Chapter IX: Overbreadth, Vagueness, and Prior Restraints

A. Overbreadth and Vagueness

Overbreadth and vagueness are two defects in the way a statute is drafted that are reasons for striking a statue down under the First Amendment Free Speech Clause. While the two are often both raised by a challenger as alternative grounds for finding a First Amendment violation, they are independent reasons for finding a constitutional violation. Overbreadth can be a form of as applied challenge or a facial challenge. In an as applied challenge, the challenger argues that the law is overbroad as applied to the challenger's conduct since that conduct cannot be punished by the government consistent with the First Amendment. The consequence of a court agreeing with the challenger is only to declare the statute unconstitutional as applied to the challenger's conduct rather than strike it down entirely.

In a facial challenge, by contrast, the analysis does not focus on the challenger's conduct. The statute may be able to be applied to the challenger's conduct without violating the First Amendment. However, the challenger may be permitted to argue that the overbreadth of the law is so substantial that the statute should be struck down in its entirety. In general, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible" to a facial overbreadth challenge. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Instead, the Supreme Court has said that a statute is substantially overbroad if its illegitimate applications represent a significant number of its applications "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

By contrast, vagueness in the drafting of a criminal statute is a due process objection that can be raised outside of the First Amendment area. A statute is vague and violates due process if people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). However, in statutes that regulate speech, vagueness is particularly problematic. A vague statute can have a chilling effect on the willingness of people to speak if they think, but can't be certain, that their words might subject them to criminal penalties. In addition, a vague statute can be used by the government to selectively prosecute speakers based on the government's dislike of the content of their speech.

1. BROADRICK v. OKLAHOMA
413 U.S. 601 (1973)

MR. JUSTICE WHITE delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined.

Section 818 of Oklahoma's Merit System of Personnel Administration Act restricts the political activities of the State's classified civil servants in much the same manner that the Hatch Act proscribes partisan political activities of federal employees. Three employees of the Oklahoma Corporation Commission who are subject to the proscriptions of § 818 seek to have two of its paragraphs declared unconstitutional on their face and enjoined because of

asserted vagueness and overbreadth. After a hearing, the District Court upheld the provisions. We noted probable jurisdiction of the appeal. We affirm the judgment of the District Court.

Section 818 was enacted in 1959 when the State first established its Merit System of Personnel Administration. The section serves roughly the same function as the analogous provisions of the other 49 States, and is patterned on § 9 (a) of the Hatch Act [A federal law regulating activities of employees of the United States government.]. Without question, a broad range of political activities and conduct is proscribed by the section. Paragraph six, one of the contested portions, provides that "[n]o employee in the classified service . . . shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose." Paragraph seven, the other challenged paragraph, provides that no such employee "shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office." That paragraph further prohibits such employees from "tak[ing] part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." As a complementary proscription (not challenged in this lawsuit) the first paragraph prohibits any person from "in any way" being "favored or discriminated against with respect to employment in the classified service because of his political . . . opinions or affiliations."

Appellants do not question Oklahoma's right to place even-handed restrictions on the partisan political conduct of state employees. Appellants freely concede that such restrictions serve valid and important state interests, particularly with respect to attracting greater numbers of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from "political extortion." Rather, appellants maintain that however permissible, even commendable, the goals of § 818 may be, its language is unconstitutionally vague and its prohibitions too broad in their sweep, failing to distinguish between conduct that may be proscribed and conduct that must be permitted. For these and other reasons, appellants assert that the sixth and seventh paragraphs of § 818 are void in toto and cannot be enforced against them or anyone else.

We have held today that the Hatch Act is not impermissibly vague. We have little doubt that § 818 is similarly not so vague that "men of common intelligence must necessarily guess at its meaning." Whatever other problems there are with § 818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it proscribes or fails to set out "explicit standards" for those who must apply it.

Shortly before appellants commenced their action in the District Court, they were charged by the State Personnel Board with patent violations of § 818. According to the Board's charges, appellants actively participated in the 1970 re-election campaign of a Corporation Commissioner, appellants' superior. All three allegedly asked other Corporation Commission employees to do campaign work or to give referrals to persons who might help in the campaign. Most of these requests were made at district offices of the Commission's Oil and Gas Conservation Division. Two of the appellants were charged with soliciting money for the campaign from Commission employees and one was also charged with receiving and distributing campaign posters in bulk. In the context of obviously covered conduct, the

statement of Mr. Justice Holmes is particularly appropriate: "if there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns."

Appellants assert that § 818 has been construed as applying to such allegedly protected political expression as the wearing of political buttons or the displaying of bumper stickers. But appellants did not engage in any such activity. They are charged with actively engaging in partisan political activities - including the solicitation of money - among their coworkers for the benefit of their superior. Appellants concede - and correctly so - that § 818 would be constitutional as applied to this type of conduct. They nevertheless maintain that the statute is overbroad and purports to reach protected, as well as unprotected conduct, and must therefore be struck down on its face and held to be incapable of any constitutional application. We do not believe that the overbreadth doctrine may appropriately be invoked in this manner here.

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court.

In the past, the Court has recognized some limited exceptions to these principles, but only because of the most "weighty countervailing policies." One such exception is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves. Another exception has been carved out in the area of the First Amendment.

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. As a corollary, the Court has altered its traditional rules of standing to permit - in the First Amendment area - "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own right of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate "only spoken words." In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of

association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights.

The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner.

It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face. But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct - even if expressive - falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect - at best a prediction - cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Unlike ordinary breach-of-the-peace statutes or other broad regulatory acts, § 818 is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments. But at the same time, § 818 is not a censorial statute, directed at particular groups or viewpoints. The statute, rather, seeks to regulate political activity in an even-handed and neutral manner. As indicated, such statutes have in the past been subject to a less exacting overbreadth scrutiny. Moreover, the fact remains that § 818 regulates a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace or criminal trespass. There is no question that § 818 is valid at least insofar as it forbids classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of national, state, or local committees of political parties, or officers or committee members in partisan political clubs, or candidates for any paid public office; taking part in the

management or affairs of any political party's partisan political campaign; serving as delegates or alternates to caucuses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a partisan effort to get voters to the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate.

These proscriptions are taken directly from the contested paragraphs of § 818, the Rules of the State Personnel Board and its interpretive circular, and the authoritative opinions of the State Attorney General. Without question, the conduct appellants have been charged with falls squarely within these proscriptions.

Appellants assert that § 818 goes much farther than these prohibitions. According to appellants, the statute's prohibitions are not tied tightly enough to partisan political conduct and impermissibly relegate employees to expressing their political views "privately." The State Personnel Board, however, has construed § 818's explicit approval of "private" political expression to include virtually any expression not within the context of active partisan political campaigning, and the State's Attorney General, in plain terms, has interpreted § 818 as prohibiting "clearly partisan political activity" only. Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute. Appellants further point to the Board's interpretive rules purporting to restrict such allegedly protected activities as the wearing of political buttons or the use of bumper stickers. It may be that such restrictions are impermissible and that § 818 may be susceptible of some other improper applications. But, as presently construed, we do not believe that § 818 must be discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute. Section 818 is not substantially overbroad and is not, therefore, unconstitutional on its face. The judgment of the District Court is affirmed.

2. VIRGINIA v. HICKS
539 U.S. 113 (2003)

SCALIA, J., delivered the opinion for a unanimous Court.

The issue presented in this case is whether the Richmond Redevelopment and Housing Authority's trespass policy is facially invalid under the First Amendment's overbreadth doctrine.

The Richmond Redevelopment and Housing Authority (RRHA) owns and operates a housing development for low-income residents called Whitcomb Court. Until June 23, 1997, the city of Richmond owned the streets within Whitcomb Court. The city council decided, however, to "privatize" these streets in an effort to combat rampant crime and drug dealing in Whitcomb Court--much of it committed and conducted by nonresidents. The council enacted Ordinance No. 97-181-197, which provided, in part:

> §1. That Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of Sussex Street and the 2700-2800 Block of Magnolia Street, in Whitcomb Court . . . be and are hereby closed to public use and travel and

abandoned as streets of the City of Richmond.

The city then conveyed these streets by a recorded deed to the RRHA (which is a political subdivision of the Commonwealth of Virginia). This deed required the RRHA to "'give the appearance that the closed street, particularly at the entrances, are no longer public streets and that they are in fact private streets.'" To this end, the RRHA posted red-and-white signs on each apartment building--and every 100 feet along the streets--of Whitcomb Court, which state: "'NO TRESPASSING[.] PRIVATE PROPERTY[.] YOU ARE NOW ENTERING PRIVATE PROPERTY AND STREETS OWNED BY RRHA. UNAUTHORIZED PERSONS WILL BE SUBJECT TO ARREST AND PROSECUTION. UNAUTHORIZED VEHICLES WILL BE TOWED AT OWNERS EXPENSE.'" The RRHA also enacted a policy authorizing the Richmond police

> to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property.

Persons who trespass after being notified not to return are subject to prosecution under Va. Code Ann. §18.2-119 (1996):

> If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof . . . he shall be guilty of a Class 1 misdemeanor.

Respondent Kevin Hicks, a nonresident of Whitcomb Court, has been convicted on two prior occasions of trespassing there and once of damaging property there. Those convictions are not at issue in this case. While the property-damage charge was pending, the RRHA gave Hicks written notice barring him from Whitcomb Court, and Hicks signed this notice in the presence of a police officer. Twice after receiving this notice Hicks asked for permission to return; twice the Whitcomb Court housing manager said "no." That did not stop Hicks; in January 1999 he again trespassed at Whitcomb Court and was arrested and convicted under §18.2-119.

At trial, Hicks maintained that the RRHA's policy limiting access to Whitcomb Court was both unconstitutionally overbroad and void for vagueness.

II

Hicks does not contend that he was engaged in constitutionally protected conduct when arrested; nor does he challenge the validity of the trespass statute under which he was convicted. Instead he claims that the RRHA policy barring him from Whitcomb Court is overbroad under the First Amendment, and cannot be applied to him--or anyone else. The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the

standards for facial challenges. The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), suffices to invalidate all enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."

We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech--especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

As we noted in *Broadrick*, however, there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law--particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the "strong medicine" of overbreadth invalidation.

Petitioner asks this Court to impose restrictions on "the use of overbreadth standing," limiting the availability of facial overbreadth challenges to those whose own conduct involved some sort of expressive activity. The United States as amicus curiae makes the same proposal and urges that Hicks' facial challenge to the RRHA trespass policy "should not have been entertained." The problem with these proposals is that we are reviewing here the decision of a State Supreme Court; our standing rules limit only the federal courts' jurisdiction over certain claims. "[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law." Whether Virginia's courts should have entertained this overbreadth challenge is entirely a matter of state law.

This Court may, however, review the Virginia Supreme Court's holding that the RRHA policy violates the First Amendment. We may examine, in particular, whether the claimed overbreadth in the RRHA policy is sufficiently "substantial" to produce facial invalidity. These questions involve not standing, but "the determination of [a] First Amendment challenge on the merits."

The Virginia Supreme Court found that the RRHA policy allowed Gloria S. Rogers, the manager of Whitcomb Court, to exercise "unfettered discretion" in determining who may use the RRHA's property. Specifically, the court faulted an "unwritten" rule that persons wishing to hand out flyers on the sidewalks of Whitcomb Court need to obtain Rogers' permission.

This unwritten portion of the RRHA policy, the court concluded, unconstitutionally allows Rogers to "prohibit speech that she finds personally distasteful or offensive."

Hicks, of course, was not arrested for leafleting or demonstrating without permission. He violated the RRHA's written rule that persons who receive a barment notice must not return to RRHA property. The Virginia Supreme Court, based on its objection to the "unwritten" requirement that demonstrators and leafleters obtain advance permission, declared the entire RRHA trespass policy overbroad and void--including the written rule that those who return after receiving a barment notice are subject to arrest. The Virginia Supreme Court could not properly decree that they fall by reason of the overbreadth doctrine, however, unless the trespass policy, taken as a whole, is substantially overbroad judged in relation to its plainly legitimate sweep. The overbreadth claimant bears the burden of demonstrating, "from the text of [the law] and from actual fact," that substantial overbreadth exists.

Hicks has not made such a showing with regard to the RRHA policy taken as a whole--even assuming, arguendo, the unlawfulness of the policy's "unwritten" rule that demonstrating and leafleting at Whitcomb Court require permission from Gloria Rogers. Consider the "no-return" notice served on nonresidents who have no "legitimate business or social purpose" in Whitcomb Court: Hicks has failed to demonstrate that this notice would even be given to anyone engaged in constitutionally protected speech. Gloria Rogers testified that leafleting and demonstrations are permitted at Whitcomb Court, so long as permission is obtained in advance. Thus, "legitimate business or social purpose" evidently includes leafleting and demonstrating; otherwise, Rogers would lack authority to permit those activities on RRHA property. Hicks has failed to demonstrate that any First Amendment activity falls outside the "legitimate business or social purpose[s]" that permit entry. As far as appears, until one receives a barment notice, entering for a First Amendment purpose is not a trespass.

Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment. Punishing its violation by a person who wishes to engage in free speech no more implicates the First Amendment than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is Hicks' nonexpressive conduct--his entry in violation of the notice-barment rule--not his speech, for which he is punished as a trespasser.

Most importantly, both the notice-barment rule and the "legitimate business or social purpose" rule apply to all persons who enter the streets of Whitcomb Court, not just to those who seek to engage in expression. The rules apply to strollers, loiterers, drug dealers, roller skaters, bird watchers, soccer players, and others not engaged in constitutionally protected conduct--a group that would seemingly far outnumber First Amendment speakers. Even assuming invalidity of the "unwritten" rule that requires leafleters and demonstrators to obtain advance permission from Gloria Rogers, Hicks has not shown, based on the record in this case, that the RRHA trespass policy as a whole prohibits a "substantial" amount of protected speech in relation to its many legitimate applications. That is not surprising, since the overbreadth doctrine's concern with "chilling" protected speech "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward

conduct." Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating). Applications of the RRHA policy that violate the First Amendment can still be remedied through as-applied litigation, but the Virginia Supreme Court should not have used the "strong medicine" of overbreadth to invalidate the entire RRHA trespass policy.

For these reasons, we reverse the judgment of the Virginia Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

3. UNITED STATES v. STEVENS
130 S. Ct. 1577 (2010)

Note: Chapter II included the first part of the *Stevens* opinion (pages 48-50) in which the Court rejected the argument that depictions of animal cruelty should be classified as a new category of unprotected speech. Below is the second part of the opinion addressing the issue of overbreadth.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Because we decline to carve out from the First Amendment any novel exception for § 48, we review Stevens's First Amendment challenge under our existing doctrine.

Stevens challenged § 48 on its face. To succeed in a facial attack in the First Amendment context, a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Stevens argues that § 48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense of § 48 rests on interpreting the statute as narrowly limited to specific types of "extreme" material. Therefore, the constitutionality of § 48 hinges on how broadly it is construed.

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the statute's ban on a "depiction of animal cruelty" nowhere requires that the depicted conduct be cruel. That text applies to "any . . . depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." § 48(c)(1). "[M]aimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation.

While not requiring cruelty, § 48 does require that the depicted conduct be "illegal." But this requirement does not limit § 48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane "wound[ing] or kill[ing]" of "living animal[s]." Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits) can be designed to raise revenue, preserve animal

populations, or prevent accidents. The text of § 48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal.

What is more, the application of § 48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in "the State in which the creation, sale, or possession takes place, regardless of whether the . . . wounding . . . or killing took place in [that] State." A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of § 48, because although there may be "a broad societal consensus" against cruelty to animals, there is substantial disagreement on what types of conduct are properly regarded as cruel.

In the District of Columbia, for example, all hunting is unlawful. Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, and hunting television programs, videos, and Web sites are equally popular. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Compare Brief for National Rifle Association (estimating that hunting magazines account for $ 135 million in annual retail sales) with Brief for United States (suggesting $ 1 million in crush video sales per year, and noting that Stevens earned $ 57,000 from his videos). Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital.

Those seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate jurisdictions. Some States permit hunting with crossbows, while others forbid it. Missouri allows the "canned" hunting of ungulates held in captivity, but Montana restricts such hunting to certain bird species. The sharp-tailed grouse may be hunted in Idaho, but not in Washington.

The disagreements among the States extend beyond hunting. State agricultural regulations permit different methods of livestock slaughter in different places or as applied to different animals. California has recently banned cutting or "docking" the tails of dairy cattle, which other States permit. Even cockfighting is legal in Puerto Rico, and was legal in Louisiana until 2008. An otherwise-lawful image of any of these practices, if sold or possessed for commercial gain within a State that happens to forbid the practice, falls within the prohibition of § 48(a).

The only thing standing between defendants who sell such depictions and five years in federal prison is the statute's exceptions clause. Subsection (b) exempts from prohibition "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." The Government argues that this clause substantially narrows the statute's reach: News reports about animal cruelty have "journalistic" value; pictures of bullfights in Spain have "historical" value; and instructional hunting videos have "educational" value. Thus, the Government argues, § 48 reaches only crush videos, depictions of animal fighting (other than Spanish bullfighting), and perhaps other depictions of "extreme acts of animal

cruelty."

The Government's attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with anything more than "scant social value" is excluded. But the text says "serious" value. We decline to regard as "serious" anything that is not "scant." "Serious" means a good bit more.

Quite apart from the requirement of "serious" value in § 48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature. Many popular videos "have primarily entertainment value" and are designed to "entertai[n] the viewer, marke[t] hunting equipment, or increas[e] the hunting community." The Government offers no principled explanation why these depictions of hunting would be *inherently* valuable while those of Japanese dogfights are not. The dissent contends that hunting depictions must have serious value because hunting has serious value, in a way that dogfights presumably do not. But § 48(b) addresses the value of the *depictions*, not of the underlying activity. There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban.

The Government explains that the language of § 48(b) was largely drawn from our opinion in *Miller* v. *California*, 413 U.S. 15 (1973), which excepted from its definition of obscenity any material with "serious literary, artistic, political, or scientific value." According to the Government, incorporation of the *Miller* standard into § 48 is surely enough to answer any First Amendment objection.

In *Miller* we held that "serious" value shields depictions of sex from regulation as obscenity. We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech. *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even "'[w]holly neutral futilities . . . come under the protection of free speech.'" *Cohen* v. *California*, 403 U.S. 15, 25 (1971). Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of § 48(b), but nonetheless fall within the broad reach of § 48(c).

Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty, and it "neither has brought nor will bring a prosecution for anything less." The Government hits this theme hard, invoking its prosecutorial discretion. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint. The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Nor can we rely upon the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." "[T]his Court may impose a limiting

construction on a statute only if it is 'readily susceptible' to such a construction." We "'will not rewrite a . . . law to conform it to constitutional requirements,'" for doing so would constitute a "serious invasion of the legislative domain," and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place." To read § 48 as the Government desires requires rewriting, not just reinterpretation.

Our construction of § 48 decides the constitutional question; the Government makes no effort to defend the constitutionality of § 48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities -- depictions that are presumptively protected by the First Amendment but that remain subject to the criminal sanctions of § 48.

Nor does the Government seriously contest that the presumptively impermissible applications of § 48 (properly construed) far outnumber any permissible ones. However "growing" and "lucrative" the markets for crush videos and dogfighting depictions might be, they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of § 48. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that § 48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.

JUSTICE ALITO, dissenting.

The Court strikes down in its entirety a valuable statute that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty -- in particular, the creation and commercial exploitation of "crush videos," a form of depraved entertainment that has no social value. The Court's approach is unwarranted. Respondent was convicted under § 48 for selling videos depicting dogfights. On appeal, he argued, among other things, that § 48 is unconstitutional as applied to the facts of this case. The Court of Appeals -- incorrectly, in my view -- declined to decide whether § 48 is unconstitutional as applied to respondent's videos and instead reached out to hold that the statute is facially invalid. Today's decision strikes down § 48 using what has been aptly termed the "strong medicine" of the overbreadth doctrine, a potion that generally should be administered only as "a last resort."

Instead of applying the doctrine of overbreadth, I would vacate the decision below and instruct the Court of Appeals on remand to decide whether the videos that respondent sold are constitutionally protected. If the question of overbreadth is to be decided, however, I do not think the present record supports the Court's conclusion that § 48 bans a substantial quantity of protected speech.

The "strong medicine" of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court. Because the Court has addressed the overbreadth question, however, I will

explain why I do not think that the record supports the conclusion that § 48 is overly broad.

In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals. "There must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."

In holding that § 48 violates the overbreadth rule, the Court declines to decide whether, as the Government maintains, § 48 is constitutional as applied to two broad categories of depictions that exist in the real world: crush videos and depictions of deadly animal fights. Instead, the Court tacitly assumes for the sake of argument that § 48 is valid as applied to these depictions, but the Court concludes that § 48 reaches too much protected speech to survive. The Court relies primarily on depictions of hunters killing or wounding game and depictions of animals being slaughtered for food. I address the Court's examples below.

I turn first to depictions of hunting. I would hold that § 48 does not apply to depictions of hunting. First, because § 48 targets depictions of "animal cruelty," I would interpret that term to apply only to depictions involving acts of animal cruelty as defined by applicable law, not to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. Virtually all state laws prohibiting animal cruelty either expressly define the term "animal" to exclude wildlife or else exempt lawful hunting activities, so the statutory prohibition in § 48(a) may reasonably be interpreted not to reach most hunting depictions.

Second, even if the hunting of wild animals were otherwise covered by § 48(a), I would hold that hunting depictions fall within the exception in § 48(b) for depictions that have "serious" (*i.e.,* not "trifling") "scientific," "educational," or "historical" value.

For these reasons, I am convinced that § 48 has no application to depictions of hunting. But even if § 48 did impermissibly reach the sale or possession of depictions of hunting in a few unusual situations, those isolated applications would hardly show that § 48 bans a substantial amount of protected speech.

Although the Court's overbreadth analysis rests primarily on the proposition that § 48 substantially restricts the sale and possession of hunting depictions, the Court cites a few additional examples, including depictions of methods of slaughter and the docking of the tails of dairy cows. Such examples do not show that the statute is substantially overbroad, for two reasons. First, anti-cruelty laws do not ban the sorts of acts depicted in the Court's hypotheticals. Second, nothing in the record suggests that any one has ever created, sold, or possessed for sale a depiction of the slaughter of food animals or of the docking of the tails of dairy cows that would not easily qualify under the exception set out in § 48(b).

In sum, we have a duty to interpret § 48 so as to avoid serious constitutional concerns, and § 48 may reasonably be construed not to reach almost all, if not all, of the depictions that the Court finds constitutionally protected. Thus, § 48 does not appear to have a large number of unconstitutional applications. Invalidation for overbreadth is appropriate only if the statute suffers from *substantial* overbreadth -- judged in relation to the statute's "plainly legitimate sweep." As I explain, § 48 has a substantial core of constitutionally permissible applications.

As the Court of Appeals recognized, "the primary conduct that Congress sought to address was the creation, sale, or possession of 'crush videos.'" A sample crush video, which has been lodged with the Clerk, records the following event:

> [A] kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead.

It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. But before the enactment of § 48, the underlying conduct depicted in crush videos was nearly impossible to prosecute. These videos, which "often appeal to persons with a very specific sexual fetish," were made in secret, and "the faces of the women inflicting the torture often were not shown, nor could the location or the date of the activity be ascertained from the depiction." Thus, law enforcement authorities often were not able to identify the parties responsible.

In light of the practical problems thwarting prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct. And Congress' strategy appears to have been vindicated. We are told that "[b]y 2007, sponsors of § 48 declared the crush video industry dead. Even overseas Websites shut down in the wake of § 48. Now, after the Third Circuit's decision, crush videos are already back online."

The First Amendment protects freedom of speech, but it does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.

The most relevant of our prior decisions is *Ferber*. The Court there held that child pornography is not protected speech, and I believe that *Ferber*'s reasoning dictates a similar conclusion here. In *Ferber,* an important factor was that child pornography involves the commission of a crime that inflicts severe personal injury to the "children who are made to engage in sexual conduct for commercial purposes.'" The *Ferber* Court repeatedly described the production of child pornography as child "abuse," "molestation," or "exploitation." In *Ferber* "[t]he production of the work, not its content, was the target of the statute."

Second, *Ferber* emphasized the fact that these underlying crimes could not be effectively combated without targeting the distribution of child pornography. Third, the *Ferber* Court noted that the value of child pornography "is exceedingly modest, if not *de minimis,"* and that any such value was "overwhelmingly outweigh[ed]" by "the evil to be restricted."

All three of these characteristics are shared by § 48, as applied to crush videos. First, the conduct depicted in crush videos is criminal in every State and the District of Columbia. Thus, any crush video made in this country records the actual commission of a criminal act that inflicts severe physical injury and excruciating pain and ultimately results in death. Those who record the underlying criminal acts are likely to be criminally culpable, either as aiders and abettors or conspirators. And in the tight and secretive market for these videos, some who sell the videos or possess them with the intent to make a profit may be similarly culpable. To the extent that § 48 reaches such persons, it surely does not violate the First Amendment.

Second, the criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by § 48 -- the creation, sale, and possession for sale of depictions of animal torture with the intention of realizing a commercial profit. The evidence presented to Congress posed a stark choice: Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record.

Finally, the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations. And § 48(b) provides an exception for depictions having any "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

It must be acknowledged that preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos. But the Government also has a compelling interest in preventing the torture depicted in crush videos. The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country.

Applying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment.

Application of the *Ferber* framework also supports the constitutionality of § 48 as applied to depictions of brutal animal fights. (For convenience, I will focus on videos of dogfights, which appear to be the most common type of animal fight videos.)

First, such depictions, like crush videos, record the actual commission of a crime involving deadly violence. Dogfights are illegal in every State and the District of Columbia, and under federal law constitute a felony punishable by imprisonment for up to five years.

Second, Congress had an ample basis for concluding that the crimes depicted in these videos cannot be controlled without targeting the videos. Like crush videos and child pornography, dogfight videos are very often produced as part of a "clandestine industry," and "the need to market the products requires a visible apparatus of distribution." In such circumstances, Congress had reasonable grounds for concluding that it would be "difficult, if not impossible, to halt" the underlying exploitation of dogs by pursuing only those who stage the fights.

The commercial trade in videos of dogfights is "an integral part of the production of such materials." Some dogfighting videos are made "solely for the purpose of selling the video (and not for a live audience)." In addition, those who stage dogfights profit from the gambling revenue they take in from the fights; the videos "encourage [such] gambling activity because

they allow those reluctant to attend actual fights to still bet on the outcome." Moreover, "[v]ideo documentation is vital to the criminal enterprise because it provides *proof* of a dog's fighting prowess." In short, because videos depicting dogfights are essential to the success of dogfighting, the sale of such videos helps to perpetuate the criminal conduct depicted in them.

Third, depictions of dogfights that fall within § 48's reach have by definition no appreciable social value. As noted, § 48(b) exempts depictions having any appreciable social value, and thus the mere inclusion of a depiction of a live fight in a larger work that aims at communicating an idea or a message with a modicum of social value would not run afoul of the statute.

Finally, the harm caused by the underlying criminal acts greatly outweighs any trifling value that the depictions might be thought to possess.

As with crush videos, the statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation's criminal laws and preventing criminals from profiting from their illegal activities.

In sum, § 48 may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. Thus, the statute has a substantial core of constitutionally permissible applications. Moreover, the record does not show that § 48, properly interpreted, bans a substantial amount of protected speech. *A fortiori*, respondent has not met his burden of demonstrating that any impermissible applications of the statute are "substantial" in relation to its "plainly legitimate sweep." Accordingly, I would reject respondent's claim that § 48 is facially unconstitutional under the overbreadth doctrine.

4. COATES v. CITY OF CINCINNATI
402 U.S. 611 (1971)

MR. JUSTICE STEWART delivered the opinion of the Court joined by DOUGLAS, HARLAN, BRENNAN, and MARSHALL, JJ.

A Cincinnati, Ohio, ordinance makes it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." The issue before us is whether this ordinance is unconstitutional on its face.

The appellants were convicted of violating the ordinance, and the convictions were ultimately affirmed by a closely divided vote in the Supreme Court of Ohio, upholding the constitutional validity of the ordinance. The record brought before the reviewing courts tells us no more than that the appellant Coates was a student involved in a demonstration and the other appellants were pickets involved in a labor dispute. For throughout this litigation it has been the appellants' position that the ordinance on its face violates the First and Fourteenth Amendments of the Constitution.

In rejecting this claim and affirming the convictions the Ohio Supreme Court did not give the ordinance any construction at variance with the apparent plain import of its language. The court simply stated:

> The ordinance prohibits, inter alia, conduct . . . annoying to persons passing by.' The word 'annoying' is a widely used and well understood word; it is not necessary to guess its meaning. 'Annoying' is the present participle of the transitive verb 'annoy' which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate.
>
> We conclude that the ordinance 'clearly and precisely delineates its reach in words of common understanding. It is a "precise and narrowly drawn regulatory statute [ordinance] evincing a legislative judgment that certain specific conduct be . . . proscribed.

Beyond this, the only construction put upon the ordinance by the state court was its unexplained conclusion that "the standard of conduct which it specifies is not dependent upon each complainant's sensitivity." But the court did not indicate upon whose sensitivity a violation does depend - the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.

We are thus relegated, at best, to the words of the ordinance itself. If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.

But the vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms. The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is "annoying" because their ideas, their

lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.

MR. JUSTICE BLACK.

This Court has long held that laws so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face. Likewise, laws which broadly forbid conduct or activities which are protected by the Federal Constitution, such as, for instance, the discussion of political matters, are void on their face. On the other hand, laws which plainly forbid conduct which is constitutionally within the power of the State to forbid but also restrict constitutionally protected conduct may be void either on their face or merely as applied in certain instances. As my Brother WHITE states in his opinion (with which I substantially agree), this is one of those numerous cases where the law could be held unconstitutional because it prohibits both conduct which the Constitution safeguards and conduct which the State may constitutionally punish. Thus, the First Amendment which forbids the State to abridge freedom of speech, would invalidate this city ordinance if it were used to punish the making of a political speech, even if that speech were to annoy other persons. In contrast, however, the ordinance could properly be applied to prohibit the gathering of persons in the mouths of alleys to annoy passersby by throwing rocks or by some other conduct not at all connected with speech. It is a matter of no little difficulty to determine when a law can be held void on its face and when such summary action is inappropriate. This difficulty has been aggravated in this case, because the record fails to show in what conduct these defendants had engaged to annoy other people. In my view, a record showing the facts surrounding the conviction is essential to adjudicate the important constitutional issues in this case. I would therefore vacate the judgment and remand the case with instructions that the trial court give both parties an opportunity to supplement the record so that we may determine whether the conduct actually punished is the kind of conduct which it is within the power of the State to punish.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

The claim in this case, in part, is that the Cincinnati ordinance is so vague that it may not constitutionally be applied to any conduct. But the ordinance prohibits persons from assembling with others and "conduct[ing] themselves in a manner annoying to persons passing by . . . ." Any man of average comprehension should know that some kinds of conduct, such as assault or blocking passage on the street, will annoy others and are clearly covered by the "annoying conduct" standard of the ordinance. It would be frivolous to say

that these and many other kinds of conduct are not within the foreseeable reach of the law.

It is possible that a whole range of other acts, defined with unconstitutional imprecision, is forbidden by the ordinance. But as a general rule, when a criminal charge is based on conduct constitutionally subject to proscription and clearly forbidden by a statute, it is no defense that the law would be unconstitutionally vague if applied to other behavior. Such a statute is not vague on its face. It may be vague as applied in some circumstances, but ruling on such a challenge obviously requires knowledge of the conduct with which a defendant is charged.

Our cases, however, recognize a different approach where the statute at issue purports to regulate or proscribe rights of speech or press protected by the First Amendment. Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights.

Even accepting the overbreadth doctrine with respect to statutes clearly reaching speech, the Cincinnati ordinance does not purport to bar or regulate speech as such. It prohibits persons from assembling and "conduct[ing]" themselves in a manner annoying to other persons. Even if the assembled defendants in this case were demonstrating and picketing, we have long recognized that picketing is not solely a communicative endeavor and has aspects which the State is entitled to regulate even though there is incidental impact on speech.

In the case before us, I would deal with the Cincinnati ordinance as we would with the ordinary criminal statute. The ordinance clearly reaches certain conduct but may be illegally vague with respect to other conduct. The statute is not infirm on its face and since we have no information from this record as to what conduct was charged against these defendants, we are in no position to judge the statute as applied. That the ordinance may confer wide discretion in a wide range of circumstances is irrelevant when we may be dealing with conduct at its core.

B. Prior Restraints

Regulation of speech is divided into techniques that prevent speech from occurring at all, called prior restraints, and techniques that take effect after the speech has occurred such as criminal penalties. Generally, there is stricter review of prior restraints than other forms of regulation. There are a number of reasons for the hostility to the use of prior restraints. One is historical. Prior restraints were used in England as far back as the Star Chamber in 1637 followed by the Licensing of the Press Act of 1662. Among other things, the Act was used to prevent the publication of seditious writings, writings that disagreed with the Parliament and the monarch. The attitude of the British government toward the press found its way to the colonies in an attempt to censor the American media by prohibiting newspapers from publishing unfavorable articles about the British government. A second reason for the negative view of prior restraints is that they are a regulatory technique that deprives the

marketplace of ideas of the benefits of the speech in comparison to after the fact punishment which punishes the speaker, but not until after the audience has heard the speech.

The English history of censorship through the use of a licensor who blocked publications before they occurred and, therefore, operated as a system of prior restraints, was very much on the minds of the framers of the First Amendment. It is the one form of government restraint on speech it is clear the framers meant to restrict. Inevitably, whenever a Supreme Court decision analogizes the current case to the English licensing laws, the restriction on speech is struck down. It's even a comparison the Court made in *Citizens United v. FEC*, 558 U.S. 310 (2010), invalidating restrictions on independent campaign spending by corporations: "These onerous restrictions thus function as the equivalent of prior restraints by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit."

Because of this history and the adverse impact of prior restraints, prior restraints are a less favored technique for regulating speech, but not a prohibited one. While prior restraints are best known for silencing criticism of the government, that isn't their only use and therefore courts don't strike down all uses of prior restraints. For example, cities typically require parade organizers to obtain a permit before they are allowed to hold a parade on city streets. Requiring a permit before speech can occur is a form of prior restraint. Such permitting schemes are upheld if the criteria for granting or denying the permit are constitutional because cities have legitimate reasons for needing to know in advance when parades will be held.

1. NEAR v. MINNESOTA
283 U.S. 697 (1931)

CHIEF JUSTICE HUGHES delivered the opinion of the Court, joined by HOLMES, BRANDEIS, STONE, and ROBERTS, JJ.

Chapter 285 of the Session Laws of Minnesota for the year 1925 provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical." Section one of the Act is as follows:

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

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(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.

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 . . . .

In actions brought under (b) above, there shall be available the defense that the truth was

published with good motives and for justifiable ends.

Section two provides that, whenever any such nuisance is committed or exists, the County Attorney of any county where any such periodical is published or circulated may maintain an action to enjoin perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted.

The action, by section three, is to be "governed by the practice and procedure applicable to civil actions for injunctions," and, after trial, the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation, and, "in and by such judgment, such nuisance may be wholly abated."

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a "malicious, scandalous and defamatory newspaper, magazine and periodical" known as "The Saturday Press," published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates, published and circulated editions of that periodical which were "largely devoted to malicious, scandalous and defamatory articles" concerning Charles G. Davis, Frank W. Brunskill, the Minneapolis Tribune, the Minneapolis Journal, Melvin C. Passolt, George E. Leach, the Jewish Race, the members of the Grand Jury of Hennepin County impaneled in November, 1927, and then holding office, and other persons, as more fully appeared in exhibits annexed to the complaint, consisting of copies of the articles described and constituting 327 pages of the record. While the complaint did not so allege, it appears from the briefs of both parties that Charles G. Davis was a special law enforcement officer employed by a civic organization, that George E. Leach was Mayor of Minneapolis, that Frank W. Brunskill was its Chief of Police, and that Floyd B. Olson was County Attorney.

The articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

At the beginning of the action, on November 22, 1927, and upon the verified complaint, an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate or have in their possession any editions of the periodical from September 24, 1927, to November 19, 1927,

inclusive, and from publishing, circulating, or having in their possession, "any future editions of said The Saturday Press" and "any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint."

The defendants challenged the constitutionality of the statute. The District Court certified the question of constitutionality to the Supreme Court of the State. The Supreme Court sustained the statute, and it was thus held to be valid over the objection that it violated the Fourteenth Amendment of the Constitution of the United States.

Thereupon, the defendant Near answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. He admitted the publication of the articles in the issues described in the complaint, but denied that they were malicious, scandalous or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. The case then came on for trial. The plaintiff offered in evidence the issues of the publication in question. The defendant then rested without offering evidence. The plaintiff moved that the court direct the issue of a permanent injunction, and this was done.

The District Court made findings of fact which followed the allegations of the complaint and found in general terms that the editions in question were "chiefly devoted to malicious, scandalous and defamatory articles" concerning the individuals named. The court further found that the defendants "did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper," and that "the said publication" "under said name of The Saturday Press, or any other name, constitutes a public nuisance." Judgment was thereupon entered adjudging that "The Saturday Press," as a public nuisance, "be and is hereby abated." The Judgment perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law," and also "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title."

The defendant Near appealed from this judgment to the Supreme Court of the State, again asserting his right under the Federal Constitution, and the judgment was affirmed. From the judgment as thus affirmed, the defendant Near appeals to this Court.

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the

essential attributes of that liberty.

It is thus important to note precisely the purpose and effect of the statute as the state court has construed it. First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel, but at an existing business which involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication. In the present action, there was no allegation that the matter published was not true. It is alleged that the publication was "malicious." But there is no requirement of proof by the State of malice in fact, as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense not of the truth alone, but only that the truth was published with good motives and for justifiable ends.

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges, by their very nature, create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends. This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to

be "malicious, scandalous, and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance, the judgment restrained the defendants from "publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by the law." The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class.

If we cut through mere details of procedure, the operation and effect of the statute, in substance, is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter -- in particular, that the matter consists of charges against public officers of official dereliction -- and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "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." The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, "the great and essential rights of the people are secured against legislative as well as against executive ambition. "They are secured not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also."

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions. The point of criticism has been "that the mere exemption

from previous restraints cannot be all that is secured by the constitutional provisions", and that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. 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.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: "When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right." No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force." These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.

The exceptional nature of its limitations places in a strong light the general conception that 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. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration.That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct.

The fact that, for approximately one hundred and fifty years, there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional

guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege.

In attempted justification of the statute, it is said that it deals not with publication per se, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends, and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected.

The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth.

For these reasons we hold the statute, so far as it authorized the proceedings in this action to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. Judgment reversed.

MR. JUSTICE BUTLER, dissenting.

The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized, and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND concur in this opinion.

2. NEW YORK TIMES v. UNITED STATES
403 U.S. 713 (1971)

PER CURIAM.

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy."[1]

---

[1] Professor's Note: The New York Times began to publish parts of a secret Defense Department study known as the Pentagon Papers on June 13, 1971. The Washington Post followed beginning on June 18, 1971. The 7000 page study commissioned by Secretary of Defense Robert McNamara reviewed the development of American foreign policy in Vietnam, including its military and diplomatic aspects. Daniel Ellsberg turned over copies of most of the study to the two newspapers. Ellsberg had worked at both the Defense Department and the State Department and at the time he copied the top-secret study he was working at the RAND Corporation, a think tank. RAND had been provided with two copies of the study and Ellsberg had access to the study as a result of his work for RAND. After the Nixon Administration learned that the newspapers were planning to publish excerpts from the study, it brought two lawsuits to halt publication. The cases very rapidly moved through the judicial system including the district courts and courts of appeal between June 15 and June 23, 1971. The Supreme Court granted certiorari on June 25. The oral argument took place on June 26 and the decision was handed down on June 30. On December 29, 1971 Ellsberg and Anthony Russo, who had helped Ellsberg photocopy the Pentagon Papers, were indicted and charged with, among other things, violations of the Espionage Act of 1917. The charges were eventually dismissed because of

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Near v. Minnesota*, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." The District Court for the Southern District of New York, in the New York Times case, and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, in the Washington Post case, held that the Government had not met that burden. We agree.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed, and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

JUSTICE BLACK, with whom JUSTICE DOUGLAS joins, concurring.

I adhere to the view that the Government's case against the Washington Post should have been dismissed, and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. It is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

In seeking injunctions against these newspapers, and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the

---

misconduct by the Nixon administration in breaking into the office of Ellsberg’s psychiatrist to steal his medical records and illegally wiretapping Ellsberg’s conversations.

Founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. We are asked to hold that, despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt to rely on any act of Congress. Instead, it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

JUSTICE BRENNAN, concurring.

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near v. Minnesota*, 283 U.S. 697 (1931).

Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. And, therefore, every restraint issued in this case, whatever its form, has violated the First Amendment -- and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

JUSTICE STEWART, with whom JUSTICE WHITE joins, concurring.

The only effective restraint upon executive policy and power in the areas of national defense

and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For, without an informed and free press, there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then, under the Constitution, the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is the constitutional duty of the Executive through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly, Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law, as well as its applicability to the facts proved.

But in the cases before us, we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one resolution of the issues before us. I join the judgments of the Court.

JUSTICE WHITE, with whom JUSTICE STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication, at least in the absence of express and appropriately limited

congressional authorization for prior restraints in circumstances such as these.

JUSTICE MARSHALL, concurring.

The Government contends that the only issue in these cases is whether, in a suit by the United States, "the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States.'" With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases, there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority to classify documents and information. Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether, in these particular cases, the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. The Government argues that, in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country.

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if, when the Executive Branch has adequate authority granted by Congress to protect "national security," it can choose, instead, to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct, rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression that, from the time of *Near v. Minnesota* we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these

cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government, and, specifically, the effective exercise of certain constitutional powers of the Executive.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts. Why are we in this posture? I suggest we are in this posture because these cases have been conducted in unseemly haste. The prompt setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases, and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public "right to know." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota*. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably, such exceptions may be lurking in these cases and, would have been flushed had they been properly considered in the trial courts, free from frenetic pressures. An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication.

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper, and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time, and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instanter.

Would it have been unreasonable, since the newspaper could anticipate the Government's objections to release of secret material, to give the Government an opportunity to review the entire collection and determine whether agreement could be reached on publication? With such an approach -- one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press --the newspapers and Government might well have narrowed the area of disagreement as to what was and was not publishable, leaving the

remainder to be resolved in orderly litigation, if necessary. The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issue. If the action of the judges up to now has been correct, that result is sheer happenstance.

Our grant of the writ of certiorari before final judgment in the Times case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals for the Second Circuit. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. I agree generally with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN, but I am not prepared to reach the merits. We all crave speedier judicial processes, but, when judges are pressured, as in these cases, the result is a parody of the judicial function.

JUSTICE HARLAN, with whom CHIEF JUSTICE BURGER and JUSTICE BLACKMUN join, dissenting.

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases. This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable.

The time which has been available to us, to the lower courts, and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues -- as important as any that have arisen during my time on the Court -- should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form.

It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

> "The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers."

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." This safeguard is required in the analogous area of executive claims of privilege for secrets of state. But, in my judgment, the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

> "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility, and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (Jackson, J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative. Pending further hearings conducted under the appropriate ground rules, I would continue the restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the status quo long enough to act responsibly in matters of such national importance as those involved here.

JUSTICE BLACKMUN, dissenting.

I join JUSTICE HARLAN in his dissent. I also am in substantial accord with much that JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.

3. SHUTTLESWORTH v. CITY OF BIRMINGHAM
394 U.S. 147 (1969)

JUSTICE STEWART delivered the opinion of the Court, joined by joined by WARREN, C.J. and BLACK, DOUGLAS, BRENNAN, WHITE, and FORTAS, JJ.

The petitioner stands convicted for violating an ordinance of Birmingham, Alabama, making it an offense to participate in any "parade or procession or other public demonstration" without first obtaining a permit from the City Commission. The question before us is whether that conviction can be squared with the Constitution of the United States.

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a

Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear. As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

At the end of four blocks the marchers were stopped by the Birmingham police, and were arrested for violating § 1159 of the General Code of Birmingham. That ordinance reads as follows:

"It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

"To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

"The two preceding paragraphs, however, shall not apply to funeral processions."

The petitioner was convicted for violation of § 1159 and was sentenced to 90 days' imprisonment at hard labor and an additional 48 days at hard labor in default of payment of a $75 fine and $24 costs. We granted certiorari to consider the petitioner's constitutional claims.

There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint

upon the enjoyment of those freedoms."

It is argued, however, that what was involved here was not "pure speech," but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true. We have emphasized before this that "the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). "Governmental authorities have the duty and responsibility to keep their streets open and available for movement." *Id.* at 554-55.

But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection. Accordingly, "[a]lthough this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Kunz v. New York*, 340 U.S. 290, 293-94 (1951). Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community.