower, 536 U.S. at 160–61.

117. *Id.* at 165–66. The Village proffered prevention of fraud, prevention of crime, and protection of privacy as their intentions behind the ordinance. *Id.* at 164–65. The Court considered these to be important and sufficient for "regulation of solicitation activity," but, the Village included non-commercial speech, that is, political and religious expression, in its scheme. *Id.* at 165. "Had this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud." *Id.*

ordinance purports to serve."[118] In balancing the interests, the Court noted and elaborated on three constitutional flaws.[119] First, the ordinance required the canvasser to identify himself in the permit application and in the papers subsequently made available for public inspection.[120] Emphasizing the canvasser's interest in maintaining anonymity as a protected constitutional interest, the Court held that the permit scheme resulted in a surrender of anonymity that could "preclude such persons from canvassing for unpopular causes."[121] Second, the Court identified an "objective burden" that the ordinance placed on the religious and political scruples of those whose beliefs may preclude them from registering and obtaining government permission for their activities with a clear conscience.[122] Their convictions might be so strong "that they would prefer silence to speech licensed by a petty official."[123] Lastly, the Court was troubled by the adverse impact on spontaneous speech.[124] The requirement raised some hypothetical, but very practical, concerns:

> A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission.[125]

118. *Id.* at 165.

119. *Id.* at 166–67. Interestingly, in assessing the matter, the Court found the intrusion on free expression so extensive that they did not even bother with forum analysis.

120. *Id.*

121. *Id.* "'The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.'" *Id.* at 166 (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995)). The Jehovah's Witnesses themselves did not raise any such concerns and voiced no interest in speaking anonymously, but this provision was nevertheless subject to challenge as being facially overbroad. *Id.* at 166 n.14.

122. *Id*. at 167. Jehovah's Witnesses believe the effort in seeking governmental permission to share their message is "an act of disobedience" to God. Lovell v. City of Griffin, 303 U.S. 444, 448 (1938) (quotations omitted).

123. *Watchtower*, 536 U.S. at 167. Justice Scalia, in a concurring opinion joined by Justice Thomas, questioned the "objective burden" standard to the extent it would "convert an invalid free-exercise claim . . . into a valid free-speech claim . . . ." *Id.* at 171 (Scalia, J., concurring).

124. *Id.* at 167–68.

125. *Id.* at 167.

Weighing these considerations, the Court held that the interests for regulation, as presented by the Village—fraud, privacy, and crime—did not justify the scope of the ordinance and therefore could not validate the burden imposed on speech.[126] Thus, the ordinance was declared unconstitutional.[127]

IV. PERMISSIBLE PERMIT SCHEMES

Through the aforementioned decisions, the Supreme Court has effectively crafted the constitutionally permissible parameters of permit schemes. *Freedman* sets forth the procedural requirements for prior restraints that prevent the governmental entity enforcing them from becoming the final arbiters of what type of speech enters the public square.[128] *Shuttlesworth* provides needed protection for speech by requiring permit schemes to contain objective and narrow standards that will guide the decisionmaker in granting or denying permission to permit applicants and prevent the exercise of unfettered discretion by government officials.[129] These objective standards are further applied to the assessment of fees in *Forsyth*, which requires fees to be charged on a content-neutral basis, thus incorporating some content analysis in the case of fee-based schemes.[130] The issue of content became fully integrated into the Supreme Court's prior restraint analysis in *Thomas*, by excluding content-neutral schemes from *Freedman*'s procedural safeguards requirement, while finding them suitable for content-based schemes.[131] Additional policy considerations, such as protecting a speaker's interests in anonymity, the constitutional right to spontaneous speech, and the objective burden placed on the religious and political scruples of individuals by requiring permits

126. *Id.* at 168–69. The Court believed the fraud concern to be misplaced in respect to non-commercial speech. *Id.* at 168. As for privacy: "The annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit." *Id.* at 168–69. The Court also found it highly unlikely that the permit requirement would deter crime. *Id.* at 169.

127. *Id.* at 168. Following *Watchtower*, municipalities are not powerless in efforts to regulate solicitation, at least not if done properly. They can still enforce ordinances curbing door-to-door commercial sales and solicitations of charities. Brad D. Bailey, *Solicitations After* Watchtower*: Brother, Do You Want a Tract?*, COLO. LAW., Dec. 2002, at 65, 67.

128. *See supra* Part III.A.

129. *See supra* Part III.B.

130. *See supra* Part III.C.

131. *See supra* Part III.D.

for public speech, were contemplated by the Court in *Watchtower*.[132] It is clear from these cases that the historic presumption of unconstitutionality invariably remains intact and still applies to all systems of prior restraints. Further, it is also clear that determining the constitutional validity of permit schemes calls for a separate and strict First Amendment analysis.

A. *Reasonable Time, Place, and Manner Regulation*

The Court has settled that:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[133]

Therefore, a content-neutral time, place, or manner restriction can be imposed in a public forum, but only if it is a "narrowly drawn and precise enactment[] that aim[s] at specific conduct."[134] The precedent presented herein supplies the limits of what constitutes a narrowly-drawn time, place, and manner restriction.

1. *Large Group Activity*

The constitutional hurdle of demonstrating a legitimate governmental interest before any regulation of speech can be constitutionally valid leads to inquiries about the size of the group impacted by a permit scheme and whether the government has an interest in regulating singular individuals and small gatherings.[135] One of the most frequent justifications for the use of a prior restraint is the preservation of public safety and order.[136] This

132. *See supra* Part III.E.

133. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

134. Davis v. Francois, 395 F.2d 730, 736 (5th Cir. 1968).

135. It is important to note that permit schemes in the United States were initially created as an attempt to regulate massive rallies and parades, such as those conducted by the Salvation Army. *See supra* notes 29–31 and accompanying text. The origin of permit schemes infers that the government only has an interest in pre-emptive regulation when the magnitude of the speech truly presents complications for public safety and order. *See supra* notes 29–31 and accompanying text.

136. *E.g.*, State v. Cox, 16 A.2d 508, 514 (N.H. 1940). As the court in Cox stated:

oft-cited purpose of safety and order only gains practical legitimacy, however, if the ordinance in question seeks to regulate large group activities, such as parades and rallies.[137] Courts entertaining this issue routinely hold that a permit requirement imposed on individual or small group speech to be overly burdensome.[138]

No doubt, individuals and small groups are particularly vulnerable to restrictions on spontaneous speech.[139] Large groups are not as susceptible because it takes more time for them to disseminate information about an event, assemble, and engage in public expression. Individuals and small groups have a greater capacity to be informed of and react to developments in current issues with immediacy and tend to involve less formation and structure. Permit schemes tend to hamper their right to spontaneous speech more than larger groups that have a somewhat diminished logistical

> Application for a permit gives the public authorities notice in advance of any parade or procession for which license may be granted, thus giving opportunity for its proper policing. And the license, in fixing the time and place of a parade or procession, serves to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder.

Id. at 514.

137. *E.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) ("[T]he Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a *march, parade, or rally*.") (emphasis added) (citations omitted).

138. *See, e.g.*, Cox v. City of Charleston, 416 F.3d 281, 285 (4th Cir. 2005) ("We . . . believe that the unflinching application of the Ordinance to groups as small as two or three renders it constitutionally infirm."); Parks v. Finan, 385 F.3d 694, 705–06 (6th Cir. 2004) (holding permit scheme enforced against individual expression as not being narrowly tailored to the significant governmental interest); Douglas v. Brownell, 88 F.3d 1511, 1524 (8th Cir. 1996) (stating in dicta that the ordinance as applied to groups as small as ten is not narrowly tailored); Grossman v. City of Portland, 33 F.3d 1200, 1206–07 (9th Cir. 1994) (upon finding Portland's permit requirement for speech in public parks applied to individuals "making an address," the court held, "the ordinance did not simply burden speech; it discriminated against speech."); Cmty. for Creative Non-Violence v. Turner, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (holding a permit requirement invalid because it could conceivably apply to individuals and groups as small as two); Diener v. Reed, 232 F. Supp. 2d 362, 387–88 (M.D. Pa. 2002) (holding a permit requirement that could apply to an individual distributing literature or making public speech in a city park invalid); Paulsen v. Lehman, 839 F. Supp. 147, 163–64 (E.D.N.Y. 1993) (striking down state regulation because it included individual expressive activity in its permit requirement).

139. *Grossman*, 33 F.3d at 1206–07.

ability to engage in such immediate speech.[140] Consequently, a permit requirement that covers individuals and small groups should be viewed as improper because movements of such small magnitude are not significant enough to justify prior permission.[141]

The Court in *Watchtower* discussed how a regulation of door-to-door canvassing is a violation of free speech rights because of its far-reaching effect.[142] In striking down the scheme as unconstitutional, the Court commented that the imposition of a permit on individual expression adversely impacts too much speech:

> It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.[143]

2. *For No (or an Appropriate) Fee*

The Supreme Court recognizes that regulatory fees may be assessed as part of a system of prior restraint, but only if the system is content-neutral and serves a legitimate state interest.[144] Such interests may include

140. As the Ninth Circuit discerned in *Grossman*:

> Some type of permit requirement *may* be justified in the case of large groups, where the burden placed on park facilities and the possibility of interference with other park users is more substantial [but] we simply cannot agree that six to eight people carrying signs in a public park constituted enough of a threat to the safety and convenience of park users . . . to justify the restrictions imposed on their speech here.

Id. at 1206–07.

141. *But see* New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 26–29 (1st Cir. 2002) (upholding a permit requirement that could include individuals for expression on "narrow thronged" sidewalk deemed to be "congested" and "crowded"). It seems that *Kinton* does not support a large group requirement for the validity of ordinances but rather concentrates on the nature and capacity of the forum in question. *See id.* at 26–27 (distinguishing precedent on the basis of location). Nevertheless, it is not difficult to reconcile this decision with the others by proposing that courts need not set a numerical quota in determining the validity of ordinances but rather make determinations on what constitutes a "large group," for purposes of the prior restraint doctrine, by examining the nature and capacity of the forum in question.

142. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 165–69 (2002).

143. *Id.* at 165–66.

144. Forsyth County v. Nationalist Movement, 505 U.S. 123, 136–37 (1992).

the protection of public safety and the maintenance of order. However, as with any system of prior restraint, the assessment of fees must be directed by definite, objective, and narrow standards.[145] A government entity cannot arbitrarily assign fees as a matter of unfettered discretion.[146]

The propriety of a fee-based scheme also turns on whether the imposition is content-neutral or content-based.[147] A state interest must be "compelling" to excuse a content-based regulation on speech.[148] Even when the legitimacy of a state interest is beyond question, like with public safety and order, such interest may be trumped by the prospect of a subjective evaluation.[149] In this respect, the amount of the fee is not an accurate gauge for determining the appropriateness of the restriction. Even nominal fees can be taxed in a content-based manner.[150] Yet, "a more than nominal permit fee is constitutionally permissible so long as the fee is reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order."[151]

145. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

146. *Forsyth County*, 505 U.S. at 137.

147. *Id.* at 134–35 ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."). Even seemingly rational fees are unconstitutional if the government bases them, directly or indirectly, on the content of the message. *See* Cent. Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1521 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986) (striking down an ordinance that required groups to prepay cost of police protection where unpopularity of message might increase costs); Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281, 285–86 (D. Md. 1988) (striking down ordinance that required group to pay costs of police protection); *see also* Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 497 (1999) (with schemes that contemplate hostile reaction or allow for unbridled discretion, "the First Amendment flaw is the same: public forum access is left to hinge on the *popularity* of a speaker's message").

148. A recognized part of the Court's free speech jurisprudence is that a compelling government interest must exist for any content-based restrictions to be valid and that it is narrowly-drawn towards that end. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

149. A scheme that allows arbitrary application by a licensor supplies a means for suppressing a particular point of view. *Forsyth County*, 505 U.S. at 130.

150. *Id.* at 137.

151. Ne. Ohio Coal. for the Homeless v. City of Cleveland, 105 F.3d 1107, 1110 (6th Cir. 1997) (quoting Stonewall Union v. City of Columbus, 931 F.2d 1130, 1136 (6th Cir. 1991)); *see also* O'Neill, *supra* note 147, at 473–74 (noting the principle that the "'state may recoup the actual costs of governmental services that are generated by the use of public property for speech activities, so long as the charge is not so great as to appear to the judiciary to be oppressive or completely preclusive of speech'") (quoting David Goldberger, *A Reconsideration of* Cox v. New Hampshire*: Can Demonstrators*

Aside from content-neutrality, the government still cannot financially burden speech as a means for raising revenues. Fees must be tied to the regulatory scheme and not some other government project.[152]

3. *Without Requiring Unreasonable Notice*

As the Supreme Court specifically acknowledged in *Watchtower*, every citizen not only enjoys the right to speech, but also the right to spontaneous speech.[153] This right is obviously jeopardized by a requirement that the speaker supply notice of the proposed speech in advance.[154] Simple delay restricts speech.[155] "[W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."[156] In addition to limiting the effectiveness of the speech and drastically reducing its potential to affect current issues, the imposition of advance notice also functions as a deterrent to those who wish to engage in public expression.[157] The ineffectiveness of public speech due to mere

Be Required to Pay the Costs of Using America's Public Forums?, 62 TEX. L. REV. 403, 409–10 (1983)).

152. As one professor so eloquently puts it: "In the final analysis, it is easy to price the product but very hard to tolerate the intolerable. But we must try if we are not to abandon the experiment initiated by those who shed blood to end taxes on knowledge." Neisser, *supra* note 14, at 351. *Compare Ne. Ohio Coal. for the Homeless*, 105 F.3d at 1110 (upholding $50 fee for peddling permit as appropriate way of defraying costs incident to implementation of ordinance), *with* Turley v. N.Y. City Police Dep't, 988 F. Supp. 667, 674 (S.D.N.Y. 1997) (striking down $45 fee for sound device permit as being greater than proven administrative costs).

153. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 164, 167–68 (2002).

154. Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1046 (9th Cir. 2006) ("Advance notice or permitting requirements do, by their very nature, foreclose spontaneous expression. . . . Consequently, in any particular forum, true spontaneous expression and the application of an advance notice requirement are mutually exclusive.").

155. "Obedience to a prior restraint order, even if such order is later overturned, necessarily means that there is a loss in the immediacy and the timeliness of the speech." 1 SMOLLA, *supra* note 21, § 15:10.

156. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969) (Harlan, J. concurring); *see also* Grossman v. City of Portland, 33 F.3d 1200, 1206 (9th Cir. 1994) ("[B]ecause of the delay caused by complying with the permitting procedures, '[i]mmediate speech can no longer respond to immediate issues'"(quoting NAACP v. City of Richmond, 743 F.2d 1346, 1355–56 (9th Cir. 1984))); *City of Richmond*, 743 F.2d at 1355 ("[T]he delay inherent in advance notice requirements inhibits speech. By requiring advance notice, the government outlaws spontaneous expression.").

157. *Grossman*, 33 F.3d at 1206 ("Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to

delay discourages citizens from even thinking about engaging in such speech. To be sure, there is not much incentive in uttering a statement that will not gain consideration due to the untimely nature of the utterance.[158]

This concern about delay is particularly poignant when an advance notice requirement is imposed on small groups or individuals.[159] There may be good reasons for a municipality to know about an expressive activity in advance in the case of large groups because of the potential for causing public disturbance and unrest. This interest wanes significantly, however, with small groups and individuals.[160] Thus, while the demand of advance notice could make sense as it concerns a huge rally, it is quite another matter to apply the same requirement to a single activist sharing a message in a public place.[161]

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be granted may discourage potential speakers.").

158. Political speech is one area in which restrictions on spontaneous expression can become excessively burdensome. "Restricting spontaneous political expression places a severe burden on political speech . . . . To suggest that the waiting period is minimal ignores the reality of breakneck political campaigning and the importance of getting the message out in a timely, or, in some cases, even instantaneous fashion." Ariz. Right to Life PAC v. Bayless, 320 F.3d 1002, 1008 (9th Cir. 2003).

159. *See supra* notes 135–43 and accompanying text.

160. Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1043–44 (9th Cir. 2006). As noted by the Third Circuit:

> [T]he length of the required period of advance notice is critical to its reasonableness; and given that the time required to consider an application will generally be shorter the smaller the planned demonstration and that political demonstrations are often engendered by topical events, a very long period of advance notice with no exception for spontaneous demonstrations unreasonably limits free speech.

Santa Monica Food Not Bombs, 450 F.3d at 1043–44 (quoting Church of the Am. Knights of the Ku Klux Klan v. City of Gary, 334 F.3d 676, 682 (7th Cir. 2003))); *see also Church of the Am. Knights of the Ku Klux Klan*, 334 F.3d at 682–83 (striking down forty-five-day advance notice requirement for a fifty-person demonstration on public property); Douglas v. Brownell, 88 F.3d 1511, 1523–24 (8th Cir. 1996) (ruling unconstitutional five-day advance notice requirement with groups as small as ten).

161. The Sixth Circuit made much of the critical distinction between large rallies and individual activists when it held a regulation requiring individuals to secure a permit prior to engaging in expressive activities on the state capitol grounds unconstitutional. Parks v. Finan, 385 F.3d 694, 701–03 (6th Cir. 2004). The court surmised: "When it comes to wearing a campaign button or symbolic clothing, requiring a permit obtained 15 days ahead of time, at a cost of $20, is pretty close in its effect to an outright prohibition." *Id.* at 703.

4. *Without Demanding Identity*

The Supreme Court has consistently struck down laws curbing the freedom of citizens to engage in public expression anonymously.[162] When an individual is required to divulge their identity just to secure permission to speak, this is a compulsion that "necessarily results in a surrender of that anonymity."[163] In the Court's opinion, "an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. . . . [I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[164] As recently confirmed in *Watchtower*, demanding a citizen to identify himself to exercise the right to speak is a clear affront to First Amendment

162. *E.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002) (identity requirement for door-to-door canvassing surrendered anonymity); Talley v. California, 362 U.S. 60, 64 (1960) (mandate of names and addresses on handbills inhibits freedom of speech and expression); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 451, 462 (1958) (divulgence of members of group violates privacy rights of association). In *Talley*, the Supreme Court presented a historical overview of anonymity's role in the development of speech jurisprudence:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Talley, 362 U.S. at 64–65 (footnotes omitted).

163. *Watchtower*, 536 U.S. at 166.

164. *Talley*, 362 U.S. at 64–65.

values.[165]

This condemnation of identification compulsion not only applies to individuals, but also to groups. The Court has reasoned that the constitutionally-protected interest in privacy of association is necessarily compromised by a government mandate that requires identification of affiliation prior to engaging in public expression.[166]

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases discussed were thought likely to produce upon the particular constitutional rights involved in those cases. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action that might interfere with freedom of assembly . . . "[a] requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature."[167] Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order.

To force individuals to reveal the group they represent as a condition of public speech is an invitation to suppression. This divulgence allows government officials to activate prejudices against certain platforms and ideas that they personally dislike and partake in a form of censorship. Keeping the knowledge of a speaker's affiliation away from an official then

165. *Watchtower*, 536 U.S. at 166–67; *see also* Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 412 (2003) ("In June 2002, the Supreme Court [in *Watchtower*] affirmed its protections for anonymous speech.").

166. *Watchtower*, 536 U.S. at 166–67. There are arguments, however, that some believe may justify overriding anonymity:

> Anonymous house-to-house canvassing enhances the possibilities for dirty tricks. A door-to-door election worker could, for example, wear false identification tags, misrepresent the opponent candidate's position on issues, or engage in conduct designed to prejudice voters unfairly. . . . [T]he augmented danger of crime and intimidation . . . places the hearer [in door-to-door canvassing] in a more vulnerable position than written communication.

Kathryn Lusty, Note, *Proselytizers, Pamphleteers, Pests, and Other First Amendment Champions:* Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 18 BYU J. PUB. L. 229, 242–43 (2003).

167. *Patterson*, 357 U.S. at 462 (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

becomes necessary to safeguard against prejudice that could otherwise creep into the decisionmaking process.[168]

Additionally, as with other aspects of a permit requirement, the compelled disclosure of identity serves as a deterrent to the speech itself, especially for those holding unpopular political positions.[169] Potential advocates may opt for silence in lieu of subjecting themselves to backlash for voicing ideas that cut against the grain.[170]

B. *Employs Objective Standards*

The necessity for objective and narrow standards in a permit scheme that restricts public expression is inherent in Blackstone's premise that to subject speech "to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."[171] As a constitutional prerequisite, government may not delegate unduly broad discretion to a licensing official or body.[172] By

168. *See* Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) ("[C]ompulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members.").

169. In the not so distant future, the Supreme Court will undoubtedly wrestle with how this notion of protected anonymity applies to internet use. *See* Ekstrand, *supra* note 165, at 413–17 (expounding on practical concerns raised with anonymous internet users). *See generally* Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces,* 104 YALE L.J. 1639 (1995) (examines application of First Amendment principles in cyberspace).

170. *Watchtower*, 536 U.S. at 167.

171. 4 BLACKSTONE, *supra* note 26, at 152.

172. Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992). A separate but closely related issue is whether unduly broad discretion is only inappropriate in public forums. In *Forsyth County*, for instance, the restriction applied to speech taking place in a traditional public forum. *Id.* at 125–26. Whether unfettered discretion utilized in other types of fora is similarly condemned is not entirely clear, as reflected in recent appellate court decisions. While some circuits strictly ban unbridled discretion, other circuits allow for unbridled discretion, in non-public fora. *Compare* Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 95 (1st Cir. 2004) ("Our view is that a grant of discretion to exercise judgment in a non-public forum must be upheld so long as it is 'reasonable in light of the characteristic nature and function' of that forum." (quoting Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1323 (Fed. Cir. 2002))), *with* Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch., 457 F.3d 376, 386 (4th Cir. 2006) ("[T]here is broad agreement that, even in limited public and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment."). Still, it would seem that the

supplying a governmental authority with the capacity to approve or deny an individual or a group permission to speak—without universal standards to follow—equates to decisions that are unavoidably subjective in nature.[173] Indeed, the presumption of unconstitutionality attached to prior restraints comes from this peril that the licensing individual or body will make value judgments based on personal beliefs. [174]

> Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.[175]

This presumption of unconstitutionality can only be overcome by replacing discretion with objectivity. A system of prior restraints must possess well-defined and sufficiently narrow guidelines to direct the governing body's decisionmaking.[176] Such guidelines must be truly objective in order to prevent the permit-giving official from making decisions impacting speech that are based on tastes, preferences, or biases.[177]

Supreme Court would frown on unbridled discretion no matter where it is found. Unbridled discretion empowers officials to pick and choose which viewpoints to allow, and viewpoint discrimination is forbidden in all forums. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983).

173. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969).

174. *Forsyth County*, 505 U.S. at 130–31.

175. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

176. *Shuttlesworth*, 394 U.S. at 150–51.

177. *Id.* at 153. The lack of objectiveness can take different forms. *Shuttlesworth* illustrates the impropriety of ambiguous terminology, allowing subjective interpretation of an operative phrase to turn into a biased decision. *Id.* at 150–51; *see also* United States v. Rainbow Family, 695 F. Supp. 294, 311–12 (E.D. Tex. 1988) (following *Shuttlesworth*, striking down "'clear and present danger to public health or safety'" ground for denial of permit as being "standardless"). This identical concern is also present with non-existent standards. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 753–54 (1988). In *City of Lakewood*, the Supreme Court ruled unconstitutional an ordinance that failed to supply any criteria for guiding a mayor's decision in issuing permits for newsracks. *Id.* at 772; *accord* City of Houston v. Hill, 482 U.S. 451, 465–67 (1987) (ordinance that gave police officers unguided discretion in criminalizing pure speech held invalid). Another aspect of this dilemma is found when speech is denied in the absence of any law at all. Without a "properly drawn ordinance," government officials are free to prohibit speech on an ad hoc and invalid

The reasons for these concerns are manifest: abusive bans on speech and unfettered discretion go hand in hand.[178] Thus, if an administrator has the power to grant, modify, postpone, or waive a permit for expressive activity on the basis of vague or non-existent criteria, the regulation is deemed invalid under the prior restraint doctrine.[179] Equally as important, objective standards are essential for judicial review of the licensing decision. Vague or non-existent standards not only allow an official to invoke bias, but also could give him the cover to get away with it. "[T]he absence of express standards makes it difficult to distinguish . . . between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power."[180] The judicial body reviewing challenges to permit denials rely on objective standards for determining the propriety of the administrative body's decision. These independent standards remove preferences and "provide the guideposts that check the licensor and allow

basis. Million Youth March, Inc. v. Safir, 18 F. Supp. 2d 334, 343 (S.D.N.Y. 1998).

178. Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987) ("'The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.'" (quoting Lewis v. City of New Orleans, 415 U.S. 130, 136 (1974) (Powell, J., concurring))). Allowing a licensing official to retain unchecked "'discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth County,* 505 U.S. at 130 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981)); *see also City of Houston*, 482 U.S. at 465–67 (discussing unguarded discretion found in broad regulation of expressive activities). The discretion results in inequity. *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2416 (2003) ("[T]he existence of discretion creates a substantial risk that government actors will contravene equality norms. Left to their own devices, the various entities that exercise discretionary decisionmaking authority—including police officers, bureaucrats, judges, juries, and even the electorate—may base their decisions on improper considerations.").

179. In the seminal *Shuttlesworth* decision, the Supreme Court considered and held invalid a statute allowing for individual judgment on "public welfare, peace, safety, health, decency, good order, morals or convenience." *Shuttlesworth*, 394 U.S. at 150 (internal quotations omitted).

180. *City of Lakewood*, 486 U.S. at 758. This includes the real prospect of self-censorship:

> [T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . Self-censorship is immune to an "as applied" challenge, for it derives from the individual's own actions, not an abuse of government power. . . . Only standards limiting the licensor's discretion will eliminate this danger . . . .

Id. at 757–58 (internal citation omitted); *see also* Guerrera, *supra* note 46, at 1225 (depicting self-censorship as a "major concern in cases of prior restraint").

courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."[181] Conversely, the omission of these guideposts allows licensing officials to make "*post hoc* rationalizations [with] the use of shifting or illegitimate criteria . . . making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."[182]

V. PROPRIETY OF UNLIMITED TIME FOR DECISION WITH PERMIT SCHEMES

The assurance of due process is another hallmark of constitutionally valid permit schemes.[183] As espoused in *Freedman*, the existence of a specified brief time period during which the status quo is maintained, the availability of prompt judicial review, and the placement of the burden of litigation on the state, are all components of the protections that are required of prior restraints.[184] Before *Thomas*, it was presumed—at least by some—that these securities were mandated for all prior restraints.[185] But, in *Thomas*, the Supreme Court set the record straight, declaring: "We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*."[186]

181. *City of Lakewood*, 486 U.S. at 758.

182. *Id.* The Supreme Court, in *Thomas,* echoed the twin concerns about unfettered discretion, offering that a valid permit scheme must "contain adequate standards to guide the official's decision and render it subject to effective judicial review." Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002); *see also* Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566, 578–79 (7th Cir. 2002) (analyzing Supreme Court jurisprudence, from *Freedman* to *Shuttlesworth* to *City of Lakewood* to *Thomas*, observed that "the Supreme Court has made clear that when a decisionmaker has unbridled discretion there [exists] the risk that the decisionmaker will use its unduly broad discretion to favor or disfavor speech based on its viewpoint or content, and that without standards to guide the official's decision an as-applied challenge will be ineffective to ferret out viewpoint discrimination"); Whorf, *supra* note 108, at 8 (noting that courts have two problems with discretion: (1) potential applicants may censor their own speech, even if government does not abuse discretion, and (2) discretion may hide perfidious suppression of speech, making it difficult for courts to monitor when abuses occur).

183. *See supra* Part III.A.

184. Freedman v. Maryland, 380 U.S. 51, 58 (1965).

185. *E.g.*, Beal v. Stern, 184 F.3d 117, 127–29 (2d Cir. 1999) (applied first two *Freedman* factors to content-neutral scheme).

186. *Thomas*, 534 U.S. at 322.

Paying attention to this pronouncement, a few appellate courts have jumped to the conclusion that there is no need for content-neutral permit schemes to have a fixed deadline for the licensing official to act on a given request. In *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg*, the Eleventh Circuit evaluated a municipal sign ordinance requiring a permit.[187] The ordinance was plainly content-neutral on its face, yet it did not require the city to process an application within any certain time frame.[188] Upon consideration of this, the appellate court upheld the ordinance and opined that a deadline is no longer mandatory post-*Thomas*.[189] The Tenth Circuit, as reflected in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, has construed *Thomas* in the same way.[190] The panel surmised: "Among the procedural requirements the *Thomas* Court held inapplicable to content-neutral permit schemes is the requirement of a limit on the time during which speech can be restrained before the decisionmaker acts on the application."[191] Pursuant to this interpretation of *Thomas*, the Tenth Circuit did not render the omission of a fixed deadline for granting or denying a permit application to be violative of the First Amendment.[192] And finally, representing the most recent appellate court to join in on this assessment of *Thomas*, the Ninth Circuit, in *Southern Oregon Barter Fair v. Jackson County*, determined that a deadline was not required for a content-neutral scheme pertaining to mass gatherings.[193] The appellate court held that "[t]he lack of a permit application deadline is not sufficient to invalidate the Act on a facial challenge."[194]

187. Granite State Outdoor Adver., Inc. v. City of St. Petersburg, Fla., 348 F.3d 1278, 1279–80 (11th Cir. 2003).

188. *Id.* at 1281–82.

189. *Id.* at 1282–83. The court acknowledged the potential for bias entering into the decision, in the absence of a time limit, but still did not consider the issue suitable for a facial challenge: "We realize City officials could potentially delay the processing of certain permit applications and thereby arbitrarily suppress disfavored speech. We will not, however, address hypothetical constitutional violations in the abstract." *Id.* at 1282.

190. Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1258–60 (10th Cir. 2004).

191. *Id.* at 1259. Confusingly, the court concluded that a time limit was not required because *Thomas* only mandates "adequate" standards, as if a scheme without a deadline could be considered adequate. *Id.*

192. *Id.* The court considered a fixed deadline as part and parcel of the *Freedman* procedural requirements. *Id.*

193. S. Or. Barter Fair v. Jackson County, 372 F.3d 1128, 1138 (9th Cir. 2004).

194. *Id.* at 1139. This ruling was reached while "acknowledg[ing] the

These appellate decisions interpreting *Thomas* obviously generate momentum for the idea that fixed deadlines are not essential for permit schemes. Even so, the *Thomas* decision still begs the question: Did the Supreme Court actually say, "You shall not require deadlines for permit requests?"[195]

The petition in *Thomas* focused on whether the Park District would be required to initiate litigation in defending its scheme and whether a deadline was needed for judicial review after a permit denial.[196] The Supreme Court answered both questions in the negative.[197] The Court did not address the constitutional import of a fixed deadline for considering a permit.[198] Instead, the Court rebuffed what it termed "the procedural requirements set forth in *Freedman*."[199] The Court specifically defined those safeguards as follows:

> "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court."[200]

Thus, with respect to deadlines for permit decisions, it is more correct to say that *Thomas* did not rule on the issue, but remarked that content-neutral schemes are not required to have *Freedman* procedural safeguards, including the one mandating a specified brief time period and the maintenance of the status quo. This procedural safeguard is not synonymous with a fixed deadline requirement.[201] A fixed time deadline for decisionmaking does not necessarily demand a "brief" time period, nor

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theoretical possibility that, without a deadline, Jackson County could effectively shut down gatherings by delaying permit decisions indefinitely." *Id.* at 1138.

195. This is a play on words adopted from an account of the exchange between the serpent and Eve in the Garden of Eden, as recorded in the Bible. *Genesis* 3:1 (English Standard Version).

196. Thomas v. Chi. Park Dist., 534 U.S. 316, 322 (2002).

197. *Id.*

198. *Id.* In fact, the Park District had a fixed deadline of twenty-eight days in which to respond to a permit request. *Id.* at 324.

199. *Id.*

200. *Id.* at 321 (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227 (1990)).

201. Different from the reasoning of the aforementioned appellate decisions, these two matters are similar, but not synonymous. The essential problem with a missing time deadline is the unfettered discretion that comes into play.

the keeping of the status quo.[202]

Significantly, the *Thomas* Court goes on to emphasize:

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. . . . We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.[203]

Without elaborating much on this point, the Supreme Court clings to the concept that "adequate" standards are still a must for guiding an official's decision with a permit scheme.[204] In dealing with the adequacy of the ordinance at hand, the Court pointed out that a decision on a permit had to be processed by the Park District within twenty-eight days, in judging that the "grounds are reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.'"[205]

A motion for rehearing en banc was pursued in the *Southern Oregon Barter Fair* case, which was subsequently denied.[206] From this denial, Judge Berzon proffered an impassioned and well-informed dissent, which six other judges from the Ninth Circuit joined.[207] In specifying the basis, the dissenters decried what they characterized as the panel's "fundamental misreading of *Thomas*."[208] These judges explained that *Thomas* comprises

202. These are separate issues. *See, e.g.*, 11126 Balt. Blvd., Inc. v. Prince George's County, 58 F.3d 988, 997–98 (4th Cir. 1995) (150-day time period not considered brief enough).

203. *Thomas*, 534 U.S. at 323.

204. *Id.*

205. *Id.* at 324 (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992)).

206. S. Or. Barter Fair v. Jackson County, 401 F.3d 1124, 1124 (9th Cir. 2005).

207. *Id.* at 1124–29.

208. *Id.* at 1125. The dissenters were not charitable in their assessment of the decision: "The panel's decision mangles its application [of *Thomas*]." *Id.* The dissenters added:

> *Thomas* did not decide that a content-neutral time place, and manner regulation need not include any deadline for administrative review; the ordinance in *Thomas*, indeed, had such a deadline—twenty-eight days. Instead, the Court decided only that two *Freedman* requirements—a deadline for judicial review of a censor's decision, and the requirement that the

two holdings: one dealing with the procedural safeguards established in *Freedman*, and the other concerning the mandate that content-neutral schemes contain adequate standards to guide the official's decision.[209] They believed the panel went awry in observing the first holding of *Thomas* while neglecting the second.[210]

A clear reading of *Thomas* suggests that the dissenting judges in the Ninth Circuit have a better grasp of the precedent than their colleagues. Unless the Supreme Court expresses otherwise, *Thomas* cannot be read to allow the licensor an indefinite amount of time to grant or deny a permit, whether the regulation is content-based or content-neutral. The importance of a time-limit requirement transcends the content inquiry: "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. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech."[211] Undue delay can easily amount to an arbitrary denial.[212]

> government must initiate litigation—do not apply to content-neutral schemes. Furthermore, in deciding whether the Chicago Park District regulatory scheme contained "adequate standards to guide [an] official's discretion and render it subject to effective judicial review," the Court specifically pointed to the deadline for administrative review—mandating that "the Park District must process applications within 28 days"—as among the reasons why the Chicago Park District's scheme does not give "the licensing official . . . unduly broad discretion in determining whether to grant or deny a permit, [creating] a risk that he will favor or disfavor speech based on its content."

Id. at 1126 (quoting *Thomas*, 534 U.S. at 323–24) (citations and emphasis omitted).

209. *Id.* at 1125–26.

210. *Id.* at 1126–28. These dissenters debunked the notion that a plaintiff would have to suffer through some inordinate delay before having the right to challenge the lack of time limit. "In short, relegating citizens applying for permits for speech-related activity to as-applied challenges is decidedly *not* the law." *Id.* at 1127. In the minds of the dissenters, it mattered not how other appellate courts viewed the issue. They "note that fear of creating an inter-circuit conflict is no reason to decide this case contrary to *Thomas*." *Id.* at 1128.

211. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227 (1990); *see also* Chesapeake B & M, Inc. v. Harford County, 58 F.3d 1005, 1009–10 (4th Cir. 1995) (unbridled discretion exists in absence of time limit).

212. Not much imagination is required for this scenario: an administrator need only sit on his hands, whether it be for days, months, or even years, until the desire for expression has dissipated or the purpose for the requested speech has become moot. In effect, there is no appreciable difference between this delay tactic and the use of discretion that would allow an administrator to arbitrarily ban speech outright.

At bottom, unfettered discretion as to the timing is still unfettered discretion, and unfettered discretion is still unconstitutional.[213] Just like the Court condemns vague or non-existent standards for awarding a permit in the first place,[214] and just like the Court condemns vague or non-existent standards for imposing a fee for a permit,[215] the Court most assuredly condemns vague or non-existent standards for determining when to decide about a permit. As the Court resolved in the *Thomas* decision, a fixed time limit is a factor for ensuring that the licensing standard is adequate.[216] To interpret *Thomas* any other way is to undercut the long-standing constitutional protections against unfettered discretion.[217]

VI. IMPACT OF PERMIT REQUIREMENT ON RELIGIOUS AND PATRIOTIC VIEWS

One of the more controversial aspects of the current prior restraint jurisprudence stems from the portion of the *Watchtower* opinion that addresses the impact on religious and patriotic views.[218] The Supreme Court put forward that "requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views."[219] This imposition, the Court held, would negatively affect those with "religious scruples" or

213. *See Thomas*, 534 U.S. at 323–24. Judge Berzon and his fellow dissenters to the motion for rehearing en banc in *Southern Oregon Barter Fair* were particularly critical of the panel's handling of the issue of unbridled discretion: "There is no basis for treating unbridled discretion with respect to timing of administrative response to a permit application differently from other kinds of administrative discretion with respect to issuance of permits, and the panel suggests none." *S. Or. Barter Fair*, 401 F.3d at 1127.

214. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969).

215. Forsyth County v. Nationalist Movement, 505 U.S. 123, 133–34 (1992).

216. *Thomas*, 534 U.S. at 324.

217. In other words, *Thomas* would effectively be overruling the import of *Shuttlesworth*, as well as *Forsyth County*, and be in direct conflict with *Watchtower*. In the wake of *Thomas*, and the recent federal appellate court decisions concerning *Thomas*, some commentators have proclaimed the death of the time-limit requirement in content-neutral schemes, along with the procedural safeguards set out in *Freedman*. Carter & Clark, *supra* note 10, at 226–27, 244–49, 253–54. To paraphrase Mark Twain, rumors of the death of time-limit requirements have been greatly exaggerated. Surely, Judge Berzon and the other dissenters in the Ninth Circuit will not stand alone on this issue. Upon being addressed by other circuits, *Thomas* should finally be read correctly.

218. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 167 (2002).

219. *Id.*

otherwise possess "firm convictions about their constitutional right to engage in uninhibited debate . . . ."[220]

Labeled as a "pernicious effect" of a permit requirement, this "objective burden" phraseology was more than a passing mention by the *Watchtower* Court; it served as a partial basis for holding the permit scheme restricting door-to-door canvassing to be unconstitutional.[221] Pursuant to that holding, if public expression of religious or patriotic views becomes subject to a permit scheme, such restriction falls under some undefined—but still heightened—form of scrutiny.[222]

In his concurrence in *Watchtower*, Justice Scalia, joined by Justice Thomas, took this comment about "objective burden" to task as being an attempt to circumvent the very difficult standard attached to a free exercise of religion claim.[223] The scrutiny associated with a free exercise claim was greatly reduced in *Employment Division, Department of Human Resources of Oregon v. Smith*, in which the Court, in an opinion authored by Scalia, held that intermediate scrutiny would suffice and that no compelling governmental interest would be necessary for determining the constitutional validity of a government action that burdens free exercise rights.[224] Different from the holding in *Watchtower*, *Smith* declared that "'[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.'"[225]

With the new precedential development in *Watchtower*, it appears

220. *Id.*

221. *Id.* at 166–68.

222. The meaning of the phrase was not fully hashed out in the decision.

223. *Watchtower*, 536 U.S. at 171 (Scalia, J., concurring). Justice Scalia complains that the use of the objective burden standard "would convert an invalid free-exercise claim into a valid free-speech claim—and a more destructive one at that." *Id.* (citation omitted).

224. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882–90 (1990). The shift in scrutiny is significant. Practically speaking, under *Smith*, government can burden the exercise of an individual's religion as long as it uses a "'valid and neutral law of general applicability.'" *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). Congress attempted to raise this level of scrutiny, but the Supreme Court ruled the legislation unconstitutional. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1993)), *overruled by* City of Boerne v. Flores, 521 U.S. 507 (1997).

225. *Smith*, 494 U.S. at 879 (quoting Minersville Sch. Dist. Bd. of Ed. v. Gobitis, 310 U.S. 586, 594 (1940)).

that the near-impossible burden *Smith* places on non-governmental parties—at least in the context of religious speech—can now be averted. But despite his expressed concerns over this development, Justice Scalia does not speak for the majority on the matter. Per precedent of *Watchtower*, the adverse impact on patriotic views and religious scruples is an established consideration for judging the validity of a prior restraint.[226]

VII. CONCLUSION

The body of case law constituting the Court's prior restraint jurisprudence attests to its continued aversion to permit schemes or any other regulatory system that preemptively screens speech before it can enter the public arena. The time-tested presumption of constitutional invalidity should provide more than an inkling of the Court's overall

226. Lower courts are taking heed to this edict about an "objective burden." The Court of Appeals for the Third Circuit recently struck down an ordinance in Mount Lebanon, Pennsylvania, impacting door-to-door political campaigning because of its burden on political views. Serv. Employees Int'l Union, Local 3 v. Municipality of Mount Lebanon, 446 F.3d 419, 425–29 (3d Cir. 2006). The scope of Mt. Lebanon's ordinance and the burden it places on free speech are comparable to the scope and "pernicious" effects found in *Watchtower*. Mt. Lebanon's registration requirement extends to the core of First Amendment areas of religious and political discourse, and its regulation of written material encompasses all subject matter without limitation. Moreover, its effect on spontaneous speech, anonymous advocacy, and advocacy by those with religious or patriotic scruples is indistinguishable from that of the *Watchtower* ordinance. *Id.* at 426–27 (footnotes omitted). Similarly, a federal district court in Ohio held invalid a permit scheme because it burdened religious scruples.

> [T]he Court recognizes the United States Supreme Court's conclusion that 'requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views.' That Court explained that 'there are a significant number of persons whose religious scruples will prevent them from applying for [a permit].' Crediting Plaintiff's testimony that applying for a permit would be against his 'religious conscience,' the Court finds that he is indeed just such a person as contemplated in *Watchtower*. Although the *Watchtower* majority's reliance on 'religious objections to applying for a permit' analysis failed to garner unanimous support from all justices joining the judgment, it nonetheless is a majority holding constituting binding precedent. As such, the Court is bound to conclude that the scheme at issue today carries the same considerable burden on religious speakers.

Parks v. Finan, No. C2-03-94, 2003 WL 23412981, at *13 (S.D. Ohio June 4, 2003) (citations omitted) (quoting *Watchtower*, 536 U.S. at 167), *aff'd*, 385 F.3d 694 (6th Cir. 2004).

leaning—prior restraints, such as permit schemes, should rarely be permitted and only if they pass the requisite rigorous analysis.

Undoubtedly, the Supreme Court will revisit the issue of prior restraints at some point in the future to attend to lingering issues, such as whether time limits are needed for content-neutral schemes, or whether religious scruples can be contemplated in the analysis. In the meantime, authoritative precedent supports the view that permit schemes should be limited in scope in all aspects and that any legitimate interest the government has pertains to public expression of such magnitude and attendance that, for the purposes of public safety and order, government regulation is deemed absolutely necessary. Individuals and small group gatherings should never be subjected to such tedious requirements. Furthermore, the law contemplates the need for the judiciary to be aware of the dangers of unfettered discretion, the time-sensitive nature of speech, and the possible deterrent effects that permit schemes as a whole can have on public expression of protected ideas.

The danger of censorship is inherent and undeniable in what prior restraints allow government officials to do, and the possibility of individual bias taking the stead of the law in determining who can and cannot speak justifies the cautious approach of courts in dealing with such speech regulations. A judicial attitude of healthy skepticism toward regulations that serve to pre-judge speech is not only appropriate, but also crucial in protecting the marketplace of ideas the framers of the First Amendment staunchly purposed to protect.