FIRST AMENDMENT — PRIOR RESTRAINT — SEX, RICO, AND PRIOR RESTRAINT: THE FORFEITURE OF EXPRESSIVE MATERIAL PROTECTED BY THE FIRST AMENDMENT AS PUNISHMENT FOR RACKETEERING OFFENSES DOES NOT CONSTITUTE A PRIOR RESTRAINT — *Alexander v. United States*, 113 S. Ct. 2766 (1993).

David J. Sprong

I. INTRODUCTION

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."[1] While this guarantee of free speech is not absolute,[2] the government is nonetheless prohibited under the Constitution from imposing prior restraints upon protected speech.[3] Broadly defined, a prior restraint is any governmental "restraint on publication before it is published."[4] Since 1931,

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[1]U.S. CONST. amend. I. The full text of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[2]The First Amendment protection, while an integral part of American civil liberties, does not extend to every type of speech or expressive conduct. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7(b), at 942-43 (4th ed. 1991) (explaining that while the First Amendment appears to be written in absolute terms, the position that all expression is absolutely protected has never been adopted by the Court). *See, e.g.*, International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992) (holding that government may place reasonable time, place, and manner restrictions on free speech activities in non-public fora); Miller v. California, 413 U.S. 15 (1973) (establishing a three-part test identifying obscene expression which is not protected under the Constitution). *See also* Armando O. Bonilla, Note, *Municipal Noise Ordinance Imposing Mandatory Adherence to Sound Amplification Guidelines Constitutes a Valid Time, Place, or Manner Restriction on Protected Speech*, 1 SETON HALL CONST. L.J. 451 n.2 (1991) (discussing that some governmental restrictions may even be placed on protected forms of speech).

[3]*See generally* Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931). For a detailed discussion, see *infra* notes 27-44 and accompanying text.

[4]BLACK'S LAW DICTIONARY, 1074 (5th ed. 1979). Although BLACK'S LAW DICTIONARY attempts to provide a general definition, the question of what types of speech should be afforded constitutional protection from prior restraints is vigorously debated by

the Supreme Court has generally recognized that the First Amendment precludes, as a prior restraint, numerous categories of governmental action.[5] Nevertheless, in 1993, the United States Supreme Court refused to extend First Amendment protection to expressive materials forfeited by a federal court order as punishment for a criminal conviction under the Racketeering and Corrupt Organizations Act ("RICO").[6]

For thirty years, and throughout the 1980's, Ferris J. Alexander was engaged in the "adult entertainment" business in the State of Minnesota.[7] Alexander's business was highly lucrative, generating annual revenues in the millions of dollars.[8] Alexander owned movie theaters where sexually explicit films were shown as well as stores in which pornographic magazines, videotapes, and other sexual paraphernalia were sold and rented.[9]

Alexander was tried and convicted in the United States District Court for the District of Minnesota on, among other things, three counts under the

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judges and legal scholars. *See infra* notes 52-57 and accompanying text. Essentially, a prior restraint law requires expression to be submitted to a government official who may then grant or deny permission to utter or publish it solely based upon its content. *See* Alexander v. United States, 113 S. Ct. 2766, 2779 (Kennedy, J., dissenting) (citing Staub v. City of Baxley, 355 U.S. 313, 322 (1958); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 222 (1964) (Harlan, J., dissenting); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984)).

[5]For a detailed analysis of the Court's prior restraint jurisprudence, see *infra* notes 26-43 and accompanying text. Primarily, the doctrine precluding prior restraints applies to two types of governmental action: (1) an injunction or other court order that forbids an individual from engaging in certain expressive conduct; or (2) a statute or rule that requires a permit or license before anyone may engage in a form of expression. For examples of the former category, see Vance v. Universal Amusement Co. Inc., 445 U.S. 308 (1980) (per curiam); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). These cases are discussed *infra* note 46. For examples of category two, see FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990); Freedman v. Maryland, 380 U.S. 50 (1965). The latter two cases are discussed *infra* note 48.

[6]Alexander v. United States, 113 S. Ct. 2766 (1993).

[7]*Id.* at 2769. For a more detailed account of the facts surrounding this case, see Alexander v. Thornburgh, 943 F.2d 825, 827-29 (8th Cir. 1991).

[8]*Alexander*, 113 S. Ct. at 2769.

[9]*Id.*

RICO statute.[10] Alexander was subsequently fined one hundred thousand dollars, sentenced to six years in prison, and ordered to pay court costs.[11] Following a forfeiture hearing required under RICO, the district court ordered that Alexander forfeit all of his wholesale and retail businesses, all related assets, and nearly nine million dollars, which the court found was acquired through his racketeering activity.[12]

Alexander appealed the forfeiture order to the United States Court of Appeals for the Eighth Circuit.[13] The court of appeals, affirming the district court's forfeiture order, rejected each of the petitioner's assertions that the order violated his First and Eighth Amendment rights.[14] The United States Supreme Court granted Alexander's petition for *certiorari* to examine, among other things, whether the forfeiture order acted as a prior restraint and, thereby, violated the First Amendment.[15] Affirming the court of appeal's decision regarding this issue, the Supreme Court held that a forfeiture penalty,

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[10]*Id.* Alexander was convicted on twelve counts of "transporting obscene material in interstate commerce for the purpose of sale or distribution," in violation of RICO § 1465 and five counts of "engaging in the business of selling obscene material" in violation of RICO § 1466. *Id. See* 18 U.S.C. § 1465-66 (1988 & Supp. III). These convictions were based upon the jury's determination that four obscene magazines, and three obscene videotapes, had been sold at Alexander's stores. *Alexander*, 113 S. Ct. at 2769. The jury further found that multiple copies of the obscene material had been distributed to Alexander's other adult entertainment stores. *Id.* at 2770.

The obscenity convictions served as the predicates for the following RICO convictions: one count of "receiving and using income derived from a pattern of racketeering activity," in violation of § 1962(a); one count of "conducting a RICO enterprise," in violation of § 1962(c); and one count of "conspiring to conduct a RICO enterprise," in violation of § 1962(d). *Id.* at 2770-71. *See* 18 U.S.C. § 1962.

[11]*Alexander*, 113 S. Ct. at 2776.

[12]*Id.* at 2770. Specifically, the government asserted that Alexander should be ordered to forfeit the real estate and business which embodied his interest in the racketeering enterprise pursuant to RICO § 1963(a)(2)(A), the holdings which allowed him to exact his influence over that enterprise pursuant to § 1963(a)(2)(D), and the assets and proceeds which he had obtained as a result of the racketeering offenses pursuant to § 1963(a)(1)(3). *Id.* (citing 18 U.S.C. § 1963(a) (1988 & Supp. III)).

[13]*See* Alexander v. Thornburgh, 943 F.2d 825 (8th Cir. 1991).

[14]*Id.* at 836.

[15]Alexander v. United States, 113 S. Ct. 2770 (1993). The Court also granted review to consider the question of whether the forfeiture order violated Alexander's Eighth Amendment right to be free from cruel and unusual punishment. *Id.* For an examination of the Court's disposition of this issue, see *infra* note 60 and accompanying text.

including materials otherwise protected by the First Amendment and imposed as punishment for a criminal conviction under RICO, does not constitute an unconstitutional prior restraint.[16] In so holding, the majority unequivocally refused to extend the prior restraint doctrine to any expressive materials that may be forfeited as punishment for a RICO offense.[17]

II. THE HISTORICAL DEVELOPMENT AND APPLICATION OF THE JUDICIALLY CREATED PROSCRIPTION ON PRIOR RESTRAINTS

A. HISTORICAL EVOLUTION OF THE DOCTRINE OF PRIOR RESTRAINT

The threat presented by the imposition of prior restraints upon the civil liberties of free citizens can be traced back to the fifteenth century and the invention of the printing press.[18] Such monumental printing technology soon spread throughout the Western World and brought with it unprecedented possibilities for the unfettered exchange of a vast array of ideas.[19] Despite its utility, however, this technological development placed the right to free expression in jeopardy, as ruling authorities sought to gain exclusive control over this new mode of communication.[20]

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[16]*Id.* at 2771.

[17]*Id.* The Court flatly stated that Alexander's assertion that the RICO forfeiture violated the First Amendment "stretches the term 'prior restraint' well beyond the limits established by our cases." *Id.*

[18]Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650 (1955). Professor Emerson's article has been recognized as the foremost commentary on the prior restraint doctrine. *See* John Calvin Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 411 n.13 (1983) ("The classic treatment [of the doctrine] is Emerson.").

[19]*See* Emerson, *supra* note 18, at 650.

[20]*Id.* Professor Emerson characterizes the advent and spread of the printing press as the battlefield for "one of the early battles for freedom of expression." *Id.*

A draconian example of governmental restraint on the spread of printing technology was related by Justice Kennedy in his dissent in Alexander v. United States, 113 S. Ct. 2766, 2776 (1993) (Kennedy, J., dissenting). In his dissent, Justice Kennedy recounted that, in 1579, a British printer enraged Queen Elizabeth I when he printed a certain tract and was sentenced to lose his right hand. *Id.* at 2780. (Kennedy, J., dissenting) (citing F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, 91-92 (1952)). This sentence, Justice Kennedy explained, exemplified the quintessential prior restraint in that the physical disability would never again allow the printer to operate his press. *Id.*

The most prominent historical example of governmental restraint on expression is the English Licensing Act of 1662.[21] Under this Act, individuals were prohibited from printing any material unless it was first reviewed and licensed by the appropriate government authority.[22] Although the English government stopped enforcing this law in 1695,[23] freedom from the Act's constraints nonetheless evolved as a natural or common law right afforded to all Englishmen.[24] Accordingly, this freedom or right was almost certainly in the minds of the Framers of the United States Constitution in

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[21]*See* Jeffries, *supra* note 18, at 412. In his article, Professor Jeffries explained that "[m]ost accounts [of the doctrine of prior restraint] began with the English Licensing Act of 1662" [hereinafter the Act]. *Id.* at 412.

[22]Emerson, *supra* note 18, at 650. The Act primarily banned all "seditious and heretical" publications. *Id.* However, it also required that all printed matter be registered with a government monopoly called "the Stationers' Company" and further required that publications be licensed by the appropriate state clerk. *Id.* Moreover, the Act directed that no book be sold or imported without a license, mandated that all printing presses be registered with the Stationers' Company, limited and licensed the occupation of the master printer, and granted law enforcement officials broad power to search homes and businesses for printed expression violating the Act. *Id.*

[23]*Id.* at 651. Professor Emerson stated that the British House of Commons declined to renew the Act, and thus, the system simply lapsed. *Id.* Moreover, the professor explained that the refusal to extend the Act was rooted not in an opposition to its restrictions on free expression, but because it had become "generally unwieldy, extreme and even ridiculous." *Id.* For a detailed analysis of the events leading to the death of the Licensing Act of 1662, Professor Emerson cited two noteworthy publications: THOMAS B. MACAULAY, 4 THE HISTORY OF ENGLAND 430-43 (1879); and William Holdsworth, *Press Control and Copyright in the 16th and 17th Centuries*, 29 YALE L.J. 841, 852-56 (1920). *Id.*

[24]Jeffries, *supra* note 18, at 412. Both Professors Jeffries and Emerson, citing the eminent English legal scholar, William Blackstone, explained the eighteenth century English right to be free from prior restraints on expression as follows:

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

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52, *quoted in* Emerson, *supra* note 18, at 651; Jeffries, *supra* note 18, at 413.

1791 when the First Amendment was drafted and subsequently ratified by the states.[25]

B. *NEAR V. MINNESOTA* — THE CONSTITUTIONAL DOCTRINE OF PRIOR RESTRAINT IS ESTABLISHED BY THE UNITED STATES SUPREME COURT

Despite the clear existence of the common law right to be free from governmental restraints on future expression, 130 years passed before the United States Supreme Court recognized that the First Amendment specifically prohibited prior restraints on free speech.[26] In the landmark case of *Near v. Minnesota ex rel. Olson*,[27] the Supreme Court established for the

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[25]Emerson, *supra* note 18, at 651-52. For example, Thomas Jefferson, in criticizing the newspaper business, condemned the "putrid" manner in which the newspapers of his day were published. *See* Letter from Thomas Jefferson to Dr. J. Currie (Jan. 28, 1786), *in* 9 THE PAPERS OF THOMAS JEFFERSON 1785-1786, at 239-40 (Julian P. Boyd ed., 1955) [hereinafter JEFFERSON PAPERS]. Jefferson wrote: "[the state of newspaper publishing] is an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost." *Id.* Also, Justice Kennedy, in his dissent in *Alexander*, revealed that James Madison not only believed that the First Amendment guaranteed a right to be free from prior restraints, but, in fact, believed that it extended to a broader category of freedoms than the English right articulated by Blackstone. Alexander v. United States, 113 S. Ct. 2766, 2780-81 (1993) (Kennedy, J., dissenting) (citing 6 WRITINGS OF JAMES MADISON 386 (G. Hunt ed., 1906)).

[26]Emerson, *supra* note 18, at 652. In his article, Professor Emerson noted that not only the problem of prior restraint, but also the entire First Amendment itself, received "scant attention" during the 130 years after it was adopted. *Id.*

Additionally, Justice Kennedy, in a dissenting opinion in *Alexander*, pointed out that a few early Supreme Court cases involving government restrictions on expression were decided in accordance with Blackstone's articulation of the English common law right, although the doctrine of prior restraint was not specifically applied. *Alexander*, 113 S. Ct. at 2781 (1993) (Kennedy, J., dissenting) (citing Patterson v. Colorado ex rel. Attorney General of Colorado, 205 U.S. 454, 462 (1907); Robertson v. Baldwin, 165 U.S. 275, 281 (1897)). For an in-depth analysis of the historical developments in the United States leading up to *Near v. Minnesota*, including a discussion of *Patterson v. Colorado*, see Paul L. Murphy, *Near v. Minnesota in the Context of Historical Developments*, 88 MINN L. REV. 95 (1981).

[27]283 U.S. 697 (1931).

first time the constitutional precedent which has become known as the doctrine of prior restraint.[28]

In *Near,* the petitioners, a newspaper called "The Saturday Press" and its publishers, challenged a Minnesota statute which outlawed, as a public nuisance, any "malicious, scandalous and defamatory newspaper, magazine, or other periodical."[29] In response, the State contended that the newspaper

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[28]*See, e.g.*, Jeffery A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 440 (1987) (noting that *Near v. Minnesota* is "the Court's first major pronouncement on the matter"); Emerson, *supra* note 18, at 652 (explaining that "the Court did not invoke the doctrine [of prior restraint] until, in 1931, it decided the case of *Near v. Minnesota*").

The best definition of the doctrine established by the Supreme Court in *Near* was espoused by Professor Emerson:

> [T]he doctrine of prior restraint holds that the First Amendment forbids the Federal Government to impose any system of prior restraint, with certain limited exceptions, in any area of expression that is within the boundaries of that Amendment. By incorporating the First Amendment in the Fourteenth Amendment, the same limitations are applicable to the states.

Emerson, *supra* note 18, at 648.

[29]*Near*, 283 U.S. at 701-02. The law, codified in Chapter 285, Section 1 of the 1925 Session Laws of Minnesota, provided in full:

> Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away.
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> (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or
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> (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.
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> Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock of interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation.
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> In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report [sic] to issues or editions or periodicals taking place more than three months before the commencement of the action.

carried articles which essentially charged that a Jewish gangster controlled the gambling, bootlegging, and racketeering activities in Minneapolis, and that local law enforcement agencies and officers were not "energetically performing their duties" in this regard.[30] After a full trial, the Minnesota district court held that the newspaper constituted a public nuisance under Minnesota law and enjoined the petitioners from further publication or any such nuisance.[31] On appeal, the Minnesota State Supreme Court affirmed the trial court's decision.[32]

Id. at 702 (quoting 1925 Minn. Laws 10123-1).

The remedy for a violation of Section 1 of Chapter 285 was found in Sections 2 and 3, which provided that any citizen could bring an action in the State's name to perpetually enjoin those persons committing or maintaining such a nuisance from further committing or maintaining it (by both a temporary and then a permanent injunction). *Id.* at 702-03.

Finally, Section 3 also provided for imprisonment of up to one year and a fine of up to one thousand dollars for any violations of a court ordered injunction under Section 1. *Id.* at 703.

In *Near*, the State charged the publishers of "The Saturday Press" with violating this law and sought to enjoin any further publication of the paper. *Id.*

[30]*Id.* at 704. Essentially, the substance of the articles in question charged that the chief of police grossly neglected his duty, was associated with gangsters, and participated in graft. *Id.* Additionally, the article charged that the county attorney, Floyd Olson, knew of the chief's alleged activities and did nothing to remedy them. *Id.* Further, the newspaper accused the mayor of inefficiency and dereliction in executing his office. *Id.* Finally, the publishers demanded that a special grand jury and a special prosecutor be convened to deal with the situation and to investigate an attempted assassination of a publisher who eventually was shot by gangsters soon after "The Saturday Press" first had been published. *Id.*

[31]*Id.* The trial court found that the papers in question were "chiefly devoted to malicious, scandalous and defamatory articles" and that the publishers "did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper." *Id.* The court concluded that The Saturday Press constituted a public nuisance under Minnesota laws and ordered the publication to be abated. *Id.* The court's judgment perpetually enjoined the petitioners from "producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper," or any other such nuisance. *Id.*

Justice Kennedy, dissenting in *Alexander*, explained that, literally read, this injunction only served to outline the circumstances under which the publishers of The Saturday Press could be subjected to later punishment. Alexander v. United States, 113 S. Ct. 2766, 2781 (1993) (Kennedy, J., dissenting). The Justice, however, revealed that practically, this injunction subjected the publishers to "active state intervention for the control of future speech," a quintessential prior restraint. *Id.*

[32]*Near*, 283 U.S. at 706.

In a five to four decision, the United States Supreme Court reversed the the Minnesota court's decision and struck down the statute as a First Amendment violation.[33] The Court began its analysis by noting that the statute in question was not intended to remedy individual or private wrongs, but was intended to protect the public welfare.[34] Specifically, the majority explained that the statute was intended to suppress, through injunctive relief, a newspaper or other periodical which reported on, and thereby inflamed, a public scandal.[35] Chief Justice Hughes examined the history of the protection guaranteed by the First Amendment, noting that "it has been generally, if not universally, considered that it is the chief purpose of that guaranty to prevent prior restraints on publication."[36] The Court then found that "restraint [was] the object and effect of the statute,"[37] and as a practical matter, the statute's substantive operation and effect constituted "the essence of censorship" and, therefore, was unconstitutional.[38]

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[33]*Id.* at 722-23. The Court in *Near* specifically invalidated clause (b) of Section 1 of the Minnesota statute as an "infringement of the liberty of the press guaranteed by the Fourteenth Amendment." *Id.* at 723. For this reason, the *Near* decision has also been recognized as standing for the proposition that First Amendment protections apply to the states. *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-12, at 772 n.9 (2nd ed. 1988).

[34]*Id.* at 709-10. The majority noted that "[r]emedies for libel remain available and unaffected" despite the existence of the statute in question. *Id.* at 709.

[35]*Id.* at 710-11.

[36]*Id.* at 713.

[37]*Id.* at 712.

[38]*Id.* at 713, 722-23. After discussing the functional application of the statute, the Court concluded that, notwithstanding the procedural details, the substantive effect and operation of the Minnesota statute allowed public authorities to suppress the further publication of expression, which was considered scandalous and defamatory. *Id.* The Court characterized the law's substantive effect as "the essence of censorship." *Id.* Accordingly, the Court gave constitutional might to the doctrine of prior restraint, which it defined as: "the liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." *Id.* at 716.

In his article, Professor Emerson proclaimed that "the Court in *Near v. Minnesota*, refurbishing an ancient principle, created a potent instrument of modern constitutional law." Emerson, *supra* note 18, at 654. The potent instrument to which Emerson was referring is the doctrine of prior restraint. *Id.*

The *Near* Court, however, also espoused that the doctrine was limited in exceptional circumstances. Near v. Minnesota, 283 U.S. 697, 716 (1931). For example, the Court

Near v. Minnesota is universally recognized as the case which created the constitutional doctrine of prior restraint.[39] Specifically, the Court in *Near* expanded the First Amendment protections to include injunctions within the definition of those governmental actions which may constitute a prior restraint.[40] Further, the doctrine fashioned by Chief Justice Hughes was grounded upon the fundamental distinction between a prior restraint on future speech and a subsequent punishment for illegal activity.[41] Moreover, *Near*

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explained that the doctrine would not protect a governmental prohibition on the publication of "the sailing dates of transports or the number or location of troops." *Id.* (citation omitted).

[39]*See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 12 (1981) (explaining that *Near* would have been a landmark decision if it did "nothing more than to import into modern first amendment doctrine the eighteenth century aversion to licensing[, b]ut *Near* has had a broader impact"); Emerson, *supra* note 18, at 654 (noting that certain aspects of the *Near* decision deserve "special attention").

[40]*See* William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 249 (1982). Traditionally, the definition of prior restraint only encompassed administrative licensing schemes. *Id. See also supra* notes 21-23 and accompanying text (discussing the English Licensing Act of 1662). Professor Mayton related that the *Near* Court "brought injunctions within the prior restraint doctrine." Mayton, *supra*, at 249. Mayton, however, further observed that the *Near* Court was sharply divided, the majority consisting of only five Justices, and that the four dissenting Justices sought to preserve a distinction between injunctions and administrative licensing schemes. *Id.* n.30.

[41]*See Near*, 283 U.S. at 719-20. As Professor Jeffries points out, the Supreme Court based the *Near* decision on the constitutional difference between prior restraints and subsequent punishments. *See* Jeffries, *supra* note 18, at 415. The majority stated:

> In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

Near, 283 U.S. at 715.

This distinction has become a critical issue regarding the application of the doctrine in the sixty-plus years since the *Near* decision and is the basis for the Supreme Court's holding in *Alexander*, the subject of this Casenote. Accordingly, *infra* notes 44-57 and accompanying text of this Casenote will analyze this important component of the doctrine of prior restraint.

is generally regarded among scholars as a pivotal declaration concerning the depth and breadth of the freedom of the press in the United States.[42] Quite simply, the *Near* decision continues to this day to be the seminal American case regarding prior restraints.[43]

C. POST-*NEAR* DEVELOPMENTS REGARDING THE DOCTRINE OF PRIOR RESTRAINT

To this day, the *Near* decision remains the law of the land.[44] Since *Near*, the United States Supreme Court has considered numerous cases involving various methods of governmental restrictions on the freedom of speech guaranteed by the First Amendment.[45] As a result of *Near*, the Court has employed the prior restraint doctrine to both invalidate and uphold the

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[42]*See generally* FRED W. FRIENDLY, MINNESOTA RAG (1981). Mr. Friendly's position is clearly that *Near v. Minnesota* was a triumph for the press. *Id.* This view is further exemplified by the fact that a passage from the *Near* decision is chiseled in marble in the Chicago Tribune Building lobby. *Id.*

[43]*See generally* Jeffries, *supra* note 18, at 411 (declaring that *Near* is "the Supreme Court's first great encounter with prior restraint and . . . that case [has emerged] as the doctrine's leading precedent"); Blasi, *supra* note 39, at 11-12 ("Even after fifty years, *Near v. Minnesota* remains the Supreme Court's most important opinion on this subject.").

[44]For examples of cases applying *Near's* reasoning, see Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 316 (1980) (finding invalid a statute that had the effect of authorizing "prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene"); Entertainment Concepts, Inc., v. Maciejiwski, 631 F.2d 497, 506 (7th Cir. 1980) (holding invalid an ordinance that "authorizes a prior restraint against the showing of any film based solely upon an administrative determination of obscenity of past films").

[45]*See* Jeffries, *supra* note 18, at 417. As Professor Jeffries correctly revealed, the history of the prior restraint doctrine after *Near* "may be stated summarily, for the latter cases, although numerous, do little more than repeat and extend" the legal analytical framework of the doctrine as established by the *Near* Court. *Id.*

A detailed review of every Supreme Court decision involving the doctrine of prior restraint is outside the scope of this Casenote. For a more exhaustive review of recent Supreme Court decisions in this area, as well as an examination of the treatment of the doctrine by the lower federal courts, see Elliot Mincberg, *A Look at Recent Supreme Court Decisions: Judicial Prior Restraint and the First Amendment*, 44 HASTINGS L.J. 871 (1993).

following categories of governmental regulation: court ordered injunctions,[46] restrictions intended to maintain national security,[47] various bureaucratic

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[46]Blasi, *supra* note 39, at 16. The Court in *Near* included for the first time an injunction within the definition of a prior restraint. *Id.* (citing Near v. Minnesota ex rel. Olson, 283 U.S. 697, 706 (1931)). Numerous other Supreme Court decisions have also applied the doctrine to analyze the constitutionality of a court ordered injunction prohibiting expression.

A notable example is *Vance*, 445 U.S. 308 (1980) (per curiam). In *Vance*, a Texas statute authorized state court judges to enjoin theaters from the future exhibition of adult-oriented motion pictures without a final judgment as to whether the films were obscene. *Id.* at 309. The Court struck down this statute as a clear prior restraint. *Id.* at 317. The Court reasoned that the Constitution "prefers to punish the few who abuse rights of speech *after* they break the law rather than to throttle them and all others beforehand." *Id.* at 316 (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975)). *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (invalidating a court order which enjoined the distribution of leaflets "anywhere in the town of Westchester, Illinois" as an impermissible prior restraint).

As Chief Justice Rehnquist explained in *Alexander*, the injunctions in *Vance*, *Keefe*, and *Near* imposed a legal impediment on the ability to engage in future expressive activity and, thus, constituted a prior restraint. Alexander v. United States, 113 S. Ct. 2776, 2771 (1993).

[47]Restrictions intended to maintain national security are one area in which the *Near* Court recognized a potential narrow exception to the broad prohibition on prior restraints. *Near*, 283 U.S. at 716. In the "Pentagon Papers case," New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam), the government sought to enjoin the New York Times and the Washington Post from exposing the details of a classified government study concerning United States policy on the Vietnam Conflict. *Id.* In this case, a splintered Court, with each individual Justice writing an opinion, refused to enjoin the publication of the study on prior restraint grounds. *Id.* For a detailed analysis of this complex case, see Arensen, *Prior Restraint: A Rational Doctrine or an Elusive Compendium of Hackneyed Cliches?*, 26 DRAKE L. REV. 265 (1986).

Contrary to the Court's holding in the Pentagon Papers case, but further explaining the meaning of prior restraint, the Court in Snepp v. United States, 444 U.S. 507 (1980) (per curiam), refused to invalidate a contract requiring a CIA agent to obtain Agency pre-clearance before publishing confidential government information. *Id.* at 508. The Court focused on Snepp's voluntary assent to the agreement and assumed that if pre-clearance had been sought, the government would only have acted reasonably to protect national security and any censorship would have been subject to judicial review. *Id.* at 513 n.8.

In accord with *Snepp*, the doctrine of prior restraint was again utilized by a United States district court in United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979). In *Progressive*, the district judge issued an order enjoining a magazine from publishing an article containing instructions on how to make a hydrogen bomb. *Id.* The judge reasoned that the threat of thermonuclear war posed by the publication of such instructions outweighed the magazine's First Amendment rights and, thus, fell into the very fine exception to the doctrine of prior restraint espoused in *Near*. *Id.* For a more detailed analysis of the problem presented by this case in light of the Pentagon Papers case and

permit requirements or licensing schemes,[48] ordinances prohibiting obscene expression,[49] RICO authorized forfeitures of protected, sex-related expression

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Snepp, see DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW § 11.05(A)(1), at 889-91 (1989).

[48]Historically, a system of licensing was the primary source of a prior restraint. *See supra* notes 21-23 and accompanying text. The leading United States Supreme Court case on licensing schemes as prior restraints is Freedman v. Maryland, 380 U.S. 51 (1965). In *Freedman*, a Maryland statute required that all motion pictures be submitted to the Maryland State Board of Censors who were required to issue a license before the film was exhibited. *Id.* The petitioner exhibited a film without first obtaining a license and was convicted under the statute. *Id.* In striking down this licensing scheme, the Supreme Court posited that licensing or permit requirements may be constitutional only if the procedures required to obtain the license or permit are sufficient to "obviate the dangers of a censorship system." *Id.* at 58.

As part of its holding, the Court, per Justice Brennan, established a three-part test to determine whether a licensing system includes the requisite procedural safeguards mandated by the Constitution. *Id.* at 58-59. The Justice noted that the three elements included: (1) any system of prior restraint before judicial review may be maintained only for a brief period during which the *status quo* must be maintained; (2) the system must assure a prompt judicial determination as to the protected or unprotected nature of the expression; and (3) the censor bears the burden of going to court to restrain the speech and also bears the burden of persuasion in court. *Id.* at 58-60.

Twenty-five years later, the Court in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), while striking down a Dallas statute which controlled sexually oriented businesses, slightly modified the *Freedman* test. *Id.* at 229. Writing for the majority, Justice O'Connor affirmed that the first two prongs of the *Freedman* test are essential to the constitutionality of a licensing scheme. *Id.* at 228. The Justice, however, further held that if the scheme is content-neutral, the First Amendment does not place on the censor the burden of going to court and proving its case. *Id.* at 230. For an in-depth analysis of *City of Dallas*, see Andrew B. Bloomer, Note, *Sex, Speech and Videotape: Prior Restraint and* FW/PBS, Inc. v. City of Dallas, 1991 WIS. L. REV. 707 (1991).

[49]In *Near*, the majority speculated that obscenity would constitute one type of exception to the prohibition on prior restraints. *See Near*, 283 U.S. at 716. This potential exception, however, was eliminated by the *Freedman* Court's requirement, recently affirmed in *City of Dallas*, that the *status quo* be maintained pending a judicial determination of obscenity. *See* Bloomer, *supra* note 48, at 714 n.54.

The recent decision in Fort Wayne Books v. Indiana, 489 U.S. 46, 66 (1989), stands for the principle that only where expressive material is adjudged to be obscene, may its distribution be prohibited. In rendering its opinion, the *Fort Wayne Books* majority, per Justice White, rejected a pre-trial seizure of expressive material under a RICO-like state statue where there was only probable cause that a criminal violation had occurred. *Id.* The Court additionally determined that a finding of probable cause that material was obscene is not, by itself, constitutionally adequate to restrain the distribution of expression. *Id.*

connected to illegal activities,[50] and a host of other governmental action.[51] Despite *Near's* continuing precedent and the associated validity of the doctrine, the reasoning behind the doctrine of prior restraint has been widely criticized by legal academia.[52]

In particular, one principal component of the doctrine has spawned widespread scholarly, and more importantly, judicial debate.[53] Within the meaning of prior restraint, there has evolved an important distinction between

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[50]RICO and state RICO-like penalty provisions have recently developed as a burgeoning area for prior restraint analysis. In addition to Alexander v. United States, 113 S. Ct. 2766 (1993), the subject of this Casenote and discussed in detail *infra* notes 59-108 and accompanying text, and Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989), discussed *supra* note 49, another recent Supreme Court case warrants examination.

In Arcara v. Cloud Books, Inc., 478 U.S. 697, 700 (1986), the Supreme Court upheld a court order which shut down an adult bookstore as punishment under a general nuisance statute, on the basis that it was also a place of lewdness and prostitution. *Id.* Writing for the *Arcara* majority, Chief Justice Berger rejected a claim that the closure constituted a prior restraint for two reasons:

> First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are hard to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited — indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

Id. at 705-06 n.2. For a thorough examination of the *Arcara* decision, see Marianne Benevenia, Note, *First Amendment Does not Preclude Closure of Adult Bookstore Where Illegal Activity Occurs on Premises*, 17 SETON HALL L. REV. 382 (1987).

[51]*See, e.g.*, Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975) (striking down a city's refusal to allow a production of the musical play "Hair"); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (invalidating as a prior restraint the activities of the Rhode Island Commission to Encourage Morality in Youth which sought to induce booksellers to refrain from selling materials to minors which the commission deemed as objectionable); Grosjean v. American Press Co., 297 U.S. 233 (1936) (including within the definition of a prior restraint a tax on newspaper revenues).

[52]*See, e.g.*, Emerson, *supra* note 18; Jeffries, *supra* note 18; Blasi, *supra* note 39; Mayton, *supra* note 40; Howard O. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283 (1982); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53-55 (1984). For a concise, but thorough overview of the these and other academic evaluations of the doctrine of prior restraint, see Smith, *supra* note 28, at 443-47.

[53]While scholarly debate is useful, it is more noteworthy that this debate exists in the judiciary. It is the position of jurists that will directly affect the application of the judicially created and maintained doctrine of prior restraint. *See, e.g.*, Emerson, *supra* note 18, at 660.

a restraint on future communication and a subsequent punishment for criminal activity.[54] The former type of governmental regulation is, pursuant to the *Near* decision, almost always precluded by the First Amendment.[55] Alternatively, however, the latter form of governmental action has generally been held not to violate the Constitutional guarantee of free speech.[56] It is the question of whether a punishment for past criminal activity can also serve as a prior restraint on speech that continues to be a fundamental consideration in extending the *Near*-based doctrinal protection afforded by the First Amendment. This particular characteristic of the prior restraint doctrine is the root of the broad disparity between the positions of the majority and dissenting opinions in *Alexander*,[57] the most recent Supreme Court case to consider the doctrine of prior restraint.[58]

III. *ALEXANDER V. UNITED STATES*: A RICO FORFEITURE OF PRINTED EXPRESSION OTHERWISE PROTECTED BY THE FIRST AMENDMENT DOES NOT CONSTITUTE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH

A. THE *ALEXANDER* MAJORITY REFUSED TO EXTEND THE LIMITS OF THE DOCTRINE OF PRIOR RESTRAINT TO EXPRESSIVE MATERIAL FORFEITED UNDER RICO

The *Alexander* majority, per Chief Justice Rehnquist, flatly refused to reverse the district court's RICO forfeiture order on First Amendment

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[54]The existence of this distinction is uncontroverted. *See, e.g.*, Alexander v. United States, 113 S. Ct. 2766, 2771 ("[T]he distinction, [is] solidly grounded in our cases, [that there is a difference] between prior restraints and subsequent punishments."). The dissent in *Alexander* similarly stated that "[o]ur cases do recognize a distinction between prior restraints and subsequent punishments." *Id.* at 2779 (Kennedy, J., dissenting). The dispute arises, however, as to the boundaries and defining characteristics of the two terms. *Id.*

[55]*See supra* notes 26-54 and accompanying text.

[56]The *Alexander* majority noted that the Court has in the past rejected First Amendment challenges to statutes that impose severe prison sentences and fines as punishment for speech related criminal offenses. *Alexander*, 113 S. Ct. at 2773 (citing Ginzburg v. United States, 383 U.S. 463, 464-65 n.2 (1966); Smith v. United States, 431 U.S. 291, 296 n.3 (1977); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 59 n.8 (1989)). Generally, the constitutionality of a criminal penalty will be considered in light of the Eighth Amendment, not the First Amendment. *See, e.g., id.* at 2775. *See also infra*, note 59.

[57]113 S. Ct. 2766 (1993).

[58]*See infra* notes 59-108 and accompanying text.

grounds.[59] Although the Court ultimately remanded the case on other grounds,[60] the Chief Justice justified the reversal by stating that the First Amendment does not forbid either severe criminal sanctions for obscenity offenses, or forfeiture of expressive material as a penalty for criminal conduct.[61] In rendering the Court's decision, the Chief Justice relied primarily on a First Amendment theory, positing that such a forfeiture is simply not a prior restraint.[62]

The Court began its analysis by considering Alexander's argument that the RICO forfeiture effectively shut down his entire adult entertainment business

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[59]*Alexander*, 113 S. Ct. at 2773. The Chief Justice was joined by Justices White, O'Connor, Scalia, and Thomas. *Id.* at 2769. Justice Souter filed a brief opinion concurring in the judgment in part and dissenting in part. *Id.* (Souter, J., concurring in part and dissenting in part).

[60]*Id.* The Court remanded the case to the court of appeals to reexamine whether the RICO forfeiture violated the petitioner's Eighth Amendment rights. *Id.* at 2776. The essence of petitioner's Eighth Amendment argument was that the RICO forfeiture order, imposing a fine in addition to a prison term, was disproportionate to the gravity of his crimes. *Id.* at 2775. This disproportionate result, the petitioner asserted, violated his Eighth Amendment rights on two grounds: first, that the forfeiture constituted cruel and unusual punishment; and second, that it was an excessive fine. *Id.* (quoting Brief for petitioner 40).

In remanding, Chief Justice Rehnquist noted that the court of appeals "lumped the two [Eighth Amendment] challenges together" and disposed of these arguments with a general statement that the proportionality review is not required under the Eighth Amendment for a sentence less than life in prison without parole. *Id.* (citing Alexander v. Thornburgh, 943 F.2d 825, 836 (8th Cir. 1991)). The Chief Justice, however, explained that this rule of law is relevant only to questions concerning the Eighth Amendment's prohibition against cruel and unusual punishments and has no significance regarding the Excessive Fines Clause. *Id.* at 2775-76. Accordingly, the Court concluded, this aspect of the holding by the court of appeals was in error and should be vacated. *Id.* at 2776. Instead, the majority posited that the RICO forfeiture in this case constituted "a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine,'" and thus, should be analyzed only under the Excessive Fines Clause. *Id.* at 2775-76 (citation omitted). Reluctant to decide whether the forfeiture was indeed an excessive fine, the majority instead found it preferable to remand this question to the court of appeals, despite open skepticism regarding the likelihood of success of this claim. *Id.* at 2776.

[61]*Id.* at 2773.

[62]*Id.* The majority engaged in a lengthy analysis of the doctrine of prior restraint, and focused primarily on that doctrine's inapplicability to the petitioner's case. *Id.* The Court, however, also held that the forfeiture was not unconstitutional under what it called "normal First Amendment Standards." *Id.*

and, thus, acted as an unconstitutional prior restraint on speech.[63] The Court rejected this contention, holding that such an interpretation "stretches the term 'prior restraint' well beyond the limits established" by prior cases.[64] The primary basis for this holding, the Chief Justice explained, is grounded in the distinction between prior restraints and subsequent punishments.[65]

Next, Chief Justice Rehnquist contrasted the nature of the RICO forfeiture order with the traditional meaning of the term prior restraint.[66] The majority found that the forfeiture did not forbid the petitioner from taking part in any future expressive activities, nor did it require him to obtain prior governmental permission to engage in such endeavors.[67] The Court explained that Alexander could still "sell as many sexually explicit magazines and videotapes as he likes" and is "perfectly free to open an adult bookstore or otherwise engage in the production and distribution of erotic materials."[68] The Chief Justice further reasoned that the RICO forfeiture simply did not allow the petitioner to finance his future enterprises with assets which he

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[63]*Id.* at 2770. According to the petitioner, the forfeiture of his business and the related expressive materials was predicated solely on previous obscenity offenses. *Id.* Consequently, he argued, this forfeiture acted as a prior restraint because it prohibited the future distribution of presumptively protected expressive material. *Id.* at 2770-71. The petitioner further reasoned that the RICO forfeiture was, in fact, no different from the injunction which was found to be a prior restraint in *Near*. *Id.* at 2771.

[64]*Id.*

[65]*Id.* For a discussion of the root of this distinction, see *supra* note 54 and accompanying text.

[66]*Id.* The Court first briefly reviewed the historical development of the term prior restraint. *Id.* (citing Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931)). The majority then concluded 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.'" *Id.* (quoting RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984)). For a detailed analysis of the cases employed by the Chief Justice and others important to the development of the doctrine of prior restraint, see *supra* notes 18-57 and accompanying text.

[67]Alexander v. United States, 113 S. Ct. 2766, 2771 (1993).

[68]*Id.* For the purposes of its analysis, the Court assumed that the petitioner retained sufficient assets to finance a new enterprise. *Id.*

derived from his prior racketeering enterprise.[69] Accordingly, the Court concluded that forfeiture was not a constitutional infirmity under the First Amendment.[70]

In rendering this holding, the majority reasoned that the forfeiture of petitioner's expressive material was not predicated on whether it was protected or unprotected[71] by the First Amendment.[72] Instead, the Court

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[69]*Id.*

[70]*Id.*

[71]*Id.* Expression which is not afforded protection by the First Amendment's guarantee of free speech is considered unprotected. *See* CRUMP ET AL., *supra* note 47, at 782 n.4. Unprotected utterances may be regulated by government. *Id.* Categories of speech which are currently considered unprotected include so called "fighting words," obscenity and defamatory statements. *Id.*

For examples of fighting words found to be unprotected speech, see Chaplinsky v. New Hampshire 315 U.S. 568 (1942) (categorizing as unprotected by the First Amendment words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace"). *Cf.* Cohen v. California 403 U.S. 15 (1971) (holding that the words "fuck the draft" written on the back of a jacket worn in public were not fighting words).

For an example of obscenity as unprotected speech, see Miller v. California, 413 U.S. 15 (1973). In *Miller*, the Court created a three-prong test to determine whether material is obscene, asking:

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

Id. at 24 (citations omitted). *See also* Pope v. Illinois, 481 U.S. 497 (1987) (refining the third prong of the *Miller* test to require only that the serious value question be based on a reasonable person test and not based on contemporary community standards).

For the seminal case on defamation as unprotected speech, see New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that defamatory statements made with actual malice, *i.e.*, with knowledge of falsity or reckless disregard for the truth, are not protected by the First Amendment).

[72]Alexander v. United States, 113 S. Ct. 2766, 2772 (1993). The Court distinguished the petitioner's case from prior decisions in which the doctrine against prior restraints prohibited the government from seizing expressive materials which were suspected to be obscene, and thus, only allegedly unprotected. *Id.* (citing Marcus v. Search Warrant, 367 U.S. 717 (1961); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Roaden v. Kentucky, 413 U.S. 496 (1973); Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam)). The majority explained that these decisions hold that the First Amendment only prohibits the government

opined, the assets in question were forfeited based only on the role that they played in the petitioner's criminal racketeering enterprise.[73] The Chief Justice posited that the RICO statute is "oblivious to the expressive or non-expressive nature of the assets forfeited" and, therefore, posed no threat of violating the First Amendment rights of a defendant convicted under RICO.[74]

Furthermore, the majority refused to extend the meaning of the term prior restraint to include the petitioner's forfeiture penalty, finding that to do so would "undermine the time honored distinction between barring speech in the future and penalizing past speech."[75] This distinction, the Chief Justice continued, has been steadfastly preserved in the Court's jurisprudence since the doctrine of prior restraint was first recognized in this nation.[76] Chief Justice Rehnquist opined that it is important to precisely delineate the boundaries of the doctrine, thus implying that adherence to prior cases is

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from restraining expressive materials before they are adjudicated to be, in fact, obscene. *Id.* at 2771-72. Thus, the Court explained, its prior decisions have only enjoined the government from a prior restraint where the reason for the governmental action is based upon the unprotected nature of the speech. *Id.* at 2772.

The Court further distinguished its previous prior restraint cases on the grounds that petitioner had not been deprived of the requisite procedural safeguards. *Id.* The majority explained that the denial of procedural safeguards has been a recurring theme in cases where a governmental restraint on future expression has been rejected on First Amendment grounds. *Id.* (citing Fort Wayne Books, Inc. v. Indiana, 486 U.S. 46 (1989)). Accordingly, the Court concluded, the governmental seizure of Alexander's assets was not premature and, therefore, not "prior," but instead the result of a full criminal trial. *Id.*

[73] *Id.*

[74] *Id.* The Court found that the RICO forfeiture clause treated all assets in the same manner, whether they are books or sports cars, videotapes or cash. *Id.* The Chief Justice warned that a contrary strategy which afforded First Amendment protection from RICO forfeiture to some types of assets would be "disastrous" because it would enable racketeers to protect their assets from forfeiture by investing their criminal proceeds in protected expressive material. *Id.*

[75] *Id.* at 2773.

[76] *Id.* The Court noted that prior governmental restraints on future speech were permitted under English common law, but have since been held to be inconsistent with the principles of the First Amendment to the United States Constitution. *Id.* *See* Grosjean v. American Press Co., 297 U.S. 233, 246 (1936) (holding that the prohibition on prior restraints under the United States Constitution, established in *Near*, is broader than the right which was afforded under English common law).

critical to achieving the requisite clarity and stability necessary under the doctrine.[77]

Chief Justice Rehnquist further explained that a holding in favor of Alexander would be inconsistent with the Court's prior decision in *Arcara v. Cloud Books, Inc.*[78] The Court noted that the *Arcara* decision held that if a court order left a defendant free to carry on other adult entertainment enterprises, regardless of the difficulty involved in so doing, the order would not constitute a prior restraint.[79] Applying that reasoning to *Alexander*, the majority found that because the forfeiture did not expressly forbid the petitioner from starting up another adult entertainment business, it was not a prior restraint.[80] The Court, therefore, concluded that in light of past decisions, the interpretation of the term prior restraint proposed by the petitioner was beyond the scope of First Amendment protection.[81]

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[77]Alexander v. United States, 113 S. Ct. 2766, 2772 (1993). The Court justified this rigid interpretation of prior cases, despite acknowledging the fact that if the Court had not expanded upon English common law, it could never have developed the doctrine prohibiting prior restraints. *Id.* Noting that the doctrine has been expanded in the past, the Court nonetheless concluded that "quite obviously . . . we have never before countenanced the essentially limitless expansion of the term" proposed by Alexander. *Id.* at 2773 n.2.

Justice Kennedy strongly criticized this "formalistic approach" in his dissenting opinion. *Id.* at 2782 (Kennedy, J., dissenting). The dissenting Justice reasoned that if the same rigid approach were employed by the Court in 1931, the "novel argument" forwarded in *Near* would have been ignored, and the doctrine would not have been established. *Id.*

[78]478 U.S. 697 (1986). Again, adherence to the prior decisions of the Court clearly is the underlying theme of the majority opinion and the basis for its holding that "the First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct." *Alexander*, 113 S. Ct. at 2773.

[79]*Alexander*, 113 S. Ct. at 2772. For a more detailed review of *Arcara*, see *supra* note 50.

[80]*Alexander*, 113 S. Ct. at 2772. The petitioner asserted that *Arcara* was distinguishable from the case at bar, arguing that his forfeiture was not imposed for the crimes of prostitution or lewdness, but rather for obscenity, a crime which has an inherent and meaningful expressive ingredient. *Id.* at 2772-73 (quoting Brief for petitioner 16 (quoting *Arcara*, 478 U.S. at 706)). The majority, however, summarily rejected Alexander's attempt to distinguish *Arcara* and instead applied its reasoning "with equal force to this case." *Id.* at 2772.

[81]*Id.* at 2776 (Kennedy, J., dissenting).

B. JUSTICE KENNEDY CAUTIONS THAT THE MAJORITY'S HOLDING POSES AN OMINOUS AND ONEROUS THREAT TO THE FIRST AMENDMENT'S GUARANTEE OF FREE SPEECH

In a powerful dissent,[82] Justice Kennedy rejected the majority's position that strict adherence to the settled limits of the doctrine of prior restraint is required by prior First Amendment jurisprudence.[83] The dissenting Justice specifically cautioned that the Court's holding will result in a dangerous chilling effect[84] upon the freedom of speech and expression protected by the First Amendment to the United States Constitution.[85]

Justice Kennedy agreed with the majority that obscenity is a form of unprotected expression and that government may therefore freely regulate and criminalize obscenity without violating the First Amendment.[86] Similarly, the dissenting Justice agreed that strict fines and prison sentences are appropriate punishment for violations of obscenity laws.[87] The Justice, however, explained that these facts have little bearing on the majority's decision to allow forfeiture of protected expressive material as punishment for criminal acts involving only unprotected expression.[88]

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[82]*Id.* Justice Kennedy filed a vigorous dissent, focusing on the prior restraint issue. *Id.* Justice Kennedy was joined by Justices Stevens and Blackmun. *Id.*

[83]*Id.* at 2779 (Kennedy, J., dissenting). Justice Kennedy began his analysis with a near desperate warning concerning the "ominous, onerous threat" posed by the majority's position that the dissenting Justice referred to as a "grave repudiation of First Amendment principles." *Id.* at 2776 (Kennedy, J., dissenting).

[84]The term "chilling effect" is used to denote any law which seriously discourages the exercise of a constitutional right. BLACK'S LAW DICTIONARY 217 (5th ed. 1979). For an extensive treatment of the chilling effect of RICO, see Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805 (1990).

[85]Alexander v. United States, 113 S. Ct. 2766, 2779 (1993) (Kennedy, J., dissenting).

[86]*Id.* at 2777 (Kennedy, J., dissenting).

[87]*Id.* (citing Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989); Ginzburg v. United States, 383 U.S. 463, 464-65 n.2 (1966)).

[88]*Id.* Justice Kennedy contended that no prior cases have even addressed this matter, *i.e.*, the destruction of protected expression in retaliation for criminal violations involving unprotected speech. *Id.* The Justice reasoned that if prior cases had indeed addressed this issue, it would have been unnecessary for the Court to reserve judgment on the same question in *Fort Wayne Books*, decided four terms earlier. *Id.*

Considering what Justice Kennedy referred to as the majority's "principal holding," the dissent forcefully challenged the Court's position that the RICO forfeiture in this case did not constitute an unconstitutional prior restraint.[89] The dissenting Justice questioned the Court's rigid application of its prior decisions concerning the distinction between prior restraints and subsequent punishments.[90] Specifically, Justice Kennedy criticized the majority's warning that the doctrine will be disparaged if it is expanded.[91] Instead, the dissent posited that the same prior restraint decisions historically have adjusted the application of the First Amendment to meet "new threats to speech."[92]

After a detailed analysis of the history of prior restraint law in the United States and England, Justice Kennedy posited that the Court's development of First Amendment law has not limited the applicability of the prior restraint doctrine only to its most blatant forms.[93] Instead, the Justice argued, the progression of the Court's First Amendment jurisprudence has extended prior restraint protection beyond the classic forms of governmental measures aimed at supplanting basic freedoms.[94] For example, the dissent speculated

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The Justice also posited that a RICO forfeiture as a criminal penalty is very different, for First Amendment purposes, from traditional fines and prison terms. *Id.* Instead, Justice Kennedy opined that the remedy or penalty of forfeiture is subject to historic disfavor in the United States. *Id.*

[89]*Id.* at 2782, 2786 (Kennedy, J., dissenting).

[90]*Id.*

[91]*Id.* at 2779 (Kennedy, J., dissenting).

[92]*Id.*

[93]*Id.* at 2779-81 (Kennedy, J., dissenting).

[94]*Id.* at 2781-82 (Kennedy, J., dissenting). The dissenting Justice explained that the Court's First Amendment cases have not restricted the application of the prior restraint doctrine to its "simpler forms," such as "outright licensing or censorship before speech takes place." *Id.* at 2781 (Kennedy, J., dissenting). As support, Justice Kennedy offered three examples: in Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam), the Court applied the prior restraint doctrine to invalidate a state nuisance statute which authorized state courts to shut down an adult theater solely because obscene films were shown in the past; in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), the Court utilized the prior restraint doctrine to invalidate a state administrative system through which the state warned that the circulation of potentially obscene publications could be illegal; and in Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931), the Court employed the prior restraint doctrine to invalidate a state issued injunction forbidding future violations of a

whether the novel argument advanced in *Near*, a pivotal prior restraint case, would have been ignored by a court following the formalistic approach adopted by the majority.[95] The dissent opined that *Near* and other cases demonstrate that the applicability of prior restraint protection "depends not alone upon the name by which the [governmental] action is called, but upon its operation and effect on the suppression of speech."[96]

In reference to the Rico forfeiture order, Justice Kennedy opined that, "[w]hat is happening here is simple, [b]ooks and films are condemned and destroyed not for their own content but for the content of their owner's prior speech."[97] The dissent concluded that the RICO forfeiture order is exactly the type of government control and censorship which is condemned in prior restraint jurisprudence.[98] Accordingly, Justice Kennedy voted to invalidate the portions of the RICO forfeiture order which compelled Alexander to forfeit expression protected by the First Amendment as a prior restraint.[99]

In the second part of the dissenting opinion, Justice Kennedy refuted the majority's position that prior cases authorized the destruction of expressive materials that are not first adjudicated to be obscene.[100] Justice Kennedy referred to this issue as "[q]uite apart" from the majority's prior restraint analysis, and attacked the conclusion that "the First Amendment does not prohibit . . . forfeiture of expressive materials as punishment for criminal conduct."[101] The Justice distinguished the single case upon which the majority relied, *Arcara v. Cloud Books Inc.*, noting that the forfeiture

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state press regulation. Alexander v. United States, 113 S. Ct. 2766, 2781-82 (1993) (Kennedy, J., dissenting).

[95]Alexander v. United States, 113 S. Ct. 2766, 2781-82 (1993) (Kennedy, J., dissenting).

[96]*Id.* at 2782 (Kennedy, J., dissenting) (citing Near v. Minnesota ex rel. Olson, 283 U.S. 697 at 708; Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101 (1979); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552-53 (1975); Schneider v. State, 308 U.S. 147, 161 (1939)).

[97]*Id.* at 2783-84 (Kennedy, J., dissenting).

[98]*Id.* at 2784 (Kennedy, J., dissenting).

[99]*Id.* at 2784-85 (Kennedy, J., dissenting).

[100]*Id.* at 2785 (Kennedy, J., dissenting).

[101]*Id.* (citation omitted).

involved in that case did not act to confiscate protected material.[102] Instead, Justice Kennedy explained that the petitioner's RICO forfeiture order compelled the destruction of books that were only presumed unprotected, but actually included items that the jury later determined to be protected speech.[103] Accordingly, the dissent posited that contrary to the majority's holding, past cases require that "protected materials cannot be destroyed altogether for some alleged taint from an owner who committed a [constitutional] speech violation."[104] Therefore, Justice Kennedy concluded, the forfeiture of the petitioner's expressive material, which was not adjudicated as obscene, violated the First Amendment.[105]

C. JUSTICE SOUTER AGREES WITH THE MAJORITY'S DISPOSITION OF THE CASE, BUT JOINS THE DISSENT'S POSITION THAT THE FORFEITURE OF PROTECTED SPEECH WAS UNCONSTITUTIONAL

In a brief opinion, Justice Souter agreed with the majority's conclusion that Alexander's forfeiture did not qualify as a prior restraint "as the term has traditionally been understood by the Court" and concurred with the majority's decision to remand the case on Eighth Amendment grounds.[106] The Justice, however, joined the second part of the dissent's opinion, positing that the First Amendment prohibits the forfeiture of Alexander's expressive material without a judicial determination that it is unprotected.[107] Accordingly, Justice Souter broke from the majority and joined Part II of Justice Kennedy's dissenting opinion.[108]

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[102]*Id.* For a discussion of *Arcara*, 478 U.S. 697 (1988), see *supra* note 50 and accompanying text.

[103]Alexander v. United States, 113 S. Ct. 2766, 2785 (1993) (Kennedy, J., dissenting).

[104]*Id.*

[105]*Id.* at 2786 (Kennedy, J., dissenting).

[106]*Id.* at 2776 (Souter, J., concurring in part and dissenting in part).

[107]*Id.*

[108]*Id.*

IV. CONCLUSION

The majority in *Alexander* unequivocally held that the RICO forfeiture of Alexander's entire inventory of expressive materials as criminal punishment is not an unconstitutional prior restraint.[109] The Chief Justice affirmed the petitioner's forfeiture order, which included not only the petitioner's entire inventory of expressive materials, but also those which have not been adjudicated to be constitutionally unprotected.[110] In other words, as Justice Kennedy posited, the majority effectively allows governmental restraint upon the future distribution of expressive materials not because the materials themselves have been adjudged to be unconstitutional, but only because of their owner's RICO convictions.[111] To paraphrase *Near v. Minnesota,* the majority's position disturbingly endorses the use of RICO in a manner which embodies the essence of censorship.[112]

Justice Kennedy properly criticized the majority's rigid adherence to prior decisions for the sake of *stare decisis* and in the name of maintaining the integrity of the prior restraint doctrine.[113] Instead, the doctrine would be better served, and the spirit of the seminal *Near* decision perpetuated, if the doctrine was expanded to prevent new threats to the freedom of speech. The dissenting Justices correctly conclude that if the *Near* majority had uncompromisingly refused to apply traditional doctrine to a new situation, as the majority has done, the constitutional doctrine of prior restraint would never have been established.[114] Accordingly, while the majority purports to be faithful to *Near,* the holding instead effectively undermines *Near* and limits the doctrine of prior restraint.

Finally, it is questionable whether Congress intended RICO to act as such a broad restriction on the civil liberties of citizens who are not involved in so-called organized crime. Indeed, the Supreme Court's holding has allowed RICO to be employed to restrain the expression of a businessman simply because he engaged in the distribution of pornographic materials subject to governmental and societal disfavor. Contrary to the majority's position the

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[109]*See supra* notes 59-81 and accompanying text.

[110]*See supra* notes 72-74 and accompanying text.

[111]*See supra* notes 101-103 and accompanying text.

[112]Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713 (1931).

[113]*See supra* notes 90-91 and accompanying text.

[114]*See supra* note 95.

decision disparages, rather than affirms, the underlying principles of freedom for which *Near* stands. Accordingly, the *Alexander* Court's endorsement of the government's use of RICO to effectively limit civil liberties, as Justice Kennedy cautioned, poses an ominous threat to the personal freedoms of all American citizens.