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COMMENT ON “THE NYLON CURTAIN: AMERICA’S NATIONAL BORDER AND THE FREE FLOW OF IDEAS”

JOHN R. BROCK*

The Neuborne Article is premised on the following concept: a formidable network of regulations and statutes exists that uses our national border to keep foreign ideas out and American citizens in. The Article proposes to describe the degree to which our borders currently interdict the flow of information. The size of the authors’ work reflects an impressive academic standard.

The writers state their position as follows:

The authors have served and are serving as counsel in a number of cases discussed in this Article. Accordingly, we make no claim to be dispassionate observers. We have attempted, though, to avoid arguing positions merely because they would be beneficial to our clients. The material in this article reflects our personal beliefs—*partisan as they may be*.¹

A review of the paper reflects that this “disclaimer” accurately states the writers’ position and this reviewer agrees that the paper is both partisan and extreme. First amendment freedom of speech is indeed taken by the writers to be absolute. No balance of the needs and prerogatives of a sovereign nation against individual rights is made. Similarly, the authors do not respect the fact that first amendment absolutism has never commanded a majority in the United States Supreme Court. It has been settled from the beginning that the Constitution does not provide for unfettered rights of expression.

First amendment freedoms are vital, but their exercise must be compatible with the preservation of other essential rights. Application of the first amendment can no more be governed by absolute rules than can that of other constitutional provisions.

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1. Neuborne and Shapiro, *The Nylon Curtain: America’s National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 719 (1985) (emphasis added).

Society must protect itself. There must be a balance of the right of self-preservation and the individual right to free speech. Tort law concepts such as the law of libel recognize the finite extension of freedom of speech. The right of an individual to free speech extends only to the point that it interferes with the rights of others. The paper is devoid of any balancing concept of the societal rights versus individual rights.

For example, the authors refer to the Supreme Court case of *Kleindienst v. Mandel*.² In this case, a Belgian Marxist, Ernst Mandel, applied for an entry visa to permit him to deliver a series of lectures at American universities. When the Attorney General declined to grant Mandel a discretionary waiver for entry into the United States to make speeches, six American professors who had invited Mandel challenged the refusal to grant a waiver for entry, as an exercise of censorship.³ The Supreme Court declined to require justification of the action for denying entry under first amendment free speech review standards.⁴

It is hard to find fault with the Supreme Court's action in this case, because, clearly an excludable alien has no first amendment rights. In February 1984, the United States Court of Appeals for the Eleventh Circuit considered whether Haitian "boat people" and other excluded aliens illegally present in the United States were entitled to any rights under the Constitution.⁵ The court held that because they were not United States citizens they did not have constitutional rights.

The court in *Jean* declared that excludable aliens caught at the border, with no right to enter, could not invoke the Constitution to challenge their subsequent detention.⁶ "Aliens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights they are granted by Congress."⁷ An alien speaker, therefore, has no constitutional right to enter the United States for public speaking purposes.

2. 408 U.S. 753 (1972).

3. *Id.* at 759.

4. *Id.* 768-69.

5. *Jean v. Nelson*, 727 F.2d 957 (1984), *aff'd*, 53 U.S.L.W. 4892 (U.S. June 26, 1985).

6. *Id.* at 968.

7. *Id.*

Certainly, benefits accrue from the free flow of information and the exercise of individual rights accompanying that free flow. A nation's most sovereign right, however, rests in boundary controls. The concept of a nation consists of a defined geographic area, a collection of people, and a recognition of the above by other nations. This jurisdictional control of boundaries is the very essence of nationhood. This need for control must always be balanced against the individual's first amendment rights. The writers have failed to put forth any balancing concept and hold exclusively to the concept of *absolute* free speech—simply not sound or realistic analysis.