William & Mary Law Review

Volume 26 (1984-1985)
Issue 5

Article 11

June 1985

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EMBARGOES ON EXPORTS OF IDEAS AND INFORMATION: FIRST AMENDMENT ISSUES

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I. INTRODUCTION

United States efforts to limit the outflow of privately generated scientific and technological information in the interest of national security take two forms, restrictions on content of what is communicated and limitations on contact among communicators.[1] Content restrictions include both civil and criminal penalties and use of prior restraints.[2] Contact restrictions may involve barring certain aliens from entering the country or limiting their activities once here.[3] Similar restrictions might be imposed in connection with foreign travel by United States nationals.[4]

Much discussion regarding these restrictions raises practical questions.[5] Are such attempts detrimental to United States scientific progress? How can they be reconciled with academic freedom? Will they really inhibit the military progress of our adversaries? These are important issues, but they cannot automatically be equated with those raised under the first amendment. Although

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1. For a summary of the five statutes applicable to dissemination of privately generated scientific information, see, Alexander, *Preserving High Technology Secrets: National Security Controls on University Research and Teaching*, 15 LAW & POL'Y IN INT'L BUS. 173, 178-202 (1983).

2. *See* Trading with the Enemy Act of 1917, 50 U.S.C. app. §§ 1-44 (1982).

3. See Neuborne & Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 Wm. & Mary L. Rev. 719 (1985).

4. Haig v. Agee, 453 U.S. 280 (1981) (former Central Intelligence Agency (CIA) agent's passport was rescinded after the agent began a scheme of identifying CIA undercover operatives in foreign countries).

5. *E.g.*, Wilson, *National Security Control of Technological Information*, 25 JURIMETRICS J. 109, 129 (1985); Note, *National Security Protection: The Critical Technologies Approach to U.S. Export Control of High-Level Technology*, 15 J. INT'L. L. & ECON. 575, 599-604 (1981).

the wisest policy on export of information may be one which minimizes restraints, the first amendment may well permit restrictions many think ill-advised and counterproductive.

Three recent first amendment analyses[6] suggest that restrictions on the dissemination of scientific and technological information must survive a high level of scrutiny. The authors focus on the extent scientific and technological speech advances traditional first amendment values.[7] They conclude that these values apply and that consequently the validity of national security restrictions should be determined under what each deems to be appropriate first amendment standards.[8] One writer, Ferguson, rejects almost any use of an "intermediate" standard of review comparable to that applied in commercial speech cases.[9] He believes the appropriate test for a valid restriction demands a compelling interest measured by the gravity of the evil to be averted and the likelihood of its occurrence.[10]

Unlike Ferguson, Alexander identifies two major types of scientific information. Alexander differentiates noncommercial technological expression "taking the form of publication of research findings and university instruction of students" from "technical data transmission in the commercial context."[11] The commercial communication would receive a more limited protection than that afforded the noncommercial scientific communication to which both Alexander and Ferguson would apply the compelling interest test.[12]

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6. Alexander, *supra* note 1, at 240; Ferguson, *Scientific and Technological Expression: A Problem in First Amendment Theory*, 16 HARV. C.R.-C.L. L. REV. 519 (1981); Comment, *National Security Controls on the Dissemination of Privately Generated Scientific Information*, 30 UCLA L. REV. 405 (1982); *see* Note, *Executive Order 12,356: The First Amendment Rights of Government Grantees*, 64 B.U.L. Rev. 447, 490-96 (1984) [hereinafter cited as Note, *Executive Order 12,356*]; Note, *The Export Administration Act's Technical Data Regulations: Do They Violate the First Amendment?*, 11 GA. J. INT'L & COMP. L. 563 (1981).

7. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

8. Alexander, *supra*, note 1, at 203-04; Ferguson, *supra* note 6, at 533-43; Comment, *supra* note 6, at 436.

9. Ferguson, *supra* note 6, at 543-47. Even he suggests, however, more limited protection for the unusual case of "technological information that is only subject to military applications." *Id.* at 544.

10. *Id.* at 554.

11. Alexander, *supra* note 1, at 204 n.223.

12. *Id.* at 205-06.

The student comment author, Funk, also differentiates two types of scientific information. He would apply a compelling interest standard to information which "contributes to human knowledge and sheds light on the consequences of both alternative national policies and personal choices."[13] All other scientific information, "chiefly of economic interest" and analogous to commercial speech, would be tested under a lesser intermediate standard which justifies a restraint if even a "substantial" rather than an "exceptional" threat to national security is demonstrated.[14]

The following first amendment analysis considers four factors. The first factor addresses the audience to whom the communication is directed. Most discussions of first amendment rights assume that the communication is addressed to a domestic audience or at least assume that the domestic or foreign nature of the audience is inconsequential. A difference may exist, however, if the audience is solely foreign. Also, the discussions further assume a mass audience receives the communication. The dissemination of technological and scientific information to a limited audience of a few selected persons, corporations, or governments may be important.

The analysis next considers the source of the communication. The Supreme Court has held that a corporation's speech receives first amendment protection.[15] Nevertheless, it may be relevant that corporate rather than individual communication is involved in a significant portion of exported technological and scientific information.

Third, the analysis reviews the subject matter of the communication. The Court already has identified commercial speech as a category of communication afforded a lesser degree of protection than other forms of speech.[16] This separate categorization of commercial speech suggests that the technological and scientific nature of the material also may affect the scope of permissible regulation.

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13. Comment, *supra* note 6, at 436-39.

14. *Id.* at 437-41.

15. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

16. Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557 (1980); *see* Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981). Justice White's plurality opinion, *id.* at 508-11, and the dissenting opinions of Chief Justice Burger, *id.* at 556, Justices Rehnquist, *id.* at 569, and Stevens, *id.* at 540, indicate an especially deferential approach to regulation of commercial speech.

The fourth and final factor considers the role of the regulation's purpose or effect in first amendment analysis. This factor reviews the interplay between a regulation's purpose or effect and the appropriate standards of review.

This Article advances five major propositions that account for the above four factors. First, when scientific or technological information is communicated solely to a foreign person, corporation, or government, the generally cited first amendment values have little or no application. Second, when the communication reaches a domestic as well as a foreign audience, regulation more directly implicates first amendment values and is vulnerable under conventional first amendment analysis. Third, an alternative and preferable analytic approach focuses on the first amendment as a limit on the the appropriate role of government towards the individual's mind; a bar to the use of regulatory power to shape viewpoint. Fourth, under the just stated proposition, most scientific and technological speech may be regulated to promote security regardless of detrimental effect on progress, if the regulation is supported by a rational basis. Fifth, in cases in which scientific and technological speech is regulated with the purpose or effect of skewing debate on public policy issues, the regulations must be subjected to strict review.

II. Scientific and Technological Communication Addressed Solely to a Foreign Audience

Communication to an exclusively foreign audience is most likely when the addressee is a person, corporation or government rather than the general public. An analogy to antitrust theory relating to imports and exports may illuminate the problems posed by efforts to curtail such communication. The concern with restrictions on "imports" is clear, from both an antitrust and a first amendment perspective. Antitrust law protects United States consumers of products and services from anticompetitive activities that reduce the benefits of foreign competition in the American marketplace.[17] Similarly, the first amendment protects the right of United States

17. 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad § 10.01 (2d ed. 1981).

consumers to receive ideas and information from abroad.[18] Thus, in both instances, the rights of consumers in a domestic marketplace are safeguarded.

The theoretical basis for the export aspect of antitrust is more problematic. While other benefits may flow from such antitrust enforcement, for example, preserving business opportunities for individual United States firms, improving the balance of trade, or furthering good foreign relations, it is difficult to identify any tangible benefit to United States consumers.[19] The economic interest of United States antitrust policy in protecting foreign consumers from exploitation by American firms is not evident.[20] A similar problem of justification arises for the "export" side of first amendment protection as explained below.

A. First Amendment Values and the Foreign Audience

1. *Self-Governance*

A question exists of how to justify a concern over restrictions on the flow of information and ideas out of the country.[21] This question of justification remains even if the restricted material contains core political expression. The self-governance rationale for freedom of expression does not fit here completely. Assume a debate on some aspect of United States foreign policy. No first amendment self-governance interest exists in informing foreign nationals on the debate.[22] Of course, to the extent that the United States has

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18. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

19. Conceivably, blocking anticompetitive actions by United States firms might reduce the need for retaliatory behavior by foreign firms. Also, maintaining an atmosphere of vigorous competition by United States firms in foreign markets might have a spillover effect on the firms' behavior in the United States market. Both of these benefits, however, are highly speculative.

20. 1 J. ATWOOD & K. BREWSTER, *supra* note 17, § 9.06, at 282.

21. *See* T. EMERSON, *supra* note 7, at 93-95. Professor Henkin recently suggested that the Constitution should be more than a compact between citizens and their government. It also should serve as a "conscience" over all governmental activities, including those affecting only aliens outside our borders. Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at our Gates*, 27 WM. & MARY L. REV. 11 (1985) (Feb. 27, 1985, Cutler Lecture). The question remains open whether even Professor Henkin's view of the Constitution as "conscience" would demand concern with information restrictions.

22. A marginal contribution to the "safety valve" function could exist which helps maintain a stable and orderly society. *See* T. EMERSON, *supra* note 7. This value, however, is irrelevant to scientific and technological speech.

surrendered sovereignty to international institutions, the self-governance first amendment theory would apply to communication addressed to such institutions having a regulatory impact on the United States.

2. Marketplace of Ideas

Another major rationale for freedom of expression is that it aids the search for truth.[23] Assisting foreign nationals to find truth, however, is not a first amendment goal. It may be argued that "free trade in ideas" requires us to give so that we may receive. Returning to the antitrust analogy, there is criticism of a similar rationale for United States antitrust enforcement in foreign trade.[24] United States economic rivals are not necessarily committed to a procompetitive policy. In fact, they may do just the opposite. The same is true in the transnational marketplace of ideas. The United States cannot guarantee that nationals of other countries will enjoy freedom of speech. The transnational marketplace of ideas is as flawed as that for goods and services.

Because much of what is communicated abroad might be available to United States consumers of information, it is for the most part impossible to segregate a domestic market from a transnational market. To the extent that communication intended for foreign markets is made available in the United States, the self-governance and search for truth theories justify first amendment protection. No reason exists, however, to permit purely foreign communication unless we internationalize our concept of the first amendment or regard foreign pressure on the United States government as part of self-governance.

3. Self-Fulfillment

Another first amendment rationale, individual self-fulfillment, similarly does not provide a persuasive basis for affording protection to the purely foreign dissemination of information. With regard to this value, a critical difference may exist if the disseminator is a corporation rather than an individual. The Supreme Court,

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23. *See* T. EMERSON, *supra* note 7, at 6.

24. *See generally* 1 J. ATWOOD & K. BREWSTER, *supra* note 17, § 1.03-05, at 6-7.

in *First National Bank of Boston v. Belotti*,[25] held that corporations enjoy a right of free speech. The Court based its decision on the contribution which corporate speech makes in the marketplace of ideas. The Court reasoned that the source of the speech did not matter because the resulting benefit remained the same.[26] In *Belotti*, protected corporate speech enhanced discussion on the desirability of changes in Massachusetts tax laws. Because corporate rather than individual free speech was involved, however, no reliance could be placed on the theory that freedom of speech is a means for the communicator's personal self-fulfillment. Here, only the benefit to society and to individual recipients mattered.

The above analysis regarding foreign audiences suggests that the clearest case for refusing to give first amendment protection to exclusively foreign dissemination of information occurs when the disseminator is a corporation. As in *Belotti*, no self-fulfillment aspect exists to corporate speech. Moreover, if the material simply is utilized by a foreign government, corporation, or individual recipient, no marketplace of ideas or self-governance benefit arises within the United States. We are not constitutionally committed to facilitating these objectives abroad.[27]

In *United States v. Edler Industries, Inc.*[28] and *Briggs & Stratton Corp. v. Baldrige*,[29] two United States courts of appeals decided cases involving corporate speech solely to a foreign recipient. Both courts erroneously assumed that the first amendment automatically applied and that, therefore, a first amendment standard of review was necessary.

In *Edler* a United States aerospace corporation provided unclassified technical information, having both military and civilian uses, to French missile companies. The corporation and its president were convicted of the unlicensed exporting of technical data relating to articles on the United States Munitions List.[30] Viewing the technical assistance as a form of commercial speech, the United States Court of Appeals for the Ninth Circuit did not differentiate

25. 435 U.S. 765 (1978).
26. *Id.* at 777.
27. *But see* Henkin, *supra* note 21, at 18-24.
28. 579 F.2d 516 (9th Cir. 1978).
29. 728 F.2d 915 (7th Cir.), *cert denied*, 105 S. Ct. 105 (1984).
30. 579 F.2d at 518.

between the corporation's rights and those of its president. Instead, the court stated that "Edler ha[d] advanced a colorable claim that the First Amendment furnishes a degree of protection for . . . dissemination of technological information."[31] By narrowly construing the statute, however, the court found it unnecessary "to resolve the precise scope of that protection."[32]

Unlike *Edler*, *Briggs* did not concern transmittal of scientific or technological information. Rather, it concerned the supply of data on the business operations of two United States corporations. These corporations, doing business with Arab countries, were forbidden by the Export Administration Act[33] from responding to questions asked by the Arabs' Trade Boycott Office regarding the Arab boycott of Israel. The two corporations brought separate actions to vindicate their claim of a first amendment right to answer the boycott office's questions. Both the United States District Court for the Eastern District of Wisconsin and the United States District Court for the Western District of Wisconsin, assuming again that first amendment rights were implicated, focused on whether the requested information was political or commercial.[34] The courts determined that the requested information was commercial speech and applied the first amendment standards stated

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31. *Id.* at 520.

32. *Id.* The statute was said to prohibit "only the exportation of technical data significantly and directly related to articles on the Munitions list." *Id.* at 521. Otherwise, the court envisioned "serious interference with the interchange of scientific and technological information." *Id.* Moreover, if the information had both peaceful and military applications, the defendant had to know or have had reason to know that the information was intended for a prohibited use. As construed, the statute regulated "conduct" with only an incidental limitation upon expression:

> Section 1934 and the regulations do not interfere with constitutionally protected speech. Rather, they control the conduct of assisting foreign enterprises to obtain military equipment and related technical expertise. So confined, the statute and regulations are not overbroad. For the same reasons the licensing provisions of the Act are not unconstitutional prior restraint on speech.

579 F.2d at 521.

Relying on Zemel v. Rusk, 381 U.S. 1 (1965), the court further held that public availability in the United States "is not a [first amendment] defense recognized by the Constitution." 579 F.2d at 522.

33. 50 U.S.C. §§ 2401-2420 (1982).

34. Trane Co. v. Baldrige, 552 F. Supp. 1378 (W.D. Wis. 1983); Briggs & Stratton Corp. v. Baldrige, 539 F. Supp. 1307 (E.D. Wis. 1982).

in *Central Hudson Gas v. Public Service Commission*[35] resulting in validation of both the Act and its implementing regulations. The United States Court of Appeals for the Seventh Circuit affirmed both lower court decisions, adopting the reasoning expressed in one of the district court opinions, *Briggs & Stratton Corp. v. Baldrige*.[36]

Unlike corporate speech, when an individual American communicates to a foreign recipient the self-fulfillment rationale does apply. The communicator's self-fulfillment, however, is not isolated in the major freedom of speech cases because these involve dissemination either directly or indirectly to a domestic audience. Consequently, such cases couple the self-fulfillment rationale with others principally relating to self-governance and the marketplace of ideas. Given the frequent coincidence of these rationales, the Supreme Court has given no firm indication of the weight to be accorded self-fulfillment alone.[37]

It is difficult to hypothesize situations in which only the communicator's self-fulfillment is involved. If one searches enough, societal impact may be found in every exercise of freedom of speech. Accepting the proposition that individual communication solely to a foreign person, corporation, or government, however, is or approaches a pure case of self-fulfillment, then the foundation for first amendment protection is weakened. This weakening is due not only to the absence of the typically cited societal benefits of free speech, but also, as suggested by *Edler* and *Briggs*, to the nature of the material typically communicated.

The preceding discussion of self-fulfillment assumed that all forms of speech by an individual equally advance this value. This may not be true. For example, nothing in the Supreme Court's commercial speech decisions suggests that such speech deserves

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35. 447 U.S. 557 (1980).

36. 539 F. Supp. 1307 (E.D. Wis. 1982).

37. One commentator argues that individual self-fulfillment or a "liberty model" is "the most coherent theory of the first amendment." Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 966 (1978). Another suggests that "the one true value" which the constitutional guarantee of freedom of speech ultimately serves is "individual self-realization." This term is designed to emphasize both self-development and autonomy of decisionmaking. Professor Redish views other previously identified first amendment values as legitimate but as derivative from individual self-realization. M. REDISH, FREEDOM OF EXPRESSION; A CRITICAL ANALYSIS 11-12 (1984).

first amendment protection as a matter of self-fulfillment even when the disseminator is an individual.

In *Virginia Pharmacy Board v. Virginia Consumer Council*,[38] the Court assumed "that the advertiser's interest is a purely economic one" but concluded that this "hardly disqualifies him from protection under the First Amendment."[39] The Court analogized the advertiser's commercial speech to the previously sustained right of free speech in a labor dispute involving a single factory.[40] The fate of such a factory, the Court reasoned, could turn on its ability to advertise as well as on the resolution of its labor difficulties.[41] Further, "practices in [this] factory [might] have economic repercussions upon a whole region and affect widespread systems of marketing."[42] The Court never suggested that vindicating the advertiser's personal development for its own sake was an important first amendment value. In safeguarding informed decisionmaking in the commercial marketplace, the Court stressed the economic welfare of individual buyers and sellers and of society.

Whether the Court was right in grafting the "invisible hand of the free market" onto the more traditionally accepted body of first amendment benefits is inconsequential here.[43] Importantly, self-fulfillment of the advertiser was not a factor in the Court's reasoning. The self-fulfillment rationale arguably could be applied to the communicator's ability to fashion creative advertising.[44] However, even the view that the self-fulfillment argument best supports the protection of commercial speech[45] appears to place more emphasis on the interest of the individual recipient than on that of the advertiser.

When an individual communicates technological and scientific information to a foreign person, corporation, or government, half the self-fulfillment rationale immediately disappears. Even when

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38. 425 U.S. 748 (1976).

39. *Id.* at 762.

40. *Id.* at 762-63 (citing Thornhill v. Alabama, 310 U.S. 88 (1940)).

41. *Id.* at 763.

42. *Id.* (citing Thornhill v. Alabama, 310 U.S. 88, 103 (1940)).

43. *See*, Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

44. M. REDISH, *supra* note 37, at 67.

45. *Id.* at 60-61.

the recipient is a foreign individual, no United States constitutional interest arises in fostering the self-fulfillment of a foreign citizen. With a foreign recipient of the communication, only the argument based on the communicator's need for self-fulfillment remains.

Detailed technological information that would pose security problems if made available overseas is comparable to commercial speech because the primary justifications for its dissemination do not relate to the personal development of any particular communicator. Even assuming the communicator's personal development interest, however, foreign dissemination is not controlled by *Virginia Pharmacy Board* because, unlike Virginia's ban on drug price advertising, a limitation on the export of information still may allow domestic dissemination. Thus the communicator's self-fulfillment is just partially or perhaps not at all adversely affected. This may be true even if internal dissemination is curtailed so that only limited recipients may obtain the information. Further, publication of information sometimes may not be critical to self-fulfillment of an individual whose creative input is channeled into products with disclosure only within his firm or government agency.

III. Scientific and Technological Communication Reaching a Mixed Domestic and Foreign Audience

A. *First Amendment Values and the Mixed Domestic and Foreign Audience*

When communication reaches both a domestic and foreign audience, a more direct confrontation arises between government regulation of such communication and recognized first amendment values. The extent to which these values are impaired depends on the nature of the material regulated. The Supreme Court has assumed that "scientific" communication is protected speech.[46] It has not considered specifically the application of customarily cited first amendment rationales.

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46. *See* Miller v. California, 413 U.S. 15, 24 (1973). *See generally* New York v. Ferber, 458 U.S. 747, 762-63, 773 (1982) (the Court dismissed an argument that child pornography might contain scientific information and therefore receive first amendment protection, but reiterated protection for medical textbooks).

1. Self-Governance

Some scientific communication might qualify for protection even under the view that only political discourse is shielded by the first amendment.[47] This communication may be indistinguishable from political speech or closely related to it, for example, the theory suggesting the "nuclear winter" consequences of a nuclear war. No question arises regarding the political character of a newspaper ad by concerned scientists pointing out the newly identified danger and therefore urging support of a nuclear freeze or a more conciliatory stance on nuclear disarmament talks.[48] One step removed from this ad would be publication of a scientific paper setting forth the "nuclear winter" theory but refraining from specifically urging any public policy. Nevertheless, the relationship to policy matters would be evident.

Most scientific and technological information has little or no discernible connection to a defined public policy issue except that any contribution to the total store of available information might contribute to informed decisionmaking.[49] The lack of a relationship to a public policy issue was a major factor in *United States v. Progressive, Inc.*[50] in which the United States District Court for the Western District of Wisconsin granted a preliminary injunction against publication of an article describing how to construct a hydrogen bomb. The magazine's publisher argued that the article would "alert the people . . . to the false illusion of security created by the government's futile efforts at secrecy."[51] This would give the people "needed information to make informed decisions on an urgent issue of public concern."[52] The court responded that "[t]his Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on the issue."[53]

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47. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 23-35 (1971); *see also* BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 355-58 (1978).

48. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

49. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 256-57.

50. 467 F. Supp. 990 (W.D. Wis. 1979).

51. *Id.* at 994.

52. *Id.*

53. *Id.*

2. The Marketplace of Ideas

Even when the dissemination of scientific and technological information has only a remote relation to issues of public policy, it may pertain to the "search for truth" within the particular field. Consequently, although suppression of the information may not prejudice any self-governance interest, it is more likely to injure the free interchange of information which is assumed to yield further progress. In the field of scientific inquiry, the "search for truth" rationale has particular appeal as a justification for free speech.[54]

3. Self-Fulfillment

Finally, one must consider the value of self-fulfillment. For those individuals who are capable of communicating and of understanding scientific and technological information, the free flow of such material can enhance personal development. Moreover, popularized accounts of scientific and technological advances can contribute to the sophistication of the layman.

In conclusion, the three rationales discussed above do support the view[55] taken by the previously mentioned authors that restrictions on the dissemination of scientific and technological information demand a high level of scrutiny. These authors, however, did not consider whether the nature of the audience, solely foreign or mixed foreign and domestic, made a difference for first amendment analysis.[56] Thus, for the reasons relating to foreign audiences, this conclusion is restricted to the case involving a mixed domestic and foreign audience. Assuming this case, Funk's analysis best comports with the Supreme Court's current decisional framework by drawing a line between fully protected scientific and technological speech and scientifically oriented commercial speech. This analysis applied strict review to the scientific speech and an intermediate standard to the commercial speech.[57]

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54. Ferguson, *supra* note 6, at 537-41.

55. Alexander, *supra* note 1; Ferguson, *supra* note 6; Comment, *supra* note 6.

56. Alexander does mention the domestic-foreign dichotomy in a footnote. Alexander, *supra* note 1, at 205 n.225.

57. Comment, *supra* note 6, at 436-41. The *Edler* decision attempted to account for this sort of distinction by characterizing the transmission of information on a specific product as

B. An Alternative Analysis for Regulations on Scientific and Technological Speech

In method of analysis and in ultimate result, the following discussion takes a different approach from the three authors discussed earlier. Strict review is necessary, but in a narrower category of cases. Furthermore, most restrictions should be reviewed as ordinary regulations of liberty under a standard requiring only a rational relationship to a legitimate governmental objective.

1. The First Amendment as a Limit on Government's Role Vis-à-Vis the Individual's Mind

For the most part, the alternative analysis does not consider whether a particular category of expression, be it scientific, artistic, commercial, or political, advances one or more identified values.[58] Rather, it addresses the first amendment's central premise regarding the legitimate role of government[59] toward the mind of each individual. The premise assumes that it is almost always invalid for the government, either as an end in itself or as a means to an end, to shape the public's thinking by regulating communication.[60] As Holmes's *Lochner v. New York* dissent[61] says, the Constitution "is made for people of fundamentally differing views."[62]

Holmes's viewpoint is most clear when the government invalidly regulates political discourse by suppressing certain views, thereby advancing others. The business of government does not include using its regulatory power to shape a political viewpoint. It does not matter that the objectionable criticism or advocacy occurs in an "artistic" work. For example, the Supreme Court held that a state could not censor as "sacrilegious" a film showing adultery in an

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"conduct" rather than speech, thus triggering a less stringent standard of review. 579 F.2d 516, 520 (1978). This labeling simply masked the necessity of identifying and weighing the interests at stake.

58. *See* Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 139-40 (1982).

59. *See* Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 204 (1981).

60. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley v. Georgia, 394 U.S. 557, 565-66 (1969); Kleindienst v. Mandel, 408 U.S. 753, 772 (1972) (Douglas, J., dissenting).

61. 198 U.S. 45, 74 (1905).

62. *Id.* at 76.

allegedly favorable light.[63] Government censorship remains inappropriate even if the censorship flows from the government's opposition to the political views of the artist, writer, or composer, unrelated to any supposed message in an artistic work. This censorship represents simply an indirect effort to silence ideas to which the government is hostile.

One commentator has suggested that government regulation of artistic expression generally is invalid because it almost always involves hostility to a point of view either in the work of art or of the artist.[64] Certainly this accounts for much of the impetus for censorship of the arts. Other commentators have relied on the contribution which the arts make to the individual's overall ability to participate intelligently in the political process[65] or generally to his self-fulfillment.[66] None of these observations criticizing government regulations, however, are required to support the view that the first amendment protects the arts against government censorship.

Consider a case where government regulation flows strictly from a concern that a particular category of art or music is not worthy of public attention. The government is seeking to control what is performed as a means of elevating the public's cultural tastes. Again, the first amendment does not permit this because such government regulation focuses on thought control. Government regulation is prohibited despite a sincere and well founded belief that the public would be benefitted, for example, if rock music were banned and more classical music were played. The first amendment, however, does permit the government affirmatively to foster and encourage one kind of artistic expression over another. Thus the government may teach appreciation of classical music in the public schools, finance the public performance of Mozart, but re-

63. Kingsley Int'l. Pictures Corp. v. Regents, 360 U.S. 684 (1959).

64. F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 111 (1981). Contrary to Professor Schauer's view, *id.* at 181-88, this hostile attitude may exist even with so-called "obscenity", which the Court has defined out of the first amendment. The concern with obscenity fundamentally involves a desire to control the individual's attitudes about sexual behavior. The concern remains that material primarily depicting sexual practices in an explicit and offensive way will have a particularly corrosive effect on moral attitudes. *Id.* at 181-88; *see* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

65. Meiklejohn, *supra* note 49, at 256-57.

66. M. REDISH, *supra* note 37, at 57.

fuse to fund a comparable rock concert, and create new public forums designed to foster presentation or discussion of particular subject matter.[67]

Another area of first amendment concern involves the regulation of commercial speech. Without reference to the value attributable to a particular example of commercial speech, the first amendment here also limits the objective for which government may regulate. Therefore, commercial speech regulation designed to affect public attitudes and behavior regarding an advertised product or service should be held invalid.[68] This limitation is consistent with sustaining some regulation barring false or misleading advertising because this limitation involves an effort to ensure the integrity of the individual's decisionmaking.[69] It also is consistent with forbidding an offer of an illegal product or service because this choice has been foreclosed.[70]

Political speech is the one speech category that should be differentiated in terms of the values it serves. The effect of a regulation in suppressing or advancing a political view ought to have independent significance even if the objective for which the regulation was adopted has nothing to do with shaping viewpoints. Regulation controlling speech directly related to issues of public policy demands strict review.[71]

This corollary is offered for two reasons. First, regulation having an effect on public policy strongly suggests an illicit regulatory purpose, which the government almost always will deny with a measure of plausibility. While actual proof of improper purpose therefore would be difficult, the government's strong incentive to shape public opinion through a variety of means, some quite subtle, is undeniable. Second, regulation suppressing a political view,

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67. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1110-13 (1979).

68. *Virginia Pharmacy Bd.*, 425 U.S. at 770; Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 96 (1977). There is, however, a contrary implication in *Central Hudson Gas*, 447 U.S. at 569-72. Justice Blackmun's concurring opinion strongly and properly objected to this. 447 U.S. at 573-75.

69. *See* M. REDISH, *supra* note 37, at 64-65.

70. This is distinguished from protected advocacy for the legalization of a product or service. *Cf.* National Soc'y of Professional Eng. v. United States, 435 U.S. 679, 697-98 (1978).

71. *Cf.* Comment, *First Amendment Standards for Subsequent Punishment of Dissemination of Confidential Government Information*, 68 CALIF. L. REV. 83, 102-04 (1980).

regardless of the regulation's objective, poses a direct and immediate threat to the process by which the people maintain some check on all government activities.[72] Regulation having a nonpolitical affect on other forms of speech creates no such threat. For similar reasons, and in contrast with the position taken on fostering the arts, government dissemination of its own views, "government speech," and government subsidization of private speech with the purpose or effect of advancing a political view also should be suspect.[73]

2. Application of Alternative Analysis to Scientific and Technological Speech

Assume a provable governmental purpose to distort public policy or scientific debate. All such efforts to suppress scientific or technical information to shape public or scientific opinion should be invalid. Consider the earlier reference to the new theory on a "nuclear winter."[74] Government officials could have decided that release of these theories would have unreasonably intensified public fear over the threat of nuclear war and would have increased pressure on the government to make unwarranted concessions in nuclear disarmament talks. The attempt to censor this theory clearly would violate the first amendment because of the illicit governmental purpose. As explained below, however, instances may arise of a legitimate security need to suppress information even though the effect would be to distort debate.

Assume that an illicit governmental purpose cannot be proved but that an inevitable effect of governmental regulation is to skew scientific debate. Assume further no adverse impact on any debate involving public policy. Although most scientific and technological information does not bear on any public issue, it may involve the "search for truth" within the field as well as individual self-fulfillment. Suppression of the information may injure the process of free interchange important both to scientific progress and to the individual scientist's development. Thus the question in most instances is whether, notwithstanding these detriments, the govern-

72. *See* Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.F. RES. J. 521.
73. Kamenshine, *supra* note 67, at 1113-22.
74. See *supra* note 48 and accompanying text.

ment may curtail dissemination of scientific and technological information for national security reasons.

The government may adopt security policies limiting disclosure of scientific and technological information notwithstanding adverse side effects on scientific progress and self-fulfillment and remain consistent with the view that the foundation of the first amendment is denial of the government's power to try and control viewpoint. First, little reason exists to suspect that a national security regulation having these side effects actually was intended to distort scientific debate. Second, a valid national security purpose can be linked only tenuously to illicit thought control. No plan can be found to shape ideas in the abstract nor to control viewpoint to prevent "undesirable" behavior. Rather, the assumption in this discussion is that persons, groups, or nations already are committed to, or are threatening to use force against our society. The scientific and technological information represents a means to an end in the same sense as a weapon. Therefore, subject to a rational basis review by the courts, the government appropriately may balance the adverse impact on scientific development and self-fulfillment against the national security interest.

Assume finally the most difficult situation, when no illicit purpose can be established but when the information to be suppressed has a relationship to existing issues of public policy or would tend to create such an issue, especially by discrediting a position advanced by government spokesmen. Based on my alternative analysis, I support a strong presumption against this suppression, i.e., courts should invoke strict scrutiny.[75] One easily can hypothesize

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75. For discussion of the factors pertinent to strict review of restraints on dissemination of scientific and technological information, see Alexander, *supra* note 1, at 205-08; Ferguson, *supra* note 6, at 554-58; Comment, *supra* note 6, at 439-40. Although the authors are not in total agreement, they share a substantial identity of approach.

The most speech-protective formulation, with which I agree, appears in Comment, *supra* note 6. To constitute a "compelling" threat to national security, the danger would have to be "immediate, certain and exceptional." The information would be such as to enable "a potential or actual enemy to develop a significant weapon or countermeasure to a United States weapon within a period of time too short for the United States to take corrective steps." The threat would be "immediate" "if the time from its receipt by a foreign power to its actual application is short as measured on an appropriate time scale of technological development." The threat would be "certain" "when it has identifiable direct military uses or related production applicability" and would be "exceptional" "when it would give the enemy an identifiable, material advantage over the United States in military terms." The

situations in which the nation's security would be seriously threatened by publication of information highly pertinent to a public debate.[76] The strict review standard acknowledges not only that a vital governmental interest sometimes must take precedence over adverse effect on open debate[77] but also that those instances must be minimized.

Once a party objecting to government suppression established the necessary public issue relationship, the government then would have the burden of demonstrating a compelling necessity for its regulation. Unlike the case in which only scientific debate is distorted, a great risk exists that the government is using national security as a pretext to pursue an improper objective of skewing public policy discussion. Also, no matter how legitimate and important the government's actual suppression objective, the effect will be manipulation of public opinion. Public policy debate marks the only instance in national security regulation when effect alone should trigger a heightened standard of review.

IV. Applicability of Ancillary First Amendment Doctrines

This Article has established that most technological and scientific speech may be regulated upon the showing of a rational relationship to a national security objective. The Article now considers ancillary doctrines which have been used to safeguard freedom of speech.

A. Standard of Review for Prior Restraints

The Court in *New York Times Co. v. United States* (the *Pentagon Papers* case)[78] and *Near v. Minnesota*[79] maintained that only the strictest necessity will justify a prior restraint. Both cases illus-

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final requirement would be that the United States be "the exclusive source of the information." Comment, *supra* note 6, at 440.

76. *See* Linde, *supra* note 59, at 198-99; Van Alstyne, *supra* note 58, at 113-14.

77. One commentator has observed that for "national security data" the "less restrictive alternative" of regulating the use to which the information is put is not available. "By definition, the perceived danger in such a setting is posed by hostile nations or terrorist groups who would not be deterred by, or even subject to, criminal prosecution." Ferguson, *supra* note 6, at 553-54.

78. 403 U.S. 713 (1971).

79. 283 U.S. 697 (1931).

trate attempted censorship of clearly political speech. Most technological and scientific information, however, should be subject to prior restraint on national security grounds without having to meet the *Near-Pentagon Papers* standard.[80] Normally the government may balance the need for national security against the interest of advancing science or technology through open exchange of information. Strict review, roughly equivalent to the *Near-Pentagon Papers* standard,[81] would be reserved in both prior censorship and subsequent punishment cases for situations when the questioned material related to matters of public policy.

The district court in *Progressive* found that "the government ha[d] met its heavy [*Near*] burden of showing justification for the imposition of a prior restraint on publication of the objected-to technical portions of the . . . article."[82] This conclusion is open to criticism.[83] As mentioned earlier, however, the court also remained "unconvinced that suppression . . . would in any plausible fashion impede the defendants in their laudable crusade to stimulate public knowledge of nuclear armament and bring about enlightened debate on national policy questions."[84] The district court's focus on the relevance of the H-bomb plan to a public issue was not required by the *Near-Pentagon Papers* standard. The focus, however, is consonant with the approach in the alternative analysis which sharply reduces the government's burden in obtaining a prior restraint on publication of information which has only a technological significance.

B. Special First Amendment Procedural Safeguards

1. *Judicial Review of Prior Restraints*

In prior restraint cases, the Court has demanded not only a showing of strict necessity for the restraint but also special proce-

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80. This assumes, contrary to usual first amendment doctrine, that the standard of review should remain the same regardless of whether there is a prior or subsequent restraint. *See* M. REDISH, *supra* note 37, at 127.

81. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-02 (1979).

82. 467 F. Supp. at 996.

83. Cheh, *The Progressive Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls*, 48 GEO. WASH. L. REV. 163, 199 (1980).

84. 467 F. Supp. at 996.

dural safeguards ensuring prompt judicial review.[85] Although this Article has shown that dissemination of a large percentage of scientific and technological material safely could be subject to prior restraint under a rational basis standard, the question of procedural safeguards remains for discussion. No strong reason for these safeguards exists if prior censorship would never involve illicit motivation or substantial detriment to political discourse. But as previously discussed, this assumption cannot be made. Given the consequent risk of damage to the political process through prior censorship of scientific and technological material, a strong basis for stringent procedural safeguards exists.[86]

2. Restriction of Informal Censorship

In *Bantam Books v. Sullivan*,[87] the Court found that a system of informal government censorship of books believed obscene violated the first amendment. One commentator cited the decision as making suspect the efforts at informal cooperation between government representatives and groups of scientists to control the dissemination of sensitive material.[88] Two fundamental problems arise with drawing this inference from *Bantam Books*. First, the decision's relevance is difficult to assess given the opinion's lack of clarity. Second, an opinion relating to obscenity control should not be applied uncritically to the control of scientific information.

The Court in *Bantam Books* clearly was concerned that the Rhode Island Commission to Encourage Morality in Youth used censorship which circumvented constitutionally required safe-

85. National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

86. Professor Redish has suggested that *any* use of administrative prior restraints in "national security" cases is unjustified and that "[t]he courts' are . . . the only proper forum for restricting publication. . . ." M. REDISH, *supra* note 37, at 158. This position is based on the dangers to freedom of speech from regulation encompassing more than dissemination of scientific or technological information. For example, the material might be comparable to the study of the government decision-making process leading to involvement in the Viet-Nam War at issue in the *Pentagon Papers* case and *New York Times*. 403 U.S. at 713. Although the material manifestly related to a vital policy debate on the war, the security interest advanced by the government was not in denying scientific or technological information to a possible military adversary, but in preventing embarassment in the conduct of United States foreign policy.

87. 372 U.S. 58 (1963)

88. *See* Alexander, *supra* note 6, at 216.

guards for regulation of obscenity.[89] The opinion concluded by distinguishing the Commission's activities from those of law enforcement officers engaged in informal meetings with possible law violators.[90] A concurring opinion by Justice Clark[91] found that the Commission's overall functioning was not objectionable. Rather, the problem was its coercive tactics in making intimidating threats of legal action. Otherwise, he found no fault in the Commission's reviewing books and making public recommendations. The majority, however, may have been concerned that unlike an informal opinion by an individual law enforcement official, the Commission appeared to be making an authoritative public determination that certain books were obscene. Even though the Commission lacked enforcement power, first amendment and due process considerations arguably precluded this official determination without an appropriate hearing.[92]

Informal cooperation between government agencies and scientific organizations more closely resembles the permissible meetings with law enforcement officials because no agency purports to make an authoritative public determination of illegality. Moreover, although informal control of scientific and technological information is unlikely to involve the Rhode Island Commission's methodology, it is of equal importance that first amendment values at stake in the two cases are different. Having erroneously categorized obscenity as unprotected, the Court has taken steps to ensure that anti-obscenity enforcement also does not limit protected artistic speech, the regulation of which involves an illicit attempt to control viewpoint. The line between obscenity and protected speech is inherently unclear,[93] and the government becomes involved in making improper artistic value judgments. *Jenkins v. Georgia*[94] demonstrates the risks of obscenity enforcement and the need for continuing Supreme Court supervision. In *Jenkins* the Court was compelled to reverse an obscenity conviction for showing a well-respected motion picture.

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89. 372 U.S. at 69-70.
90. *Id.* at 71-72.
91. *Id.* at 74.
92. *See* Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518 (1970).
93. Paris Adult Theatre v. Slaton, 413 U.S. 49, 83-85 (1973) (Brennan, J., dissenting).
94. 418 U.S. 153 (1974).

National security controls on scientific and technological speech also involve some risk of constitutionally suspect regulation. This risk increases the need for prompt judicial review of enforceable prior restraints, even though most prior restraints would be reviewed under only a rational basis test. The risk of suspect security regulation, however, is minor compared to the substantial risk that protected artistic speech will be censored in the name of obscenity control.

Normally the purpose and effect of security controls on scientific and technological information legitimately prevents militarily sensitive information from reaching our adversaries. Therefore, informal consultation between government agencies and private researchers sensibly permits a less restrictive means of achieving security objectives. Moreover, these nonpublic consultations are unlikely to be as effective a means of censoring politically relevant material as were the Rhode Island Commission's public activities stifling protected artistic expression. The difference in effectiveness would be especially pronounced with scientists who believed that the government, in the name of security, was attempting to stifle disclosure of material with high political relevance.

C. Curtailment of Vagueness and Overbreadth

The Supreme Court's hostility toward vague or overbroad laws which substantially impinge on freedom of speech is well known.[95] This hostility stems from concern that statutes or regulations serving a valid purpose should not also jeopardize protected communication. The decisions invalidating regulation for vagueness or overbreadth normally involve a threat to protected political speech. Given the Court's approach to so-called subversive advocacy by which only the most narrow category of political speech may be punished,[96] any particular regulation of political speech likely will be found unjustified. Therefore, the high sensitivity in political speech cases to problems of vagueness and overbreadth in statutes and regulations remains appropriate given the likely inhibition of protected speech.

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95. *See* M. NIMMER, FREEDOM OF SPEECH §§ 4.11 [A], [E][1] (1984).

96. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-29 (1982); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

In contrast to political speech, this Article assumes that most scientific and technological speech may be regulated on a rational basis standard. Therefore, in any particular case, the risk is low that a regulation of such speech will inhibit communication which the government may not regulate. This low risk undercuts the applicability of the first amendment overbreadth and vagueness doctrines. The conclusion, however, does not depend on reasoning by analogy to the commercial speech decisions. In the commercial speech cases, the Court rejected attacks based on overbreadth and vagueness because commercial speech is "hardy" and consequently not likely to be inhibited by overbroad or vague regulations.[97] This explanation may be questionable given the strong commercial motivation for other forms of expression which merit the benefit of these doctrines.[98]

V. Conditional Grants to Private Researchers

A. *Unconstitutional Conditions*

Because much ostensibly private scientific research is government funded, the government may feel entitled to restrict dissemination of the resulting work product. The unconstitutional conditions doctrine offers the usual perspective from which to evaluate attempted restrictions on the first amendment rights of government grantees.[99] According to this doctrine, the validity of conditions on such grantees' freedom of speech is judged by first amendment standards as if the conditions restricted grantees and nongrantees alike. The government's interests in controlling the behavior of a grantee, however, may be different from and more substantial than those it has vis-à-vis the general population.[100] Therefore, sometimes the government constitutionally could regulate grantees more extensively.

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97. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, 772 n.24 (1976).

98. M. Redish, *supra* note 37, at 64.

99. M. Nimmer, *supra* note 95, § 4.08; Note, *Executive Order 12,356, supra* note 6, at 482-85.

100. M. Nimmer, *supra* note 95, § 4.08, at 437-38.

B. Government as Owner or Purchaser of Private Research

The government could be viewed as having an ownership interest, somewhat analogous to a copyright, in the resultant work product of government funded scientific research. The government may rely on this interest to justify grant conditions on dissemination, including requirements of prepublication review.[101]

Rather than merely considering ownership as an interest to be weighed under appropriate first amendment standards, a different view of government funding appears to avoid first amendment scrutiny. The government may choose the constitutionally protected activities it wants to subsidize. For example, it might pay for a scholar's research and publication of materials on American History but decline to fund similar work on European History.

Selective promotion of research applies as well to science and technology because numerous projects are vying for federal support. Normally a grant applicant contemplates research, writing, and dissemination to the scientific community and perhaps to a wider audience. The government may argue, however, that it may do more than select the subject matter and a particular applicant. It may claim that it can pay solely for projects with limited dissemination objectives in accord with established national security guidelines. This government position arguably would involve no unconstitutional condition on the exercise of freedom of speech but simply a willingness to pay for only some speech.

Two recent Supreme Court first amendment decisions, *Regan v. Taxation with Representation*,[102] and *FCC v. League of Women Voters*,[103] provide a framework for analyzing dissemination restrictions on government funded research. In *Regan*, the Court, in an opinion by Justice Rehnquist, held that the first amendment permitted the denial of section 501(c)(3) tax exempt status, a form of subsidy, to organizations which engaged in substantial lobbying activity.[104] The Court reasoned that although protected first amend-

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101. *See* Alexander, *supra* note 1, at 232-35; *cf.* United States v. Snepp, 447 U.S. 507 (1980) (CIA employee); United States v. Marchetti, 466 F.2d 1309 (4th Cir.) (CIA employee), *cert. denied*, 409 U.S. 1063 (1972); Comment, *supra* note 71.

102. 461 U.S. 540 (1983).

103. 104 S. Ct. 3106 (1984).

104. The Court refused to allow Taxation With Representation of Washington (TRW) to qualify as a section 501(c)(3) (I.R.C. § 501(c)(3) (1982)) organization that would permit any

ment activity, such as lobbying, might not disqualify a person or organization from an otherwise available government benefit, the government had no obligation to fund the first amendment activity itself. Funding on a politically discriminatory basis still would be constitutionally suspect.[105]

More recently, in *League of Women Voters*, the Court ruled invalid section 399 of the Public Broadcasting Act of 1967's[106] prohibition of editorialization by public broadcasting stations receiving Corporation for Public Broadcasting (CPB) grants.[107] The Court rejected the government's reliance on *Regan*, emphasizing that in *Regan* the Internal Revenue Code permitted a lobbying charitable organization to create a nonlobbying affiliate to conduct activities using tax deductible charitable contributions.[108] By comparison, a public station receiving only a minute portion of its general funds from CPB would be barred totally from editorializing with no opportunity to segregate its editorializing and noneditorializing programming activities according to the source of the funds.[109]

Dissemination restrictions in government grants may occur in three contexts: (1) when the project is totally government funded; (2) when the project is partially government funded; and (3) when none of the project is government funded but when the grantees receive grants for other purposes. The *Regan* argument which refutes any obligation to finance speech, would be strongest in case (1), weaker but still controlling in case (2),[110] and inapposite in

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contribution to TRW to be tax deductible. The Court did allow, however, TRW to retain its section 501(c)(4) (I.R.C. § 501(c)(4) (1982)) tax exempt status, permitting TRW to receive contributions for its lobbying activities without paying income tax on those contributions. 461 U.S. at 543-44.

105. 461 U.S. at 548.

106. 47 U.S.C. §§ 390-405 (1982).

107. 104 S. Ct. at 3127-28.

108. *Id.* at 3128.

109. Justice Rehnquist, however, now in dissent, focused on subsidization of functions rather than particular programming. If, as the record showed, a station received 20 to 30 percent of its operating funds for salaries, equipment, and training, all aspects of the station's functioning, including editorializing, benefited proportionately. He argued, therefore, that it was reasonable for the government to prevent this subsidization of editorializing by a total ban on the activity. 104 S. Ct. at 3131-32.

110. The first amendment analysis may be made more complex when the government pays for only a portion of a project. This situation, however, is closer to *Regan* than to *League of Women Voters*. The *League* opinion evidently viewed the public station as conducting a myriad of distinct activities. As the Court saw it, the government was refusing to

case (3) for which *League of Women Voters* would be controlling.[111]

C. First Amendment Scrutiny Despite Owner or Purchaser Analysis

The preceding discussion of the subsidization rationale in *Regan* may be inconsequential in view of the earlier alternative analysis of the first amendment's impact on dissemination restrictions. As noted, *Regan* recognized that the government could not choose to subsidize only those political views with which it agreed.[112] The Court concluded, however, that the exclusion of veterans groups from the lobbying prohibition did not constitute such discrimination.[113]

Even if government completely subsidized a scientific research project, a governmental purpose to suppress dissemination of results because of their likely impact on public policy would be invalid. Moreover, courts still would apply strict review to cases in which the restrictions' effect was to deprive the public of information relevant to such an issue.[114] When public policy debate was

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subsidize any of these activities unless the station refrained from one—its first amendment right to editorialize. It is questionable whether each of the programming activities of a broadcasting station should be considered distinct for purposes of analyzing conditions on subsidies.

Moreover, the result in *League* may have been different if the government said it would not provide grants to any station which spent a substantial portion of its activity in editorializing. Taking the facts and conclusion in *League* as a given, however, a partially government funded scientific research project is evidently dissimilar. Such a project would be more comparable to one for which the government made a partial grant for a music program provided that the program be for classical music disseminated solely to children. The government, as in *Regan*, still would be entitled to subsidize only the project it favored.

111. The situation most closely approximating *League of Women Voters* would be a grant for general university purposes, perhaps for science buildings or equipment, provided that the institution comply with restrictions on dissemination of specified scientific research. An even clearer situation in which first amendment rights would apply occurs when the government conditions a university's eligibility for funds for a particular project, such as a new gymnasium, on compliance with similar guidelines. The project from which funds might be cut would have no relationship with any research to which the restrictions applied. In both instances, the Court would use the same first amendment standards as if a direct content regulation were imposed on dissemination of the research.

112. 461 U.S. at 548.

113. *Id.* at 548-51.

114. *Id.* at 548; *see League of Women Voters*, 104 S. Ct. at 3132 (Rehnquist, J., dissenting).

not implicated, dissemination restrictions on funded research would have to meet the same rational basis scrutiny as would similar restrictions on unfunded research.[115]

VI. Indirect Means of Stemming the Outflow of Scientific and Technological Information

Means other than content controls may be invoked to slow the drain of scientific and technological information from the country. These means include: (1) excluding certain aliens from the United States; (2) allowing these aliens to enter but forbidding their participation in specified conferences, courses, seminars, or more individualized academic programs; and (3) restricting foreign travel by United States citizens or limiting their participation in foreign conferences.

A. Excluding Aliens

Kleindienst v. Mandel[116] recognized an independent first amendment value in the face-to-face exchange of ideas between United States students and scholars and an alien Marxist scholar, Mandel, even if other reasonable means of communication were available. The Court, though, found no need to balance the first amendment values against the government's facially legitimate interest, unrelated to the suppression of ideas, in excluding Mandel from the country. On prior visits to the United States, he apparently had violated certain visa restrictions.[117] These visa violations formed the stated basis of the attorney general's refusal to exempt him[118] from a statutory standard which denied visitors visas to aliens who advocated communism.[119]

Justice Marshall's dissent observed that the Court's focus on the statutory exception process was misplaced because ultimately the exclusion rested on a law which unconstitutionally denied visas on

115. Justice Rehnquist's dissent in *League of Women Voters* states that absent a politically discriminatory objective, "when the government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy. . . ." 104 S. Ct. at 3132.

116. 408 U.S. 753 (1972).

117. *Id.* at 758.

118. *Id.* at 759.

119. 8 U.S.C. § 1182(a)(28)(G)(V) (1982).

an ideological basis.[120] In justification of the majority's approach which focused solely on the exception process, exceptions had been granted routinely in the past, including two for Mandel.[121] Therefore the majority reasonably regarded the statutory criterion of communist views as essentially nullified in practice.

If one considers the legitimacy of a viewpoint-based exclusion, a fundamental difference undeniably exists between merely admitting ideas into the country and admitting their proponent. An individual's views alone, however, unless they normally would subject him to criminal punishment, should not be a valid basis for excluding him. The appropriate standard for exclusion should be whether the alien poses a threat to United States security by actions he is likely to take once admitted. Unpopular views are insufficient evidence of a threat.[122] In some cases, however, those views coupled with additional evidence might outweigh an audience's first amendment interest in face-to-face contact.

Similar concerns exist with the exclusion of an alien, not for what he wants to say, but for what he wants to receive by the way of scientific and technological communication. This exclusion deprives United States communicators of a face-to-face audience for their ideas. As discussed earlier, under certain circumstances the communication of information to a foreign recipient may be forbidden altogether. Therefore, in such cases the loss of a face-to-face audience for United States communicators would be of no independent concern. Nevertheless, while this ban on foreign recipients of communication does not involve censorship of ideas entering the country, the net result, as in *Mandel*, eliminates whatever benefit a United States audience derives from face-to-face contact with a speaker.

The Court concluded in *Mandel* that a facially legitimate reason for exclusion, which includes slowing the outflow of sensitive information, obviated any need to balance the alien's interest against the audience's interest in face-to-face communication. Assuming, despite recent improvement in communications technology, that face-to-face contact still represents a significant first amendment

120. 408 U.S. at 774, 779-80 (Marshall, J., dissenting).

121. *Id.* at 756.

122. *See* 408 U.S. at 774 (Marshall, J., dissenting); *id.* at 771 (Douglas, J., dissenting).

value, *Mandel*'s deference to the government goes too far. The Court should examine closely the government's justification for exclusion, such as preventing loss of scientific or technological information, if evidence suggests politically relevant material will be barred from presentation in the United States. Again, this exclusion normally would not be a problem for scientific and technological communication. Thus, in most instances, evidence offering a rational basis for concluding that the visitor-communicator might pick up sensitive information would be enough to justify his exclusion. Otherwise, the Court should strictly review the exclusion, including the possibility of mandating less restrictive alternatives such as allowing the alien to enter but placing limitations on his information gathering activities.[123]

An additional first amendment value protected from the government's effort to exclude an alien on security grounds involves schools' ability to select their students. Justice Powell's tie-breaking opinion discussed this value in *University of California Regents v. Bakke*.[124] Assuming the existence of such an independent first amendment right, no reason arises to differentiate a university's position towards an alien student whom it wants for a nuclear physics course and its stance toward an alien scientist whom it wants as a participant in a conference. The university's interest in selecting a student to enhance diversity or otherwise improve the educational environment is comparable to its interest in facilitating face-to-face discussion with a foreign scientist.

B. Conditional Admission of Aliens

A further question regarding admission of aliens is whether the analysis concerning their exclusion changes when the alien is admitted but is limited in his activities. These security restrictions may forbid attendance at certain meetings or enrollment in particular courses. Whether the visiting alien now has first amendment rights should make no difference[125] because such rights would be

123. See *infra* note 125 and accompanying text.

124. 438 U.S. 265, 311-15 (1978).

125. The normal sanction for violation of visa conditions would be deportation. This may be predicated on grounds that would be invalid if made the basis of criminal punishment. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1090 (2d ed. 1983)

greater than those already possessed by the persons with whom the alien would be communicating. Accordingly, the same analytic approach should be applied for limitations on an alien's activities as total exclusion.

C. Restricting Foreign Travel by United States Citizens

Another method of dealing with the outflow of scientific and technological information may be to restrict foreign travel of United States scientists and engineers when such travel is for the purpose of conferring with foreign counterparts. This restriction represents another form of a limitation on face-to-face contact. The Court has held in *Zemel v. Rusk*[126] that foreign travel is a liberty interest protected by fifth amendment due process and subject to regulation on a rational basis standard. Foreign travel is not in itself a fundamental right under the first amendment.

In *Haig v. Agee*,[127] the Court in sustaining the revocation of a former CIA agent's passport considered an argument that his first amendment rights were being penalized. Agee had been traveling to various countries and publicly identifying individuals and organizations located there as CIA undercover agents, employees, or sources.[128] The Court's cursory rejection of his first amendment argument was preceded with the begrudging statement that it was only "[a]ssuming *arguendo*, that First Amendment protections reach beyond our national boundaries."[129]

The Court in *Mandel* said that a facially legitimate reason sufficed to deny an alien speaker entrance to the United States and

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(congressional authority to deport aliens is subject to broad discretion). Moreover, in the case of a breach of express entry conditions, if the alien has been notified appropriately he has assented to the conditions by entering the country.

126. 381 U.S. 1 (1965).

127. 453 U.S. 280 (1981).

128. *Id.* at 283-84.

129. *Id.* at 308. During oral argument, Solicitor General McCree was asked whether the Secretary of State could refuse to issue a passport on the grounds that the applicant was journeying to El Salvador to denounce United States support of the ruling junta. The Solicitor General responded yes. He pointed to the foreign policy responsibility of the President and the Secretary of State and observed that the "freedom of speech that that we enjoy domestically may be different from that we can exercise in this context." *Id.* at 319 n.9 (Brennan, J., dissenting).

thereby preclude face-to-face contact.[130] But the right at stake in *Mandel* did not belong to Mandel but to United States scholars and students. Therefore *Mandel* suggests that these same scholars and students would have no greater first amendment right to leave the country for face-to-face contact than they would have to have Mandel enter. Like entry restrictions on aliens, however, I would afford foreign travel by United States citizens a significant degree of first amendment protection. Permission to travel could not be denied for the purpose of punishing the traveler for his political views or attempting to skew scientific or political debate.[131] Further, a demonstrated effect of skewing political debate would trigger strict review of the government's justifications. Similar reasoning would apply when travel is permitted but limitations are placed on participation in certain conferences, or seminars.

VII. Conclusion

Short range benefits from regulations curtailing scientific and technological dissemination often may be outweighed by long range detriments to progress in these areas. To a large degree national security ultimately depends on such progress. Therefore, reconciling the benefits of free trade in scientific and technological ideas with the legitimate concern that accessible information will be used against our country is not easy. The first amendment poses critical questions concerning the constitutional parameters within which the government may do its balancing.

If one believes in maximizing the benefits of an open society in the fields of science and technology, as I do, it would be nice to be able to say that the first amendment dictates this result. This is essentially the conclusion which prior authors have reached. However, this Article suggests that the government in fact has much greater constitutional maneuvering room. This latitude derives first from the dichotomy between foreign and domestic dissemina-

130. 408 U.S. at 769.

131. *See* Regan v. Wald, 104 S. Ct. 3026 (1984). The opinion emphasized that the Secretary of State in *Wald* and in *Zemel* "made no effort selectively to deny passports on the basis of political belief or affiliation." *Id.* at 3038. "First Amendment rights . . . controlled" in prior decisions invalidating attempts to limit foreign travel by Communists. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

tion and second from an alternative perspective on the purpose of the first amendment.

With dissemination solely to a foreign audience, a regulation's adverse effect on traditional first amendment values is minimized. With dissemination to a domestic audience, when traditional values clearly are implicated, most regulation would be consistent with the first amendment's role forbidding regulation aimed at viewpoint manipulation. The first amendment's primary task here is to ensure that security regulation having the purpose or effect of skewing debate on public policy issues be subjected to the strongest presumption of invalidity. This type of security regulation, threatening the democratic process itself, presents the most urgent constitutional concern.