UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 65 | Number 4 Article 5

4-1-1987

Seizing Obscenity: New York v. P.J. Video, Inc. and the Waning of Presumptive Protection

James H. Jeffries IV

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

 Part of the Law Commons

Recommended Citation

James H. Jeffries IV, *Seizing Obscenity: New York v. P.J. Video, Inc. and the Waning of Presumptive Protection*, 65 N.C. L. REV. 799 (1987).
Available at: http://scholarship.law.unc.edu/nclr/vol65/iss4/5

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

NOTES

Seizing Obscenity: *New York v. P.J. Video, Inc.* and the Waning of Presumptive Protection

The printed word and visual image have long enjoyed special protection under the laws of the United States. This special protection, embodied in the first amendment,[1] stems directly from the esteem in which the founding fathers held freedom of thought.[2] Generally, the courts have treated the constitutional protection provided to books and images deferentially to ensure the continued free dissemination of thoughts and ideas.[3] Pornography and obscenity prosecutions have provided a wellspring of precedent for first amendment protections because these cases raise fundamental questions about the appropriate balance between morality and free speech in our society.[4]

United States Supreme Court holdings in the last few decades represent a shift from relatively expansive first amendment protection under the Warren Court to a significantly more inhibitive fourth amendment under the Burger Court.[5] Although the first and fourth amendments both constrain governmental power, they do so in substantially different ways. The first amendment provides protection to ideas, regardless of form.[6] The fourth amendment provides protection from unreasonable seizures without reference to the nature of the articles seized.[7] If seizures are analyzed in terms of the first amendment, the seized materials are presumptively protected at the outset. This protection calls for

---

1. The first amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

2. *See* Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 1-3 (1980); Comment, *A Fourth Amendment Gag Order—Upholding Third Party Searches at the Expense of First Amendment Freedom of Association Guarantees*, 47 U. PITT. L. REV. 257, 267 (1985).

3. *See generally* Near v. Minnesota, 283 U.S. 697, 714-19 (1931) (discussing the historical deference courts and society have given to the freedom to disseminate ideas); Whitney v. California, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring) (explaining why the courts give great deference to the freedom to disseminate ideas).

4. *See* Clor, *Obscenity and the First Amendment: Round Three*, 7 LOY. L. REV. 207, 207 (1974); *see also* Berbysse, *Conflict in the Courts: Obscenity Control & First Amendment Freedoms*, 20 CATH. LAW. 1 (1974) (tracing and evaluating the moral component in the Court's elimination of obscenity from first amendment protection).

5. *See* Fahringer & Brown, *The Rise and Fall of* Roth*—A Critique of the Recent Supreme Court Obscenity Decisions*, 10 CRIM. L. BULL. 785 (1974). Much of this change may be attributable to President Nixon's more conservative appointments to the Court. Nixon appointed four Justices to the Court in the two year period 1969-1971: Chief Justice Burger in 1969, Justice Blackmun in 1970, and Justices Powell and Rehnquist in 1971. Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37, 37 n.2 (1976).

6. All speech and exchange of ideas are protected by the first amendment so long as they are within the definition of first amendment speech. That is, unless speech is excluded from the first amendment it is presumed to be protected. *See infra* notes 37-44 and accompanying text. It is this presumption that protects the free dissemination of ideas because it creates protection inherent in the nature of the speech.

7. The fourth amendment to the United States Constitution provides: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause." U.S. CONST. amend. IV.

special considerations in the materials' seizure. Under a fourth amendment analysis, however, the nature of the seized materials is irrelevant and only the process is subject to constitutional examination. When seizures of first amendment materials are constrained only by the fourth amendment's protection, the materials effectively lose the presumptive protection of the first amendment. In the recent case of *New York v. P.J. Video, Inc.*[8] the Supreme Court enunciated a common fourth amendment standard for the evidentiary seizure of allegedly obscene materials, unrestrained by any presumptive protection from the first amendment.

This Note reviews the controlling precedent for the seizure of allegedly obscene materials and examines the *P.J. Video* Court's holding in light thereof. It demonstrates that *P.J. Video* is remarkable in three respects. Primarily, the decision is indicative of a societal trend towards lesser tolerance for pornography and obscenity. This intolerance has led to the effective eradication of presumptive protection for evidentiary seizures of alleged obscenity. Second, the holding is indicative of the Supreme Court's continued willingness to overrule state court decisions protecting individual liberties, in favor of state prosecutorial agencies. This is a trend that has been strongly criticized as beyond the proper jurisdiction of the Court. Third, the internal logic of the Court's opinion, most notably its interpretation of the New York Court of Appeals' holding, is flawed. The Note concludes that the total effect of the holding in *P.J. Video* is to lessen the protection that the first amendment ostensibly provides to books and films that are presumptively within the area of protected speech.

P.J. Video originated in the Justice Court of the Village of Depew, New York. After viewing copies of ten films rented from defendant, an investigator for the Erie County District Attorney's Office prepared affidavits describing the films' contents and attached them to an application for a warrant to seize the films, alleging that they violated the state's obscenity law.[9] The warrant application was then submitted to a New York Supreme Court Justice, who issued the warrant after an *ex parte* proceeding.[10] Each affidavit was similar in form and content[11] and contained: (1) an identification of the affiant, (2) an identification of the film, (3) a description of the circumstances of the viewing, and (4) a list of the sexual acts depicted in the film. This last element was preceded in each case by a statement that the list described the "content and character" of the video.[12] On the force of the warrant, thirteen video cassettes were seized and defendant was subsequently charged with violating New York's obscenity statute.[13]

Defendant moved to suppress the evidence on the ground that the warrant

8. 106 S. Ct. 1610 (1986).

9. *Id.* at 1612. The State's obscenity law provided, in part, that "[a] person is guilty of obscenity in the third degree when knowing its content and character, he: 1. Promotes, or possesses with intent to promote, any obscene material . . . ." N.Y. PENAL LAW § 235.05(1) (McKinney Supp. 1986).

10. *P.J. Video*, 106 S. Ct. at 1612.

11. The affidavits ranged in length from 11 to 27 lines. Respondent's Brief at 9, *P.J. Video*.

12. *P.J. Video*, 106 S. Ct. at 1616-19.

13. Of the 13 videos seized, 5 were multiple copies. The net result was seizure of 1 or more copies of 8 titles. Respondent's Brief at 2, *P.J. Video*.

authorizing the seizure was issued without probable cause to believe the videos were obscene. The Justice Court granted the motion and dismissed the complaint.[14] The Erie County Court reviewed and affirmed the dismissal, and an appeal was then taken to the New York Court of Appeals.[15] In an opinion that cited both state and federal precedent,[16] New York's highest court affirmed the suppression and dismissal.[17] The court first noted that prior to any seizure a probable cause determination was required to be made by a neutral magistrate to determine whether there was sufficient evidence to believe that the materials sought existed and could be found in a specific place.[18] The court then noted that because seizure of first amendment materials created potential prior restraint concerns, the court must apply a higher standard in evaluating an application for such a warrant.[19] The court of appeals found that the probable cause determination by the issuing Justice had been deficient and, therefore, seizure of the films had violated defendant's rights.[20] The court characterized the affidavits as amounting to little more than lists of sexual activity,[21] which could not sustain a finding of probable obscenity under New York's tripartite definition.[22] The court reasoned that because the affidavits did not provide an adequate basis for a magistrate to determine probable cause, seizure of the videos based solely on such affidavits was unlawful.[23]

After three consistent holdings by the New York courts that the warrant in question was issued without probable cause, the United States Supreme Court granted certiorari[24] to resolve the "proper standard for issuance of a warrant authorizing the seizure of materials presumptively protected by the first amend-

14. *P.J. Video*, 106 S. Ct. at 1613.

15. *Id.*

16. The court of appeals' opinion consistently cited New York precedent followed by Supreme Court precedent. People v. P.J. Video, Inc., 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985), *rev'd sub. nom*, New York v. P.J. Video, 106 S. Ct. 1610 (1986). This fact indicates that the court partially relied on state law in reaching its holding, thus calling into question the Supreme Court's authority to overturn that portion of the lower court's holding. *See infra* notes 131-34 and accompanying text.

17. *P.J. Video*, 65 N.Y.2d at 573, 483 N.E.2d at 1125, 493 N.Y.S.2d at 993.

18. "No warrant shall issue except upon probable cause .... This requirement was designed to insure that the determination of probable cause ... to believe that the property is subject to seizure must be made by a neutral magistrate." *Id.* at 569, 483 N.E.2d at 1122, 493 N.Y.S.2d at 990.

19. *Id.* at 569-70, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991. *See infra* note 35 (discussing the concept of prior restraint).

20. *Id.* at 571-72, 483 N.E.2d at 1124-25, 493 N.Y.S.2d at 992-93.

21. *Id.* at 571, 483 N.E.2d at 1124, 493 N.Y.S.2d at 992.

22. *Id.* New York's definition of obscenity is virtually identical to that set forth in Miller v. California, 413 U.S. 15 (1973), and provides that

> any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value.

N.Y. PENAL LAW § 235.00(1) (McKinney 1980). The Supreme Court's decision in *Miller* is discussed *infra* notes 47-53 and accompanying text.

23. *P.J. Video*, 65 N.Y.2d at 571-72, 483 N.E.2d at 1124-25, 493 N.Y.S.2d at 992-93.

24. New York v. P.J. Video, 106 S. Ct. 244 (1985).

ment."[25] The Court rejected the New York Court of Appeals' use of a "higher standard" of probable cause for seizure of allegedly obscene materials.[26] The Court reasoned that for evidentiary seizures the fourth amendment provides adequate protection for first amendment materials: "We think, and accordingly hold, that an application for a warrant authorizing the seizure of materials presumptively protected by the first amendment should be evaluated under the same standard of probable cause used to review warrant applications generally."[27] Using this standard the Court concluded that the facts before the issuing magistrate were adequate for him to make a probable cause determination.[28] Having reversed three levels of the New York courts, the Supreme Court remanded.[29]

In a strongly worded dissent Justice Marshall, joined by Justices Brennan and Stevens, criticized the majority holding.[30] Marshall questioned the Court's interpretation of the standard used by the New York courts, which Marshall characterized as simply that " 'there must be enough information before [the issuing magistrate] in one form or other . . . to enable him to judge the obscenity of the film.' "[31] Applying this standard the dissent described the holding of the New York Court of Appeals as unassailable; "a mere listing of sex acts . . . says little about the predominant effect of the film as a whole" and as such cannot adequately form the basis for a probable cause determination of obscenity.[32]

The decision in *P.J. Video* is a pronouncement of the relative weights and priorities accorded to the first and fourth amendments by the Court when allegedly obscene material is seized. The early cases dealing with seizure of presumptively protected materials clearly established that the protections of the first amendment were a qualification to general fourth amendment proscriptions.[33] Later cases have limited these protections,[34] not by altering the essential subordinance of the fourth amendment to the first amendment, but largely by characterizing the seizure to avoid prior restraint problems[35] and to assert the

25. *P.J. Video*, 106 S. Ct. at 1612. The Court granted certiorari ostensibly to resolve the conflict between the New York Court of Appeals' holding in *P.J. Video* and decisions in Sequoia Books, Inc. v. McDonald, 725 F.2d 1091 (7th Cir. 1984) (validating warranted seizure of allegedly obscene materials when the issuing magistrate made an *ex parte* probable cause determination solely on the force of descriptive affidavits filed with the warrant application) and United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974) (validating issuance of a warrant to seize allegedly obscene films based solely on a descriptive affidavit).

26. *P.J. Video*, 106 S. Ct. at 1616.

27. *Id.* at 1615.

28. "[W]e think it clear beyond peradventure that the warrant was supported by probable cause to believe that the five films at issue were obscene." *Id.* at 1616.

29. *Id.*

30. *Id.* at 1619-22 (Marshall, J., dissenting).

31. *Id.* at 1620 (Marshall, J., dissenting) (quoting People v. P.J. Video, Inc., 65 N.Y.2d 566, 571, 483 N.E.2d 1120, 1124, 493 N.Y.S. 2d 988, 992 (1985).

32. *Id.* at 1621 (Marshall, J., dissenting).

33. Comment, *supra* note 2, at 273-74; *see infra* notes 55-80 and accompanying text.

34. *See infra* notes 81-98 and accompanying text.

35. "Prior restraint" refers to methods used by the government to restrain dissemination of presumptively protected materials, even those possibly unlawful in nature. Any statute, regulation, or administrative procedure that acts as a prior restraint bears a " '[h]eavy presumption' against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). For

protections of the fourth amendment in place of the first amendment. The changes in the relative protections provided to allegedly obscene material by the first and fourth amendments, as interpreted by the Court, were substantially a reflection of the general values prevalent on the Court and in society at the time each decision was issued.[36]

Before examining the relative balance of first and fourth amendment protections, it is necessary to delineate the legal status of obscenity. The Court has consistently and clearly held that obscenity is not protected speech within the meaning of the first amendment.[37] *Roth v. United States*[38] is the leading case in which the Court pronounced this doctrine. In *Roth* a citizen facing prosecution for violation of a federal obscenity statute attempted to invoke the first amendment as a protection from prosecution.[39] In rejecting this argument the Court analyzed the historical significance of the amendment[40] and concluded that "obscenity is not within the area of constitutionally protected speech or press."[41] The Court noted that the first amendment was not intended to protect every utterance[42] and characterized obscenity as one category of speech excluded from the protection of the first amendment.[43] The Court, however, did caution that "all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties . . . ."[44]

Although the nonprotected status of obscenity has long been clear, its identification as such has been, and continues to be, the primary obstacle to its prosecution.[45] The definition of obscenity has been an evolving concept[46] and,

---

an analytical discussion of prior restraint, see Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

36. *Compare* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970) (recommending repeal of laws forbidding dissemination of obscenity to consenting adults) *with* 1 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 322-85, 433-58 (1986) [hereinafter FINAL REPORT] (recommending the use of a wide variety of tools to combat the harms perceived to be caused by obscenity and pornography). This change would seem to reflect a change in the public's attitude toward pornography and obscenity. *Id.* at 932-35. This value change is evident in the contrast between the holdings of the Burger Court and those of the Warren Court. *See* Lockhart, *Escape From the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 544-48 (1975).

37. For a discussion of constitutional speech and nonspeech, see Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

38. 354 U.S. 476 (1957).

39. Roth was a businessman in New York engaged in the sale of pornographic books, magazines, and photographs. He used circulars sent through the mail to advertise his business. Roth was convicted by a federal district court on four counts of violating a federal obscenity statute prohibiting the distribution of obscene materials through the mail. *Id.* at 479-80.

40. The opinion cites 10 state constitutions and the journals of the continental congress, among other documents, in tracing the limited nature of speech guarantees with respect to obscenity. *Id.* at 482-85.

41. *Id.* at 485.

42. *Id.* at 483.

43. *Id.* at 485.

44. *Id.* at 484.

45. Obscenity is difficult to prosecute because material is not legally obscene until judicially declared so, and thus it is not readily identifiable. Until material is declared obscene, it has the presumptive protection of the first amendment. For a discussion of changes in the definition of

although the Court promulgated an explicit definition in 1973, it remains a vague standard capable of variance from community to community. After numerous attempts to define obscenity, the Court in *Miller v. California*[47] finally settled on a unified definition.[48] *Miller* involved a conviction for mailing obscene advertisements for various "adult" products.[49] The Court rejected the definition of obscenity used by the lower courts and promulgated a new standard. This new definition of obscenity made state statutes, "as written or authoritatively construed," the primary source of determining obscenity.[50] The Court held also that the state statute must allow obscenity to be found only when

> 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[51]

This holding established broad guidelines for the judiciary in each state to define obscenity,[52] but did nothing to make obscenity readily identifiable.[53]

Although obscenity clearly is not protected speech, the overriding difficulty with obscenity prosecutions remained even after *Miller*. The inability to distinguish protected pornography readily from unprotected obscenity made prosecution difficult and fraught with constitutional challenges. These challenges typically took the form of challenges to seizures of allegedly obscene materials on the ground that the procedures used intruded on first amendment protections.[54]

---

obscenity recommended to the Attorney General's Commission on Pornography, see Lynn, *"Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. L. REV. 27, 40-48 (1986).

46. For a general discussion of the evolution of a definition of obscenity, see Fahringer & Brown, *supra* note 5; *see also* Note, *Assessing the Constitutionality of North Carolina's New Obscenity Law*, 65 N.C.L. REV. 400 (1987) (discussing the development of the Supreme Court's obscenity doctrine and its application to the recent amendments to North Carolina's obscenity statute).

47. 413 U.S. 15 (1973).

48. Justice Douglas, in a dissenting opinion, traced the development of the Court's attempt to define obscenity and the variety of platitudes used by the Court in its attempt to differentiate between protected pornography and unprotected obscenity. *Id.* at 37-40 (Douglas, J., dissenting).

49. *Id.* at 16.

50. By including the language "as written or authoritatively construed," the Court allowed state courts to interpret existing obscenity statutes so as to avoid wholesale invalidation thereof. *Id.* at 24 n.6.

51. *Id.* at 24 (citations omitted).

52. Several commentators have concluded that the holding in *Miller* also effectively encouraged the prosecution of obscenity by easing standards of proof for prosecutors. *See* George, *Obscenity Litigation: An Overview of Current Legal Controversies*, 3 NAT'L J. CRIM. DEF. 189, 190 (1977); Yarbrough, *supra* note 5, at 89.

53. To the extent that the *Miller* definition required judicial action to determine obscenity, it did nothing to correct either the problem of notice to the citizen or identification for the policeman. For a discussion of the notice dilemma, see Lockhart, *supra* note 36.

54. Although the cases discussed in this Note involved seizure in the prosecution of violations of criminal obscenity statutes, courts have used several other approaches for dealing with obscenity. *See* Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (upholding a dispersal zoning plan for adult businesses); American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (rejecting

The Court has considered the validity of such first amendment challenges in a series of cases. In the first such case, *Marcus v. Search Warrant*,[55] a Missouri judge issued a search warrant for a newsstand after an *ex parte* probable cause determination that it contained obscene materials.[56] In determining probable cause, the judge relied solely on the affidavit of a police officer who testified that the premises to be searched contained five magazines that were obscene.[57] The warrant authorized the seizure of all "obscene" materials on the premises and provided no guidance for defining obscenity.[58] The search resulted in the wholesale seizure of all copies of materials on the premises that, in the judgment of the seizing officers, were obscene.[59]

In rejecting the Missouri statute that sanctioned the seizure, the Court noted that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech."[60] The Court focused on the protection provided the seized material by the first amendment in declaring the actions constitutionally impermissible.[61] The Court considered the lack of a preseizure hearing to determine obscenity, the broad nature of the warrant, and the discretionary power of the police to determine what was obscene; and concluded these factors were not "designed to focus searchingly on the question of obscenity,"[62] nor did they afford "a reasonable likelihood that nonobscene publications, entitled to constitutional protection, [would] reach the public."[63] The Court further noted that the seizure of all copies of all allegedly obscene works[64] constituted a prior re-

---

as unconstitutional an Indianapolis ordinance making pornography illegal as a form of sex discrimination); Fahringer & Cambria, *The New Weapons Being Used in Waging War Against Pornography*, 7 CAP. U.L. REV. 553 (1978) (discussing alternative means of combatting pornography and obscenity); Note, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 COLUM. L. REV. 1616 (1984) (discussing developments in enjoining obscenity distribution under a nuisance theory).

55. 367 U.S. 717 (1961).

56. *Id.* at 722.

57. Acting under authority of MO. REV. STAT. § 542.380 (1951), the issuing magistrate, after receiving a complaint swearing that obscene materials were known to be kept on petitioner's premises, issued a search warrant directing seizure of all obscene materials found on petitioner's premises. This warrant was issued without examination of any of the obscene materials (although police had copies of five such magazines) and without providing petitioner an opportunity to dispute the obscenity determination. *Marcus*, 367 U.S. at 717-23.

58. *Marcus*, 367 U.S. at 722-23.

59. Approximately 11,000 items were seized. *Id.*

60. *Id.* at 731.

61. The Court's framing of the issue is revealing on this point: "The question here is whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression." *Id.* at 729-30; *see also* Burnett, *Obscenity: Search and Seizure and the First Amendment*, 51 DEN. U.L. REV. 41, 55 (1974) (tracing the interplay of the first and fourth amendments in the Court's decisions involving the seizure of allegedly obscene materials).

62. *Marcus*, 367 U.S. at 732.

63. *Id.* at 736.

64. Only one-third of the books seized were eventually determined to be obscene, a fact the Court noted "strengthens the conclusion that discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative." *Id.* at 733.

straint on the dissemination of protected materials.[65] The Court determined that the qualitative nature of the objects seized required a fourth amendment probable cause determination that was sensitive to the presumptive protections of the first amendment so as to avoid an "erosion of . . . constitutional guarantees."[66]

In *A Quantity of Copies of Books v. Kansas*[67] the Court struck down a state statute that authorized the mass seizure[68] of books without a preseizure determination of obscenity.[69] In execution of a search warrant, police had seized multiple copies of thirty-one titles of allegedly obscene books, resulting in a total seizure of over 1,700 books.[70] Justice Brennan, in a plurality opinion, held the statute unconstitutional on the ground that it did not adequately protect nonobscene books from seizure.[71] Specifically, Justice Brennan noted that "since the warrant . . . authorized the sheriff to seize all copies of the specified titles, and since [defendant] was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was . . . constitutionally deficient."[72] As in *Marcus*, the constitutional deficiency stemmed from both the qualitative nature of the items seized and the quantitative nature of the seizure. Justice Brennan specifically rejected the notion that "the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to [contraband]."[73] Thus, the ultimate mandate of the holding was that a preseizure determination of obscenity and seizure of something less than all copies of allegedly obscene material would be required to observe the "higher" standard controlling mass seizure of presumptively protected materials.[74]

In *Lee Art Theatre, Inc. v. Virginia*[75] the Court rejected the seizure of one copy of a film because the warrant had been issued in a manner that failed to

---

65. The Court noted:

> But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor.

Id. at 736.

66. *Id.* at 733.

67. 378 U.S. 205 (1964).

68. Although the prior adversary hearing requirement was rejected for single seizures for evidentiary purposes in Heller v. New York, 413 U.S. 483 (1973) (discussed *infra* notes 89-97 and accompanying text), it remains a prerequisite for mass seizures. *See P.J. Video*, 106 S. Ct. at 1614.

69. *Copies of Books*, 378 U.S. at 208. The case involved an information filed by a district attorney in Kansas, in which he alleged that 57 books published under a specific caption were obscene and being disseminated from a local bookstore. The attorney attached seven copies of the captioned books to the information, and after an *ex parte* determination of probable obscenity, a magistrate issued a warrant for the seizure of all titles listed in the information. *Copies of Books*, 378 U.S. at 208-09.

70. *Id.* at 209.

71. *Id.* at 208.

72. *Id.* at 210.

73. *Id.* at 211-12.

74. *Id.* at 210-13.

75. 392 U.S. 636 (1968).

protect first amendment interests.[76] The petitioner in *Lee Art Theatre* was the operator of a motion picture theater where the allegedly obscene film was being shown.[77] The officer applying for the warrant made out an affidavit based on his observation of the film and advertisements, testifying that the film was obscene.[78] The magistrate issued the warrant on the force of the police officer's conclusion that the film in question was obscene.[79] Without any reference to prior restraint, the Court held that the procedures used in the issuance of the warrant failed to " 'focus searchingly' on the question of obscenity" and for that reason were constitutionally deficient.[80]

In these cases the Supreme Court focused almost exclusively on the first amendment in reaching its holdings. These holdings, issued by the Warren Court, are expansive in their protections of presumptively protected materials. In subsequent cases, however, the Court shifted its emphasis to deal with the seizure issue in a fourth amendment context.

The Court first used the fourth amendment as a rationale for deciding a contested seizure of presumptively protected materials in *Roaden v. Kentucky*.[81] *Roaden* involved the seizure of an allegedly obscene film from a theater incident to the arrest of the manager for displaying the film.[82] No warrant was obtained for the seizure, nor was any prior hearing conducted to determine probable obscenity.[83] The Court held that seizure of allegedly obscene material without a constitutionally sufficient warrant was unreasonable per se under the fourth amendment.[84] Noting that a prior restraint of books or films "calls for a higher hurdle in the evaluation of reasonableness,"[85] the Court reasoned that the presumptive protection of the first amendment required a different standard of reasonableness for searches under the fourth amendment.[86] The Court concluded by quoting *Stanford v. Texas*,[87] noting that " 'in short, . . . the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain.' "[88] This language clearly indicates the fourth amendment's subordinance to the first amendment in the Court's interpretation of the Constitution. It indicates also that only a closer examination of the basis of probable cause is required.

---

76. *Id.* at 637.
77. *Id.* at 636.
78. *Id.*
79. *Id.*
80. *Id.* at 637.
81. 413 U.S. 496 (1973).
82. *Id.* at 497-98.
83. *Id.* at 498-99.
84. *Id.* at 504.
85. *Id.* The Court noted, "The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in light of the values of freedom of expression." *Id.*
86. *Id.* at 501.
87. 379 U.S. 476 (1965).
88. *Roaden*, 413 U.S. at 504 (quoting *Stanford*, 379 U.S. at 485).

The holdings discussed thus far established that some higher standard of reasonableness is required in the seizure of presumptively protected materials. It is also evident that the initial holdings, which expounded broad protections and were analyzed on a first amendment basis, have been tempered to a degree by the implication that the fourth amendment, if scrupulously applied, adequately protects first amendment concerns. This implication and concurrent limitations on the qualitative protection of presumptively protected materials soon became the express holding of the Court.

In *Heller v. New York*[89] the Court adopted a somewhat less expansive view of the protections surrounding the seizure of presumptively protected, allegedly obscene materials. *Heller* involved the warranted seizure of an allegedly obscene film from a movie theater.[90] The issuing judge viewed the film in question immediately prior to issuing the warrant.[91] In *Heller* the Court held that the evidentiary seizure of a motion picture, when supported by a constitutionally sufficient warrant, is constitutionally permissible.[92] The Court expressly rejected defendant's argument that a preseizure determination of obscenity was required.[93] The Court based its holding on a determination that the procedure followed by the New York courts allowed a reasonable determination of probable cause and that first amendment concerns were adequately protected when seizure was for evidentiary purposes.[94] The Court further determined that a prompt post-seizure obscenity determination was required,[95] that the seizure could not constitute a final restraint,[96] and that on petition the film was available to be copied by defendant to ensure continued access to the public. The Court also relied on the contrast between the wholesale seizures in *Marcus* and *Copies of Books* and the single seizure in this case.[97]

The essence of the Court's reasoning appears to have been that no prior restraint existed under the facts and that sufficient safeguards had been employed to protect defendant's first amendment interests.[98] Although couched in terms indicating it was an exception to first amendment protections, the holding

89. 413 U.S. 483 (1973).

90. *Id.* at 483.

91. *Id.*

92. *Id.* at 492-94.

93. *Id.* at 488-89.

94. The Court noted that "[t]here has been no showing that the seizure of a copy of the film precluded its continued exhibition." *Id.* at 490. At any rate, evidentiary seizure did not subject the film "to any form of 'final restraint' " *Id. But see* United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (invalidating seizure of allegedly obscene photographs at port of entry into the United States); Freedman v. Maryland, 380 U.S. 51 (1965) (invalidating a state statute requiring submission of films to a state censor prior to dissemination).

95. In *Heller* the determination took 48 days. *Heller*, 413 U.S. at 490. The Court defined prompt as "the shortest period 'compatible with sound judicial resolution.' " *Id.* at 492 n.9 (quoting United States v. Thirty-seven Photographs, 402 U.S. 363, 367 (1971)).

96. *Id.* at 490. In reviewing the warrant application the judge viewed the film in question. This evidently was an attempt to observe a sensitivity to freedom of expression, *see supra* note 85, by observing a greater reasonableness in the seizure of protected materials. *See* Overstock Book Co. v. Barry, 436 F.2d 1289 (2d Cir. 1970); United States v. Santiago, 424 F.2d 1047, 1048 (1st Cir. 1970); Monica Theatre v. Municipal Court, 9 Cal. App. 3d 1, 14-15, 88 Cal. Rptr. 71, 80-81 (1970).

97. *Heller*, 413 U.S. at 491.

98. *Id.* at 492.

established that when first amendment concerns such as prior restraint are procedurally safeguarded, the fourth amendment provides adequate protection for the seizure of one copy of a film for evidentiary purposes.

Thus, the evolution of the relationship of first amendment protections of speech and press to fourth amendment requirements for searches and seizures in the context of obscenity seizures has been one of constriction. The expansive protective language of *Marcus* and *Copies of Books* has been limited by the fourth amendment's absorption of that protective role, at least to the extent of evidentiary seizures when procedural safeguards "adequately" protect first amendment concerns.[99] The remaining difficulties, however, involve what the Court has left unsaid. The distinctions between evidentiary seizures and final restraints, as well as the distinction between mass seizures and single seizures, leave wide factual possibilities unclear.

In light of this history, the significance of *P.J. Video* is fourfold. First, the result is startling because the Supreme Court appears to have reversed a New York Court of Appeals' holding that never existed. Second, the holding eliminates the protection of the first amendment as applied to presumptively protected materials seized for evidentiary purposes.[100] Third, the result perpetuates a continuing trend of the modern Court to assume jurisdiction over situations in which the federal interest is negligible. Last, the holding foreshadows heightened national enforcement of obscenity statutes free from the inhibiting spectre of first amendment presumptive protection.

Even a rudimentary examination of the Supreme Court's manner of framing the issue in *P.J. Video* reveals that the Court took a different approach to the resolution of the issue than did the New York Court of Appeals. The state court postulated that "[t]his appeal concerns the very basic issue of what information must be contained in an affidavit supporting a search warrant to authorize the seizure of [first amendment] materials."[101] In contrast, the Supreme Court stated that "[t]his case concerns the proper standard for issuance of a warrant authorizing the seizure of [first amendment] materials."[102] The state court approach would superficially appear to be an examination of facts to determine compliance with an existing probable cause standard; the Supreme Court approach would examine the standard itself. A reasonable reading of the state court's holding leads to the conclusion that the Court reversed the establishment of a "higher" standard of probable cause that was never promulgated.[103]

The New York Court of Appeals' holding was a procedural determination that the Justice who issued the contested warrant did not have probable cause as required by the fourth amendment and state law. This holding was derived from

99. *See* George, *supra* note 52, at 208-09.

100. Arguably, however, *Heller* reached this result. *See* Sequoia Books, Inc. v. McDonald, 725 F.2d 1091, 1093-94 (7th Cir. 1984); United States v. Pryba, 502 F.2d 391, 405-06 (D.C. Cir. 1974).

101. People v. P.J. Video, Inc., 65 N.Y.2d 566, 568, 483 N.E.2d 1120, 1122, 493 N.Y.S.2d 988, 990 (1985), *rev'd sub. nom*, New York v. P.J. Video, Inc., 106 S. Ct. 1610 (1986).

102. *P.J. Video*, 106 S. Ct. at 1612.

103. *See* People v. P.J. Video, Inc., 68 N.Y.2d 296, 299-301, 501 N.E.2d 556, 558-59, 508 N.Y.S.2d 907, 909-10 (1986); *infra* note 132.

the court's reliance on a "higher standard for evaluation of a warrant application seeking to seize such things as books and films."[104] The court applied this standard to the issuing Justice's reliance on the affidavits and concluded that they did not provide sufficient information to establish probable cause under New York's three-prong test for obscenity.[105] The court characterized the affidavits as not permitting even "an inference that the scenes described [were] more than a catalog of offensive parts of the whole."[106] The court concluded that although the affidavits described scenes that clearly were offensive,[107] they provided no adequate support for a determination that the films' appeal was primarily to the prurient interest, or that as a whole the films lacked serious literary, artistic, political, or scientific value.[108] Thus, the issuing magistrate's reliance solely on the affidavits did not satisfy the stringency requirement in making a probable cause determination for seizure of presumptively protected materials.

The Supreme Court interpreted the lower court's holding as establishing a " 'higher' standard of probable cause" when issuing warrants for the seizure of first amendment materials.[109] Although the Court never clearly articulated what it construed this "higher" standard to be, it relied on the court of appeals' language to the effect that a "higher standard for evaluation of a warrant application [was required]."[110] Apparently the Court mistook a standard for evidentiary scrutiny, which was well founded in Supreme Court precedent,[111] for the assertion of an elevated standard of the sufficiency of the evidence.

More significant than the Court's questionable interpretation of the lower court's holding is its elimination of first amendment protections for evidentiary seizures of allegedly obscene materials.[112] As discussed previously, a review of

104. *P.J. Video*, 65 N.Y.2d at 569, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991.

105. *Id.* at 570-71, 483 N.E.2d at 1124, 493 N.Y.S.2d at 992; *see supra* note 22.

106. *P.J. Video*, 65 N.Y.2d at 571, 483 N.E.2d at 1124, 493 N.Y.S.2d at 992.

107. *Id.*

108. *Id.*

109. *P.J. Video*, 106 S. Ct. at 1614.

110. *Id.* The Court neither identified nor discussed a section of the court of appeals' holding that arguably could have supported its perception of an elevated probable cause standard. Petitioner noted this language in his brief and argued that it established an elevated standard of probable cause. Petitioner's Reply Brief at 2, *P.J. Video*. The language in question was as follows: "[T]he affidavits [must permit the issuing magistrate] to determine that [the films] are within the statutory definition of obscenity and thus are not entitled to constitutional protection." *P.J. Video*, 65 N.Y.2d at 571-72, 483 N.E.2d at 1124, 493 N.Y.S.2d at 992. Out of context this passage appears to justify the Court's interpretation of the court of appeals' holding; however, the passage was made in the context of a discussion of the probable cause determination necessary for warrant issuance. Thus, the reasonable interpretation is that this is a misstatement by the court. To take this passage literally would require belief that the court was prescribing a proof determination requirement prior to seizure, a notion that is inconsistent with the tone of its opinion and is unmentioned by the Supreme Court.

111. *See Roaden*, 413 U.S. at 504; *Stanford*, 379 U.S. at 485; *Copies of Books*, 378 U.S. at 211-12; *Marcus*, 367 U.S. at 732.

112. *See P.J. Video*, 106 S. Ct. at 1615. Given the Court's approval of the "focus searchingly" requirement of *Marcus*, it would seem that the stringency protections of the first amendment have not been removed. In light of the Court's approval of United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974), however, it is dubious whether the "focus searchingly" requirement will provide any substantive protection. *Pryba* involved seizure of films discovered by an airline employee that were shown to the F.B.I. when suspected of being obscene. The applications that supported the warrant authorizing seizure alleged that the movies in question depicted "a male and a female engaged in sexual intercourse" and "various other sexual activities by males and males" as well as "males and

Supreme Court precedent reveals that the relative expansiveness of any particular holding was typically related in some degree to the constitutional rationale behind the holding and the philosophical attitude of the Court. First amendment decisions of the Warren Court, such as *Marcus* and *Copies of Books*, were expansive in their protection of first amendment materials against the evils of state repression and intimated that the protections were a result of the heavy presumption against the constitutional validity of any system constituting a prior restraint on presumptively protected materials.[113] In contrast, the later cases decided by the Burger Court under a fourth amendment examination tended to focus less on the inherent sacrosanct qualities of books and films.[114] This result is probably not extraordinary given that in the first amendment context the allegedly obscene articles were equated to political speech, while in the fourth amendment context the controversy was a more practical one aimed simply at adequate protection of materials of marginal societal value from unreasonable seizure. However, this shift in emphasis also reflects the Court's changing moral attitude.[115]

In *P.J. Video* the Court set forth a uniform fourth amendment standard for the issuance of warrants authorizing the seizure of evidence of a crime, excluding altogether first amendment considerations in evidentiary seizures.[116] This standard, taken from *Illinois v. Gates*,[117] states that "the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."[118] The Court in *P.J. Video* specifically held "that an application for a warrant authorizing the seizure of materials presumptively protected by the first amendment should be evaluated under the same standard of probable cause used to review warrant applications generally."[119] The Court's justification for this uniform standard, which appears to contradict the express language of precedent,[120] is that a valid probable cause determination within the context of a

---

females." *Id.* at 394. As the court of appeals noted in *P.J. Video*, this does not appear to be the type of scrupulous exactitude envisioned by precedent. *P.J. Video*, 65 N.Y.2d at 572 n.4, 483 N.E.2d at 1125 n.4, 493 N.Y.S.2d at 993 n.4.

113. Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 70 (1963). For a general discussion of prior restraint theory, see Redish, *supra* note 35.

114. *See Heller*, 413 U.S. 483; *Roaden*, 413 U.S. 496; *Lee Art Theatre*, 392 U.S. 636. For a critique of fourth amendment holdings by the Burger Court, see California v. Carney, 471 U.S. 386, 395-408 (1985) (Stevens, Marshall, and Brennan, J.J., dissenting).

115. This tension between preferences for free speech or conversely for "reasonable" fourth amendment protections has been evident in the dissenting opinions of several of the cases cited in this Note. *See Lee Art Theatre*, 392 U.S. at 638 (Harlan, J., dissenting); *Copies of Books*, 378 U.S. at 215 (Harlan, and Clark, J.J., dissenting).

116. *P.J. Video*, 106 S. Ct. at 1615.

117. 462 U.S. 213 (1983).

118. *Id.* at 238-89. For a practical discussion of the effect of *Gates*, see McLaren, *A Lawyer's Guide to Search Warrants and the New Federalism*, 22 CRIM. L. BULL. 5 (1986). On remand, the New York Court of Appeals interpreted the Supreme Court's holding in *P.J. Video* as extending the totality of the circumstances test of *Gates* to first amendment seizures. People v. P.J. Video, Inc., 68 N.Y.2d 296, 301, 501 N.E.2d 556, 559, 508 N.Y.S.2d 907, 910 (1986).

119. *P.J. Video*, 106 S. Ct. at 1615.

120. "It is no answer to say that obscene books are contraband, and that consequently the stan-

seizure for evidentiary purposes provides adequate protection for first amendment concerns.[121] Although this reasoning superficially appears to be a restatement of *Heller*, its scope is, in fact, greater. The holding sets forth a scheme under which first amendment protections are wholly absorbed by the less stringent requirements of the fourth amendment when evidentiary seizures are made.[122]

The Court rationalized its holding by reading the precedent requiring "special protections" for first amendment materials in a substantially mechanical fashion. The Court reduced the holdings in *Roaden*, *Marcus*, *Copies of Books*, *Heller*, and *Lee Art Theatre* to rules controlling highly fact specific situations. The Court deemed *Roaden* to stand for the rule that no exigent exception to the warrant requirement may be made for seizure of books when it would constitute a prior restraint.[123] The Court equated the holdings in *Marcus* and *Copies of Books* with the proposition that large scale seizure of books constituting a prior restraint requires a prior adversary hearing on the question of obscenity.[124] The Court described *Heller* as imposing a warrant requirement on the evidentiary seizure of books, even when no prior restraint is implicated.[125] Last, the Court reduced *Lee Art Theatre* to the proposition that conclusory opinions of police as to obscenity are insufficient evidence of probable cause for issuance of a warrant.[126] Although technically correct renditions of the ultimate holdings of these cases, the Court's characterizations are hardly faithful to the expansive discussion in most of the cases in which first amendment considerations were implicated in the seizure of books and films based on their content.

Thus, the Court's current reasoning authorizes the warranted seizure of first amendment materials on a showing of probable cause that is in no way different from the showing required for seizure of other contraband, unless the seizure would constitute a prior restraint.[127] For cases implicating prior restraint concerns, the Court simply would require adherence to precedent.[128] This reasoning presents a very streamlined approach to the problems involved in the seizure of presumptively protected materials; however, it ignores concerns of

---

dards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia [sic] and other contraband." *Copies of Books*, 378 U.S. at 211-12. The *Marcus* Court noted:

> The authority to the police officers under the warrants issued in this case, broadly to seize obscene . . . publications, poses problems not raised by the warrants to seize gambling implements and all intoxicating liquors . . . . For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications.

Marcus, 367 U.S. at 731.

121. *P.J. Video*, 106 S. Ct at 1615.

122. The mandate to "focus searchingly" on the question of obscenity, as declared in *Marcus*, appears to have survived, but also appears to be a de minimis standard in the eyes of the Court. *See supra* note 112.

123. *P.J. Video*, 106 S. Ct. at 1614.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1615.

128. *Id.* at 1614.

suppression of protected speech and the chilling effect that even an evidentiary seizure can have on the dissemination of protected speech. In addition, the Court's holding presents some disturbing possibilities. Given the Court's conclusion that proper evidentiary seizures do not constitute prior restraints and that no special protections exist when no threat of restraint exists,[129] the possibility of massive evidentiary seizures looms. Even if the Court would protect against this eventuality, another question remains—at what point does an evidentiary seizure become a seizure tainted by restraint on protected materials? In *P.J. Video*, in which the Court summarily dismissed this question, the police had seized multiple evidentiary copies of the films in question, and the almost certain implication is that they seized all copies that they could find.[130]

A third aspect of the Court's holding in *P.J. Video* involves what the dissent termed "a dubious notion of [the] Court's institutional role."[131] In virtually all prior holdings dealing with the issue of seizure of presumptively protected materials, the Court had been protecting the individual liberties of citizens against intrusion by the state or federal government. This clearly is a function that the Court is both suited for and should perform. *P.J. Video*, however, presents a case in which the Court invalidated state protection of individual liberties[132] to aid prosecution of an alleged criminal violation of state law.[133] The

129. *Id.* at 1615 n.6.

130. *Id.* at 1614. The question thus remains as to what facts will trigger the protections against prior restraint.

131. *Id.* at 1622 (Marshall, Brennan, and Stevens, J.J., dissenting); *see also* California v. Carney, 471 U.S. 386, 395-96 (1985) (Marshall, Brennan, and Stevens, J.J., dissenting) (criticizing the Court's continuing tendency to restrict fourth amendment protections). The dissent noted three flaws in the Court's current tendency toward reversing state protections of individual liberties: (1) no substantial federal interest lies in reversing state protections of individual liberties, *id.* at 2073, (2) the Court has given the exception priority over the rule, *id.* at 2071, and (3) the Court has abandoned precedential limitations on the exception, *id.* The *P.J. Video* Court arguably has accomplished the latter two with respect to evidentiary seizures of alleged obscenity.

132. A number of states, including New York, have resorted to state constitutions to protect individual liberties in the face of growing conservatism on the Court. *See* Note, *The Use of State Constitutional Provisions in Criminal Defense After* Michigan v. Long, 65 NEB. L. REV. 605 (1986). States have had a difficult time in implementing such protections in light of the Court's holding in Michigan v. Long, 463 U.S. 1032 (1983), in which the Court required states basing holdings on separate state grounds to state so plainly to avoid a presumption of Supreme Court jurisdiction when federal rights are implicated. *Id.* at 1040-41.

In New York v. Class, 106 S. Ct. 960 (1986), the Court reversed a New York Court of Appeals' determination that an automobile search by police had violated defendant's rights. In *Class* defendant was arrested after police noticed a partially concealed gun in his car after stopping it for having a cracked windshield. The police noticed the gun when moving papers on the dash of the car to locate the vehicle identification number. The New York Court of Appeals held this to be an unlawful search. *Id.* at 963. The Court deemed the court of appeals' reliance on state law and the state constitution as insufficient to constitute a "plain statement." *Id.* at 964-69. On remand the New York Court of Appeals reinstated its original dismissal, reasoning that when it had declared a procedure violative of the state constitution, Supreme Court guidance that it did not violate the United States Constitution was insufficient justification to reverse its holding, absent compelling circumstances. People v. Class, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986). Similarly, on remand the New York Court of Appeals ignored the Supreme Court's holding in *P.J. Video* and reinstated its original judgment. People v. P.J. Video, Inc., 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986). The court of appeals did so on its assessment that "Article I, § 12 of the State Constitution imposes a more exacting standard for the issuance of search warrants authorizing the seizure of allegedly obscene material than does the Federal Constitution." *Id.* at 299, 501 N.E.2d at 558, 508 N.Y.S.2d at 909. The court went on to explain that although article I, § 12 of the New York Constitution was virtually identical to the fourth amendment and had in the past generally

dissent noted that this is "especially incongruous" when obscenity is the basis of the alleged violation and by definition is determined at the state level, by the state judiciary.[134]

The final aspect of *P.J. Video*'s significance is its practical effect on the prosecution of obscenity. Obscenity prosecutions have not been commonplace in the last decade, due primarily to the complexities discussed herein and a prevailing permissive attitude.[135] This issue has recently come to the forefront of criminal prosecution in North Carolina[136] and, in light of the rising conservative attitude of the country as a whole towards obscenity, is likely to do the same in other states. As previously noted, changes in the Court's orientation toward obscenity can encourage its prosecution.[137] It is reasonable to suggest that a likely result of *P.J. Video* will be an increase in prosecutions of obscenity. Several lower courts had earlier arrived at the Court's determination that no substantive first amendment concerns were implicated in evidentiary seizures of allegedly obscene materials;[138] however, the fact this reasoning was articulated at the Supreme Court level certainly will reduce any hesitation in obscenity prosecution on the grounds of potential constitutional invalidity, particularly when rising public sentiment against pornography and obscenity is encountered.

The conclusion to be drawn from *P.J. Video* is that the Court, like much of the nation, is taking a more conservative approach toward the inclusion of alleged obscenity within the protections of constitutional speech.[139] Although this undoubtably is a laudable moral decision in some people's minds, it is also a development that undisputably reduces the role of the first amendment's presumptive protection in the seizure of allegedly obscene materials. Thus, *P.J. Video* is a decision that should have received more careful consideration than it

---

been interpreted consistent therewith, it was now more protective than the fourth amendment with respect to seizures of allegedly obscene materials. *Id.* at 301-07, 501 N.E.2d at 559-65, 508 N.Y.S.2d at 910-16.

133. *P.J. Video*, 106 S. Ct. at 1621 (Marshall, Stevens, and Brennan, J.J., dissenting).

134. *Id.*

135. I FINAL REPORT, *supra* note 36, at 366-67.

136. In 1985 the North Carolina General Assembly enacted wide-ranging revisions in the state's obscenity statute. Act of July 11, 1985, ch. 703, 1985 N.C. Sess. Laws 929 (codified as amended at N.C. GEN. STAT. §§ 14-190.1 to .20 (1985)). This chapter contained two provisions that are pertinent here. The most significant provision was the repeal of N.C. GEN. STAT. § 14-190.2 (1985) that had heretofore required a preseizure obscenity determination preceding any seizure of allegedly obscene materials. Act of July 11, 1985, ch. 703, § 2, 1985 N.C. Sess. Laws 929, 930. The second interesting provision was a declaration in N.C. GEN. STAT. § 14-190.1(h) (1985) that obscenity equates to contraband. Act of July 11, 1985, ch. 703, § 1, 1985 N.C. Sess. Laws 929, 930. The general thrust of these revisions was to aid the prosecution of obscenity in the state, which had been virtually nonexistent for several years. *See* Currin & Showers, *Analysis and Proposed Revision of State Pornography Laws*, CAMPBELL L. OBSERVER, Jan. 31, 1985, at 1; Watts, *Obscenity and Related Offenses*, in 1985 NORTH CAROLINA LEGISLATION 169 (N.C. Inst. of Gov't); Note, *supra* note 46.

137. See *supra* note 52.

138. See *supra* note 100.

139. In an interview published in the *New Jersey Law Journal*, Justice Brennan ascribed the contraction of protections of individual liberties of the Burger Court to the pendulum swing of societal opinion as a whole. He particularly noted that the Burger Court had made major inroads into the protections provided individuals by the fourth amendment. *Brennan on the Record*, N.J.L.J., June 26, 1986, at 20-22.

apparently was given; it removes first amendment protection from materials that are undeniably speech within the meaning of the first amendment when seized.

Clearly, the primary purpose of the first amendment is to protect unpopular speech and ideas from governmental suppression. When, as in *P.J. Video*, that protection is denied a class of unpopular ideas—even ideas of admittedly marginal social value—the first amendment's ability to fulfill its primary purpose is limited. In *P.J. Video* the Court did not have to eliminate the first amendment as a substantive check on evidentiary seizures of allegedly obscene materials. The exception to first amendment protections set forth in *Heller* previously had facilitated police seizure of allegedly obscene material for evidentiary purposes.[140] The Court's apparent anxiousness to overrule three levels of New York courts to facilitate an obscenity prosecution, even for the purpose of correcting an arguably misinterpreted constitutional premise, makes the danger of its holding self-evident. A Supreme Court that reduces the constitutional protection afforded to the free dissemination of a class of ideas on a subjective judgment that the ideas are not sufficiently important to merit treatment as speech, when no countervailing government interest exists,[141] sets a dangerous precedent for further erosion of constitutional guarantees.

JAMES H. JEFFRIES IV

140. *See supra* notes 89-97 and accompanying text.

141. The Court has previously allowed restrictions on protected speech when important governmental interests justified the intrusion on the first amendment. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC restrictions on broadcasting vulgar language).