1995

RICO and the First Amendment: Alexander v. United States

Bruno C. Bier
J.D. Candidate, 1996, Fordham University School of Law

Follow this and additional works at: https://ir.lawnet.fordham.edu/iplj
Part of the Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/iplj/vol6/iss1/8

This Case Comment is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
Cover Page Footnote
I would like to thank Professor Thane Rosenbaum for his assistance and guidance, my family for their continued support, and Cynthia Newhart for her encouragement.
COMMENT

RICO and the First Amendment:  
*Alexander v. United States*

Bruno C. Bier*

INTRODUCTION

The pervasiveness of sexually explicit material has generated controversy both inside and outside legal circles. Even as the debate over pornography continues, the growth of the adult enter-

---

* J.D. Candidate, 1996, Fordham University School of Law. I would like to thank Professor Thane Rosenbaum for his assistance and guidance, my family for their continued support, and Cynthia Newhart for her encouragement.


2. Pornography is to be distinguished from obscenity. Pornography is derived from the Greek words “porne” meaning “harlot” and “graphos” meaning “writing.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986). The word is defined as “1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement.” Id. Obscenity, on the other hand, is derived from the Latin word “obscaenus,” “ob” meaning “to” and “caenum” meaning “filth.” Id. “Obscene” is defined as “1a: disgusting to the senses... b: grossly repugnant to the generally accepted notions of what is appropriate... 2: offensive or revolting as countering or violating some ideal or principle...” Id. However, as used in this Comment, obscenity is a legal term of art defined as books, films, etc., which, when judged by contemporary community standards appeal to prurient interests; describe sexual conduct in a patently offensive manner; and lack serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15, 24 (1973). Thus, pornography and obscenity are not synonymous terms. See id. at 18 n.2. Obscenity receives no First Amendment protection. Id. at 36. However, pornography that has not been judged obscene is ostensibly protected speech. See infra part II.B.

369
tainment industry remains unchecked. Federal and state governments, responding to its expansive growth, have attempted to regulate and, at times, eradicate the pornography industry.

The government has used a variety of methods in its attempts to control pornography, including criminal laws, civil injunctions, licensing schemes, censorship boards, declaratory judgments, nuisance abatement laws and zoning ordinances. With the Racketeer Influenced and Corrupt Organizations statute ("RICO" or the "Act"), prosecutors gained yet another weapon in their arsenal against purveyors of obscenity.

Congress enacted RICO to give law enforcement officials an effective means of combatting organized crime. Sponsors of RICO recognized that organized crime enhanced its power by using illegal money and violence to infiltrate legitimate businesses and labor unions. Lawmakers and law enforcement officials realized

---

3. In New York City, for example, there were only 9 adult entertainment establishments in 1965. The number of these establishments grew to 151 in 1976 and 177 in 1993. N.Y. TIMES, Mar. 27, 1995, at B1.


5. See generally, FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 197, 228-46 (1976); O'Donnell, supra note 4, at 1102 & nn.6-9.


7. See generally O'Donnell, supra note 4; Ana Maria Marin, Comment, RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores, 43 U. MIAMI L. REV. 419 (1988) (concluding that RICO's forfeiture provision is a prior restraint on the dissemination of nonobscene materials).

8. Pub. L. No. 91-452, 84 Stat. at 922-23. The Statement of Findings and Purpose declares that: "It is the purpose of this Act to seek the eradication of organized crime . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Id.


With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system . . . . Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others.
that a means of combatting organized crime's infiltration into legitimate business enterprises was necessary to bring down these vast criminal empires and protect the legitimate businesses threatened by them.\textsuperscript{10} Hence, Congress provided RICO with stringent forfeiture provisions that struck at the heart of organized crime by going after its economic base.\textsuperscript{11} RICO has proven to be a potent weapon in law enforcement's ongoing war with organized crime.\textsuperscript{12}

Emboldened by RICO's successes, lawmakers sought to expand RICO's scope in order to more effectively prosecute distributors of sexually explicit materials.\textsuperscript{13} In 1984, Congress amended RICO to include state and federal obscenity violations as predicate acts triggering RICO.\textsuperscript{14} Citing a nexus between organized crime and the pornography trade, Senator Jesse Helms, the amendment's sponsor, argued that the amendment would allow prosecutors to combat organized crime and pornography.\textsuperscript{15}

\begin{itemize}
\item It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts.
\item \textit{Id.}
\item 10. \textit{See id.} Senator McClellan stated, in introducing Senate Bill 30, that "[organized crime] now dominates the fields of jukebox and vending machine distribution. Laundry services, liquor and beer distribution, nightclubs, food wholesaling, record manufacturing, the garment industry and a host of other legitimate lines of endeavor have been invaded and taken over." \textit{Id.} The Senator added:

Control of business concerns has been acquired by the sub-rosa investment of profits acquired from illegal ventures, accepting business interests in payment of gambling or loan shark debts, but, most often, by using various forms of extortion \ldots When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses.

\textit{Id.}
\item 12. \textit{See O'Donnell, supra note 4, at 1103.}
\item 15. \textit{See 130 CONG. REC. 844 (1984).}
\end{itemize}
The Supreme Court upheld RICO's use in obscenity prosecutions in *Alexander v. United States*.\textsuperscript{16} The Court held that the application of RICO in an obscenity conviction, and the resulting forfeiture of the defendant's adult entertainment business, which included his entire inventory of books, magazines and films that had not been judged obscene,\textsuperscript{17} did not contravene the First Amendment.\textsuperscript{18} In upholding the forfeiture, the majority rested much of its analysis on the prior restraint doctrine.\textsuperscript{19} The doctrine is a First Amendment bar against government regulations that seek to suppress speech before publication (i.e., licensing schemes and injunctions), as opposed to statutes that punish speech subsequent to publication.\textsuperscript{20} The Court distinguished RICO's forfeiture provisions as a subsequent punishment; hence, the seizure of Alexander's inventory did not violate his First Amendment rights.\textsuperscript{21}

While the Court examined RICO's forfeiture provisions in relation to the speaker's First Amendment rights, it failed to consider the forfeiture in relation to the audience's First Amendment rights. In so doing, the Court disregarded the very justification of earlier cases which held that such massive seizures contravened the First Amendment. Namely, these seizures were held to be unconstitutional because they interfered with the public's right of access to presumptively protected materials.\textsuperscript{22}

This Comment analyzes *Alexander v. United States* in the context of prior Supreme Court cases dealing with obscenity and the First Amendment. Part I examines RICO, its history, and punitive sanctions. Part II provides a brief analysis of the Supreme Court's post-1950s obscenity cases. Part III provides a historical sketch of the prior restraint doctrine and an overview of the debate surrounding the doctrine. Part IV discusses the Court's analysis in *Alexander*. Part V offers criticisms of the *Alexander* Court's decision, as well as an alternative analysis that focuses on the public's right of

\textsuperscript{16} 113 S. Ct. 2766 (1993).
\textsuperscript{17} *Id.* at 2769.
\textsuperscript{18} *Id.* at 2776.
\textsuperscript{19} *See infra* part IV.B.
\textsuperscript{20} *See infra* notes 172-74 and accompanying text.
\textsuperscript{21} *Alexander*, 113 S. Ct. at 2772-73.
\textsuperscript{22} *See infra* part II.B.
access to protected materials. This Comment concludes that the prior restraint-subsequent punishment distinction should not be dispositive in analyzing government seizures of materials that implicate the First Amendment. Rather, an examination of the seizure's effects on the rights of both the speaker and the audience may be a more useful tool in determining when government actions have unduly encroached upon First Amendment liberties.

I. RICO'S HISTORY AND APPLICATION

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970. Congress' intent was clear: RICO was an attempt to attack the economic roots of organized crime. Congress sought to sever organized crime from its power base by confiscating the defendant's assets and removing the defendant from the corrupted enterprise.

RICO prohibits four types of activity: (a) using or investing any income derived from a pattern of racketeering activity in the acquisition of an enterprise; (b) using a pattern of racketeering activity

---

24. See S. REP. NO. 617, supra note 11, at 79. The Senate report on the bill stated:
What is needed here... are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of our Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.
Id.
26. 18 U.S.C. § 1962(a) (1994) provides:
It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the
to acquire or maintain an interest in an enterprise;\(^{27}\) (c) conducting or participating in an enterprise engaged in a pattern of racketeering activity;\(^{28}\) and (d) conspiring to violate any of these provisions.\(^{29}\) Most RICO prosecutions are brought under § 1962 (c) and (d).\(^{30}\)

To prove a violation of § 1962(c), the following elements must be shown: "(1) that an enterprise exists; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that the defendant participated either directly or indirectly in the conduct of the affairs of the enterprise; and (5) that the defendant participated through a pattern of racketeering activity."\(^{31}\)

issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of any unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Id.

27. 18 U.S.C. § 1962(b) (1994) provides:
It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

28. 18 U.S.C. § 1962(c) (1994) provides:
It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.

29. 18 U.S.C. § 1962(d) (1994) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

Id.


31. *Id.* at 815 (citing United States v. Kopituk, 690 F.2d 1289, 1323 (11th Cir. 1982)).
The Act's definition of "racketeering activity" enumerates "those crimes most often associated with organized crime, especially those associated with the infiltration of legitimate organizations." These crimes, characterized as "predicate acts," trigger the application of the RICO statute. The Act defines "pattern of racketeering activity" as the commission of at least two predicate acts within a ten year period.

The RICO statute as enacted did not include obscenity violations as predicate acts. Congress subsequently included "dealing in obscene matter" to the list of predicate acts as an amendment to the Comprehensive Crime Control Act of 1984. Senator Jesse Helms offered the amendment from the Senate floor in order to eliminate both "[t]he scourge of widespread pornography" and the "heavy involvement of organized crime in the pornography trade."

32. S. REP. No. 617, supra note 11, at 158. These crimes include murder, kidnapping, gambling, arson, robbery, bribery, extortion, sale and distribution of narcotics, counterfeiting, usury, mail fraud, bankruptcy fraud, wire fraud and securities fraud, and obstruction of justice. 18 U.S.C. § 1961(1) (1994).
37. 130 CONG. REC. 844 (1984) (statement of Sen. Helms) [hereinafter Statement of Sen. Helms]. Senator Helms' remarks upon the introduction of the amendment were as follows:

[ anyone living in the United States in 1984, who has his or her eyes open, knows that we are experiencing an explosion in the volume and availability of pornography in our society. Today it is almost impossible to open mail, turn on the television, or walk in the downtown areas of our cities, or even in some suburban areas, without being accosted by pornographic materials. The sheer volume and pervasiveness of pornography in our society tends to make adults less sensitive to the traditional value of chaste conduct and leads children to abandon the moral values their parents have tried so hard to instill in them.

In essence, pornography degrades the dignity and worth of human beings by presenting a false picture of human sexuality. It holds sexuality out as an end in itself, totally removed from its proper and normal place as a means in marriage for conjugal love and the procreation of children. Pornography de-mans because it rejects the true meaning of sexuality.

And, Mr. President, the true meaning is the one that is reflected in our most ancient cultural tradition. It is the one that binds human sexuality inseparably to marriage and sees its fruit in the family. This is the proper context for
The amendment was subsequently adopted without debate and made a part of the act.\textsuperscript{38}

Once convicted of RICO violations, a defendant is subject to its especially harsh sanctions: fines of twice the gross profits or proceeds derived from the illegal activity, a prison term of up to 20 years, or both.\textsuperscript{39} Separate from the fines it imposes, RICO provides for forfeiture of interests obtained through violations of RICO, property that affords the defendant a source of influence over the racketeering enterprise, and any proceeds directly or indirectly obtained from racketeering activity.\textsuperscript{40} These forfeiture provisions

* * *

Mr. President, in the last decade the pornography industry has grown to mammoth proportions. Currently profit from this material is estimated to be the third largest source of income for organized crime after drugs and gambling.

* * *

In 1984, with the heavy involvement of organized crime in the pornography trade, it seems only appropriate that RICO include the crimes of "dealing in obscene matter" already in State and Federal law. Such crimes would then not only be State or Federal crimes in themselves, but they would also be RICO crimes, thereby opening the door to Federal investigation of an area of substantial interest to the criminal community.

The additions to RICO contemplated by my amendment would have a threefold effect: One, they will enable Federal prosecutors to expand their investigations into the involvement of organized crime in the illicit sex industry; two, they will make prosecutions possible along the chain from adult theater, peepshow, or bookstore employee to the owner, distributor, financier, and producer of obscene materials; and three, they will send a strong warning to organized crime and obscenity profiteers that the exploitation of women, children, and others through pornography will not be tolerated by the American people.

Id.


39. 18 U.S.C. § 1963(a) (1974). The statute also provides for a term of life in prison for a violation "based on a racketeering activity for which the maximum penalty includes life imprisonment." \textit{Id.}

40. 18 U.S.C. § 1964. RICO forfeiture differs from historical notions of forfeiture in American law. \textit{See O'Donnell, supra} note 4, at 1108 & n.43. The vast majority of forfeiture provisions are \textit{in rem}. H.R. REP. No. 1030, 98th Cong., 2d Sess. 193 (1984), \textit{reprinted} in 1984 U.S.C.C.A.N. 3182, 3376. \textit{In rem} forfeiture is based upon a legal fiction that considers the property to be the defendant, and if it is found guilty it may be forfeited. \textit{Id.} RICO, on the other hand, imposes a criminal, \textit{in personam} punishment on
play a significant role in RICO prosecutions. Moreover, § 1964 provides civil remedies to remove the defendant from the corrupted enterprise and prevent future violations. Commentators have noted that the civil provisions of § 1964 may prove to be the most significant aspect of RICO’s remedial provisions, as “their flexibility allows the court to fashion the remedy that will best remove the defendant from the enterprise.”

II. OBSCENITY AND THE CONSTITUTION

A brief overview of the relevant Supreme Court rulings on the seizure of sexually explicit materials is offered for comparison with RICO’s forfeiture provisions. A review of the Court’s holdings in these cases reveals a shift in its inquiry. The line of seizure cases is characterized by a move away from an analysis of the effects such seizures have on the availability of publications in favor of an analysis concerned more with the proscription’s form. This change in the Court’s focus culminated in Alexander v. United States, where the Court was called upon to address the constitutionality of RICO’s forfeiture laws, as applied to the forfeiture of sexually explicit materials that had not been judged obscene.

41. See O’Donnell, supra note 4, at 1107 (citing United States Department of Justice, Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors 76 (1985)).

42. 18 U.S.C. § 1964(a); see also O’Donnell, supra note 4, at 1107.

A. Substantive History

Modern obscenity law begins with Roth v. United States. Applying First Amendment standards to obscenity for the first time, the Supreme Court affirmed the conviction of the defendant for mailing obscene circulars and an obscene book. Justice Brennan, writing for the Court, held that material was obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The Court further held that material adjudged obscene received no constitutional protection. The Court stated:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

While the scope and definition of obscenity has since been modified, Roth continues to represent the “cornerstone of American
obscenity law.\textsuperscript{48}

Subsequent decisions saw the Court narrow the permissible scope of obscenity regulation,\textsuperscript{49} culminating in \textit{Memoirs v. Massachusetts}.\textsuperscript{50} In \textit{Memoirs}, the Court struck down an \textit{in rem} proceeding against John Cleland's \textit{Memoirs of a Woman of Pleasure}, popularly known as \textit{Fanny Hill}. Writing for the Court, Justice Brennan proffered the \textit{Roth} definition as modified by subsequent cases. For material to be found obscene, three elements were necessary: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."\textsuperscript{51} Thus, the \textit{Memoirs} definition differed from \textit{Roth} in a number of respects. First, the Court required the government to establish each individual element before the material could be found obscene.\textsuperscript{52} Second, a finding that the material was "patently offensive" had now become a requirement.\textsuperscript{53} Finally, the "utterly without redeeming social value" standard was made a formal requirement.\textsuperscript{54}

The Supreme Court did not address the substantive scope of obscenity again until \textit{Miller v. California}.\textsuperscript{55} The \textit{Miller} Court held that material was obscene if it met the following criteria:

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

\textsuperscript{48} SCHAUER, \textit{supra} note 5, at 39.
\textsuperscript{49} See, e.g., Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959); Jacobellis v. Ohio, 378 U.S. 184 (1964); see also SCHAUER, \textit{supra} note 5, at 40-44.
\textsuperscript{50} 383 U.S. 413 (1966).
\textsuperscript{51} \textit{Id.} at 418.
\textsuperscript{52} SCHAUER, \textit{supra} note 5, at 43.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} 413 U.S. 15 (1973).
ary, artistic, political, or scientific value. The first part of the *Miller* test reaffirmed the *Roth* standard. Moreover, the Court added two further requirements. Namely, a due process requirement was added, as the “patently offensive” sexual conduct must be specifically defined by the applicable state law. The second new requirement replaced the “utterly without redeeming social value” standard of *Memoirs* with a less rigorous standard. This standard required only that “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” While decisions after *Miller* have addressed various aspects of obscenity, none have changed the substantive scope of obscenity’s definition as enunciated in *Miller*.

**B. Procedural History**

The Supreme Court has consistently required more stringent procedural safeguards in instances where the government seeks to suppress speech. In the area of obscenity, this due process requirement demands that an adversary hearing be held in order to determine whether the materials sought to be suppressed are legally obscene.

The Court first addressed the issue of proper procedural safeguards in *Kingsley Books, Inc. v. Brown*. The Court upheld an

---

56. *Id.* at 24.
57. SCHAUER, supra note 5, at 46-47.
58. *Id.* at 47.
59. *Id.* The *Miller* standard is a less rigorous standard, first, because the value of the work “must be more predominant, more serious and more pervasive throughout the entire work.” *Id.* at 140. Conversely, under *Memoirs*, the work needed only a “modicum of social value.” *Id.* (quoting *Memoirs*, 383 U.S. at 418-20). Second, the *Miller* Court rejected the “ambiguous concept of ‘social importance.’” *Id.* at 141 (quoting *Miller*, 413 U.S. at 25 n.7). In its place, the *Miller* Court provided what seems to be an exhaustive list. *Id.* at 142. “It is not *any* serious value that is relevant, but only serious literary, artistic, political, or scientific value.” *Id.*
61. SCHAUER, supra note 5, at 206.
62. *Id.* at 206-27 (discussing case law setting out due process requirement of an adversary hearing).
63. 354 U.S. 436 (1957); *see also* SCHAUER, supra note 5, at 206-07 (discussing the procedural safeguards required by *Kingsley Books*).
injunctive scheme that allowed New York state to enjoin the sale or distribution of obscene publications, as well as the seizure of such publications.\textsuperscript{64} Rejecting the argument that the injunction amounted to a prior restraint, the Court held that “the phrase ‘prior restraint’ is not a self-wielding sword”\textsuperscript{65} and the proper test was an analysis of “the operation and effect of the statute in substance.”\textsuperscript{66} The Court noted extensive procedural safeguards were in place,\textsuperscript{67} as the injunctive scheme required a full adversary hearing on the issue of obscenity soon after the proceedings were initiated.\textsuperscript{68}

The Court returned to the issue of procedural safeguards in \textit{Marcus v. Search Warrant}.\textsuperscript{69} In \textit{Marcus}, the Court struck down Missouri’s separate statutory scheme for the search and seizure of obscene material.\textsuperscript{70} The statute provided that a judge could issue a warrant for any obscene materials upon receipt of a sworn complaint.\textsuperscript{71} The proceeding was \textit{ex parte},\textsuperscript{72} however, an adversary hearing was required before final destruction of the materials could be achieved.\textsuperscript{73} Nonetheless, there was no time limit for when the court was required to announce its decision.\textsuperscript{74} The Court held that “Missouri’s procedures . . . lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled.”\textsuperscript{75}

\textsuperscript{64} Kingsley Books, 354 U.S. at 438-41.
\textsuperscript{65} Id. The Court further stated:
\textquote[Id. at 441-42.]{Nor can [the phrase “prior restraint”] serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by . . . [Professor Freund]: “What is needed,” writes Professor [Freund], “is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.”}
\textsuperscript{66} Id. at 441 (quoting Near v. Minnesota, 283 U.S. 697, 713 (1930)).
\textsuperscript{67} Id. at 440-41.
\textsuperscript{68} Id.
\textsuperscript{69} 367 U.S. 717 (1961).
\textsuperscript{70} Id. at 718-19.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 720.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 721.
\textsuperscript{75} Id. at 731.
Specifically, the Court cited a number of objections to the Missouri statute. First, the warrants were issued on the conclusory assertions of the police officer, without judicial scrutiny of the materials to be seized. Second, in effectuating the seizure of the materials, the officers were allowed absolute discretion to seize what they adjudged obscene. Third, the statute authorized the seizure of all copies of the materials prior to a hearing on the question of obscenity. Finally, the Missouri statutory scheme had no limitation on the time within which the presiding judge was required to render a decision. Thus, the statute was constitutionally infirm, because "there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." The Court required that there be a full adversary hearing to determine whether the materials were obscene before the state effected a massive seizure of this type. The Court reasoned that such a full adversary hearing ensured that "nonobscene publications, entitled to constitutional protection, [would] reach the public."

In A Quantity of Copies of Books v. Kansas, the Supreme Court, again striking down a massive seizure of books, held that such seizures violated the public's right of access to nonobscene books. In A Quantity of Books, the statute authorizing massive seizure of books alleged to be obscene was similar to the statute struck down in Marcus. However, the statute in this case limited the discretion of those officials effectuating the seizure and re-
quired a prompt judicial determination as to their obscenity. The prosecutor, in an effort to comply with Marcus, listed all titles to be seized. Moreover, the prosecutor submitted seven novels in an ex parte hearing before a district judge, who ruled that the books "appear[ed] to be obscene literature" and gave "reasonable grounds to believe" all the novels listed in the Information were obscene. Hence, the sheriff carried out the warrant, seizing all the copies of only those titles listed in the warrant. After a hearing in which the novels were adjudged obscene, the court ordered the materials to be destroyed.

The Supreme Court, however, overturned the order, holding that a seizure of all the copies of the specified titles before the defendant was afforded an adversarial hearing violated the First Amendment. Justice Brennan noted that "[a] seizure of all copies of the named titles is indeed more repressive than an injunction preventing the further sale of the books." As in Marcus, the Court rejected the argument that equated the seizure of expressive materials with the seizure of other contraband such as gambling paraphernalia. The Court distinguished expressive materials from other contraband in that warrants for the seizure of obscene materials "implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications." Finally, the Court held such a statute violates not only the distributor's First Amendment rights, but the public's First Amendment rights as well. The Court concluded that "if seizure of books precedes an adversary determination of their obscenity, there is danger of

---

86. Id. at 206-08.
87. Id. at 208-09. Although not required by the statute, the prosecutor, in response to Marcus, filed an Information, identifying 59 novels by title. Id.
88. Id.
89. Id. at 209. Of the 59 titles listed in the warrant, the sheriff discovered only 31 of the novels on the premises. Id. In all, 1,715 copies were seized. Id.
90. Id. at 209.
91. Id. at 210-11.
92. Id. at 210.
93. Id. at 211-12.
94. Id. (quoting Marcus 367 U.S. at 731).
abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." 95

Subsequently, the Court distinguished massive seizures as in Marcus and A Quantity of Books from the seizure of individual copies for evidentiary purposes. In Heller v. United States, 96 the Court held that seizing a copy of film to preserve it as evidence was constitutionally permissible where there had been no showing that the seizure precluded continued exhibition of the film. 97 Police seized a copy of a film entitled Blue Movie after a judge and police inspector went to the theater and watched a performance upon the request of a prosecutor. 98 At the end of the film the judge signed arrest warrants for the theater manager, projectionist, and ticket taker. 99 In executing the warrant, a single copy of the film was seized. 100 The Court held that seizing a single copy of a film for evidentiary purposes was different than seizing all copies of a film in order to block distribution. 101 The Court stated that, provided proper safeguards were in place, the seizure of a film for evidentiary purposes may have been a temporary restraint; however, it did not "become a form of censorship." 102 The Court held that a greater level of scrutiny would be reserved for "large-scale seizure of ... materials presumptively protected under the First Amend-

95. Id. at 213.
96. 413 U.S. 483 (1973).
97. Id. at 490.
98. Id. at 485.
99. Id.
100. Id. at 486.
101. Id. at 492. The Court held:
[S]eizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film.

Id.
102. Id. at 490. The Court delineated three requirements in order that a seizure for evidentiary purposes be constitutional. First, the seizure must be "pursuant to a warrant." Second, the warrant must issue upon a finding of probable cause by a neutral magistrate. Third, "a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party." Id. at 492.
ment" to ensure that the public’s right to the “unobstructed circulation” of books was not abridged. The Court further stated that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”

The Supreme Court has also addressed proper procedural safeguards in the context of a RICO prosecution. In *Fort Wayne Books, Inc. v. Indiana*, the Court affirmed the proposition put forth in *Heller* and its predecessors that a “publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing.” However, the Court framed the issue in terms of an unconstitutional prior restraint, rather than the public’s right of access. In *Fort Wayne Books*, prosecutors used predicate obscenity offenses to charge two adult-book store operators with violating the state’s RICO laws. Upon a finding of probable cause that the defendants had violated state obscenity laws, the judge directed the immediate seizure of the publications, real estate, and other personal property of the corporate defendants. The Supreme Court noted that since the proceedings were aimed at halting the sale of obscenity at the defendants’ bookstores, “the special rules applicable to removing First Amendment materials from circulation are relevant here.” The Court held that “mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation.” Moreover, the fact that the motion for seizure was brought under RICO as opposed to the substantive obscenity statute was unavailing. Whether the seizure is characterized as a forfei-

103. *Id.* at 491 (quoting *A Quantity of Books*, 378 U.S. at 213).
104. *Id.*
105. *Id.* at 491-92 (quoting *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)).
107. *Id.* at 63 (citing *Heller*, 413 U.S. at 492-93; *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874-76 (1986)).
108. See *id.* at 63-64.
109. *Id.* at 50-51.
110. *Id.* at 52.
111. *Id.* at 65.
112. *Id.* at 66.
113. *Id.* The Court stated that “the way in which a restraint on speech is ‘character-
ture of assets under RICO or an injunction under the applicable state obscenity laws, the Court stated that "the risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials" is ever present.\textsuperscript{114}

In a concurring opinion, Justice Stevens argued that the state RICO statute was unconstitutional not only in the context of pre-trial forfeitures, but post-trial forfeitures as well.\textsuperscript{115} He noted that the RICO statute permits prosecutors "to cast wide nets,"\textsuperscript{116} as all of a store's books and films are subject to forfeiture upon a showing of two obscenity violations.\textsuperscript{117} Moreover, Justice Stevens maintained that the specific purpose of the statute was to enhance the government's capabilities in obscenity prosecutions at the expense of traditional constitutional protections.\textsuperscript{118} Thus, Justice Stevens stated that he would extend the majority's holding to prohibit the forfeiture of a store's inventory, even after trial, when predicated on minor obscenity violations.\textsuperscript{119} Justice Stevens concluded: "[T]he state law is of little consequence." Id.

\begin{itemize}
\item \textsuperscript{114} Id. at 63-64 (citing Maryland v. Macon, 472 U.S. 463, 470 (1985)).
\item \textsuperscript{115} Id. at 71 (Stevens, J., concurring in part and dissenting in part).
\item \textsuperscript{116} Id. at 81.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id. at 83. Justice Stevens stated that the purpose of RICO was to "expand beyond traditional prosecution of legally obscene materials into restriction of materials that, though constitutionally protected, have the same undesired effect on the community's morals as those that are actually obscene." Id.
\item \textsuperscript{119} Id. at 84. Distinguishing between expressive and nonexpressive activities, Justice Stevens stated that the First Amendment was implicated only when RICO targeted the former:
\begin{quote}
[T]here is a difference of constitutional dimension between an enterprise that is engaged in the business of selling and exhibiting books, magazines, and videotapes and one that is engaged in another commercial activity, lawful or unlawful. A bookstore receiving revenue from sales of obscene books is not the same as a hardware store or pizza parlor funded by loan-sharking proceeds. The presumptive First Amendment protection accorded the former does not apply either to the predicate offense or to the business use in the latter. Seldom will First Amendment protections have any relevance to the sanctions that might be invoked against an ordinary commercial establishment. Nor will use of RICO/CRRA sanctions to rid that type of enterprise of illegal influence, even by closing it, engender suspicion of censorial motive. Prosecutors in such cases desire only to purge the organized-crime taint; they have no interest in deterring
\end{quote}
\end{itemize}
is better to leave a few . . . noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits,' for the 'right to receive information and ideas, regardless of their social worth, is fundamental to our free society.'"120

III. THE PRIOR RESTRAINT DOCTRINE

In Marcus and A Quantity of Books, the Supreme Court required a prompt adversary hearing before the state executed massive seizures of materials presumptively protected by the First Amendment.121 The Court stated that this safeguard was necessary in order to ensure the public's right to "unobstructed circulation" of books, films and other materials that are not obscene.122 While expressing similar concerns, later cases, such as Heller and Fort Wayne Books, addressed the issue in terms of the Court's hostility towards prior restraints123. The Court's increased focus in regarding the seizure of nonobscene materials as a prior restraint issue culminated in Alexander v. United States.124 In Alexander, the Court's narrow interpretation of the prior restraint doctrine failed to take into account the underlying rationale of the doctrine, namely the protection of both the speaker's and the audience's right to the free exchange of protected materials.125

As the previous discussion suggests, the prior restraint doctrine plays a significant role in First Amendment law. While the doctrine of prior restraint has a long history, a brief account of its origins and a discussion of the issues the doctrine raises are offered

---

120. Id. at 85-86 (citations omitted).
121. See supra notes 69-95 and accompanying text.
122. See, e.g., A Quantity of Books, 378 U.S. at 213.
123. See supra text accompanying notes 105, 114.
124. See infra part IV.B.
in order to better understand the Supreme Court's decision in Alexander.

A. A Brief History

The history of the prior restraint doctrine dates back to early English common law.\(^{126}\) The English Licensing Act of 1662 required official licensing for all printed publications.\(^{127}\) However, the Licensing Act was allowed to expire in 1695, due more to its unwieldy administration than from public outcry.\(^{128}\) A century later freedom from licensing of the press had become recognized as one of the basic rights of Englishmen.\(^{129}\) Thus, Blackstone stated, in his often quoted passage, that freedom of the press meant freedom from prior restraints:

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 as 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.\(^{130}\)

At the time of the First Amendment's adoption, licensing schemes had not been known for a hundred years in England and had never been known in the American states.\(^{131}\) James Madison, in introducing the First Amendment, stated unequivocally, "[t]he people shall not be deprived or abridged of their right to speak, to

---


\(^{127}\) Jeffries, *supra* note 126, at 412.

\(^{128}\) Emerson, *supra* note 126, at 651.

\(^{129}\) Jeffries, *supra* note 126, at 412.

\(^{130}\) *Id.* at 413 (quoting 4 W. BLACKSTONE, COMMENTARIES 152).

\(^{131}\) See Emerson, *supra* note 126, at 650-52.
write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." 132

Similarly, a majority of the revolutionary-era state constitutions guaranteed freedom of the press in absolutist terms. 133 Maryland’s Declaration of Rights, for example, declared “[t]hat the liberty of the press ought to be inviolably preserved.” 134

Nevertheless, in one of its earliest First Amendment opinions, the Supreme Court held that “freedom of the press” meant freedom only from licensing schemes and pre-publication government censorship. Justice Holmes, writing for the Court in Patterson v. Colorado, 135 echoed the sentiments of Blackstone. 136 He held that the main purpose of the First Amendment was “to prevent all such previous restraints upon publications as had been practiced by other governments,” . . . [i]t does not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.” 137

Even as subsequent decisions expanded the doctrine of prior restraint beyond licensing and government censors, First Amendment jurisprudence held on to the distinction between prior restraint and subsequent punishment first proposed by Blackstone and later adopted by Holmes. In the landmark case Near v. Minnesota, 138 Chief Justice Hughes, writing for the Court, noted the criticisms of Blackstone’s distinction between prior restraint and subsequent punishment. 139 Namely, the Court recognized that subsequent punishment could potentially suppress First Amendment freedoms as effectively as prior restraints. 140 Nevertheless, the Court acknowl-

---

132. Smith, supra note 126, at 457 (quoting JAMES MADISON, Amendments to the Constitution, 5 THE WRITINGS OF JAMES MADISON 370, 377 (G. Hunt ed. 1900-1910)).
133. Id. at 454.
134. Id. (quoting 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 235, 284 (1971)).
135. 205 U.S. 454 (1907).
136. See supra note 130 and accompanying text.
137. Patterson, 205 U.S. at 462 (citations omitted).
139. Id. at 714-15.
140. Id. The Court stated: The criticism upon Blackstone’s statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of spe-
FORDHAM INTELL. PROP., MEDIA & ENT. L.J.  [Vol. 6:369

edged that "freedom of the press" has meant "principally although not exclusively, immunity from previous restraints or censorship." While the Court recognized that the subsequent punishment of publications could be deserving of some constitutional scrutiny, the Court thought it necessary to preserve the subsequent punishment-prior restraint distinction in order to strike a balance between freedom of the press and checks against its abuses. Thus, while reaffirming traditional notions of the prior restraint doctrine, the Near decision had two additional consequences. First, the Court expanded the doctrine by recognizing injunctions as a prior restraint. Second, the Court recognized some constitutional protections against subsequent punishment.

As Professor John Jeffries notes, subsequent cases have done little to elucidate the prior restraint doctrine. Professor Jeffries divides these cases into three groups. In one line of cases the Court "invoked the historic hostility to press licensing to invalidate modern permit requirements." For example, in Joseph Burstyn, Inc. v. Wilson, the Court struck down a statute prohibiting the

---

141. Id. (citation omitted).
142. See id. Concerned with protecting the public from the libelous attacks of scandal sheets, the Court emphasized that in certain instances subsequent punishment of publications was necessary. The Court stated:

The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

Id. at 720 (emphasis added).
143. See id. at 722-23.
144. See id. at 720.
146. Id.
147. 343 U.S. 495 (1952).
unlicensed commercial screening of motion pictures and authorizing denial of licenses for films deemed sacrilegious.\textsuperscript{148} Similarly, in \textit{Lovell v. City of Griffin},\textsuperscript{149} the Court struck down a municipal ordinance forbidding distribution of "literature of any kind" without prior approval from the city manager.\textsuperscript{150} In this line of cases, prior restraints were imposed by conditioning speech on the previous approval of a government official.\textsuperscript{151} 

\"[T]he legality of speech [did not] depend . . . on the substantive standard of exclusion from the First Amendment (for example, incitement or obscenity), but on the presence or absence of prior permission.\"\textsuperscript{152}

A second line of cases extended the rule against prior restraints to a diverse assortment of injunctions against speech and publication.\textsuperscript{153} Citing \textit{New York Times Co. v. United States}\textsuperscript{154} as the "premier example," Jeffries observes that in each of these cases the prior restraint bar was triggered by the issuance of an injunction.\textsuperscript{155} In \textit{New York Times}, the government sought to enjoin publication of classified documents known as the Pentagon Papers.\textsuperscript{156} The per curiam opinion of the Court held that the injunction was an impermissible prior restraint.\textsuperscript{157} The Court declared that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against Constitutional validity."\textsuperscript{158}

\begin{itemize}
\item \textsuperscript{148} See \textit{id}. at 506.
\item \textsuperscript{149} 303 U.S. 444 (1938).
\item \textsuperscript{150} \textit{id}. at 451-52.
\item \textsuperscript{151} Jeffries, \textit{supra} note 126, at 417.
\item \textsuperscript{152} \textit{id}. at 417-18. As Jeffries notes, enforcement of these permit schemes was accomplished through criminal prosecution and punishment. \textit{id}. at 417.
\item \textsuperscript{153} \textit{id}. at 418.
\item \textsuperscript{154} 403 U.S. 713 (1971).
\item \textsuperscript{155} Jeffries, \textit{supra} note 126, at 418.
\item \textsuperscript{156} \textit{See New York Times}, 403 U.S. at 714. The Pentagon Papers were a classified study entitled "History of U.S. Decision-Making Process on Viet Nam policy." \textit{id}.
\item \textsuperscript{157} \textit{See id}.
\item \textsuperscript{158} \textit{id}. (quoting \textit{Bantam Books, Inc. v. Sullivan}, 372 U.S. 58, 70 (1963)). Jeffries notes, however, that:
\begin{quote}
In none of [these cases] . . . was it clear that the speech in question could validly have been suppressed by subsequent punishment. It is difficult to tell, therefore, whether the doctrine of prior restraint was merely a convenient rhetoric, or whether it was actually applied to protect against injunction speech that would not have been protected against prosecution and punishment.
\end{quote}
\end{itemize}
A third line of cases struck down statutes which involved neither permit requirements nor injunctions. For example, in *Grosjean v. American Press Co.*, the Court struck down a gross receipts tax on newspapers as a prior restraint. In *Bantam Books, Inc. v. Sullivan*, the Court held the activities of the Rhode Island Commission to Encourage Morality in Youth to be an unconstitutional prior restraint. The Commission was authorized to identify certain books and magazines as unsuitable for sale to minors. However, the Commission had no power to suppress publications; it could only recommend criminal prosecution. Finally, the Court held in *Southeastern Promotions, Ltd. v. Conrad* that a city's refusal to rent a municipal theater for a production of *Hair* amounted to an unconstitutional prior restraint.

B. The Debate Surrounding the Prior Restraint Doctrine

Commentary regarding the prior restraint doctrine has been pervasive and robust. Commentators can be generally divided into two camps as to the prior restraint doctrine's proper role in First Amendment jurisprudence: the traditional view and the modern view. The traditional view holds that the doctrine is a useful, 

Jeffries, supra note 126, at 418.

161. See id. at 250-51.
163. See id. at 70-72.
164. Id. at 59-60.
165. Id. at 66-67.
167. See id. at 552.
if not essential, tool in protecting First Amendment rights. This view has been adopted by the vast majority of American courts. The modern view, on the other hand, contends that the doctrine is at best worthless and, at worst, a misleading categorization that distracts from the true substantive First Amendment issues in a case.

1. The Traditional View

The traditional view defines prior restraints as "official restrictions imposed upon speech or other forms of expression in advance of actual publication." Thus, a subsequent punishment is distinguished as "a penalty imposed after the communication has been made as a punishment for having made it." Hence, the prior restraint doctrine "imposes a special bar on attempts to suppress speech prior to publication, a bar that is distinct from the scope of constitutional protection accorded material after publication."

While acknowledging that the doctrine of prior restraint remains "curiously confused and unformed," Professor Thomas Emerson cites several of the doctrine's most salient features. First, the

---

169. Emerson, supra note 126, at 670.
170. See supra notes 135-67 and accompanying text.
171. See, e.g., Jeffries, supra note 126; Mayton, supra note 168; Schauer, Fear, Risk and the First Amendment, supra note 168. A third view falls somewhere in the middle, arguing that the doctrine is an important protection in certain instances; however, this view also calls for certain fundamental modifications of the doctrine. See Blasi, supra note 168; Redish, supra note 168.
172. Emerson, supra note 126, at 648. Professor Emerson is considered by many as a leading authority on the prior restraint doctrine. See, e.g., Jeffries, supra note 126, at 411 n.13. While the Supreme Court has favored the traditional view of the prior restraint doctrine, it has rarely explained its justification for this position. See MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.04, at 4-18 to 4-19 (1984). Thus, this Comment relies heavily on Emerson's thorough analysis for its clear articulation of the traditional view.
173. Emerson, supra note 126, at 648.
175. Emerson, supra note 126, at 649.
176. While concentrating on the effects of executive prior restraints, Emerson delineates four broad categories of prior restraint. Emerson, supra note 126, at 655-56. The first category includes those restraints that seek to prevent future communication or publication in the absence of "advance approval of an executive official." Id. at 655. Such restraints include licensing laws, motion picture censorship and permit requirements
doctrine purports to deal with matters of form rather than substance. The doctrine does not address governmental restrictions of substance in an area of expression, such as prohibiting obscenity in newspapers. Rather, the doctrine addresses the particular method of government censure, such as requiring pre-approval of newspaper copy. Second, the doctrine is purportedly predisposed to more precise application than other First Amendment analytical frameworks.

The traditional view offers a number of justifications for the doctrine’s hostility towards prior restraints. In one of its few pronouncements regarding the underlying justification for the doctrine, the Supreme Court stated:

Behind the distinction is a theory 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

---

177. Emerson, supra note 126, at 648.
178. Id.
179. Id.
180. Id. Emerson asserts that the doctrine: does not require the same degree of judicial balancing that the courts have held to be necessary in the use of the clear and present danger test, the rule against vagueness, the doctrine that a statute must be narrowly drawn, or the various formulae of reasonableness. Hence, it does not involve the same necessity for the court to pit its judgment on controversial matters of economics, politics, or social theory against that of the legislature.

Id.
risks of freewheeling censorship are formidable.\textsuperscript{181} Thus, the traditional view maintains that a significant distinction between prior restraints and subsequent punishments is that the former procribes speech without knowing in advance what a person subject to the prior restraint will say.\textsuperscript{182} A broader spectrum of communication, therefore, is subject to a system of prior restraint, as both protected and unprotected speech fall within the ambit of the prior restraint.\textsuperscript{183}

The traditional view holds that the administration of prior restraints also makes them disfavored. Subsequent punishment of a communication requires more time, money, and personnel.\textsuperscript{184} Additionally, in a system of subsequent punishment, the communication is made before the government proscription is effective. Hence, a government official may be more reluctant to institute a prosecution involving subsequent punishment, as the communication sought to be suppressed has already been made.\textsuperscript{185} In contrast, a scheme of prior restraints allows the official to suppress the communication "by a simple stroke of the pen."\textsuperscript{186} Furthermore, the institutional framework of the censor encourages an overzealous administration of his duties.\textsuperscript{187} As Emerson notes, "[t]he function

\begin{itemize}
\item[181.] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).
\item[182.] See Nimmer, supra note 172, \S 4.04, at 4-19.
\item[183.] Emerson, supra note 126, at 656.
\item[184.] Id. at 657.
\item[185.] Id.
\item[186.] Id.
\item[187.] Id. at 659. Emerson points to the particular dynamics of prior restraints as perhaps their most significant feature. Id. at 658. Emerson argues that prior restraints "contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration." Id. Citing particularly the area of obscenity, Emerson asserts government officials' "attitudes, drives, emotions, and impulses" lead them to suppress free communication. Id. As support for this proposition, Emerson quotes from Milton's \textit{Areopagitica}:

\begin{quote}
If [the censor] be of such worth as behoves him, there cannot be a more tedious and unpleasing journey-work, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books and pamphlets . . . we may easily foresee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remiss or basely pecuniary.
\end{quote}

Emerson, supra note 126, at 658 (omission in original) (quoting JOHN MILTON, \textit{AREOPAGITICA} 20-21 (Everyman ed., 1927)).
\end{itemize}
of the censor is to censor. He has a professional interest in finding things to suppress." 188

Finally, the traditional view claims that a system of prior restraints lacks the procedural safeguards inherent in a scheme of subsequent punishment. Acknowledging that both systems rely ultimately on penal sanctions, Emerson nevertheless notes a number of differences. 189 The penal proceeding for a prior restraint usually involves only the limited issue of whether the communication was made absent prior approval. 190 On the other hand, a penal proceeding involving a system of subsequent punishment would require a finding that the communication was made by the defendant, that the communication was within the ambit of the statute proscribing the speech, and that the proscription of such speech was constitutional. 191 Moreover, a system of subsequent punishment affords the transgressor due process rights that are generally not available in a system of prior restraints. In a system of subsequent punishment the defendant is afforded the presumption of innocence, the government must prove its case beyond a reasonable doubt, and evidence offered by the government is subject to stricter rules of admissibility. 192

188. Id. at 659. Emerson cites another difference between the two regimes: "the violation of a censorship order strikes sharply at the status of the licensor, whose prestige thus becomes involved and whose power must be vindicated." Id. at 659-60.
189. Id. at 659.
190. Id.
191. Id. at 657. Moreover, as Professor Howard Hunter notes:
[T]he local prosecutor normally must secure the help of the police, make a grand jury presentment, prepare for and prosecute a jury trial, prove his case beyond a reasonable doubt, and contend with the complexities of the criminal process from arrest through arraignment, indictment, and trial. The entire process usually takes several months. In contrast, to seek an injunction the prosecutor need only file a complaint, perhaps post a bond, and prepare for a non-jury hearing in which he will bear only a civil burden of proof. If he seeks a temporary restraining order, the hearing will occur within a matter of days or even hours. A hearing on a preliminary injunction is also held quite soon after the filing of a complaint. The trial on the merits may not take place any sooner than a criminal trial, but if the prosecutor is successful in obtaining a temporary restraining order or a preliminary injunction, the issue may well become moot.

192. Emerson, supra note 126, at 657. In a system of prior restraints:
In sum, the traditional view contends that the intrinsic deficiencies of prior restraints have a significant impact on protected speech. First, a subsequent punishment takes effect once the communication has been made. Thus, the communication reaches the marketplace of ideas.\(^{193}\) Prior restraints, however, take effect before the communication is made. Hence, the prior restraint attempts to bar the communication from ever reaching public.\(^{194}\) While both schemes are ultimately enforced by subsequent punishment, Professor Howard Hunter notes, "there is a world of difference between a government statement that one cannot speak at all according to Hunter, supra note 191, at 287. In terms of a prior restraint's application, the traditional view discounts the notion that prior restraints afford citizens greater certainty and less risks than subsequent punishment. Emerson, supra note 126, at 659. Emerson acknowledges that licensing systems may be favored over subsequent punishment in some quarters such as the motion picture industry and publishers of popular fare, as an individual can find out what expression is legal or illegal without incurring criminal sanction. \(\text{Id.}\) However, according to Emerson, this argument does not consider society's interest in free expression. Those bold individuals willing to take the risk of subsequent punishment are barred by a system of prior restraints. \(\text{Id.}\) Emerson asserts that the contention that prior restraints entail less risk and greater certainty "implies a philosophy of willingness to conform to official opinion and a sluggishness or timidity in asserting rights that bodes ill for a spirited and healthy expression of unorthodox and unaccepted opinion." \(\text{Id.}\)

\(^{193}\) Emerson, supra note 126, at 657. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), in which Holmes stated:

\[\text{W}h\text{en men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.}\]

\(\text{Id.}\); Emerson, supra note 126, at 657 ("Under a system of subsequent punishment, the communication has already been made before the government takes action; it thus takes its place, for whatever it may be worth, in the marketplace of ideas. Under a system of prior restraint, the communication, if banned, never reaches the marketplace at all.").

\(^{194}\) Emerson, supra note 126, at 657.
and a statement that one can speak out at some risk of paying a
specified cost." Second, a broader spectrum of speech is threat-
ened, as all expression within the parameters of the restraint are
subject to suppression—"the innocent and borderline as well as the
offensive, the routine as well as the unusual." Third, the fact
that they are easier to effectuate encourages more frequent applica-
tion. The traditional view, therefore, determines that prior re-
straints "operate as a greater deterrent to free expression and cause
graver damage to fundamental democratic rights than a system of
subsequent punishment."

2. The Modern View

More recent commentary has taken issue with some of the tra-
ditional view's basic tenets. These commentators seek a modifica-
tion of the prior restraint doctrine or to do away with it entirely.
They contend that a reevaluation of the doctrine is necessary, since
a number of flaws inherent in the doctrine undermine a coherent
First Amendment analysis. First, the modern view asserts that
"prior restraint" is an uncertain term that has been erratically ap-
plied. Second, critics of the doctrine argue that it renders an
analysis of form in place of a substantive analysis. Consequently,
the doctrine fails to address government proscriptions that take
the form of subsequent punishment, but nevertheless suppress pro-

195. Hunter, supra note 191, at 293.
196. Emerson, supra note 126, at 656.
197. Id. at 657.
198. Id. at 660.
199. Jeffries, supra note 126, at 419. Professor Jeffries states his objection to the
prior restraint doctrine's application as follows:
   At least as applied by the Courts, the doctrine is fundamentally unintelligible.
   It purports to assess the constitutionality of government action by distinguishing
prior restraint from subsequent punishment, but provides no coherent basis for
making that categorization . . . . Some prior restraints involve permit require-
ments; others do not. Some involve injunctions; others do not. Some cases
involving neither permits nor injunctions are treated as prior restraints; others
are not. The doctrine purports to deal with matters of form rather than of
substance, but there is no unity among the forms of government action con-
demned as prior restraints.

Id.

200. Id.
tected expression as effectively as prior restraints.\textsuperscript{201}

The modern view contends that a system of subsequent punishment is marked by an "inherent residual vagueness."\textsuperscript{202} Several factors are cited for the vagueness that inheres in a system of subsequent punishment. Laws implementing a regime of subsequent punishment are unable to identify with any degree of specificity the speech to be suppressed.\textsuperscript{203} Additionally, the law's vagueness is compounded by the fact that "the illegality consists of the speaker's

\textsuperscript{201} While many proponents of the modern view agree that administrative (executive) prior restraints are especially objectionable, they point to discretion as the key factor. \textit{id.} at 424. Hence, the fault lies not with the timing of the governmental proscription, but with the discretion afforded the public official in determining which speech falls under the ban. Jeffries notes that where the standards guiding the licensing authority are vague and allow for broad discretion, the Court will strike down the system. \textit{id.} at 423-24 (citing Freedman v. Maryland, 380 U.S. 51 (1965)). On the other hand, where standards guiding the licensing authority are "narrow, objective and definite" the Court will routinely uphold the system, such as in cases involving parade permit laws. \textit{id.} at 423 (citing Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969)). Thus, a valid preclearance statute must either "eliminate[e] executive discretion by specific standards or control[] it by judicial supervision." \textit{id.} at 424. The prior restraint doctrine, on the other hand, does not distinguish overly broad discretion as the dispositive factor. Instead, it purports to address only the chronology of the government's action vis-a-vis the subject communication. The doctrine says administrative preclearances are especially disfavored. \textit{id.} However, as Jeffries notes:

[The prior restraint doctrine] does not say which preclearance schemes should be upheld and which should be struck down. It does not identify discretion as the crucial factor . . . . The point here is not that the doctrine of prior restraint works any particular mischief (at least not within this context), but only that it is not very helpful. \textit{id.} at 424-25.

Jeffries contends that the Court, in effect, is engaging in an overbreadth analysis in these instances. \textit{id.} at 425. The overbreadth doctrine holds that where an activity could be suppressed by a more narrowly drawn statute, an overbroad statute will be struck down if it allows for application of the statute substantially beyond the permissible scope by regulating protected activity. \textit{See id.} Jeffries argues that if the Court were to articulate its application of the overbreadth doctrine in these cases, the Court would then be forced to focus on the critical issue, namely the government official's discretion. \textit{id.} at 425-26. Hence, the overbreadth doctrine would provide the Court with a clearer test and a more consistent approach in cases involving administrative preclearances. \textit{id.} at 424-25.


\textsuperscript{203} Mayton, \textit{supra} note 168, at 254.
instilling a certain state of mind in the listener . . . ."\textsuperscript{204} Thus, the speaker is not sufficiently apprised in advance as to what constitutes illegal speech.\textsuperscript{205} This uncertainty is further heightened by ill-defined standards that allow for "erroneous declaration or application of the law."\textsuperscript{206}

In addition, the modern view maintains that a system of subsequent punishment poses risks of overbroad application.\textsuperscript{207} Legal standards are intrinsically overinclusive, as they lend themselves to generalized application.\textsuperscript{208} Hence, in comparing subsequent punishment to an injunctive scheme, Jeffries notes that the latter is "particularized, immediate, and concrete"\textsuperscript{209} whereas the former is "a more generalized and impersonal threat . . . ."\textsuperscript{210} The more generalized application of a criminal statute allows government authorities to direct the statute's application to a wider spectrum of disfavored speech activity.\textsuperscript{211}

The modern commentators assert that there are significant consequences resulting from the vagueness and overbreadth intrinsic in a system of subsequent punishment. First, by threatening or actually engaging in discriminatory prosecutions, the government may effectuate "broad and unbridled" suppression of speech.\textsuperscript{212} Even though speech subject to penal sanctions will receive judicial scrutiny, provided an action is brought, litigating the matter may prove to be prohibitive, particularly in the face of repeat prosecu-

\textsuperscript{204} Id. at 255.
\textsuperscript{205} Id. at 256.
\textsuperscript{206} Schauer, \textit{Fear, Risk and the First Amendment}, supra note 168, at 699 n.65.
\textsuperscript{207} See Mayton, supra note 168, at 259.
\textsuperscript{208} See, e.g., id. at 259-60.
\textsuperscript{209} Jeffries, supra note 126, at 429.
\textsuperscript{210} Id.
\textsuperscript{211} See Mayton, supra note 168, at 260. Mayton points to the "criminal anarchy" statutes enacted after the assassination of President McKinley in 1902. Id. (citing Linde, "\textit{Clear and Present Danger} Reexamined: Dissonance in the Brandenburg Concerto," \textit{22 STAN. L. REV.} 1163, 1176-78 (1970)). Subsequently, the statutes were used to suppress the political activities of socialists and communists following World Wars I and II. Id. "'[W]hatever danger the new radicalism posed . . . , it was not [of the same danger as] the demonstrative assassinations' by the nineteenth century anarchists that occasioned the statutes." Id. (quoting Linde, supra, at 1176) (alterations in original).
\textsuperscript{212} Id. at 256.
tions. Thus, these critics claim that "a system of subsequent punishment, by the police censorship it inculcates, permits the state to exploit the overinclusiveness of these laws and suppress speech that disturbs the current governing faction."

Besides the threat of unchecked prosecutorial discretion, the modern view contends that a system of subsequent punishment permits a second, perhaps even more pernicious, form of suppression. Namely, the vagueness and uncertainty inherent in penal sanctions engenders self-imposed censorship. Indeed, these critics note that the very purpose of penal sanctions in this context is not only to punish those who violate the law, but also to induce self-censorship on the part of those who are unwilling to risk the threat of prosecution and punishment. Such a deterrent effect does not by itself violate constitutional principles. However, constitutional principles are implicated when a penal sanction directed at unprotected speech deters individuals from engaging in protected speech. This "chilling effect" is a product of the fear generated by the uncertainty surrounding a penal law's application to a

213. Id. at 257. Mayton notes that "[c]urrently, the police discretion afforded by vague obscenity laws is being used in various locales to censor speech that is unacceptable to majoritarian sentiments, or to the tastes of local law enforcement officials." Id. He recounts the following:

In Atlanta, a district attorney's thorough and relentless prosecutions has forced the distributors of magazines, books, and movies that his office considers obscene to cease distribution of such materials. This success was engendered not by the fact that a judge and jury determined that these materials were obscene, but because the distributors simply could not bear the cost of subsequent punishment as assessed by the district attorney. In particular, the distributors finally chose not to bear the continuous litigation costs necessary to defend their practices.


214. Mayton, supra note 168, at 262.
215. Id. at 261.
216. Id.
217. Schauer, Fear, Risk and the First Amendment, supra note 168, at 693.
218. Specifically, Schauer offers the following definition: "A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity." Id. at 693 (emphasis omitted).
particular speech activity\textsuperscript{219} and the severity of the punishment accompanying those sanctions.\textsuperscript{220} The danger is that as the severity of the punishment increases along with the uncertainty of a given statute’s application, “[t]he risk-averse among us, those who will not chance the costs of prosecution and punishment, simply will not speak.”\textsuperscript{221}

The modern commentators argue that these characteristics of subsequent punishment call into question many of the prior restraint doctrine’s basic tenets. First, the “inherent overinclusiveness of laws against speech”\textsuperscript{222} allows for the same discriminatory enforcement in a system of subsequent punishment that the prior restraint doctrine attempts to deter.\textsuperscript{223} Second, in comparing the effects of injunctions and subsequent punishment on protected speech, an injunction may be more effective at proscribing the expressive activity at which it is aimed, but it is narrowly confined.\textsuperscript{224} Thus, there is less risk of deterring activity beyond the

\begin{itemize}
  \item \textsuperscript{219} Schauer discusses a number of factors as the source of this uncertainty, including the possibility of error in application of the relevant legal standards, as well as the inability of the speaker to determine whether his speech violates those legal standards. \textit{Id.} at 694-99.
  \item \textsuperscript{220} See \textit{id.} at 697-99. An additional consideration is the expected benefit derived from the speech activity. \textit{Id.} at 698. Schauer offers the following formula: “Deterrence = risk aversion (\textit{probability of punishment} \times \textit{extent of punishment}) - \textit{expected benefit}.” \textit{Id.} at 698 n.62. As an example Schauer cites the case of a law which imposes sanctions on a bookseller for possession of obscene materials:

The difficulty is not that the merchant is theoretically unable to discover the nature of all the publications in his store, but rather, that as a practical matter, it is nearly impossible for him to do so. The burden imposed by such a statute, particularly on a seller with an enormous inventory, is simply too great. Thus, if punishment may be inflicted without proof of scienter, a bookseller will be thrust into a state of uncertainty. This uncertainty will create a fear, a fear ultimately resulting in the chilling of protected activity. \textit{Id.} at 699.
  \item \textsuperscript{221} See Mayton, \textit{supra} note 168, at 268; Schauer, \textit{Fear, Risk and the First Amendment}, \textit{supra} note 168, at 698.
  \item \textsuperscript{222} See Mayton, \textit{supra} note 168, at 267. Hence, “the state gains an unconfined discretion to pick and choose the idea that it would smother with the costs of subsequent punishment.” \textit{Id.}
  \item \textsuperscript{223} Cf. Emerson, \textit{supra} note 126, at 656.
  \item \textsuperscript{224} Mayton, \textit{supra} note 168, at 270.
\end{itemize}
specific target of the injunction.\textsuperscript{225} The uncertain prospect of criminal prosecution in a scheme of subsequent punishment, however, may prove sufficient incentive "to steer well clear of arguably proscribed activities."\textsuperscript{226} Moreover, such self-censorship eludes the judicial scrutiny required in each instance of suppression.\textsuperscript{227} The modern view asserts that "[a] system of injunctive relief, on the other hand, is more protective of first amendment values because it requires such process."\textsuperscript{228} Hence, the rationale that a system of subsequent punishment offers greater procedural safeguards is called into question, as it does not take into consideration those instances of self-censorship such systems induce.\textsuperscript{229} The deterrent effect of subsequent punishment also underscores the relative costs of each scheme of enforcement. Enforcement costs are minimized in a system of subsequent punishment, since suppression is achieved through deterrence.\textsuperscript{230} Conversely, injunctive relief imposes significantly greater enforcement costs, as in each instance the state seeks suppression judicial process is required.\textsuperscript{231}

Finally, the modern commentators contend that the deterrence induced by a system of subsequent punishment calls into question an even more basic precept of the prior restraint doctrine. The prior restraint doctrine holds that the most significant difference between a scheme of prior restraints and subsequent punishment is that the former takes effect prior to the speech having been made, while the latter takes effect once the speech has been made.\textsuperscript{232} Therefore, subsequent punishment allows the speech to reach the marketplace of ideas, whereas a prior restraint stops it from occurring at all.\textsuperscript{233} Such an analysis, however, fails to consider two relevant factors. First, both schemes are enforced only after the

\textsuperscript{225} Id.
\textsuperscript{226} Id. at 256 (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).
\textsuperscript{227} Id. at 261.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 268.
\textsuperscript{230} Id. at 269.
\textsuperscript{231} Id. at 272.
\textsuperscript{232} See Emerson, supra note 126, at 657.
\textsuperscript{233} Id.
speech has occurred.\textsuperscript{234} Second, and more importantly, such an analysis does not consider that subsequent punishment’s deterrent effect suppresses speech on “a broad scale, through the extensive self-censorship that it inculcates.”\textsuperscript{235} As Mayton notes, “[t]his too is lost speech, in an amount likely to be greater than that of speech lost by the more specific suppression of an injunction.”\textsuperscript{236}

Thus, many modern commentators urge modification of the prior restraint doctrine or its outright retirement.\textsuperscript{237} These commentators assert that the traditional distinction between prior restraints and subsequent punishment shrouds the fact that a system of subsequent punishment may exact far greater costs in chilling First Amendment freedoms. Nevertheless, the prior restraint doctrine continues to be a fundamental aspect of First Amendment jurisprudence.\textsuperscript{238} However, as an examination of the Court’s analysis in \textit{Alexander v. United States} aptly illustrates, reliance on the doctrine may infringe upon First Amendment rights, rather than uphold them.

\textsuperscript{234} \textsc{Nimmer, supra} note 172, § 4.03, at 4-14. Nimmer writes:

The point is that engaging in speech activities contrary to a previously issued administrative or judicial order in fact can at most give rise to subsequent punishment. That is, the punishment is administered only after the act of speech itself has already occurred. In that literal sense the censor’s order and the court’s injunction result in a form of subsequent punishment no less than do statutory penalties for speech activities which are not accompanied by such in personam directives. If such personally directed orders are thought of as prior restraints because of the chilling effect on the speaker which occurs prior to his engaging in speech, then the distinction is at most one of degree.

\textit{Id.}

\textsuperscript{235} Mayton, \textit{supra} note 168, at 276.

\textsuperscript{236} \textit{Id.}

\textsuperscript{237} See, \textit{e.g.}, Jeffries, \textit{supra} note 126, at 437 (calling for the abolishment of the prior restraint doctrine); Schauer, \textit{Fear, Risk and the First Amendment}, \textit{supra} note 168, at 729-30 (suggesting that a “chilling effect” analysis should replace the prior restraint doctrine); Mayton, \textit{supra} note 168, at 281 (concluding that systems of subsequent punishment incur greater costs to free speech than injunctions).

\textsuperscript{238} See \textit{supra} notes 135-67 and accompanying text.
IV. ALEXANDER V. UNITED STATES

During the 1992 Term, the United States Supreme Court heard Alexander v. United States.\textsuperscript{239} The defendant, Ferris J. Alexander, was convicted under RICO for obscenity violations. The government subsequently seized his adult entertainment business, including his entire stock of films, videos, and publications, pursuant to RICO's forfeiture laws.\textsuperscript{240} Alexander brought a challenge to the RICO forfeiture order, arguing that the forfeiture violated his First and Eighth Amendment rights.\textsuperscript{241} The Court ruled, in upholding the order, that the forfeiture did not constitute an impermissible prior restraint and did not violate the First Amendment.\textsuperscript{242} However, the Court remanded the case to determine whether the forfeiture violated the Eighth Amendment's Excessive Fines Clause.\textsuperscript{243}

A. Facts of Alexander

Alexander was in the adult entertainment business for over thirty years, selling sexually explicit magazines and sexual paraphernalia.\textsuperscript{244} He also showed pornographic movies at his establishments and eventually sold and rented videotapes of the same genre.\textsuperscript{245} He received shipments of these materials at a warehouse in Minneapolis, Minnesota, and his products were then sold through his 13 retail stores in a number of Minnesota cities.\textsuperscript{246} Alexander's business generated millions of dollars annually;\textsuperscript{247} at the time of the seizure his assets were valued at over $9 million dollars.\textsuperscript{248}

In 1989, federal authorities filed a 41-count indictment against Alexander.\textsuperscript{249} The indictment charged, \textit{inter alia}, 34 obscenity

\textsuperscript{239} 113 S. Ct. 2766 (1993).
\textsuperscript{240} Id. at 2770.
\textsuperscript{241} Id. at 2769.
\textsuperscript{242} Id. at 2766.
\textsuperscript{243} Id. at 2776.
\textsuperscript{244} Id. at 2769.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id. at 2770.
\textsuperscript{249} Id. at 2669.
counts and 3 RICO counts predicated on the obscenity charges.\textsuperscript{250} After a four-month jury trial, Alexander was convicted of 17 substantive obscenity offenses: 12 counts of transporting obscene material in interstate commerce for the purpose of sale or distribution,\textsuperscript{251} and five counts of engaging in the business of selling obscene material.\textsuperscript{252} He was also convicted of three RICO offenses predicated on the obscenity convictions.\textsuperscript{253} The jury’s findings that four magazines and three videotapes were obscene provided the basis for the obscenity and RICO convictions.\textsuperscript{254} The Supreme Court noted that “[m]ultiple copies of these magazines and videos, which graphically depicted a variety of ‘hard core’ sexual acts, were distributed throughout petitioner’s adult entertainment empire.”\textsuperscript{255}

Alexander was sentenced to six years in prison and fined $100,000.\textsuperscript{256} In addition, the district court reconvened the same jury and held a forfeiture proceeding pursuant to RICO’s forfeiture provision, § 1963(a)(2).\textsuperscript{257} The jury determined that Alexander utilized his interest in 10 pieces of commercial real estate and 31 current and former businesses to conduct his racketeering enterprise.\textsuperscript{258} As a result, the district court ordered Alexander to forfeit his wholesale and retail businesses, including the books, magazines and videos sold by these businesses, and almost $9 million acquired through his racketeering activity.\textsuperscript{259}

The Eighth Circuit Court of Appeals affirmed the district

\textsuperscript{250} Id.
\textsuperscript{251} Id.; see 18 U.S.C. § 1465 (1994).
\textsuperscript{252} Alexander, 113 S. Ct. 2769-70; see 18 U.S.C. § 1466.
\textsuperscript{253} Alexander, 113 S. Ct. at 2769-70. Defendant was convicted of one count of receiving and using income derived from a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(a); one count of conducting a RICO enterprise, in violation of 18 U.S.C. § 1962(c); and one count of conspiring to conduct a RICO enterprise, in violation of 18 U.S.C. § 1962(d). Alexander, 113 S. Ct. at 2769-70.
\textsuperscript{254} Id. at 2770.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id. For the district court’s Order and Judgment of Forfeiture, see United States v. Alexander, No. 4-89-85, 1990 WL 117882 (D. Minn. Aug. 6, 1990).
\textsuperscript{258} Alexander, 113 S. Ct. at 2770.
\textsuperscript{259} Id. The Supreme Court noted that the government, not wishing to go into the business of selling pornographic materials, decided to destroy the forfeited expressive materials. Id. at 2770 n.1.
court’s forfeiture order, rejecting Alexander’s contention that the application of RICO’s forfeiture provisions constituted a prior restraint in violation of the First Amendment. The court of appeals held that the forfeiture was a permissible criminal sanction imposed as a subsequent punishment for defendant’s RICO violations. The court also rejected Alexander’s claim that the forfeiture provisions were unconstitutionally overbroad. Finally, the circuit court rejected the defendant’s claim that the forfeiture provisions violated the Eighth Amendment’s prohibition against “cruel and unusual punishments” and “excessive fines.”

B. The Supreme Court’s Decision

1. The Majority Opinion

Chief Justice Rehnquist, writing for the majority and joined by Justices White, O’Connor, Scalia and Thomas, first examined Alexander’s claim that the forfeiture of the business constituted an unconstitutional prior restraint. Foregoing a functional approach and applying, instead, a formalistic analysis, the Chief Justice held that “the term prior restraint is used ‘to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.’” The Court then pointed to temporary restraining orders and permanent injunctions as “classic examples of prior restraints.” Distinguishing Near v. Minnesota, Organization for a Better Austin v. Keefe, and Vance v. Universal Amusement Co., the Court held that the state action in these cases was impermissible because it had forbidden expressive activity in the future or had required prior

261. Alexander, 943 F.2d at 834.
262. Id.
263. Id. at 835.
264. Id. at 836.
266. Id. at 2771 (quoting NIMMER, supra note 172, § 4.03, at 4-14).
267. Id. (citing NIMMER, supra note 172, § 4.03, at 4-16).
268. 283 U.S. 697 (1931).
approval for the expressive activity in question.\textsuperscript{271} In \textit{Near}, for example, the Court held that a state law providing for a permanent injunction against a newspaper or periodical found to be a public nuisance for producing a "malicious, scandalous and defamatory"\textsuperscript{272} publication, was an unconstitutional prior restraint.\textsuperscript{273} Similarly, in \textit{Vance}, the Court struck down as an unconstitutional prior restraint a Texas statute authorizing injunctions of indefinite duration prohibiting theaters to exhibit films, upon a showing that the theater had shown obscene films in the past.\textsuperscript{274} In distinguishing \textit{Alexander}, the Court held that the RICO forfeiture order did not prohibit the defendant from engaging in any expressive activities in the future, nor did the order require him to obtain prior approval for any expressive activities.\textsuperscript{275} Notwithstanding his imprisonment and the confiscation of his business, the Court noted that the defendant was free to "open new stores, restock his inventory, . . . hire staff . . . [and] go back into the adult entertainment business tomorrow, . . . sell[ing] as many sexually explicit magazines and videotapes as he likes, without any risk of being held in contempt for violating a court order."\textsuperscript{276} In short, the Court held that "[u]nlike the injunctions in \textit{Near}, \textit{Keefe}, and \textit{Vance}, the forfeiture order in this case imposes no legal impediment to—no prior restraint on—petitioner's ability to engage in any expressive activity he chooses."\textsuperscript{277}

Chief Justice Rehnquist then distinguished \textit{Alexander} from those cases in which the government had seized materials suspected of being obscene absent a prior judicial determination that they were in fact obscene.\textsuperscript{278} The seized magazines, books, videos and

\begin{itemize}
\item \textsuperscript{271} \textit{Alexander}, 113 S. Ct. at 2771.
\item \textsuperscript{272} \textit{Near}, 283 U.S. at 702.
\item \textsuperscript{273} \textit{Id.} at 722-23.
\item \textsuperscript{274} \textit{Vance}, 445 U.S. at 311.
\item \textsuperscript{275} \textit{Alexander}, 113 S. Ct. at 2771.
\item \textsuperscript{276} \textit{Id.} Provided he could find the capital, as well as the courage, to re-enter the same line of business, the defendant would perhaps not have to worry himself about being held in contempt. He would, however, likely be more than a little concerned about incurring another RICO violation. This highlights the essential problem with the prior restraint-subsequent punishment distinction. See \textit{supra} notes 222-26 and accompanying text.
\item \textsuperscript{277} \textit{Alexander}, 113 S. Ct. at 2771.
\item \textsuperscript{278} \textit{Id.} at 2771-72 (citing \textit{Marcus v. Search Warrant}, 367 U.S. 717 (1961); Bantam
films in *Alexander* were forfeited not because they were believed to be obscene, but because they were related to the defendant’s past racketeering violations. The Chief Justice observed that “[t]he statute is oblivious to the expressive or nonexpressive nature of the assets forfeited; books, sports cars, narcotics, and cash are all forfeitable alike under RICO.”

The Supreme Court found, moreover, that the assets were not seized without affording the defendant the proper procedural safeguards. The Court noted that in *Fort Wayne Books, Inc. v. Indiana* a pretrial seizure of certain expressive material, based on a probable cause finding that a RICO violation had occurred, was held unconstitutional. However, the *Alexander* Court held that *Fort Wayne Books* turned on the fact that there had been no prior judicial determination that the seized items were obscene or that there had been an underlying RICO violation. Quoting *Fort Wayne Books*, the Court reaffirmed the proposition that “mere probable cause to believe a legal violation ha[d] transpired . . . is not adequate to remove books or films from circulation.” In the instant case, however, the defendant had a full criminal trial on the merits of the obscenity and RICO charges, in which the government had to prove beyond a reasonable doubt the basis for the forfeiture.

The majority’s opinion also relied on *Arcara v. Cloud Books, Inc.* for the proposition that expressive activities could be restricted if in the form of a subsequent punishment. In *Arcara*, the Court sustained a lower court order, issued under a general nuisance statute, that closed down an adult bookstore that was

---


279. *Id.* at 2772.

280. *Id.*

281. *Id.*


284. *Id.*


286. *Id.*


288. See *Alexander*, 113 S. Ct. at 2772.
being used as a place of prostitution and lewdness.\textsuperscript{289} The Court in \textit{Alexander} noted that the \textit{Arcara} Court based its decision on two considerations in rejecting the defendant’s claim that the state action had amounted to an improper prior restraint. First, the closure of the bookstore imposed no prior restraint at all on the dissemination of particular materials, “since respondents [were] free to carry on their bookselling business at another location . . . .”\textsuperscript{290} Second, the closure order was not “imposed on the basis of an advance determination that the distribution of particular materials [was] prohibited . . . .”\textsuperscript{291} The \textit{Alexander} Court held that the same reasoning applied in the instant case.\textsuperscript{292} Namely, “the RICO forfeiture order was not a prior restraint on speech, but a punishment for past criminal conduct.”\textsuperscript{293} The defendant’s attempts to distinguish \textit{Arcara} on the grounds that obscenity, unlike prostitution or lewdness, has significant expressive elements, was to no avail.\textsuperscript{294} The Court held that this distinction had no bearing on the issue of whether the forfeiture was an impermissible prior restraint.\textsuperscript{295}

The Court next looked to the historical antecedents of the First Amendment’s distinction between prior restraint and subsequent punishment.\textsuperscript{296} The Court maintained that accepting the defendant’s First Amendment challenge would “undermine the time-honored distinction between barring speech in the future and penalizing past speech.”\textsuperscript{297} While acknowledging that American jurisprudence has given a broader definition to prior restraint than traditional common law, the Court nonetheless held that preserving the distinction between prior restraint and subsequent punishment was “critical to our First Amendment jurisprudence.”\textsuperscript{298}

\begin{itemize}
\item \textsuperscript{289} \textit{Arcara}, 478 U.S. at 699-700.
\item \textsuperscript{290} \textit{Alexander}, 113 S. Ct. 2772 (quoting \textit{Arcara}, 478 U.S. at 705 n.2).
\item \textsuperscript{291} Id. (quoting \textit{Arcara}, 478 U.S. at 705 n.2).
\item \textsuperscript{292} Id.
\item \textsuperscript{293} Id.
\item \textsuperscript{294} Id. at 2772-73.
\item \textsuperscript{295} Id. at 2773.
\item \textsuperscript{296} Id.
\item \textsuperscript{297} Id.
\item \textsuperscript{298} Id. Since the forfeiture was judged to be a subsequent punishment, the Court analyzed the seizure under “normal First Amendment standards.” Id. The Court main-
Chief Justice Rehnquist also dismissed the defendant's overbreadth argument, contending it was in actuality a challenge to the improper "chilling" effect such a statute would have. The Chief Justice did not doubt that RICO's severe forfeiture provisions would "induce cautious booksellers to practice self-censorship and remove marginally protected materials from their shelves . . . ." The Court held, however, that deterring the sale of obscene materials was constitutionally permissible and that any obscenity statute would "induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene."

Finally, the Court rejected the defendant's challenge that the statute targeted expressive activity and, in so doing, unconstitutionally proscribed protected speech. Citing Arcara, the Court ruled that:

criminal and civil sanctions having some incidental effect on First Amendment activities are subject to First Amendment scrutiny "only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in United States v. O'Brien or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue."

Acknowledging that the conduct the legal sanctions proscribed
had expressive elements, the Court nevertheless held that those expressive elements were insufficient to trigger First Amendment scrutiny. The Court emphasized that "'obscenity' can be regulated or actually proscribed consistent with the First Amendment."\(^{304}\)

2. The Dissent

Justice Kennedy, writing in dissent, was joined by Justices Blackmun and Stevens. Justice Souter also joined as to Part II.\(^{305}\) The dissent denounced the majority’s opinion as "a deplorable abandonment of fundamental First Amendment principles."\(^{306}\) Admonishing the majority for it's elevation of form over substance, the dissent urged a more functional approach to the prior restraint doctrine.\(^{307}\) Justice Kennedy argued that in order to protect important First Amendment values an analysis of the proscription’s operation and effect was necessary rather than a mere examination of

\(^{304}\) Id. The Court went on to analyze the defendant's Eighth Amendment claims and eventually remanded the case to the court of appeals for consideration of whether the forfeiture violated the Eighth Amendment's Excessive Fines Clause. Id. at 2775-76. The “excessive” nature of RICO’s forfeiture laws is certainly relevant to potentially impermissible “chilling effects” of RICO. This potential excessiveness reveals the weakness of a more formalistic prior restraint-subsequent punishment analysis. Id. However, the Court’s discussion of Alexander’s Eighth Amendment challenge sheds little light on the issues raised in this Comment and, therefore, is beyond its scope. Id.

\(^{305}\) Id. at 2776 (Kennedy, J., dissenting). Justice Souter, concurring in part and dissenting in part, filed a brief separate opinion, in which he indicated he agreed with the majority that the forfeiture did not constitute a prior restraint, as traditionally understood. Id. (Souter, J., concurring in part dissenting in part). However, Justice Souter, in joining Part II of the dissent, also stated that "the First Amendment forbids the forfeiture of petitioner’s expressive material in the absence of an adjudication that it is obscene or otherwise of unprotected character." Id.

\(^{306}\) Id. at 2786. Justice Kennedy stated:

The Court today embraces a rule that would find no affront to the First Amendment in the Government’s destruction of a book and film business and its entire inventory of legitimate expression as punishment for a single past speech offense. Until now I had thought one could browse through any book or film store in the United States without fear that the proprietor had chosen each item to avoid risk to the whole inventory and indeed to the business itself. This ominous, onerous threat undermines free speech and press principles essential to our personal freedom.

Id. at 2776.

\(^{307}\) See id. at 2782-83.
its form.\textsuperscript{308}

The dissent noted that since the First Amendment’s conception, the prior restraint doctrine has been characterized by an expansion of English common law’s traditional notion of the doctrine.\textsuperscript{309} The dissent also took issue with the majority’s reading of the seminal prior restraint case, \textit{Near v. Minnesota}.\textsuperscript{310} According to the dissent, \textit{Near} was a case in which the Court was faced with state action that did not fall within the traditional notions of prior restraint, yet posed many of the same censorship dangers.\textsuperscript{311} In that case, however, the Court held that the doctrine did not apply only to traditional forms of prior restraints, such as licensing and prior censorship.\textsuperscript{312} Instead, the Court extended the doctrine to apply to “injunctive systems which threaten or bar future speech based on some past infraction.”\textsuperscript{313} In short, the dissent argued that \textit{Near} stood for the proposition that the First Amendment requires more than an examination of the regulation’s form; the First Amendment requires an examination of the regulation’s “operation and effect on the suppression of speech.”\textsuperscript{314}

Moreover, the dissent asserted that matters of form were inconsequential in the face of RICO’s broad sweep.\textsuperscript{315} Underscoring RICO’s effects, Justice Kennedy stated that “[w]hat is happening here is simple: Books and films are condemned and destroyed not for their own content but for the content of their owner’s prior speech. Our law does not permit the government to burden future

\textsuperscript{308} See id. at 2783.
\textsuperscript{309} Id. at 2780-82. Part III of this Comment discusses the history of the prior restraint doctrine, to which Justice Kennedy refers. See supra part III.A.
\textsuperscript{310} Alexander, 113 S. Ct. at 2782 (Kennedy, J., dissenting).
\textsuperscript{311} Id. at 2782-83.
\textsuperscript{312} Id. at 2783.
\textsuperscript{313} Id.
\textsuperscript{314} Id. at 2782 (citing \textit{Near}, 283 U.S. at 708). Justice Kennedy observed that “[t]he cited cases identify a progression in our First Amendment jurisprudence which results from a more fundamental principle. As governments try new ways to subvert essential freedoms, legal and constitutional systems respond by making more explicit the nature and the extent of the liberty in question.” Id. at 2782-83.
\textsuperscript{315} Id. at 2783.
speech for this sort of taint." The dissent also rebuked the Court for its formalistic analysis of the prior restraint doctrine. The dissent noted that the majority determined that the forfeiture was not a prior restraint and then abandoned any further substantive analysis of the defendant’s First Amendment rights. Justice Kennedy retorted: “The rights of free speech and press in their broad and legitimate sphere cannot be defeated by the simple expedient of punishing after in lieu of censoring before.”

The dissent distinguished RICO’s forfeiture provisions from more traditional criminal sanctions. Justice Kennedy noted that RICO’s purpose is “to destroy or incapacitate the offending enterprise . . .” Quoting Justice Stevens’ concurrence in Fort Wayne Books, the dissent maintained that RICO’s forfeiture provisions “arm prosecutors not with scalpels to excise obscene portions of an adult bookstore’s inventory but with sickles to mow down the entire undesired use.”

Justice Kennedy contended that, even if the forfeiture did not constitute a prior restraint, it nonetheless violated the First Amendment. Justice Kennedy asserted that upholding the massive seizure of materials that had not been adjudged obscene was without “parallel in our cases.” Citing a line of pretrial search and seizure cases in which the Court mandated special protections for presumptively protected expression, Justice Kennedy stated that “we have been careful to say that First Amendment materials can-

316. Id. at 2783-84.
317. Id. at 2779.
318. Id. at 2783. Justice Kennedy stated, “[i]f mere warning against sale of certain materials was a prior restraint, I fail to see why the physical destruction of a speech enterprise and its protected inventory is not condemned by the same doctrinal principles.” Id. at 2782 (Kennedy, J., dissenting) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)).
319. Id. at 2783.
320. Id. Justice Kennedy stated: “The admitted design and the overt purpose of the forfeiture in this case are to destroy an entire speech business and all its protected titles, thus depriving the public of access to lawful expression.” Id. at 2779.
321. Id. at 2784 (quoting Fort Wayne Books, 489 U.S. at 85 (Stevens, J., concurring in part and dissenting in part)).
322. See id. at 2785.
323. Id.
not be taken out of circulation until they have been determined to be unlawful."\textsuperscript{324} He further asserted that these prior decisions had held that in the case of interim seizures "one title does not become seizable or tainted because of its proximity on the shelf to another."

\textsuperscript{325} The dissent also argued that the \textit{permanent} destruction of protected materials required even greater protection: "[W]hile in the past we invalidated seizures which resulted in a temporary removal of presumptively protected materials from circulation, today the Court approves of government measures having the same permanent effect."\textsuperscript{326} Justice Kennedy observed that the majority was willing to give less protection to the permanent forfeiture of materials than the Court, in prior cases, had consistently given to materials only temporarily seized.\textsuperscript{327} The dissent thus argued that regardless of whether it was a prior restraint or subsequent punishment, the permanent forfeiture of protected materials violated the First Amendment as had the temporary seizure of such materials.\textsuperscript{328}

\section*{V. ANALYSIS OF THE COURT'S DECISION IN ALEXANDER}

\textbf{A. The Prior Restraint-Subsequent Punishment Distinction as Applied to Obscenity}

The Supreme Court, in \textit{Alexander}, held that the seizure of the defendant's nonobscene material under RICO's forfeiture provisions was constitutionally permissible.\textsuperscript{329} However, in distinguishing RICO's forfeiture provisions from traditional forms of prior restraints, the Court failed to consider the very dangers which the prior restraint doctrine attempts to check. Simply put, the prior restraint doctrine serves to ensure that materials protected by the First Amendment reach the marketplace of ideas.\textsuperscript{330} Two distinct

\begin{flushleft}
\textsuperscript{324} Id. (citing \textit{Fort Wayne Books}, 489 U.S. at 63; Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 n.5 (1979); Marcus v. Search Warrant, 367 U.S. 717, 731-33 (1961); \textit{A Quantity of Books}, 378 U.S. at 211-13; Maryland v. Macon, 472 U.S. 463, 470 (1985)).

\textsuperscript{325} Id.

\textsuperscript{326} Id. at 2786.

\textsuperscript{327} Id.

\textsuperscript{328} Id.

\textsuperscript{329} See supra part IV.B.

\textsuperscript{330} See supra notes 193-95 and accompanying text.
\end{flushleft}
interests are implicated by such a paradigm. First, government regulations that obstruct the free exchange of protected materials affect the First Amendment rights of the speaker. Second, and just as importantly, such proscriptions affect the rights of the audience as well.

1. The First Amendment Rights of the Speaker

The Court’s analysis in Alexander underscores one of the chief defects of the prior restraint doctrine. In addressing the particular form of the government proscription rather than its substantive aspects, the doctrine fails to consider the proscription’s effect on protected speech. The doctrine analyzes the timing of the government regulation rather than the extent of the regulation.

Indeed, the Alexander Court’s application of the prior restraint doctrine proved to be inadequate in addressing the substantive issue in the case. The Court’s analysis failed to consider the “operation and effect” of the regulation vis-à-vis presumptively protected materials. To state that the forfeiture of the materials was a permissible subsequent punishment for a past infraction neglects to address the critical question: Did the government action suppress protected materials to such an extent that it transgressed First Amendment liberties? As the dissent in Alexander noted, the majority labeled the forfeiture a subsequent punishment, then “dismiss[ed] any further debate over the constitutionality of the forfeiture penalty under the First Amendment.”

A system of prior restraints may be less oppressive for certain classes of communications than a system of subsequent punishment. Such is the case for those classes of speech that do not provide the speaker with clear guidelines as to what constitutes proscribed speech. Prior restraints afford guidance to the speaker before he has transgressed the government’s proscription.

331. See supra notes 200-01 and accompanying text.
332. See supra notes 200-01 and accompanying text.
333. Alexander, 113 S. Ct. at 2783 (Kennedy, J., dissenting).
334. Id. at 2779.
335. See supra notes 202-06 and accompanying text.
336. See supra notes 224-25 and accompanying text.
quent punishment, on the other hand, takes effect once the communication is uttered and the law has been violated. A speaker subjected to an especially vague statute enforced by subsequent punishment may not realize his transgression until a prosecution has commenced.\textsuperscript{337} Such prior guidance may be especially welcome in an area of First Amendment jurisprudence such as obscenity. Applied to obscenity, prior restraints may actually be less restrictive than subsequent punishment.\textsuperscript{338}

For example, a purveyor of adult videos would likely prefer a system of prior restraint that indicated in advance those videos he could legally sell and those he could not.\textsuperscript{339} Upon the issuance of an injunction that proscribed specific titles, he could then go about selling the merchandise not enumerated in the injunction with the knowledge that he was within the constraints of the law. A system of subsequent punishment, on the other hand, provides the hypothetical adult-video seller no advance notice that he has violated the law. Even a conscientious, law-abiding distributor would not know he had violated the law until a prosecution was brought against him.

In addition, the severity of the subsequent punishment is critical in determining its effect on both proscribed and protected communication.\textsuperscript{340} Where the subsequent punishment is insignificant, it may be discounted as a cost of doing business.\textsuperscript{341} In that case the prior restraint may act as a more repressive regime. However, where the subsequent punishment is severe, violation of the law may result in silencing not only the transgressor's future speech, but the entire class of speech from whence the original communication came.\textsuperscript{342} Thus, severe sanctions would discourage the convict-

\begin{itemize}
\item \textsuperscript{337} See Schauer, \textit{Fear, Risk and the First Amendment}, supra note 168, at 699 n.65.
\item \textsuperscript{338} See supra note 213.
\item \textsuperscript{339} See Mayton, supra note 168, at 271 n.164 (citing cases in which publishers sought declaratory relief rather than risk subsequent punishment).
\item \textsuperscript{340} See Schauer, \textit{Fear, Risk and the First Amendment}, supra note 168, at 698 & nn. 61-62.
\item \textsuperscript{341} Id.
\item \textsuperscript{342} Id. at 699; \textit{see also} Nimmer, supra note 172, § 4.04, at 4-21. Nimmer writes that "[a] statute restricting speech, which holds out the threat of subsequent punishment for its violation will tend to chill the speech of the public at large. An injunction on
ed adult-video seller from future distribution. Moreover, other sellers fearing such sanctions would also be constrained in the distribution of not only proscribed material, but protected material as well.\footnote{343}

Consequently, RICO's severe forfeiture provisions encroach upon the defendant's First Amendment rights in a number of ways. First, the pecuniary penalty would have the dual effect of disabling the defendant's distribution facilities, as well as convincing him to steer clear of speech that would result in significant economic sanctions. The Alexander Court, however, held that neither of these effects were enough to implicate the First Amendment.\footnote{344} The Court noted that the First Amendment did not prohibit severe criminal penalties for obscenity cases.\footnote{345} Moreover, the Court held that any chilling effect induced in other booksellers by the removal of "marginally protected materials" was permissible,\footnote{346} because deterring the sale of obscene materials "is a legitimate end of state antiobscenity laws."\footnote{347} However, RICO's severe sanctions deter more than the sale of obscene materials. The provisions will significantly impact sexually explicit speech that approaches the hazy line of the Miller obscenity standards, as distributors are likely to remove materials that are not legally obscene.

Aside from the monetary effects that would act to chill or stifle the distribution of sexually explicit material, the distributor's rights are restricted when he is prevented from distributing protected

\footnote{343} See Schauer, Fear, Risk and the First Amendment, supra note 168, at 699.
\footnote{344} See supra notes 302-04 and accompanying text.
\footnote{346} Id. at 2774; see also Schauer, Fear, Risk and the First Amendment, supra note 168 (discussing the chilling effect doctrine in First Amendment jurisprudence).
\footnote{347} Alexander, 113 S. Ct. at 2774 (quoting Fort Wayne Books, 489 U.S. at 60). The Court went on to state that "our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'" Id.
materials by the government's confiscation of those materials. The Alexander Court discounted this argument. The Court analogized the forfeiture of the defendant's inventory of books, magazines, and videos to the injunction forcing the closure of the bookstore in Arcara. The Court stated that in Arcara it upheld the closure of a business engaged in expressive activity as a punishment for criminal conduct. The Court reasoned, therefore, that "forfeiture of expressive materials as punishment for criminal conduct" was consistent with the First Amendment.

Arcara, however, can be distinguished on several grounds. The conduct that received the government sanction in Arcara was not speech-related, whereas the RICO provisions in Alexander were directed at speech, albeit, ostensibly unprotected speech. Additionally, Arcara did not involve the seizure of protected materials. The defendant's store was closed by a court order, however, the materials he sold were not seized. Thus, the defendant in Arcara was free to distribute his materials at another location. Alexander, on the other hand, does not have the same option, as the government destroyed his entire inventory.

2. The First Amendment Rights of the Audience

The Alexander Court employed the prior restraint doctrine in analyzing RICO's forfeiture provisions in relation to the First Amendment rights of the distributor. In so doing, the Court neglected to take into account the First Amendment rights of the audience. However, the Supreme Court has repeatedly held that in addition to the speaker's rights, a First Amendment right also inheres in the audience. The First Amendment "serves significant

348. See supra notes 287-95 and accompanying text.
349. See supra note 288 and accompanying text.
350. See Alexander, 113 S. Ct. at 2775.
351. See id. at 2779; The Supreme Court, 1992 Term—Leading Cases, 107 HARV. L. REV. 144, 244-50 (1993) [hereinafter Leading Cases].
352. Arcara, 478 U.S. at 705.
353. Id.
354. Alexander, 113 S. Ct. at 2785.
355. NIMMER, supra note 172, § 1.02(F)(1), at 1-20 & nn.34, 37 (citing Supreme Court cases upholding the First Amendment rights of the audience in receiving information). Nimmer notes, however, that in many instances the audience's rights may be
societal interests’ wholly apart from the speaker’s interest in self-expression. . . . [T]he First Amendment protects the public’s interest in receiving information.”\footnote{356} Accordingly, the public has the same right of access to sexually explicit materials that have not been judged obscene. As the Court in \textit{Stanley v. Georgia}\footnote{357} held, “[t]his right to receive information and ideas, regardless of their social worth is fundamental to our free society.”\footnote{358}

Hence, in cases involving the pretrial seizure of First Amendment materials, the Court has required an adversarial hearing regarding the issue of obscenity before all the copies of expressive materials could be seized. The Court in \textit{Marcus} and \textit{A Quantity of Books} reasoned that massive seizures conducted prior to a judicial hearing as to their obscenity threatened the public’s right to “unobstructed circulation of nonobscene books.”\footnote{359} However, the Court divorced its holdings from this rationale in subsequent cases. While the Court has consistently reaffirmed that an adversarial hearing was necessary before massive seizures could be undertaken,

\footnotetext[356]{356. Pacific Gas and Elec. Co. v. Public Util. Comm’n of Cal., 475 U.S. 1, 8 (1986) (holding that order from Public Utilities Commission requiring utility to place newsletter from third party in its billing envelopes violated utility’s First Amendment rights); \textit{see also} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (“It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”).}

\footnotetext[357]{357. 394 U.S. 557 (1969).}

\footnotetext[358]{358. \textit{Id.} at 564 (citation omitted). However, since \textit{Stanley}, the Court has cut back the public’s right to receive sexually explicit materials, particularly where those materials have been judged obscene. \textit{See} Miller v. California, 413 U.S. 15, 34 (1973) (“[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.”); \textit{see also} \textit{Young v. American Mini Theatres}, 427 U.S. 50 (1976) (5-4) (upholding the use of zoning ordinances restricting the exhibition of “adult” films); \textit{Paris Adult Theatre I v. Slaton}, 413 U.S. 49 (1972) (5-4) (upholding the use of civil proceedings to enjoin films that had been adjudged obscene upon an adversary hearing); \textit{cf. American Mini Theatres}, 427 U.S. at 76 (Powell, J., concurring in part) (“The primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message.”).}

in later cases the Court framed the issue as a question of improper prior restraints. This trend culminated in *Alexander*, where the Court analyzed the seizure in the context of the prior restraint doctrine, and completely ignored the rationale of *Marcus* and *A Quantity of Books*. Determining that an adversarial hearing was afforded the defendant, the *Alexander* Court held that the presumptively protected materials could be seized. However, the requirement of an adversarial proceeding was meant to protect the public’s First Amendment rights as much as the defendant’s.

Nowhere did the Court analyze RICO’s forfeiture in relation to the First Amendment rights of the public. The Court concluded that the RICO forfeiture provision is “oblivious to the expressive or nonexpressive nature of the assets forfeited.” While “books, sports cars, narcotics, and cash” are all forfeitable under RICO, only the forfeiture of books and other expressive materials affects the public’s First Amendment right in the unobstructed circulation of such materials. Indeed, by disabling distribution facilities and seizing their inventories, the goal of RICO’s forfeiture provisions is apparent: it seeks to suppress the circulation of sexually explicit materials, “thus depriving the public of access to [this] lawful expression.”

Had the Court analyzed RICO’s forfeiture provisions in relation to the public’s First Amendment rights, the distinction made between prior restraints and subsequent punishment would be of little consequence. The seizure of Alexander’s inventory would have been struck down, as the removal of protected materials from circulation clearly infringes upon the public’s right of access to such materials. Consequently, the government’s use of RICO in *Alexander* violated the First Amendment regardless of its characterization as a prior restraint or subsequent punishment.

360. *See supra* notes 95, 105 and accompanying text.
361. *See supra* notes 285-86 and accompanying text.
363. *Id.*
364. *Id.* at 2779.
B. An Alternative Approach

Once the public’s right of access has been recognized in RICO forfeitures of expressive material, an appropriate standard of review must be determined. Assuming RICO is a facially neutral statute, in that assets irrespective of their speech qualities are subject to seizure, its effects on speech require a heightened level of constitutional scrutiny. Content-neutral regulations that have a secondary effect on speech implicate the intermediate level of First Amendment scrutiny offered in United States v. O’Brian.365 The Court in O’Brien required that a “content-neutral” statute indirectly restricting speech must meet a four-part test. First, the regulation must be “within the constitutional power of the Government.”366 Second, the regulation must further “an important or substantial governmental interest.”367 Third, “the governmental interest” must be “unrelated to the suppression of free expression.”368 Finally, “the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest.”369

Applying O’Brien to RICO’s forfeiture laws, the government provision possibly fails two of the four prongs. It is unassailable that the government has the right to criminalize obscenity. Moreover, the government has a “substantial interest” in combatting organized crime and obscenity. However, the forfeiture provision in Alexander arguably fails to meet the requirement that the government interest served is “unrelated to the suppression of speech.” Moreover, the provision fails to meet the requirement that its incidental restrictions on speech are “no greater than is essential to the furtherance” of the governmental interest.

365. 391 U.S. 367 (1968); see Leading Cases, supra note 351, at 248. Previous commentators have also regarded the O’Brien test as applicable to RICO’s forfeiture provisions when applied to obscenity. See id. at 248 n.38 (citing Tod R. Eggenberger, RICO vs. Dealers in Obscene Matter: The First Amendment Battle, 22 COLUM. J.L. & SOC. PROBS. 71, 102-07 (1988); Glenn Rudolph, Comment, RICO: The Predicate Offense of Obscenity, the Seizure of Adult Bookstore Assets, and the First Amendment, 15 N. KY. L. REV. 585, 604 & nn.19-20 (1988)).

367. Id.
368. Id.
369. Id.
The government had three identifiable interests in applying RICO to obscenity violations. These interests were enumerated by Senator Helms as he offered his amendment to RICO, making its forfeiture provisions applicable to obscenity violations. First, he sought to make investigation and prosecution of organized crime’s involvement in the “illicit sex industry” more effective. Second, the proffered provision was meant to hinder the proliferation of obscene matter. These two interests are “unrelated to the suppression of free expression.” However, a third identifiable interest is related to presumptively free expression. Senator Helms stated that RICO was intended to do more than eradicate obscenity and organized crime’s proceeds from it. He hoped that the amendment would eliminate the “scourge” of pornography. However, much of the material within the class of expression identified as pornography may not be legally obscene. Hence, pornography that is not deemed obscene is presumptively protected by the First Amendment. This third interest, therefore, is related to the “suppression of free expression.”

The RICO forfeiture provision fails the fourth prong of O’Brien as well. The forfeiture in this instance acts to restrict protected materials far beyond what is necessary in order to effectuate even its legitimate interests of combatting obscenity and organized crime. RICO’s harsh sanctions provide for vast forfeitures for relatively minor obscenity violations. In Alexander, for instance, the defendant was subject to a forfeiture in excess of nine million dollars, including his entire inventory of books, magazines, and films for obscenity violations stemming from four magazines and three videotapes.

A number of commentators, as well as the Ninth Circuit Court of Appeals, have proposed that a proportionality requirement should be read into RICO when it is applied to obscenity convic-

371. Id.
372. Id.
373. Id.
374. Alexander, 113 S. Ct. at 2770.
As one commentator has suggested, an effective tailoring of RICO could be accomplished by simply limiting its forfeiture provisions to "the obscene material itself, the assets directly involved in its creation and distribution, and the proceeds stemming directly from its sale or distribution." A more narrowly tailored statute would effectuate the government's legitimate non-speech interests while ensuring that protected expression remained inviolable. As the Court noted in *A Quantity of Books*, "[t]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . ." Thus, narrowing the reach of RICO's forfeiture provisions where obscenity and other speech-related activities are the predicate offense would provide the Court with the "sensitive tools" necessary for "separation of legitimate from illegitimate speech . . ."

**CONCLUSION**

RICO has proven to be an effective tool in fighting organized
crime. Its forfeiture provisions have facilitated the government in
disgorging previously entrenched syndicates from areas that vitally
affect our nation. However, in approving the application of the
forfeiture laws to obscenity violations, the Supreme Court has al-
lowed the government to dangerously encroach upon the First
Amendment rights of both the distributor and the audience. The
government should not be able to do by way of punishment, what
it could not do as a prior restraint. Such adherence to form jeopar-
dizes exactly those values the First Amendment seeks to protect.