Courts and Censorship

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I. INTRODUCTION

For half a century conventional wisdom in the United States has equated freedom of speech and of the press with its protection by courts under the first amendment. From its modest beginning in Near v. Minnesota,¹ a widening stream of Supreme Court decisions has left an impression, not only among the public and the press itself, but among some lawyers, that the law of the first amendment and the law of the press are the same thing. First amendment jurisprudence indeed has enveloped some areas of private and public law to the point where the Constitution is not seen as a limit on the outer reach of substantive law, but rather the substantive law is assumed to reach whatever the first amendment does not protect. This happened in the 1940s to the law of picketing and twenty years later to defamation law and to the regulation of salacious entertainment. Anyone who deals with the laws of copyright, of securities regulation, of broadcast licensing, of fraud and perjury and conspiracy needs no reminder that numerous issues of law and policy ordinarily precede the rare constitutional issue. But in the public folklore of our time, the first amendment is the law of expression and the judges are its guardians.

The first amendment has served well in the hands of judges committed to freedom of expression, but that freedom is not well served by singleminded concentration on the first amendment as its first rather than its final protection nor on the courts as the single source of its governing law. This singleminded concentration on the first amendment needlessly foregoes other principles and sources of law.

Concentration on the first amendment began by transcending the barriers of federalism, not without good reason, but at a price both in the shaping of first amendment doctrine

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* Associate Justice, Oregon Supreme Court. Judge Linde's Article retains its original format as prepared for an audience of journalists and historians, as well as legal scholars.

¹ 283 U.S. 693 (1931).
and in the independent potential of state constitutions. Preoccupation with the first amendment often leaps over familiar principles of the allocation of lawmaking, at needless cost both to lawmaking and to the development of constitutional law. Moreover, having learned to see judges as their guardians against censorship, the champions of free expression forget that in American law, courts were the original censors, and they turn from the courts to lawmakers only when burdened with the handicap of a lost first amendment claim.

One result has been the growth of first amendment doctrine in directions that leave courts with incompatible functions. Too often the prevailing doctrine casts the judge in the image of Janus, one face toward the task of making law for the situation at hand, the other toward enforcing the constitutional bar against laws that encroach on freedom of expression.

The Supreme Court's opinion in *Near v. Minnesota* touches all these themes, though it became famous for its anathema against prior restraints. Laymen concerned with the press and its freedom, and some of their lawyers, need to be aware of the complexities and the occasional paradoxes that lurk behind this and other formulas of the familiar first amendment rhetoric and rethink their implications. Although rhetoric nowhere plays a more fitting role than in the law of public speech, to serve as law a formula must be precise enough to direct, rather than to decorate, judicial decision making.

In the following remarks, I first review the stunted development of freedom of the press under the state constitutions and under the fourteenth amendment. Next I turn to the case of *Near v. Minnesota* and the doctrinal problems created by the Supreme Court's opinion, particularly by its obiter dicta. Finally, I suggest an alternative view in which courts accord constitutional law its classic role in the censorship of laws rather than in the censorship of expression.

II. STATE GUARANTEES OF FREEDOM OF EXPRESSION

It is easy to forget how new most first amendment law is. When the State of Minnesota in 1928 moved to suppress the scandalous *Saturday Press* as a public nuisance, the earliest Supreme Court opinions now regarded as the starting point of first amendment doctrine were hardly a decade old, and of course they dealt with federal prosecutions and were mostly
dissents.² But this is not to say that the law of freedom of speech and of the press was not constitutional law. It was law under state constitutions, before and along with their federal counterpart.

Since Minnesota became a state in 1858, its constitution had promised: "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."³ It is one of several classic formulations found in the states' declarations of rights.⁴ Far from reflecting a state's wish to copy the august first amendment, the existence of such guarantees in the original states had forced its addition to the Federal Constitution. By 1928, freedom of speech and of the press had been constitutional law in the states for a hundred and fifty years, at least on paper, but it was not first amendment law.

Nor did the constitutional guarantees assure much freedom for speech or writing of the kind that a court or legislature would think fit to suppress. From the first, judges assumed that these guarantees had no effect on their powers to punish publications as contempts or as common law crimes. In 1788, when a Philadelphia printer named Oswald published an address to the public, claiming that he had been arrested at the instigation of federalist adversaries "whose sentiments upon the new constitution have not in every respect coincided with mine", and resting his trust in a jury of his fellow citizens, the Pennsylvania Supreme Court thought that state's guarantee of a free press presented no obstacle to punishing him for a contempt in seeking to prejudice future jurors.⁵ Reviewing the history of freedom of the press in the United States, Professor Henry Schofield in 1914 deplored the characteristic reaction of common law courts to assume that a codified text means to do no

³. MINN. CONST. of 1857, art. I, § 3.
⁴. Similar provisions may be found in the original constitutions of the following states: ARK. CONST. of 1836, art. II, § 7; CONNECT. CONST. of 1818, art. I, §§ 5-6; FLA. CONST. of 1838, art. I, § 5; IDAHO CONST., art. I, § 9; IOWA CONST. of 1846, art. I, § 7; KAN. CONST., Bill of Rts., § 11; KY. CONST. of 1796, art. XII, § 7; MO. CONST. of 1865, art. I, § 27; MONT. CONST. of 1889, art. III, § 10; NEB. CONST., art. I, § 5; NEV. CONST., art. I, § 9; N.M. CONST., art. II, § 17; N.D. CONST. of 1889, art. I, § 9; OHIO CONST. of 1802, art. VIII, § 6; R.I. CONST. of 1841, art. I, § 18; S.D. CONST., art. VI, § 5; TENN. CONST. of 1796, art. XI, § 19; TEX. CONST. of 1845, art. I, § 5; WIS. CONST., art. I, § 3.
⁵. Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 319 (Pa. 1788).
more than restate the common law, leaving the court to carry on as before: "Our own judges seem to have forgotten that the founders of the government are not distinguished for their reception of the English common law but for their adaptation of the democratic leaning and tendency of the constitutional side of it to a new career of popular freedom and equal justice." It remains true today that even a revolutionary text can be read for how much of the familiar it enshrines rather than how much it means to change.

It soon became accepted dogma that constitutional freedom of the press meant freedom from licensing and prepublication censorship. Yet if that alone was intended, a draftsman would be rather more enthusiastic than competent to write that "[t]he liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right"; and the eighteenth century draftsmen were not incompetent. Plainly, such a text intended a right of free expression beyond freedom from licensing. How could freedom of expression nevertheless be legally restrained?

One obvious way was a broad reading of the words "responsible" and "abuse," permitting the authorities to define and punish "abuse." The exercise of "liberty" of the press was virtuous and protected by the guarantee, but "licentiousness" was wicked and unprotected. By the time the suit to suppress the Saturday Press reached the Minnesota Supreme Court in State ex rel. Olson v. Guilford, that court could comfortably add one more to a string of recent precedents which permitted publications to be forbidden by such reasoning. In 1906, Senator Patterson of Colorado, publisher of two Denver newspapers, was held in contempt by the Colorado Supreme Court for publishing articles and cartoons which accused that court of partisan decisions in a political election battle. In 1912, the State of Washington convicted one Fox of a publication tending to en-

courage crime or disrespect for law, namely an article in favor of nudism.10 Four years later the same state sustained a conviction for libeling the memory of George Washington, which the court distinguished from "historical criticism made in good faith in a temperate manner."11 The Minnesota court itself had allowed a prosecution under a statute that prohibited any newspaper from publishing an account of the details of an execution, though the account was otherwise unobjectionable: "[I]f, in the opinion of the legislature, it is detrimental to public morals to publish anything more than the mere fact that the execution has taken place, then, under the authorities and upon principle, the appellant was not deprived of any constitutional right in being so limited."12 In the newly begun Minnesota Law Review, Dean W. R. Vance had written that restrictions on freedom of speech and of the press should not be expanded beyond those recognized at common law, but as to those, he saw no good reason why a publication should not be enjoined before the fact to forestall harm that could not be repaired by subsequent punishment.13

Not all decisions took a narrow view of freedom from censorship. The Nebraska Supreme Court lifted a restraining order obtained by a politician against newspaper publication of his earlier statement denying his candidacy:

The powerful agency of the press in the evolution of just and efficient government and the indefensible restrictions imposed upon publishers were understood generally when provisions similar to those quoted from the Nebraska Constitution were inserted in the fundamental law of many of the states. In the light of history, some of the leading purposes disclosed by the language of the Constitution cannot be misunderstood. The power to exercise a censorship over political publications, as formerly practiced, is taken away. The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government.14

The Minnesota Supreme Court brushed aside such objections in the case of the politically scandalous and defamatory Saturday Press. The legislature had provided that anyone in the business of publishing or circulating such a newspaper could be enjoined from publishing or circulating material of the

same kind, after a hearing in which it would be a defense "that the truth was published with good motives and for justifiable ends." 15 The court's opinion deserves quoting as a summation of the conventional judicial view of freedom of the press in 1928:

The liberty of the press consists in the right to publish the truth with impunity, with good motives, and for justifiable ends; liberty to publish with complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character when tested by such standards as the law affords. The constitutional protection meant the abolition of censorship and that governmental permission or license was not to be required, and indeed our constitution... gave the individual freedom to act—but to act properly or within legal rules of propriety. ... In Minnesota no agency can hush the sincere and honest voice of the press; but our constitution was never intended to protect malice, scandal, and defamation when untrue or published with bad motive or without justifiable ends. It is a shield for the honest, careful, and conscientious press. ... There is a legal obligation on the part of all who write and publish to do so in such a manner as not to offend against public decency, public morals, and public laws.16

For good measure, the court recited: "It is the liberty of the press that is guaranteed—not the licentiousness."17

This was the prevailing state of the law when a majority of the United States Supreme Court embarked on extending protection under the Federal Constitution against infringements of freedom of speech and of the press by the laws of the several states. In retrospect, the simple formulas of "liberty" and "license," and of "freedom" and its "abuse," appear naive. So does the invocation of truth, sincerity, honesty, and justifiable ends as legal tests for freedom without any apparent concern about the deterring effect of anticipating that these qualities might be submitted to a court's or a jury's judgment. We no longer share the earlier judges' confidence in their own sermonizing nor in the unquestioned righteousness of their own or the community's judgment. Still, it is a fair question whether modern first amendment doctrine deals more clearly with the relevance of truth and motives and the legitimacy of ends.

A different evolution of freedom of expression under the state constitutions was not precluded, but it was not likely to happen in the absence of Supreme Court leadership under the first amendment. Not only the failure of state courts but the vulnerability of a nationally distributed press to liability under

17. Id. at 463, 219 N.W. at 773.
the standards of individual states required the extension of national protection of press freedom against state infringement.\textsuperscript{18} Once that extension occurred, however, the states' own constitutional guarantees practically disappeared from sight. In constitutional law, state courts that previously struggled to work out their own theories generally adopt the formulas of the Supreme Court once it enters the field, in part because thereafter counsel will argue nothing else.

Yet though freedom of expression owes its modern scope to federal decisions, the states' constitutional guarantees themselves did not disappear, and nothing precludes their further application independent of the first amendment. On the Supreme Court of Oregon, for example, we have repeatedly held that we need not and will not reach a question under the first amendment when the challenged law fails the test of the state's Bill of Rights.\textsuperscript{19} Oregon's guarantee, somewhat different from Minnesota's, provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."\textsuperscript{20} This text does not invite a verbal distinction between "liberty of the press" and "licentiousness;" in fact, it does not single out the press as an institution.\textsuperscript{21} The qualification "responsible for abuse," the Oregon court recently held, means responsibility to a private party "for injury done him in his person, property, and reputation," a remedy which itself is guaranteed elsewhere in the Bill of Rights. But we held that this responsibility could not in Oregon extend beyond compensation for actual injury to allow punitive damages for defamation, although punitive damages are not barred by the Supreme Court's decisions under the first amendment.\textsuperscript{22}

Without the opinions of Brandeis and Black and those who followed them to write for the Supreme Court, the state constitutions might never have recovered from Blackstone and Kent.

\textsuperscript{19} E.g., State v. Spencer, 289 Or. 225, 228, 611 P.2d 1147, 1149 (1980); Deras v. Myers, 272 Or. 47, 53, 535 P.2d 541, 544 (1975).
\textsuperscript{20} OR. CONST., art. I, § 8.
\textsuperscript{22} Wheeler v. Green, 286 Or. 99, 119, 593 P.2d 777, 788 (1979). The language quoted in the text is from OR. CONST., art. I, § 10, which provides: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."
Cooley and Story. State courts, of course, cannot extend first amendment freedoms where the Supreme Court does not. Nothing but the singleminded focus on that amendment, however, prevents making principled arguments to a state court why the state’s own standards respect the claimed freedom apart from any federal constraint.

III. NEAR’S ANTECEDENTS

Though there were good reasons to transcend the barriers of federalism and to hold the states to first amendment standards, the manner in which this was done affected first amendment doctrine itself.

The first amendment itself, of course, was not directed against state laws. James Madison proposed and the House of Representatives included such a provision in the original Bill of Rights, but the Senate eliminated it. What remained was the prohibition that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Only the nationalization of citizenship in consequence of the Civil War offered an opportunity to explore what rights of political expression, at least, national citizenship might place beyond local interference.

The first sentence of the fourteenth amendment defined national citizenship and forbade the states to “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” The Supreme Court soon vitiated the force of this clause in its first case under the amendment.23 Seeking to show that the Court’s opinion had not drained the clause of all meaning, Justice Miller cited “the right to peaceably assemble and petition for redress of grievances” among the “rights of the citizen guaranteed by the Federal Constitution.”24 The only part of the Federal Constitution referring to assembly and petition, of course, is the same first amendment that guarantees freedom of the press.

This promising dictum, however, did not bear fruit. Having destroyed the privileges and immunities clause, the Court later manhandled the due process clause into service to meet persistent demands for judicial protection of business from state reg-

24. Id.
ulation, quite divorced from any question of process. Thus bereft of the contours of its text or of its original significance, the due process clause provided only the swampliest grounds for substantive scrutiny of state policies, on which the Court proceeded to erect such formulas as whether a state law was a "reasonable" exercise of the "police power" for public health, morals, or welfare. This was the available judicial theory when freedom of expression sought a constitutional refuge from the states. Ironically, the lead on the Court eventually had to come from those Justices most hostile to the notion of "substantive due process."

Contrary to the later mythology, Justice Holmes, who had little use for this notion, was more hindrance than help. When Colorado's Senator Patterson tried to appeal his contempt conviction, Holmes, then recently transplanted from the Massachusetts to the federal bench, wrote for the Court in dismissing Patterson's objections for lack of a federal question. Holmes's opinion, however, proceeded in dicta to reassert the old line of Oswald's case between "previous restraints" and punishment for contempt for obstructing the administration of justice. Only the indomitable and prescient John Marshall Harlan dissented on constitutional grounds. Because Harlan's analysis is all but forgotten in today's constitutional teaching, it deserves to be quoted at length:

Now, the Fourteenth Amendment declares, in express words, that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' As the First Amendment guaranteed the rights of free speech and of a free press without due process of law. . . ." U.S. Const. amend. XIV, § 1. 26. Patterson v. Colorado ex rel. Attorney Gen., 205 U.S. 454 (1907). 27. Respublica v. Oswald, 1 U.S. (1 Dall.) 319 (Pa. 1788). 28. We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgement on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. In the next place, the rule applied to criminal libels applies yet more clearly to contempts.

against hostile action by the United States, it would seem clear that when the Fourteenth Amendment prohibited the States from impairing or abridging the privileges of citizens of the United States it necessarily prohibited the States from impairing or abridging the constitutional rights of such citizens to free speech and a free press. But the court announces that it leaves undecided the specific question whether there is to be found in the Fourteenth Amendment a prohibition as to the rights of free speech and a free press similar to that in the First. It yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such 'previous restraints' upon publications as had been practiced by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any State since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge them. In my judgment the action of the court below was in violation of the rights of free speech and a free press as guaranteed by the Constitution.29

Holmes wrote again for the Court to sustain Fox's conviction for publishing his defense of nudism, but by then he only had to hold that the Washington statute was not too vague for due process. Liberty of the press was not even mentioned.30

The following year, Louis Brandeis joined the Court. Famous for his briefs in defense of state social legislation, Brandeis was no friend of substantive due process. A Minnesota case predating Near provided an occasion to consider whether the Federal Constitution protected freedom of expression in the states. Joseph Gilbert, a leader of the Nonpartisan League, made a speech against American participation in World War I and was convicted under a statute making it a crime to discourage military enlistment. The Minnesota Supreme Court saw no violation of the state's constitutional guarantee of freedom to speak one's sentiments on all subjects.31 In the United States Supreme Court, a majority found Gilbert's criticism of the motives of the war to be beyond the limits of free speech announced in similar decisions under the Federal Espionage Act, again without deciding whether the Constitution protected freedom of speech against state impairment at all.32 In

29. Id. at 464-65 (Harlan, J., dissenting).
31. State v. Gilbert, 142 Minn. 495, 171 N.W. 798 (1919) (per curiam).
33. Id. at 332. Accord, Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211
dissent, Brandeis asserted that the right to speak freely on national policies was a privilege or immunity of national citizenship even before the fourteenth amendment, which that amendment merely reaffirmed, like Harlan, he cited the earlier reference to the right of assembly and petition in the *Slaughter-House Cases.* As for the due process clause, he contrasted the Court's denial of liberty to criticize the war with its readiness to find in that clause a right to contract for insurance, to discharge union workers, or to conduct an employment agency, ending bitterly, "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."

On this point, at least, Brandeis had made some headway by 1927, when he published his famous concurring opinion in *Whitney v. California.* By then the Court had "assumed" that freedom of speech and of the press were among the "liberties" protected by the due process clause of the fourteenth amendment, though, like the other examples of such liberties, subject to "reasonable" state regulation in the exercise of the state's so-called "police power." Brandeis was not reconciled to "substantive due process," but in *Whitney* he abandoned the battle over premises and, now joined by Holmes, fought only for proof of incitement and immediate serious danger before

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34. *Id.* at 337-38 (Brandeis, J., dissenting). Brandeis also cited the repetition of the same dictum in *United States v. Cruikshank,* 92 U.S. 542, 552 (1875). 254 U.S. at 338 (Brandeis, J., dissenting).

35. 254 U.S. at 343 (Brandeis, J., dissenting). Justice Brandeis referred to the following decisions: *Adams v. Tanner,* 244 U.S. 590 (1917); *Coppage v. Kansas,* 236 U.S. 1 (1915); *Allgeyer v. Louisiana,* 165 U.S. 578 (1897).

36. 274 U.S. 357 (1927) (prosecution for "criminal syndicalism" in organizing the Communist Party of California).

37. *Id.* at 371 (citing *Gitlow v. New York,* 268 U.S. 652, 666-68 (1925) and cases cited therein).
speech can be suppressed.\textsuperscript{38}

Thus a Court majority that saw all liberties through the blurred lens of substantive due process diverted the defense of freedom of speech and of the press from the first amendment's clear focus on the invalidity of repressive laws at the time of enactment and reduced its defenders to litigating the "danger" of exercising those freedoms in individual cases.\textsuperscript{39} In the early years of the Roosevelt majority, there was one more revival of interest in recognizing freedom of speech and freedom of the press as privileges and immunities of citizens, as Harlan had argued. It appeared in an opinion by Justice Owen Roberts in \textit{Hague v. Committee for Industrial Organization},\textsuperscript{40} joined by Justice Black and in part by Chief Justice Hughes, but it fell short of a majority. Many years later, the Court went beyond Brandeis to hold a "criminal syndicalism" law, like California's, void on its face without reference to the defendant's conduct or its dangers in the individual case.\textsuperscript{41} But before then the Court's adjudication-oriented formulas had shaped and distorted the focus of first amendment doctrine itself.

\section*{IV. THE NEAR DECISION}

Due process, however, and not the first amendment, still

\textsuperscript{38} Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. \ldots

\ldots Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied. 274 U.S. at 373, 378-79.

\textsuperscript{39} On the same day as the decision in \textit{Whitney v. California}, the Court reversed a Kansas IWW organizer's conviction of criminal syndicalism on the ground that references to a class struggle in the preamble of the Industrial Workers of the World constitution alone were insufficient evidence of criminal intentions. \textit{Fiske v. Kansas}, 274 U.S. 380 (1927).

\textsuperscript{40} 307 U.S. 496 (1939). Frankfurter and Douglas, JJ., did not participate. Stone, J., concurred in the judgment, joined by Reed, J., and McReynolds, J. Butler, J., separately dissented. \textit{See also} \textit{Edwards v. California}, 314 U.S. 160 (1941), in which Justices Black and Murphy joined with Justices Douglas and Jackson in finding a national privilege of interstate travel and migration, which the majority rested on the commerce clause.

\textsuperscript{41} \textit{Brandenburg v. Ohio}, 395 U.S. 444 (1969) (per curiam).
was the formal premise for reviewing state convictions of speakers or editors when Minnesota's injunction against the *Saturday Press* reached the Supreme Court in 1931. Two propositions made *Near v. Minnesota* a landmark decision. The first was the announcement in Chief Justice Hughes's majority opinion that "[i]t 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." 42 In preceding opinions, this proposition had only been assumed for purposes of argument. After *Near*, decisions defining these liberties against state and local governments came to define them also against the federal government under the first amendment and vice versa.

The proposition for which *Near v. Minnesota* became famous was the second: that liberty of the press precluded "previous restraints," not only in the form of licensing or prepublication censorship, but also in the form of judicial injunctions against publication of material that would not be privileged against subsequent penalties. On this issue the *Near* Court divided five to four.

The disagreement was over the character of Minnesota's injunction more than over major premises. The majority concluded that by enjoining future issues of yet unpublished content, thus placing on the publisher the burden of defending its truth and good motives, the court's order "not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship." 43 The dissenters argued that the Minnesota court enjoined only publication of further material of a kind that was conceded or properly adjudged to be defamatory and unprivileged; the order left the *Saturday Press* free to publish anything that it believed it could defend in a possible contempt proceeding as not being of the same nature. This did not resemble the advance control by licensers and censors that was meant by the phrase "previous restraint."

Enthusiasm for *Near v. Minnesota* as a landmark of liberty is sobered by how much was conceded on the way to achieving its formal establishment of liberty of speech and of the press

42. 283 U.S. at 707. In the oral argument, however, Chief Justice Hughes reportedly told counsel that he need not argue further whether or not freedom of the press was a privilege or immunity under the fourteenth amendment, because "prior decisions of the court so held it." See F. FRIENDLY, supra note 8, at 129.

43. 283 U.S. at 712.
under the fourteenth amendment and the doctrine against previous restraints. *Near* added nothing to the substance of free expression; if anything, it sacrificed some substance to gain its major goal. Holmes, who had written *Patterson v. Colorado*44 twenty-five years earlier, was essential to a majority, and his dicta in *Patterson* are duly repeated: The main purpose of the constitutional guarantees is to prevent previous restraints, not to prevent the subsequent punishment of such publications "as may be deemed contrary to the public welfare."45

[It is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. . . . 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.46

There was a genuine and important difference of principle between the majority and the dissent insofar as *Near* could fairly be read to foreclose any intervention, by courts as well as executive agencies, before actual publication of material that would be subject to subsequent sanctions. Such a constitutional principle would have far-reaching implications. But it, too, was deeply qualified in the very act of announcing it: "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."47 There followed dicta which seemed again to equate the question of previous restraint with the question of limits on the substance of what might freely be said or written, dicta which, almost in passing, assumed a denial of such freedom as to subjects of speech and press—sex and military operations—that the Court in fact had not decided.48 Their sequel occupies most of our remaining discussion.

*Near* stands as a warning against a common tactic—to seek assent to a principle by conceding limits on its reach that may sound obvious in dicta but are not before the court. To counsel

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44. 205 U.S. 454 (1907). See text accompanying note 26 supra.
45. 283 U.S. at 714 (quoting *Patterson v. Colorado* ex rel. Attorney Gen., 205 U.S. 454, 462 (1907)).
46. Id. at 715 (citing, among others, *Patterson v. Colorado* ex rel. Attorney Gen., 205 U.S. 454 (1907) and *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319 (Pa. 1788)).
48. Id. at 718.
who has only the immediate case to win, such concessions are irresistible when a court probes for the implications of his or her claim. After the argument, they can be forgotten, and should be. In Supreme Court opinions, however, such limiting dicta often will appear to be necessary to the principle itself and later rise to overwhelm it when the occasion actually arises. This happened after Near v. Minnesota.

V. THE LEGACY OF NEAR v. MINNESOTA

Near left two legacies: the principle against previous restraints and the dicta that excluded some subjects from the constitutional freedom of speech and of the press.

A. PREVIOUS RESTRAINTS

The rule against previous or, as it is now more often called, prior restraint entered modern Supreme Court doctrine under the aegis of history rather than logic or policy, at a time when accepted notions of freedom of speech and of the press excluded most anything offensive enough to invite actual suppression and punishment. When so much expression was in substance outside constitutional protection, the Supreme Court's announcement that even punishable publication could not be restrained in advance was a famous victory. Near promised to bar attempts to censor publications which, once published, could be penalized but in fact might not be. In time, however, the meaning of the victory and its logic proved less obvious.

The questions of meaning and of logic can be quickly summarized. A law that prohibits specified kinds of publication under threat of a penalty, such as an ordinary criminal law, is meant to restrain the publication. Its object is to prevent publication, not to impose punishment. The law is not frustrated when no publication, and therefore no punishment, occurs; to the contrary, it has served its purpose. Why, then, is an order directed to the publisher of the Saturday Press not to publish scandalous and defamatory lies more or less a "prior" restraint than a criminal law against publishing such material? Neither

49. The doctrine's potential for confusion is shown by State ex rel. Daily Mail Publishing Co. v. Smith, 248 S.E.2d 269 (W. Va. 1978), in which the West Virginia Supreme Court of Appeals treated a criminal prohibition against publishing the names of juvenile delinquents as a prior restraint forbidden by the first amendment, and the state did not challenge that characterization on writ of certiorari. The United States Supreme Court affirmed the first amendment
form of law achieves physical prevention; the determined speaker or writer may choose to publish and suffer the consequences. Moreover, if the material is of a kind that one has no freedom to speak or publish, material that the law may rightly suppress or punish, then why, English history aside, should the law regard mere differences in the form of threatened sanctions as the essence of liberty?

Long before *Near v. Minnesota*, Roscoe Pound concluded that there was no good reason against enjoining a threatened libel or invasion of another's privacy in advance of the first publication in order to prevent irreparable harm.\(^5\) His implicit assumption, of course, was that an injunction is a stronger deterrent than tort law, an assumption which the difference between civil damages and punishment for contempt makes plausible. When the alternative to punishment for contempt is criminal punishment, that difference is less apparent. Indeed, once the potential sanctions are equal, it can be argued that a prepublication restraining order, after full and fair procedures, can be more narrowly drawn for the occasion than a general statute and thus can pose a lesser risk to a publisher, including less risk of overcautious self-censorship. Yet precisely the specter of writers, publishers, or theatrical and film producers tempted to seek safety in prepublication clearance is what gives us pause.

In the mid-1950s, at a difficult time for the first amendment, Professor Thomas Emerson undertook a systematic defense of the doctrine against prior restraint.\(^5\)\(^1\) He observed that the concept remained "curiously confused and unformed," loosely embracing different types of regulations that range from licensing laws and permit requirements to laws disqualifying proponents of unsound views from various occupations, benefits, or services.\(^5\)\(^2\) Without repeating Emerson's analysis in detail, it may

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52. *Id.* at 649. Loyalty oaths or secrecy oaths prior to employment, access to benefits, or access to information also are previous restraints against forbidden expression. In Snepp v. United States, 444 U.S. 507 (1980), the Supreme Court held that an obligation not to publish without prior agency review led to a forfeiture of the author's royalties by imposition of constructive trust in favor of the government. Of course, this sanction is an ineffectual gesture when the publication is not for the sake of profit.
be said that he found the greatest value of the doctrine against prior restraints in barring the kind of administrative censorship whose institutional dynamics are those of much single-purpose administration: a tendency to expand in coverage, zealous or wooden enforcement, a predilection for the easy adverse decision, low public visibility, and limited independent review. This indeed is the kind of censorship that in the most conservative view was the target of the constitutional guarantees. But Emerson's second defense of the rule against prior restraints is more interesting. Not only is administration of prepublication restraints easier and more expansive, he argued; it also is more apt to be effective. By offering speakers or writers the safety of advance clearance, it permits them to avoid risk and thereby keeps the forbidden communication from the public. A system limited to prosecution and punishment after the fact is preferable because it is less likely to work.53

Emerson's argument presents the central paradox of the rule against prior restraint. The expression which the rule protects against interference is by hypothesis unlawful expression, material whose publication will cause harm that cannot be undone by a later penalty and that in its substance is not privileged by the constitutional guarantees of free expression. We choose the preventive effect of testing drugs or airplanes and licensing doctors or pilots in preference to the deterrent effect of manslaughter prosecutions and damage actions. Why not also in order to prevent harm from unlawful publications? Has not the press itself demanded prior restraints to protect its financial interests, as when the International News Service pirated stories reported by the Associated Press?54 Emerson argued, in effect, that in the realm of words and ideas, even unlawful, punishable expression nevertheless has value under the Constitution. To put it more pragmatically, if the Constitution does not foreclose laws against words and ideas altogether, they might at least be ineffective laws. This defense of the doctrine against prior restraints is not easily divorced from one's view of what expression is or is not constitutionally free from all governmental restraint.

The "puzzle of prior restraint" was reexamined by Professor Stephen Barnett55 after Nebraska Press Association v. Stu-

53. See generally Emerson, supra note 51, at 656-60.
the 1976 decision in which the Supreme Court relied on the "presumption" against prior restraints to strike down a gag order limiting press and broadcast reporting of a criminal case. Though the entire Court joined in the conclusion, only Justices Brennan, Stewart, and Marshall were prepared to declare such orders invalid under any circumstances, while Chief Justice Burger's majority opinion exhumed the feeblest of all formulations of "clear and present danger" to describe the applicable test. But there was a noteworthy difference between Near and Nebraska Press Association. In Near, it was assumed on all sides that the libelous content of the Saturday Press was properly subject to civil and criminal sanctions after publication. This is what made the Court's ruling against prior restraint a famous victory. Had there been constitutional protection for the substance of the published material, its publication could not be restrained a fortiori; the Minnesota courts would have denied the injunction.

In Nebraska Press Association v. Stuart, on the other hand, the issue of prior restraints seems to appear in reverse. There was no assumption that the material in question, information about the investigation and prosecution of a crime, was outside the range of freedom of speech and of the press. There was no law against its eventual publication and (apart from any libel or invasion of privacy) there could not be. To suggest that a gag order nevertheless might be valid does not quite say that only a prior restraint would be permissible, if the "presumption" against it were overcome, but use of the doctrine in this setting is quite remote from Near v. Minnesota.

This led Professor Barnett to conclude that the only real

57. The majority opinion employed the following test:

We turn now to the record in this case to determine whether, as Learned Hand put it, "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." United States v. Dennis, 183 F.2d 201, 212 [2d Cir. 1950], aff'd, 341 U.S. 494 (1951); see also [L. Hand, The Bill of Rights] 58-61 (1958). To do so, we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.

difference between prepublication restraining orders and general statutes lay in the rule that one who disobeys such an order, unlike a statute, cannot raise the defense that the original order was invalid. Once this "collateral bar" rule is abandoned, at least insofar as the restraining order rests on the content of the forbidden expression, gag orders against constitutionally protected expression are impermissible under ordinary free speech analysis without reference to the doctrine of prior restraints. The doctrine would be reserved to prevent prepublication restraints, as in Near, against expression that may not be protected against subsequent sanctions.58

The best case that can be made for a temporary gag order is that such an order is not directed at censoring the substance of the publication but only at its timing, like other regulations accommodating the "time, place, or manner" of expression to other important social interests. The commercial compulsions of the daily and broadcast press toward instant reporting and its disdain for yesterday's news are not quite synonymous with its piously claimed duty to inform the public. But an order not to report the progress of a criminal investigation before trial may suppress publication not for a few hours but for months. In fact, when no prosecution ensues, such an order can effectively stifle public inquiry into why it has not.

There is a deeper, more ominous issue in a rule that retains the possibility of gag orders until "the danger" has passed. Its premise is that there are some things that must be kept from Americans if they, or some of them, are to do their jobs as citizens. Nowhere is this premise as appealing as when we seek to assure a defendant a trial by a jury untainted by pretrial information. We pride ourselves on the principle that a person is judged only on evidence presented and subject to rebuttal in open court, and we select, instruct, and sequester jurors to preserve it; but does the need to preserve the ignorance of a few allow the government to impose ignorance on all? Does the importance of keeping information from falling into the wrong hands justify suppressing information for everyone? The premise of higher necessity is everywhere the archenemy of constitutional rights, including freedom of speech and of the press; once conceded in the interest of fair trials, it can hardly be confined to that worthy cause. But this premise, too, is a legacy of Near v. Minnesota.

58. See Barnett, supra note 55, at 551-60.
B. Near's Exceptions to Freedom From Censorship

This second legacy of Near v. Minnesota appeared in the dicta that excluded from its principle two subjects which came to overshadow the crude libels of the Saturday Press. In view of its original obscurity and subsequent effects, the passage needs to be examined as a whole:

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.' Schenck v. United States, 249 U.S. 47, 52 .... 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. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 .... Schenck v. United States, supra. 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.59

The passage begins as a statement of exceptions to the rule against previous restraint. But the "exceptional case" cited in illustration, Schenck v. United States, involved no previous restraint; it was a criminal prosecution for urging opposition to military service in World War I. The quotation from Schenck and the sentences that follow merged the issue of previous restraint with that of constitutional freedom against subsequent sanctions.

Nor was Schenck authority for excluding the "publication of the sailing dates of transports or the number and location of troops" from the constitutional freedom of speech and of the press, which the passage lumped together with "actual obstruction" to the recruiting of troops as something that the government might "prevent." Schenck dealt with the limits of advocacy, with persuasion to action, akin to the "incitements to acts of violence and the overthrow by force of orderly government" mentioned later in the same passage. Schenck's ante-

cedents were in the law of criminal conspiracy and attempts, not of censorship and secrecy, and the opinion assumed the existence of a law forbidding the resulting acts or effects. Indeed, the defendants seemed to admit that they could be punished if their efforts actually obstructed the recruiting of troops, and Holmes's conclusion for the Court was that "we perceive no ground for saying that success alone warrants making the act a crime."60

Holmes's opinion in *Schenck* has been superseded even in its approach to the limits on advocacy.61 But the passage in *Near* had no precedent at all for its assumption that newspaper reporting or public discussion of the government's military operations, as distinct from advocacy or incitement to unlawful acts, was excluded from freedom of speech and of the press. The passage was similarly cryptic about the means by which the government might "prevent" such publication, or "enforce" what it called "the primary requirements of decency" against "obscene publications." Presumably the exceptions related to judicial restraining orders, which otherwise were being banned as prior restraints. But was this alone intended, on the doubtful assumption that such orders always assure actual compliance more than criminal laws? Prior restraints had other forms: did the Court mean that in the excluded categories government could choose to "prevent" or "enforce" by the more effective means of prepublication submission to censorship, by issuing and withdrawing licenses, or by seizing presses or files? The passage does not say that, but neither does its off-hand and ill-considered form exclude these implications.

Of the categories which the passage so summarily dismissed from constitutional protection, the third, equitable protection of private rights, was the problem that had occupied Roscoe Pound. It is something less than governmental censorship insofar as the protective judicial order is sought by a private plaintiff, and modern developments in the constitutional law of defamation, privacy, and commercial speech prevent such orders against reports or comments on most matters of public concern. As to *Near*'s dicta about "obscene publications," Justice Brennan noted as late as 1957, when in his first year on the Supreme Court he made a 5-4 majority for exclud-

60. *Id.* at 52. Advocacy of action, in the setting of a strike where it might have "all the effects of force," was also the issue in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). In that case the court sustained an injunction.

ing "obscenity" from freedom of the press, that the question of such an exclusion in fact had never previously been presented to the Court. The subsequent tragicomic story of this luxuriant specialty of constitutional law is too complex to review here. After fifteen years' experience with the course on which he had set the courts, Brennan declared the exclusion of "obscene publications" from liberty of the press to have been an error, but now he was in dissent.

It is, however, the first of Near's gratuitous dicta, the suppression of publication on a government's claim of national security, that has the most far-reaching implications for freedom of speech and of the press in a democracy. "No one would question," wrote Chief Justice Hughes, "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." To an experienced reader of legal briefs and opinions, a phrase like "no one would question" itself signals a promising target for scrutiny. It typically introduces an assertion without citation of legal or empirical support. If this much cited dictum has not been questioned, should it not be? Is it indeed beyond question, when "prevent" takes the form of censoring, enjoining, or punishing publication by speech or press?

Forty years after Near, the eminent Alexander Bickel, arguing for the New York Times against the Government's demand that the courts enjoin publication of the Pentagon Papers, was not prepared to question the old chestnut when it was put to him by Justice Stewart. As an advocate, he preferred the easier answer that nothing of the kind was involved


THE COURT [Stewart, J.]: But let me give you a hypothetical case. Let us assume that when the members of the Court go back and open up this sealed record, we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of 100 young men whose only offense had been that they were 19 years old, and had low draft numbers. What should we do?
MR. BICKEL: Mr. Justice, I wish there were a statute that covered it.
THE COURT: Well there isn't, we agree—or you submit—so I'm asking in this case, what should we do?
MR. BICKEL: I'm addressing a case which I am as confident as I can be of anything, Your Honor will not find that when you get back to your chambers. It's a hard case. I think it would make bad separation of powers law, but it's almost impossible to resist the inclination not to let that information be published, of course.
THE COURT: . . . I'm posing a case where the disclosure of something
in the government documents that the Times was publishing. But the advocate's maneuver that wins a battle often relinquishes ground on which to win a war. The implication that an injunction might hinge on first determining the nature of the information to be published is a fatal concession when the issue is prior restraint.

The Pentagon Papers Case

The Pentagon Papers themselves were past history, a Defense Department study for internal purposes entitled "History of U.S. Decision-Making Process on Viet Nam Policy." For present purposes, I pass by the difference between past and contemporaneous policy. The Department marked the study to be kept secret, the administrative device used to control its distribution and storage so as to prevent its unauthorized dissemination. When the study nevertheless came into the hands of the New York Times and the Washington Post, which decided to put it before their readers, the Government demanded that federal courts in New York and Washington enjoin these newspapers from doing so.

In retrospect, we know that the Supreme Court decided against the Government's claims. The press could mount the Pentagon Papers case as another trophy between its earlier triumph over Minnesota and its later victory over Nebraska. The striking fact remains that the constitutional necessity of this outcome was not so clear to the lower courts as to preclude temporary restraints of the press. Is it clear after the Pentagon Papers decision?

The official opinion was a three-paragraph "per curiam" which merely stated that the Government had not met the "heavy burden of showing justification" for a prior restraint.

in these files would result in the death of people who were guilty of nothing.

MR. BICKEL: You're posing me a case, of course, Mr. Justice,... in which the chain of causation between the act of publication and the feared event—the death of these 100 young men—is obvious, direct, immediate—

THE COURT: That's what I'm assuming in my hypothetical case.

MR. BICKEL: I would only say, as to that, that it is a case in which, in the absence of the statute, I suppose most of us would say—

THE COURT: You would say the Constitution requires that it be published, and that these men die? Is that it?

MR. BICKEL: No. No, I'm afraid I'd have—I'm afraid my inclinations of humanity overcome the somewhat more abstract devotion to the First Amendment, in a case of that sort.

That is the announcement of a result, not an analysis, and it forecloses nothing for the future. Analysis was scattered through individual opinions of all nine justices. They concern us here only in tracing the legacy of *Near v. Minnesota*.

One obvious difference between the suit brought to the Minnesota trial court in *Near* and the Federal Government's suits to enjoin the *New York Times* and *Washington Post* might have been enough to dispose of the Pentagon Papers cases. It is the old and elementary difference between the courts' role in enforcing a law and making a law. Minnesota's legislature had made it a law that anyone who published a malicious, scandalous, and defamatory newspaper was guilty of a public nuisance and should be enjoined from continuing it. State and federal constitutional guarantees entered the case only in their normal role as outer limits on the permissible reach of law. Within those limits, Minnesota's courts had to apply Minnesota's law, not make it.

In the Pentagon Papers case, however, the federal attorneys could cite no law prohibiting the press from publishing government documents or other information about national defense activities. Justice Douglas pointed out that Congress had rejected a version of the Espionage Act that would have authorized the President to proclaim such a prohibition and instead limited the act to conventional espionage communications.65 Certainly Congress had not directed courts to enjoin errant newspapers, as Minnesota had. The *Times* and the *Post* broke no law and could not be punished, if the courts did not first make such a law. Although dicta in some of the nine opinions got sidetracked into questions about inherent presidential power, the President had not attempted to enjoin the newspapers by executive order, as President Truman had tried to seize the steel mills.66 What the Government asked of the courts was not to apply a law but to supply one. For Justice Marshall that was enough to dispose of the case.67 In a somewhat different vein Justice Stewart suggested that it was up to the executive to maintain confidentiality within its own ranks without calling on the courts to perform that function.68

Why, then, should a court invoke the liberty of the press and the rule against prior restraints? In part, no doubt, refer-

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68. *Id.* at 727-30 (Stewart, J., concurring).
ence to the first amendment is almost reflexive in any legal action against the press, so much so that a favorable decision on other grounds might be taken as a sinister hint. The familiar doctrine furnished easy common ground for the per curiam announcement of the Court's holding. But the first amendment is cast in an ambiguous role when there is no law to be tested for constitutionality.

"Congress shall make no law . . . abridging the freedom of speech, or of the press," states the first amendment; nor the freedom, one might add where discussion of government is concerned, "to petition the Government for a redress of grievances." Here, Congress had made no such law. If the government had claimed the authority of a law, a court's duty would be to determine whether the law Congress had made abridged the freedom of speech, or of the press, or of petition. The question would not be whether some other law that Congress had not made might meet the government's objective.

To begin a case with the question how much abridgment the first amendment permits, on the other hand, implicitly assumes that the law extends to whatever restraint the amendment does not preclude. When the executive requests an injunction without a law to enforce, it asks the court to become a partner in government, a throwback to the King's chancellors of the days before lawmaking became the business of elected representatives. The first amendment also is not the first or sole question of the lawfulness of court orders to suppress pretrial disclosures. When a court takes on the role of lawmaker for a perceived need, it no longer confronts the amendment as basic law limiting the power of others, but rather as a fetter on the court's own power to accomplish what it deems necessary. That is not the most promising perspective for first amendment doctrine.

**Implications of the National Security Exception**

Suppose, however, that Congress made a law prohibiting the press from publishing information which the government declares to be secret? Would it not be a law "abridging the freedom of the press?" Surely the sophistry that what such a law restrains is the press but not part of the *freedom* of the press too patently begs the question. Does the first amendment nevertheless permit such a law simply because it is un-
thinkable that it does not—because, in *Near*’s words, no one would question it? Or could another Alexander Bickel meet the *Near* dictum head-on, if the occasion demanded it?

Although on that occasion it proved unnecessary, a number of troubling questions seem to me to invite thought about the unthinkable.

First, it is important to distinguish between breach of secrecy and publication. The unauthorized transmission of confidential information (more dramatically phrased as “intelligence” and “espionage”) is not publication; normally it is itself kept secret. Whatever dangers such breaches of secrecy pose, if some overriding danger is claimed as the basis of denying first amendment protection to publication, then the consequences of publication, not the consequences of a breach of secrecy, must have been the object of the legislative enactment, and they must be shown to be real. In this sense, “publication of the sailing dates of transports or the number and location of troops” was not the best example. Perhaps it is not inconceivable that an enemy might first learn such information from reading it in the *Times*. It seems more likely that when the press has the information, its secrecy already cannot be relied on, and publication may only alert the government to that fact. Thus a more relevant example is the government’s effort to suppress information usable for making atomic weapons, information which is no secret to other governments, hostile as well as friendly, but which each wants to keep out of “dangerous” hands. In the Pentagon Papers case, the fear that the government would appear unable to keep its secrets was itself claimed, rather circularly, to be an overriding danger from publication. The more information about its international actions the government can successfully suppress at home, the more effective it will appear, and hence be, abroad. Jefferson and Madison would appreciate this logic more as diplomats than as sponsors of the first amendment.70

Second, a doctrine that grave dangers threatened by publication can override the first amendment must face the test of its own effectiveness. “Prevent,” in the *Near* dictum, cannot stop with penal laws and restraining orders if prevention of

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70. Chief Justice Hughes had been Secretary of State from 1921 to 1925. His successful opponent in the 1916 presidential election, Woodrow Wilson, once called for “open covenants, openly arrived at,” and Henry Stimson, Secretary of State at the time of *Near v. Minnesota*, thought of codebreaking that “gentlemen do not read each other’s mail.” Of course, these men’s views are now recognized as quaintly naive.
overriding danger is the premise. These may not silence one who believes it crucial to make public what he or she knows. Moreover, their reach is limited. If the American press is muzzled despite the first amendment, another Daniel Ellsberg may take his Pentagon Papers to Montreal or Paris. Books about the operations of the Central Intelligence Agency may be published in London or Stockholm. Americans may have to smuggle such reports home, as they once did the novels of Henry Miller, or listen to the British Broadcasting Corporation to find out about their own government as some other people must. But if the secrecy that is said to justify all this nevertheless will not be assured, the justification would seem to fall with it.

Most important, to suppress public reporting of government acts and policies in the name of security also means suppressing the political means of affecting those acts and policies. The ships that are about to sail may be headed for the Bay of Pigs. The troops may secretly have been sent to Cambodia, in numbers and locations wholly unknown to and unapproved by the Congress. The scenario by which to test Near’s dicta is not disclosure of military secrets to aid an enemy in a declared war; that has separate constitutional status as treason. The critical test, rather, is to posit that a public leader, let us say a Senator, is given confidential information that he believes to be credible and that deeply disturbs him about the government’s course of conduct.

Assume, though it has little relevance, that the Senator makes quiet attempts to pursue this information which are met with assertions of secrecy in the interests of national security: the subject is “classified.” The matter strikes him as so important that he decides to make a speech about what he has been told, in or outside the Senate. Can any law that prohibits this speech, or that would enjoin the press from reporting and discussing it, pass muster under the first amendment? Perhaps the informant broke some law; possibly the Senator may be censured by the Senate; but surely press coverage of their

71. U.S. Const. art. III, § 3:
Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

72. Compare Gravel v. United States, 408 U.S. 606 (1972) (restricting a staff
disclosures could not constitutionally be punished as a crime, or as contempt, or suppressed by seizing a press run or a broadcast tape, even if they disclosed the most closely guarded secret.73

Perhaps it is this scenario that in the past has given Congress pause in enacting such secrecy laws. But the first amendment question does not hinge on the hypothetical speaker's membership in the Congress; he or she might be a candidate, a professor, a clergyman, an editor, or anyone. A prohibition against publicly describing what the government is doing is a prohibition against effectively urging that it change its course.

Countless illustrations can be imagined. An engineer may be convinced that the ships which are about to sail are certain death traps for the troops and should be stopped.74 A scientist on the Manhattan project might be shocked that radioactive wastes are secretly placed where they endanger unknowing people and decide that he must warn the community.75 An air force chaplain might learn to his horror that one bomber crew is scheduled to incinerate an entire city and think an attempt to stop it to be his sacred duty. A breakthrough in medicine can provide as much military advantage as a new weapon, but the doctor whose laboratory develops a lifesaving antibiotic might not honor the government's command to keep the discovery a military secret.76 Perhaps the government might con-

73. In Gravel v. United States, 408 U.S. 606 (1972), Justice Douglas stated that the first amendment would protect Beacon Press in publishing the Pentagon Papers after Senator Gravel had placed them into an official record of Congress, regardless whether or not the Senator or his aide acted within the “speech or debate clause,” of the Constitution. 408 U.S. at 633 (Douglas, J., dissenting).

74. In Bertolt Brecht's Threepenny Novel, rotten ships sold to the British Admiralty by a corrupt syndicate for use as troop transports sink in the English Channel within hours of leaving port. B. BRECHT, THREEPENNY NOVEL 38-44 (Bernard Hanison ltd. ed. 1938).


76. Another example of government efforts to censor academic or other research and theories developed entirely independently of the government is the contemporary attempt of the National Security Agency to suppress cryptographic research papers, so far by “voluntary” agreement. See Witt, Advances in Cryptography Press Issues of Computer Privacy, L.A. Times, May 16, 1981, at 1A, col. 1.
clude that the internment of a potentially hostile minority of enemy aliens had best be declared classified national security information, but the facts become known to a lawyer who proceeds to challenge the internment. An intelligence analyst learns that professional killers for organized crime whom government prosecutors have sought to put behind bars have secretly been recruited for undercover "security operations" and publicly denounces this arrangement, identifying the secret agents and their past criminal records.\(^7\) A cabinet officer resigns in order to oppose secret plans to invade another country. Another provides information about an impending new weapons technology, without going through the declassification process.\(^8\)

Any of these disclosures might be dangerous half-truths, motivated by self-righteous arrogance or political ambition, and might in fact cause real harm. The speakers, on the other hand, may turn Holmes's test for suppression around and insist that clear and present danger demands immediate public exposure. Does the first amendment permit the government to punish the publication of such disclosures—in a republic which conducts elections in the midst of wars, including a great civil war, and which would be at a loss how to continue legitimate government without them?

As first amendment doctrine has developed, the Supreme Court's preferred answer is that it all depends. On its face, of course, the amendment is directed at the national lawmakers and, in consequence, at officials who claim the authority of law for their acts. It tells them that a law abridging freedom of speech or of the press is beyond their powers when it is proposed or adopted, and no such abridgment can claim the authority of law. When constitutional law came to be equated with judicial review, to be conceived as law for courts rather than as law for government in advance of judicial review, most of its formulas were transmuted from rules designed to be observed when governments make or administer law into metaphors of balancing and adjectives of degree that describe only the process of case-by-case adjudication. That focus produces only formulas which will leave courts to reach whichever deci-

\(^7\) See S. 2216, 96th Cong., 2d Sess. (1980); H.R. 5615, 96th Cong., 2d Sess. (1980). This bill, entitled "Intelligence Identities Protection Act" was introduced to prohibit disclosure of CIA agents.

\(^8\) See HOUSE COMM. ON ARMED SERVICES, INVESTIGATIONS SUBCOMM. REPORT, 96TH CONG., 2D SESS., LEAKS OF CLASSIFIED NATIONAL DEFENSE INFORMATION—STEALTH AIRCRAFT (Comm. Print 1981).
sion they consider right under the circumstances. In first amendment doctrine, the most famous of these elastic formulas is the test of overriding danger.

The Pentagon Papers case should make clear that this approach to the first amendment is self-defeating when the publication of secrets is claimed to pose the overriding danger. Former Solicitor General Erwin Griswold later described in an entertaining speech the conditions under which the issue whether to censor two of the nation's greatest newspapers was argued and decided.79 When Griswold was called upon to argue for the government in the Court of Appeals, he knew nothing of what was in the Pentagon study or why the Government thought its publication needed to be suppressed. Neither he nor counsel for the newspapers had seen the study. The security guard who later delivered the forty-seven volumes to Griswold's office objected that the Solicitor General's secretary had no security clearance. The Solicitor General prepared a secret brief to the Supreme Court while his deputy wrote an open brief. The security guard was troubled that the secret brief would be filed with the Court's Clerk, who also might have no security clearance. When Griswold insisted on giving copies to counsel for the newspapers, he later learned that the security guard retrieved them immediately after the argument. If the danger of public disclosure is really the issue in litigation, what, in all seriousness, should we expect if the Government sought to disqualify a Justice whose views on the subject preclude his either wanting a security clearance or getting one?

Griswold showed the inescapable contradiction in an exception of dangerous secrets from the rule against prior restraints when he stated:

Let me say this... one of the reasons that the cases were started in the first place was that there was nobody in the Department of Justice who knew anything whatever about what was in them or who had ever heard of the Pentagon Papers before the New York Times started to print them. And so the real objective of starting the suit was simply to say 'For God's sake, give us time to find out what this is all about.'80

For exactly this reason, as long as the rule against prior restraints has such an exception, many judges will feel obliged to react in the same way by restraining the press to preserve the status quo. Judge Gurfein enjoined the New York Times for four days before deciding that it could continue publication of

80. Id. at 257-58.
the Pentagon Papers. Judge Warren felt similarly obliged by the Near dictum to restrain The Progressive magazine from publishing an article on making a hydrogen bomb. But to maintain the status quo means to forbid publication while a hierarchy of courts, on the basis of a secret record presented in secret proceedings, speculates on the likelihood of adverse effects from publication and their magnitude. It means a prior restraint in order to decide that a prior restraint is unconstitutional, as in the Pentagon Papers case. This contradiction was apparent to Justice Brennan, but even he shied from confronting the Near dictum head on. Only Justice Black, joined by Justice Douglas, was ready to proclaim that the emperor wore no clothes.

82. United States v. Progressive, Inc., 467 F. Supp. 990, 996 (W.D. Wis.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979); see Knoll, National Security: The Ultimate Threat to the First Amendment, 66 Minn. L. Rev. 161 (1981). The case was thoughtfully analyzed in two student notes: Note, United States v. Progressive, Inc.: The Faustian Bargain and the First Amendment, 75 Nw. U. L. Rev. 538 (1980); Note, United States v. Progressive, Inc.: The National Security and Free Speech Conflict, 22 WM. & MARY L. REV. 141 (1980). Both assumed that the decision whether or not to forbid publication required a factual inquiry by the trial court. Of course, this in turn would require a preliminary order against publication pending the decision.

If such an order does not deter the publisher, can he be punished for contempt if the publication otherwise could not be punished? See Barnett, supra note 55, at 551-53.

83. The Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (Title 18), directed the Chief Justice to prescribe rules to prevent unauthorized disclosure of classified information used in federal criminal trials. Procedures promulgated in February, 1981, call for the designation of a “court security officer” to take charge both of classified documents and of “secure quarters” for hearings concerning classified information, and they forbid access to the evidence by any person (other than jurors) without a security clearance. Defense counsel is entitled to access to classified evidence only under the terms of a protective order. 49 U.S.L.W. 2540 (1981).

84. 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. In my view 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 sham of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First
VI. THE FIRST AMENDMENT AS A LIMIT ON LAWS

This review of the antecedents of Near v. Minnesota and its legacy has focused more on the weakness of premises than on apparently successful outcomes. It has taken the formulas of judicial opinions seriously, perhaps more seriously than they deserve, because lawyers and judges are trained to take these formulas seriously, and therefore so will legislators, attorneys general, and district attorneys—and the lawyers who advise newspaper publishers. 85

To summarize: State judges early reduced the declarations of freedom of speech and of the press adopted in the era of the Revolution to mere restatements of English rights against licensing and prepublication censorship. They denied these declarations any effect to limit the judges' own powers to define and to punish common law crimes and contempts. Thus liberty of the press came to imply no protection against subsequent penalties for any substantive content that a state legislature or a state court might regard as an "abuse" of the freedom from prior controls.

After adoption of the fourteenth amendment, an eminent common law judge, Oliver Wendell Holmes, Jr., read this same restrictive doctrine into the clause forbidding states to abridge "liberty" without due process of law. 86 Since the process followed by the states was not the issue, "due process" in any event was only a court-fashioned tool against "unreasonable" abridgments of liberty. Burdened with the illogic of its controversial use against ordinary legislation, the due process clause at best could provide only a relative balancing of free expression against other social values.

Again, when appellants convicted under federal laws invoked the first amendment, Holmes wrote for the Court that "clear and present danger" of actual harm from a defendant's advocacy could override freedom of speech and press, although the first amendment in terms is addressed to Congress at the time it makes a law, not at the time and circumstances of the Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.


speech or publication. In this fashion judicial doctrine shifted the legal meaning of freedom of expression from a limitation on government back to what judges know best, the relative assessment of facts in case-by-case adjudication. It led to formulas of "presumptions" and "balancing" and battles over adjectives and adverbs—"heavy" presumptions, "imminent" and "extreme" danger—that remain with us to this day.

Was another approach possible? In constitutional theory it was and remains possible, though historically it was aborted by the Court of the post-Reconstruction era.

Not only the first amendment but the states' guarantees of freedom to speak and to write could have been understood, as they now are, to go beyond Blackstone and to protect freedom of expression after as well as before the fact. The first amendment could be read as it is written, first to bar the enactment of federal laws directed in terms against speech and press, and only second to protect rights of expression against the application of otherwise valid laws. A law directed in express terms against advocating overthrow of the government or publishing a suspect's confession or against publicly burning draft cards in protest against a war is on its face a law to suppress expression by virtue of its content. A law against violence or interfering with a trial or a law requiring possession of a draft card is not. The fourteenth amendment, in turn, could be read to hold the states to respecting the same "privileges and immunities" of citizenship that the first amendment and the remainder of the Bill of Rights guaranteed against the federal government, which would include immunity from state laws directed in terms against speech and press. This reading of the constitutional texts has an honorable lineage in the opinions of the first Justice Harlan, Justice Brandeis, and Justice Black.

There is a profound difference between reading the first amendment as it is written, as a limitation on permissible laws,

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89. To avoid misunderstanding: This refers to laws directed in terms against any communicative content of speech or of the press of a kind which under any circumstances would fall within the constitutional meaning of free expression. It does not refer to conventional crimes and torts involving words, such as fraud, extortion, larceny by trick, blackmail, or modern statutory equivalents, nor to the use of words to attempt, solicit, and conspire to commit a crime. See Greenawalt, Speech and Crime, 1980 Am. B. FOUNDATION RESEARCH J. 647; Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, 22 STAN. L. REV. 1163 (1970).
and reading it only to provide legal immunity when an individual is found entitled to it in the concrete situation. The perspective that the first amendment protects "rights" focuses a court's attention on the individual's conduct—what a speaker or writer has said or written, what a publisher intends to publish, and whether it exceeds the bounds of constitutional privilege. The perspective that the first amendment limits government, in contrast, places the focus first on what government has done or intends to do—on whether it means to make or enforce a law designed to abridge free expression. Only when the law passes that test is there occasion to reach the question whether to apply it in a specific case would put the law afoul of the first amendment.

It also is profoundly important whether governmental action against speech or press is based on a valid preexisting law, not for the sake of prior notice, but because the principle of lawmaking by elected representatives generally is important in a democracy. A bill proposed in Congress to protect the security of military operations, or in a state legislature to protect the fairness of trials, is open to scrutiny and debate by others than the parties to a single case. Its terms will threaten the rights of many rather than a specified few, if it is not to fail as a bill of attainder. If its terms forbid publishing specified types of content, the bill proposes a law abridging the freedom of speech or of the press, and legislators may oppose it as such or amend it so as to be constitutional. If legislators rush an unconstitutional bill into law in a fit of righteous indignation or patriotic fervor, others may seek office proposing to repeal the law or to let it lapse, as the infamous Sedition Act of 1798 was permitted to lapse. In many states the bill may be subjected to a referendum. In short, the principle of no suppression without a valid preexisting law makes censorship a political issue before it becomes a judicial issue.

None of this is true of a court order. A legislator or a candidate cannot easily propose to repeal a law that censors the press when the order that forbids publication is based on no law. The press might seek enactment of statutes affirmatively ending gag orders, just as statutes were needed to open public records and public meetings and to extend a measure of protection to a journalist's sources and files. Just a few months after the Supreme Court in Near pronounced its ban on injunctions

90. See U.S. Const. art. I, §§ 9, 10; United States v. Lovett, 328 U.S. 303, 315 (1946).
against the press, Congress enacted an equally famous ban on injunctions against another group—the ban on labor injunctions of the Norris-LaGuardia Act. To repeat, the law of the press is not synonymous with the first amendment, and the courts are not the only source of that law.

It seems anomalous, a century and a half after common law crimes were replaced by statutory criminal law, that so important and controversial a policy as gag orders against press reports of matters of public interest should be thought authorized without a law. The anomaly was apparent to several Justices in the Pentagon Papers case. It is not equally apparent to state courts when they come to protect their own function, the conduct of trials, rather than some executive function like the conduct of negotiations.

The Minnesota court's order against Near and his cohorts, of course, did rest on a statute. The Minnesota courts were applying a law, not fashioning one for the case at hand. If the first amendment is understood to bar the enactment of certain kinds of laws, if it focuses first on denying government certain powers before focusing on anyone's individual rights, then the crucial first amendment question is what kind of laws government may not make, in the form of statutes, or ordinances, or administrative rules, or executive or judicial orders, as a legal basis for adverse action against speech or press.

This crucial question cannot be answered with judicial formulas phrased so as to hinge decisions on the circumstances of individual cases. A formula based on danger at the time of publication will not serve as a test for the validity of a law at the time of enactment, and to let a legislature simply declare at the time of enactment that certain publications always are intrinsically dangerous equally makes the test useless. Neither can such vague concepts as "national security" provide an adequate distinguishing test of laws abridging freedom of speech and of the press, especially if the same mode of analysis is to serve for state laws. The pursuit of "national security" consists of thousands of discrete governmental acts, any of which may well be highly debatable for legitimate reasons. Many such

91. Act of March 23, 1932, ch. 90, 47 Stat. 70.
92. Deference to such an estimate by the New York legislature in 1902, after the assassination of President McKinley, 23 years later led to affirmance of a conviction for "criminal anarchy" under totally different circumstances, in Gitlow v. New York, 268 U.S. 652 (1925).
93. A provocative article entitled Taxonomy of Principal Foreign Affairs Secrets listing the reasons, good or bad, for withholding secrets from foreign or
acts have analogues in the states that are not easily denied equal claims to censorship. A state may have reason to fear more actual danger from an article showing how to make a gasoline bomb than how to make an atomic bomb. If the first amendment permits enactment of a federal law punishing publication of the names of intelligence agents, why not also of FBI agents, or a state law punishing identification of narcotics officers?94

Many other untimely publications can harm public objectives, such as disclosure of an impending devaluation of the dollar, or of a decision on the location of a highway exit, or of the correct answers to an examination. If the first amendment permits enactment of laws punishing publication of some of these reports but not others, the judicial formulas interpreting the amendment must be designed to tell lawmakers what kinds of laws the amendment permits or forbids. Before formulating tests of free expression under concrete circumstances, an interpretation of the first amendment must face the question whether a law directed in terms against the content of expression can avoid being a law abridging the freedom of speech or of the press, if the content is of a kind that under any circumstances would fall within the meaning of the first amendment.95 The same is true for the interpretation of equivalent guarantees in the state constitutions.96


94. See, e.g., CAL. PENAL CODE (West Supp. 1980) § 146e:
   Every person who maliciously, and with the intent to obstruct justice or the due administration of the laws, publishes, disseminates, or otherwise discloses the residence address or telephone number of any peace officer while designating the peace officer as such, without the authorization of the agency which employs such peace officer, is guilty of a misdemeanor.

95. See Linde, supra note 89, at 1174-75.

96. A recent decision invalidating a law against "abusive or obscene language" under Oregon's guarantee of free expression, see note 20 supra, stated:
   This constitutional provision is a prohibition on the legislative branch. It prohibits the legislature from enacting laws restraining the free expression of opinion or restricting the right to speak freely on any subject. If a law concerning free speech on its face violates this prohibition, it is unconstitutional; it is not necessary to consider what the conduct is in the individual case.
   ... [The statute] is directed at the expression or the speech.
   There may be types of 'expression' that would not be within the protection of Art. I, § 8 under any imaginable circumstances. But when the terms of a statute as written prohibit or restrain expression that does come within this protection, the statute is a law forbidden by Art. I, § 8. State v. Spencer, 289 Or. 225, 228, 611 P.2d 1147, 1149-49 (1980).
VII. CONCLUSION

The history of liberty of the press in the United States is not the history of the first amendment. Many factors other than constitutional protection explain the wide freedom of printed expression, at least, from governmental interference. One of them is federalism, the same federalism that the Supreme Court overcame in *Near v. Minnesota* to extend fourteenth amendment "liberty" of speech and of the press throughout the states. It is impossible as a practical matter for one state to maintain effective censorship among the porous legal compartments of a larger nation, as was recently illustrated when English threats against publication of a guide to committing suicide shifted its publication into Scotland.97

Nonetheless the role of the first amendment has been important, perhaps as much for what it is believed to do as for what it does. A modest skepticism of its effectiveness under pressure runs from Alexander Hamilton, James Madison, and Thomas Jefferson to Judge Learned Hand and Justice Robert H. Jackson.98 The first amendment is indispensable as myth, but when it fails as myth, it must prove indispensable as law. Under what circumstances it will prove so remains unfinished business.

In *Near v. Minnesota*, the Supreme Court assumed that liberty of the press did not mean freedom from penalties for publishing materials that lawmakers reasonably might suppress. That answer was not an interpretation of the first amendment, and it has not survived as an interpretation of the first amendment. But the Court also decided that liberty of the press denies lawmakers the use of prior restraints, including the use of statutory injunctions, to suppress publication even of materials that might not be privileged against subsequent penalties. Saddled from birth with qualifying dicta, this doctrine too was later reduced to a "heavy presumption," in the kind of judicial formula by which courts reserve to themselves the power of future judgments. Nevertheless, the doctrine against prior re-

97. After "Exit," a British euthanasia society, decided to withdraw a suicide guide that might have been a violation for "counseling" suicide under the Suicide Act of 1961, 9 & 10 Eliz. 2, c. 60, which applies to England and Wales, the Scottish branch of the society decided to proceed with publication. Letter from Office of Legal Attache, American Embassy, London, to Ronald Collins (September 29, 1980) (on file at the *Minnesota Law Review*).

straints remains a powerful taboo. For this, Near v. Minnesota deserves a cheer.

The search remains for formulas that explain what kind of laws the first amendment forbids lawmakers to enact for the suppression of speech or writing by virtue of its content, formulas for the constitutionality of laws antecedent to the circumstances of any particular publication. This view of the first amendment or of its equivalents in the states has not been a familiar or congenial perspective for case-oriented courts; yet why should it not be? It is the essence of constitutional law that it focuses on the actions of government, not on the actions of private parties. If government acts without a basis in a valid law, the court need not find facts or weigh circumstances in the individual case. When a constitutional prohibition is addressed to lawmakers, as the first amendment is, the role that it assigns to courts is the censorship of laws, not participation in government censorship of private expression. This, I suggest, is not an inappropriate relation between courts and censorship.