JUSTICE KENNEDY, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, and with whom JUSTICE SOUTER joins as to Part II, dissenting.

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.

Obscenity laws would not work unless an offender could be arrested and imprisoned despite the resulting chill on his own further speech. But, at least before today, we have understood state action directed at protected books or other expressive works themselves to raise distinct constitutional concerns. The Court's decision is a grave repudiation of First Amendment principles, and with respect I dissent.

I

A

The majority believes our cases "establish quite clearly that the First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct."

Ante, at 555. True, we have held that obscenity is expression which can be regulated and punished, within proper limitations, without violating the First Amendment. See, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747 (1982); *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 57–58 (1973); *Roth* v. *United States*, 354 U. S. 476 (1957). And the majority is correct to note that we have upheld stringent fines and jail terms as punishments for violations of the federal obscenity laws. See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46, 60 (1989); *Ginzburg* v. *United States*, 383 U. S. 463, 464–465, n. 2 (1966). But that has little to do with the destruction of protected titles and the facilities for their distribution or publication. None of our cases address that matter, or it would have been unnecessary for us to reserve the specific question four Terms ago in *Fort Wayne Books, Inc.* v. *Indiana*, *supra*, at 60, 65.

The fundamental defect in the majority's reasoning is a failure to recognize that the forfeiture here cannot be equated with traditional punishments such as fines and jail terms. Noting that petitioner does not challenge either the 6-year jail sentence or the $100,000 fine imposed against him as punishment for his convictions under the Racketeer Influenced and Corrupt Organizations Act (RICO), the majority ponders why RICO's forfeiture penalty should be any different. See *ante*, at 554. The answer is that RICO's forfeiture penalties are different from traditional punishments by Congress' own design as well as in their First Amendment consequences.

The federal RICO statute was passed to eradicate the infiltration of legitimate business by organized crime. Pub. L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968 (1988 ed. and Supp. III). Earlier steps to combat organized crime were not successful, in large part because traditional penalties targeted individuals engaged in racketeering activity rather than the criminal enterprise itself. Punishing racketeers with fines and jail terms failed to

break the cycle of racketeering activity because the criminal enterprises had the resources to replace convicted racketeers with new recruits. In passing RICO, Congress adopted a new approach aimed at the economic roots of organized crime:

> "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 the 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." S. Rep. No. 91–617, p. 79 (1969).

Criminal liability under RICO is premised on the commission of a "pattern of racketeering activity," defined by the statute as engaging in two or more related predicate acts of racketeering within a 10-year period. 18 U. S. C. § 1961(5). A RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under § 1963.* It is the mandatory forfeiture penalty that is at issue here.

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*Section 1963(a) provides that in imposing sentence on one convicted of racketeering offenses under § 1962, the district court *shall order* forfeiture of three classes of assets:

"(1) any interest the person has acquired or maintained in violation of section 1962;

"(2) any—

"(A) interest in;

"(B) security of;

"(C) claim against; or

"(D) property or contractual right of any kind affording a source of influence over;

"any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

"(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or

While forfeiture remedies have been employed with increasing frequency in civil proceedings, forfeiture remedies and penalties are the subject of historic disfavor in our country. Although *in personam* forfeiture statutes were well grounded in the English common law, see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 682–683 (1974), *in personam* criminal forfeiture penalties like those authorized under § 1963 were unknown in the federal system until the enactment of RICO in 1970. See 1 C. Wright, Federal Practice and Procedure § 125.1, p. 389 (2d ed. 1982). Section 1963's forfeiture penalties are novel for their punitive character as well as for their unprecedented sweep. Civil *in rem* forfeiture is limited in application to contraband and articles put to unlawful use, or in its broadest reach, to proceeds traceable to unlawful activity. See *United States* v. *Parcel of Land, Rumson, N. J.*, 507 U. S. 111, 118–123 (1993); *The Palmyra*, 12 Wheat. 1, 14–15 (1827). Extending beyond contraband or its traceable proceeds, RICO mandates the forfeiture of property constituting the defendant's "interest in the racketeering enterprise" and property affording the violator a "source of influence" over the RICO enterprise. 18 U. S. C. § 1963(a) (1988 ed. and Supp. III). In a previous decision, we acknowledged the novelty of RICO's penalty scheme, stating that Congress passed RICO to provide "new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello* v. *United States*, 464 U. S. 16, 26 (1983).

As enacted in 1970, RICO targeted offenses then thought endemic to organized crime. 18 U. S. C. § 1961(1). When RICO was amended in 1984 to include obscenity as a predicate offense, there was no comment or debate in Congress on the First Amendment implications of the change. Act of Oct. 12, 1984, Pub. L. 98–473, 98 Stat. 2143. The consequence of adding a speech offense to a statutory scheme de-

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unlawful debt collection in violation of section 1962." 18 U. S. C. §§ 1963(a)(1)–(3).

signed to curtail a different kind of criminal conduct went far beyond the imposition of severe penalties for obscenity offenses. The result was to render vulnerable to Government destruction any business daring to deal in sexually explicit materials. The unrestrained power of the forfeiture weapon was not lost on the Executive Branch, which was quick to see in the amended statute the means and opportunity to move against certain types of disfavored speech. The Attorney General's Commission on Pornography soon advocated the use of RICO and similar state statutes to "substantially handicap" or "eliminate" pornography businesses. 1 United States Dept. of Justice, Attorney General's Commission on Pornography, Final Report 498 (1986). As these comments illustrate, the constitutional concerns raised by a penalty of this destructive capacity are distinct from the concerns raised by traditional methods of punishment.

The Court says that, taken together, our decisions in *Fort Wayne Books* and *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697 (1986), dispose of petitioner's First Amendment argument. See *ante*, at 556–558. But while instructive, neither case is dispositive. In *Fort Wayne Books* we considered a state law patterned on the federal RICO statute, and upheld its scheme of using obscenity offenses as the predicate acts resulting in fines and jail terms of great severity. We recognized that the fear of severe penalties may result in some self-censorship by cautious booksellers, but concluded that this is a necessary consequence of conventional obscenity prohibitions. 489 U. S., at 60. In rejecting the argument that the fines and jail terms in *Fort Wayne Books* infringed upon First Amendment principles, we regarded the penalties as equivalent to a sentence enhancement for multiple obscenity violations, a remedy of accepted constitutional legitimacy. *Id.*, at 59–60. We did not consider in *Fort Wayne Books* the First Amendment implications of extensive penal forfeitures, including the official destruction of protected expression. Further, while *Fort Wayne Books* acknowledges that some

degree of self-censorship may be unavoidable in obscenity regulation, the alarming element of the forfeiture scheme here is the pervasive danger of government censorship, an issue, I submit, the Court does not confront.

In *Arcara*, we upheld against First Amendment challenge a criminal law requiring the temporary closure of an adult bookstore as a penal sanction for acts of prostitution occurring on the premises. We did not subject the closure penalty to First Amendment scrutiny even though the collateral consequence of its imposition would be to affect interests of traditional First Amendment concern. We said that such scrutiny was not required when a criminal penalty followed conduct "manifest[ing] absolutely no element of protected expression." 478 U. S., at 705. That the RICO prosecution of Alexander involved the targeting of a particular class of unlawful speech itself suffices to distinguish the instant case from *Arcara*. There can be little doubt that regulation and punishment of certain classes of unprotected speech have implications for other speech that is close to the proscribed line, speech which is entitled to the protections of the First Amendment. See *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). Further, a sanction requiring the temporary closure of a bookstore cannot be equated, as it is under the Court's unfortunate analysis, see *ante*, at 556–557, with a forfeiture punishment mandating its permanent destruction.

B

The majority tries to occupy the high ground by assuming the role of the defender of the doctrine of prior restraint. It warns that we disparage the doctrine if we reason from it. But as an analysis of our prior restraint cases reveals, our application of the First Amendment has adjusted to meet new threats to speech. The First Amendment is a rule of substantive protection, not an artifice of categories. The admitted design and the overt purpose of the forfeiture in this case are to destroy an entire speech business and all its pro-

tected titles, thus depriving the public of access to lawful expression. This is restraint in more than theory. It is censorship all too real.

Relying on the distinction between prior restraints and subsequent punishments, *ante*, at 548, 553–554, the majority labels the forfeiture imposed here a punishment and dismisses any further debate over the constitutionality of the forfeiture penalty under the First Amendment. Our cases do recognize a distinction between prior restraints and subsequent punishments, but that distinction is neither so rigid nor so precise that it can bear the weight the Court places upon it to sustain the destruction of a speech business and its inventory as a punishment for past expression.

In its simple, most blatant form, a prior restraint is a law which requires submission of speech to an official who may grant or deny permission to utter or publish it based upon its contents. See *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); see also M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984). In contrast are laws which punish speech or expression only after it has occurred and been found unlawful. See *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 440–442 (1957). While each mechanism, once imposed, may abridge speech in a direct way by suppressing it, or in an indirect way by chilling its dissemination, we have interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments. See, *e. g.*, *Arcara* v. *Cloud Books, Inc.*, *supra*, at 705–706; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 558–559 (1975); *Kingsley Books, Inc.* v. *Brown*, *supra*, at 440–442. In *Southeastern Promotions, Ltd.* v. *Conrad*, we explained that "[b]ehind 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." 420 U. S., at 559.

It has been suggested that the distinction between prior restraints and subsequent punishments may have slight utility, see Nimmer, *supra*, § 4.04, at 4–18 to 4–25, for in a certain sense every criminal obscenity statute is a prior restraint because of the caution a speaker or bookseller must exercise to avoid its imposition. See *Vance* v. *Universal Amusement Co.*, 445 U. S. 308, 324 (1980) (WHITE, J., joined by REHNQUIST, J., dissenting); see also Jeffries, Rethinking Prior Restraint, 92 Yale L. J. 409, 437 (1982). To be sure, the term "prior restraint" is not self-defining. One problem, of course, is that some governmental actions may have the characteristics both of punishment and prior restraint. A historical example is the sentence imposed on Hugh Singleton in 1579 after he had enraged Elizabeth I by printing a certain tract. See F. Siebert, Freedom of the Press in England, 1476–1776, pp. 91–92 (1952). Singleton was condemned to lose his right hand, thus visiting upon him both a punishment and a disability encumbering all further printing. Though the sentence appears not to have been carried out, it illustrates that a prior restraint and a subsequent punishment may occur together. Despite the concurrent operation of the two kinds of prohibitions in some cases, the distinction between them persists in our law, and it is instructive here to inquire why this is so.

Early in our legal tradition the source of the distinction was the English common law, in particular the oft cited passage from William Blackstone's 18th-century Commentaries on the Laws of England. He observed 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 upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to

> destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." 4 W. Blackstone, Commentaries *151–*152.

The English law which Blackstone was compiling had come to distrust prior restraints, but with little accompanying condemnation of subsequent punishments. Part of the explanation for this lies in the circumstance that, in the centuries before Blackstone wrote, prior censorship, including licensing, was the means by which the Crown and the Parliament controlled speech and press. See Siebert, *supra*, at 56–63, 68–74. As those methods were the principal means used by government to control speech and press, it follows that an unyielding populace would devote its first efforts to avoiding or repealing restrictions in that form.

Even as Blackstone wrote, however, subsequent punishments were replacing the earlier censorship schemes as the mechanism for government control over disfavored speech in England. Whether Blackstone's apparent tolerance of subsequent punishments resulted from his acceptance of the English law as it then existed or his failure to grasp the potential threat these measures posed to liberty, or both, subsequent punishment in the broad sweep that he commented upon would be in flagrant violation of the principles of free speech and press that we have come to know and understand as being fundamental to our First Amendment freedoms. Indeed, in the beginning of our Republic, James Madison argued against the adoption of Blackstone's definition of free speech under the First Amendment. Said Madison: "[T]his idea of the freedom of the press can never be admitted to be the American idea of it" because a law inflicting penalties would have the same effect as a law authorizing a prior restraint. 6 Writings of James Madison 386 (G. Hunt ed. 1906).

The enactment of the alien and sedition laws early in our own history is an unhappy testament to the allure that re-

strictive measures have for governments tempted to control the speech and publications of their people. And our earliest cases tended to repeat the suggestion by Blackstone that prior restraints were the sole concern of First Amendment protections. See *Patterson* v. *Colorado ex rel. Attorney General of Colorado*, 205 U. S. 454, 462 (1907); *Robertson* v. *Baldwin*, 165 U. S. 275, 281 (1897). In time, however, the Court rejected the notion that First Amendment freedoms under our Constitution are coextensive with liberties available under the common law of England. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248–249 (1936). From this came the conclusion that "[t]he protection of the First Amendment . . . is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572, n. 3 (1942).

As our First Amendment law has developed, we have not confined the application of the prior restraint doctrine to its simpler forms, outright licensing or censorship before speech takes place. In considering governmental measures deviating from the classic form of a prior restraint yet posing many of the same dangers to First Amendment freedoms, we have extended prior restraint protection with some latitude, toward the end of declaring certain governmental actions to fall within the presumption of invalidity. This approach is evident in *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), the leading case in which we invoked the prior restraint doctrine to invalidate a state injunctive decree.

In *Near*, a Minnesota statute authorized judicial proceedings to abate as a nuisance a "'malicious, scandalous and defamatory newspaper, magazine or other periodical.'" *Id.*, at 701–702. In a suit brought by the attorney for Hennepin County it was established that Near had published articles in various editions of The Saturday Press in violation of the statutory standard. *Id.*, at 703–705. Citing the instance of these past unlawful publications, the court enjoined any fu-

ture violations of the state statute. *Id.*, at 705. In one sense the injunctive order, which paralleled the nuisance statute, did nothing more than announce the conditions under which some later punishment might be imposed, for one presumes that contempt could not be found until there was a further violation in contravention of the order. But in *Near* the publisher, because of past wrongs, was subjected to active state intervention for the control of future speech. We found that the scheme was a prior restraint because it embodied "the essence of censorship." *Id.*, at 713. This understanding is confirmed by our later decision in *Kingsley Books* v. *Brown*, where we said that it had been enough to condemn the injunction in *Near* that Minnesota had "empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive." 354 U. S., at 445.

Indeed the Court has been consistent in adopting a speech-protective definition of prior restraint when the state attempts to attack future speech in retribution for a speaker's past transgressions. See *Vance* v. *Universal Amusement Co.*, 445 U. S. 308 (1980) *(per curiam)* (invalidating as a prior restraint procedure authorizing state courts to abate as a nuisance an adult theater which had exhibited obscene films in the past because the effect of the procedure was to prevent future exhibitions of pictures not yet found to be obscene). It is a flat misreading of our precedents to declare as the majority does that the definition of a prior restraint includes only those measures which impose a "legal impediment," *ante*, at 551, on a speaker's ability to engage in future expressive activity. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963), best illustrates the point. There a state commission did nothing more than warn booksellers that certain titles could be obscene, implying that criminal prosecutions could follow if their warnings were not heeded. The commission had no formal enforcement powers, and failure to heed its warnings was not a criminal offense. Although

the commission could impose no legal impediment on a speaker's ability to engage in future expressive activity, we held that scheme was an impermissible "system of prior administrative restraints." *Ibid.* There we said: "We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id.*, at 67. If 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.

One wonders what today's majority would have done if faced in *Near* with a novel argument to extend the traditional conception of the prior restraint doctrine. In view of the formalistic approach the Court advances today, the Court likely would have rejected Near's pleas on the theory that to accept his argument would be to "blur the line separating prior restraints from subsequent punishments to such a degree that it would be impossible to determine with any certainty whether a particular measure is a prior restraint or not." *Ante*, at 554. In so holding the Court would have ignored, as the Court does today, that the applicability of First Amendment analysis to a governmental action depends not alone upon the name by which the action is called, but upon its operation and effect on the suppression of speech. *Near*, *supra*, at 708 ("[T]he court has regard to substance and not to mere matters of form, and . . . in accordance with familiar principles . . . statute[s] must be tested by [their] operation and effect"). See also *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 101 (1979) (the First Amendment's application to a civil or criminal sanction is not determined solely by whether that action is viewed "as a prior restraint or as a penal sanction"); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S., at 552–553 (challenged action is "indistinguishable in its censoring effect" from official actions consistently identified as prior restraints); *Schneider* v. *State (Town*

of Irvington), 308 U. S. 147, 161 (1939) ("In every case, therefore, where legislative abridgment of [First Amendment] rights is asserted, the courts should be astute to examine the effect of the challenged legislation").

The 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. First in *Near*, and later in *Bantam Books* and *Vance*, we were faced with official action which did not fall within the traditional meaning of the term "prior restraint," yet posed many of the same censorship dangers. Our response was to hold that the doctrine not only includes licensing schemes requiring speech to be submitted to a censor for review prior to dissemination, but also encompasses injunctive systems which threaten or bar future speech based on some past infraction.

Although we consider today a new method of government control with unmistakable dangers of official censorship, the majority concludes that First Amendment freedoms are not endangered because forfeiture follows a lawful conviction for obscenity offenses. But this explanation does not suffice. 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. See *Smith* v. *Daily Mail Publishing Co.*, *supra*, at 101–102; *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102 (1940). This is so because in some instances the operation and effect of a particular enforcement scheme, though not in the form of a traditional prior restraint, may be to raise the same concerns which inform all of our prior restraint cases: the evils of state censorship and the unacceptable chilling of protected speech.

The operation and effect of RICO's forfeiture remedies are different from a heavy fine or a severe jail sentence because

RICO's forfeiture provisions are different in purpose and kind from ordinary criminal sanctions. See *supra,* at 563–565. The Government's stated purpose under RICO, to destroy or incapacitate the offending enterprise, bears a striking resemblance to the motivation for the state nuisance statute the Court struck down as an impermissible prior restraint in *Near.* The purpose of the state statute in *Near* was "not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." 283 U. S., at 711. In the context of the First Amendment, it is quite odd indeed to apply a measure implemented not only to deter unlawful conduct by imposing punishment after violations, but to " 'incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce.' " *Russello* v. *United States,* 464 U. S., at 28, quoting 116 Cong. Rec. 18955 (1970) (remarks of sponsor Sen. McClellan). The particular nature of Ferris Alexander's activities ought not blind the Court to what is at stake here. Under the principle the Court adopts, any bookstore or press enterprise could be forfeited as punishment for even a single obscenity conviction.

Assuming the constitutionality of the mandatory forfeiture under § 1963 when applied to nonspeech-related conduct, the constitutional analysis must be different when that remedy is imposed for violations of the federal obscenity laws. "Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression." *Smith* v. *California,* 361 U. S. 147, 150–151 (1959). The regulation of obscenity, often separated from protected expression only by a "dim and uncertain line," must be accomplished through "procedures that will ensure against the curtailment of constitutionally protected expression." *Bantam Books* v. *Sullivan,* 372 U. S., at 66. Because freedoms of expression are "vulnerable to gravely damaging yet barely visible encroach-

ments," *ibid.*, the government must use measures that are sensitive to First Amendment concerns in its task of regulating or punishing speech. *Speiser* v. *Randall*, 357 U. S., at 525.

Whatever one might label the RICO forfeiture provisions at issue in this case, be it effective, innovative, or Draconian, § 1963 was not designed for sensitive and exacting application. What 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 speech for this sort of taint. Section 1963 requires trial courts to forfeit not only the unlawful items and any proceeds from their sale, but also the defendant's entire interest in the enterprise involved in the RICO violations and any assets affording the defendant a source of influence over the enterprise. 18 U. S. C. §§ 1963(a)(1)–(3) (1988 ed. and Supp. III). A defendant's exposure to this massive penalty is grounded on the commission of just two or more related obscenity offenses committed within a 10-year period. Aptly described, 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." *Fort Wayne Books*, 489 U. S., at 85 (STEVENS, J., concurring in part and dissenting in part).

What is at work in this case is not the power to punish an individual for his past transgressions but the authority to suppress a particular class of disfavored speech. The forfeiture provisions accomplish this in a direct way by seizing speech presumed to be protected along with the instruments of its dissemination, and in an indirect way by threatening all who engage in the business of distributing adult or sexually explicit materials with the same disabling measures. Cf. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 390 (1973) (the special vice of the prior restraint is suppression of speech, either directly or by in-

ducing caution in the speaker, prior to a determination that the targeted speech is unprotected by the First Amendment).

In a society committed to freedom of thought, inquiry, and discussion without interference or guidance from the state, public confidence in the institutions devoted to the dissemination of written matter and films is essential. That confidence erodes if it is perceived that speakers and the press are vulnerable for all of their expression based on some errant expression in the past. Independence of speech and press can be just as compromised by the threat of official intervention as by the fact of it. See *Bantam Books, Inc.* v. *Sullivan*, *supra*, at 70. Though perhaps not in the form of a classic prior restraint, the application of the forfeiture statute here bears its censorial cast.

Arcara recognized, as the Court today does not, the vital difference between a punishment imposed for a speech offense and a punishment imposed for some other crime. Where the government seeks forfeiture of a bookstore because of its owner's drug offenses, there is little reason to surmise, absent evidence of selective prosecution, that abolishing the bookstore is related to the government's disfavor of the publication outlet or its activities. Where, however, RICO forfeiture stems from a previous speech offense, the punishment serves not only the Government's interest in purging organized-crime taint, but also its interest in deterring the activities of the speech-related business itself. The threat of a censorial motive and of ongoing speech supervision by the state justifies the imposition of First Amendment protection. Free speech principles, well established by our cases, require in this case that the forfeiture of the inventory and of the speech distribution facilities be held invalid.

The distinct concern raised by § 1963 forfeiture penalties is not a proportionality concern; all punishments are subject to analysis for proportionality and this concern should be addressed under the Eighth Amendment. See *Austin* v.

United States, *post*, p. 602. Here, the question is whether, when imposed as punishment for violation of the federal obscenity laws, the operation of RICO's forfeiture provisions is an exercise of Government censorship and control over protected speech as condemned in our prior restraint cases. In my view the effect is just that. For this reason I would invalidate those portions of the judgment which mandated the forfeiture of petitioner's business enterprise and inventory, as well as all property affording him a source of influence over that enterprise.

II

Quite apart from the direct bearing that our prior restraint cases have on the entire forfeiture that was ordered in this case, the destruction of books and films that were not obscene and not adjudged to be so is a remedy with no parallel in our cases. The majority says that our cases "establish quite clearly that the First Amendment does not prohibit . . . forfeiture of expressive materials as punishment for criminal conduct." See *ante*, at 555. But the single case cited in support of this stark new threat to all speech enterprises is *Arcara* v. *Cloud Books, Inc.* *Arcara*, as discussed, *supra*, at 565, is quite inapposite. There we found unconvincing the argument that protected bookselling activities were burdened by the closure, saying that the owners "remain free to sell [and the public remains free to acquire] the same materials at another location." 478 U. S., at 705. Alexander and the public do not have those choices here for a simple reason: The Government has destroyed the inventory. Further, the sanction in *Arcara* did not involve a complete confiscation or destruction of protected expression as did the forfeiture in this case. Here the inventory forfeited consisted of hundreds of original titles and thousands of copies, all of which are presumed to be protected speech. In fact, some of the materials seized were the very ones the jury here determined not to be obscene. Even so, all of the inventory was seized and destroyed.

Even when interim pretrial seizures are used, we have been careful to say that First Amendment materials cannot be taken out of circulation until they have been determined to be unlawful. "[W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause . . . , it is otherwise when materials presumptively protected by the First Amendment are involved." *Fort Wayne Books*, 489 U. S., at 63. See *id.*, at 65–66; *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 326, n. 5 (1979) (the First Amendment imposes special constraints on searches for, and seizures of, presumptively protected materials).

In *Marcus* v. *Search Warrant*, 367 U. S. 717, 731–733 (1961), we invalidated a mass pretrial seizure of allegedly obscene publications achieved through a warrant that was vague and unspecific. The constitutional defect there was that the seizure was imposed without safeguards necessary to assure nonobscene material the constitutional protection to which it is entitled. In similar fashion we invalidated, in *A Quantity of Copies of Books* v. *Kansas*, 378 U. S., at 211–213, a state procedure authorizing seizure of books alleged to be obscene prior to hearing, even though the system involved judicial examination of some of the seized titles. While the force behind the special protection accorded searches for and seizures of First Amendment materials is the risk of prior restraint, see *Maryland* v. *Macon*, 472 U. S. 463, 470 (1985), in substance the rule prevents seizure and destruction of expressive materials in circumstances such as are presented in this case without an adjudication of their unlawful character.

It follows from the search cases in which the First Amendment required exacting protection, that one title does not become seizable or tainted because of its proximity on the shelf to another. And if that is the rule for interim seizures, it follows with even greater force that protected materials cannot be destroyed altogether for some alleged taint from an owner who committed a speech violation. In attempting

to distinguish the holdings of *Marcus* and *A Quantity of Books*, the Court describes the constitutional infirmity in those cases as follows: "[T]he government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so." *Ante*, at 551. But the same constitutional defect is present in the case before us today, and the Court fails to explain why it is not fatal to the forfeiture punishment here under review. Thus, while 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. In my view, the forfeiture of expressive material here that had not been adjudged to be obscene, or otherwise without the protection of the First Amendment, was unconstitutional.

* * *

Given the Court's principal holding, I can interpose no objection to remanding the case for further consideration under the Eighth Amendment. But it is unnecessary to reach the Eighth Amendment question. The Court's failure to reverse this flagrant violation of the right of free speech and expression is a deplorable abandonment of fundamental First Amendment principles. I dissent from the judgment and from the opinion of the Court.