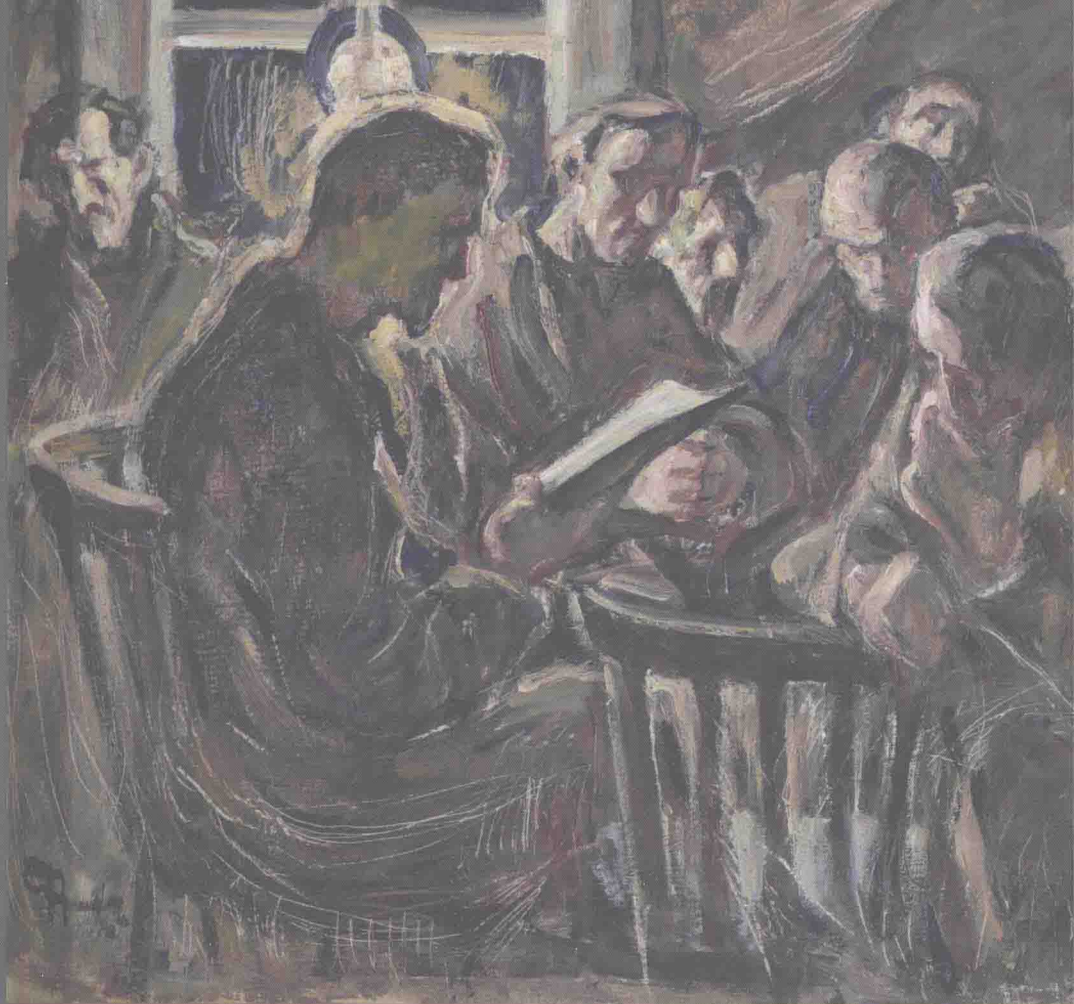




The Cosmopolitan First Amendment

Protecting Transborder Expressive
and Religious Liberties

TIMOTHY ZICK

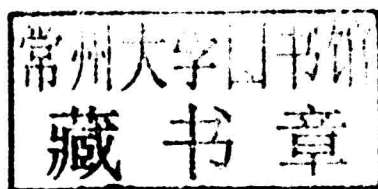
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Timothy Zick

William & Mary Law School



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THE COSMOPOLITAN FIRST AMENDMENT

We live in an interconnected world in which expressive and religious cultures increasingly commingle and collide. In a globalized and digitized era, we need to better understand the relationship between the First Amendment to the United States Constitution and international borders. This book focuses on the exercise and protection of cross-border and beyond-border expressive and religious liberties, and on the First Amendment's relationship to the world beyond U.S. shores. The examination reveals a cosmopolitan First Amendment that protects robust cross-border conversation and commingling, facilitates the global spread of democratic principles, recognizes expressive and religious liberties regardless of location, is influential across the world despite its exceptionalist character, and encourages respectful engagement with the liberty regimes of other nations. The cosmopolitan First Amendment is the product of a variety of historical, social, political, technological, and legal developments. Its principles and justifications are presented through an examination of the First Amendment's relationship to foreign travel, immigration, cross-border communication and association, religious activities that traverse international borders, conflicts among foreign and U.S. speech and religious liberty models, and the conduct of international affairs and diplomacy.

Timothy Zick is Professor of Law at William & Mary Law School. Professor Zick has twice been selected for a College of William & Mary Plumeri Award for Faculty Excellence and has been appointed the Cabell Research Professor and the Robert and Elizabeth Scott Research Professor. Professor Zick has published numerous articles on free speech issues. He has testified before Congress regarding First Amendment rights of public expression and petition and has been a frequent commentator on the First Amendment in print and other media. Professor Zick is the author of *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (Cambridge University Press, 2008).

To my parents, Suzanne and C. J.

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Although I have been thinking and writing about transborder First Amendment issues for some time, in this book I did not reproduce previously published material. However, the framework for the general argument of the book was presented in two previously published articles: "Territoriality and the First Amendment: Free Speech At – and Beyond – Our Borders, 85 *Notre Dame L. Rev.* 1544 (2010), and "The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation," 52 *B.C. L. Rev.* 941 (2011). Much of the material in Chapter 5 is drawn from a third article, "Falsely Shouting Fire in a Global Theater: Emerging Complexities of Transborder Expression," 65 *Vand. L. Rev.* 125 (2012).

CONTENTS

Acknowledgments page ix

 Introduction 1

PART I SCOPE AND THEORY

 1 The First Amendment’s Transborder Dimension. 25

 2 Transborder Perspectives: Provincialism and
 Cosmopolitanism 61

PART II CONVERSATION AND COMMINGLING

 3 Mobility and Expressive Liberties 103

 4 Cross-Border Communication and Association 132

 5 Falsely Shouting Fire in a Global Theater 164

 6 Expressive Liberties Beyond U.S. Borders 199

 7 Transborder Religious Liberties 228

PART III THE COMMUNITY OF NATIONS

 8 The First Amendment in International Forums 265

 9 Cosmopolitan Engagement 303

 10 Exporting the First Amendment 346

Notes 375

Index 439

INTRODUCTION

When most Americans think about First Amendment liberties, they likely envision domestic activities and concerns. They think, for example, in terms of speakers, religious institutions, and government officials that are acting within the United States. In traditional terms, the First Amendment contains a critical set of limitations on domestic governance. Its provisions facilitate local self-governance and define domestic or local political communities.

Scholars, courts, and government officials have considered the First Amendment's domestic domain in exhaustive detail. However, far less attention has been paid to the manner in which First Amendment liberties intersect with and relate to international borders.¹

To be sure, some scholars have recognized the impact of globalization, digitization, and international human rights protections on freedoms of speech, press, and religion.² They have examined global and comparative issues relating to expressive and religious freedoms.³ Legal scholars have also examined the special influence of the Internet on freedom of expression.⁴ But, leading casebooks, treatises, and other scholarly treatments of the First Amendment still focus almost exclusively on domestic or intraterritorial issues and concerns.⁵ Nowhere in the popular constitutional "stories" books will one find an entry for *Lamont v. Postmaster General*, which invalidated federal postal restrictions on the receipt of information sent by foreign speakers.⁶ Even with the important comparative and other work that has been done, particularly in recent years, the First Amendment's relationship to territorial borders remains conceptually, doctrinally, and jurisprudentially underdeveloped.

In our globalized and digitized era, it is important that we have a clearer understanding of the First Amendment's relationship to territorial borders.⁷ Speech conflicts and controversies increasingly have a transborder element. For example, offensive videos and other communications now reach global audiences in seconds, riling foreign audiences with different expressive and religious laws or norms. Transborder First Amendment issues, including surveillance of U.S. citizens' international communications, criminalization of various contacts between Americans and designated foreign terrorists, and conditional subsidies restricting foreign speech, have been adjudicated in U.S. courts. Transnational litigation has brought foreign speech and religious laws to the doorsteps of U.S. courts. Meanwhile, a weakened U.S. press corps struggles to provide access and reporting from foreign locations. Finally, U.S. officials and policymakers are faced daily with decisions regarding how to conceptualize and regulate a global communications infrastructure.

Today the domain, relevance, and authority of the First Amendment are being questioned as never before. This book adopts a different orientation or perspective with regard to the First Amendment.⁸ It focuses attention outward rather than inward – toward and beyond American shores rather than within them. I present and defend a cosmopolitan approach or perspective regarding the First Amendment's nondomestic or transborder dimension.

In basic terms, a cosmopolitan approach encourages lawmakers, courts, and citizens to focus on the dynamic intersection between the First Amendment's doctrines, principles, and norms and international borders. It recognizes the crucial role our First Amendment plays in terms of facilitating transborder communication, commingling, and connectivity. A cosmopolitan focus also requires that we think more carefully and systematically about how the First Amendment limits governmental power beyond U.S. shores, intersects with foreign speech and religious liberty regimes, and affects global marketplaces of information and ideas.

The perspective I advance requires that officials, courts, and citizens address or, in some instances, reconsider a wide range of issues relating to the nondomestic First Amendment. For instance, we do not have a clear conception of the First Amendment's relationship to foreign travel and immigration. Nor, surprisingly, is there any consensus regarding the extent to which the First Amendment protects cross-border speech,

association, press, petition, and religious liberties, or the justifications for granting such protection. Scholars have only begun to explore the extent to which First Amendment doctrines relating to harmful speech, including the prohibition on incitement to unlawful action, treason, and disclosure of secret information, apply to communications that cross international borders. The geographic scope or domain of the First Amendment, including whether its limits extend to U.S. government actions abroad and whether its protections apply to citizens and/or aliens when they are located beyond U.S. borders, are subjects that have not been systematically addressed. Further, in our increasingly interconnected world, we ought to have a better understanding of the manner in which foreign speech and other laws intersect with exceptional First Amendment protections; this includes development of systematic approaches to resolution of ensuing conflicts and U.S. recognition of foreign libel and other judgment. Finally, we ought to think more carefully and systematically about the extent to which the United States can or ought to export First Amendment doctrines, principles, or norms to other nations and the manner in which any such exportation ought to be accomplished.

Adopting a more cosmopolitan perspective would not entail replacement or derogation of the more traditional conception of the First Amendment as a set of constraints on domestic governance. Indeed, I will argue that some domestic protections are critical to ensuring broader First Amendment rights in the transborder context. However, a cosmopolitan perspective reveals a less provincial, more mature, and more globally embedded First Amendment than the traditional conception allows. This change in orientation will allow us to think more clearly and holistically about the nondomestic aspects of our First Amendment. And it will, as I explain in the chapters that follow, have tangible effects on laws, policies, and debates regarding the First Amendment in the twenty-first century.

THE PHILOSOPHER, PASTOR, PHARMACIST, AND PUBLISHER

First Amendment history is replete with colorful and controversial characters, and more than a few scoundrels. These include the Ku

Klux Klan members who threatened to march in Skokie, Illinois; Larry Flynt of *Hustler* magazine; and, most recently, members of the Westboro Baptist Church, who communicate deeply offensive messages near military funerals. First Amendment eras have distinct representatives. These include antiwar dissidents, communists, members of Jehovah's Witnesses, and civil rights protesters.

To render more concrete the dimension I will focus on in the book, I want to introduce a new generation of First Amendment protagonists – the Swiss philosopher, the Florida pastor, the Massachusetts pharmacist, and the Australian publisher. Their actions and the responses to them highlight some of the characteristics and complexities of the First Amendment's transborder dimension.

Tariq Ramadan is a prominent Swiss philosopher, poet, and writer who sought to enter the United States in 2004 to accept an academic post at Notre Dame University. Ramadan is an expert in the interpretation of Islamic texts and preaches, among other things, the virtues for Muslims of inclusivity and integration. After he obtained a nonimmigrant visa, the State Department informed Ramadan that the visa had been revoked, allegedly on the ground that he “espoused or endorsed” terrorism – advocacy that was prohibited under the USA PATRIOT Act.

Ramadan eventually resigned from his appointment with Notre Dame. When he next applied for and was denied a visa to enter the United States for the purpose of participating in various conferences and academic events, the American Civil Liberties Union filed a lawsuit challenging Ramadan's exclusion. This time the State Department alleged that Ramadan's visa application had been denied on the ground that he had provided material support, in the form of charitable contributions, to designated foreign terrorist groups. The government defended its denial of the visa application, in part on the ground that it was authorized to deny entry to aliens even if the exclusion was based solely on ideological or associational grounds. After many years of litigation that claim was never resolved. Secretary of State Hillary Clinton eventually lifted the ban on Ramadan's entry.

Despite the outcome in Ramadan's case, free speech activists continue to assert that the executive has barred entry to foreign nationals based on the content of their speech or the nature of their associations.

Although President Obama has been urged to denounce any such constitutional authority, he has steadfastly refused to do so. The executive branch continues to take the position that it does not need congressional approval to exclude aliens for any reason, including on the basis of their prior statements or affiliations.

Pastor Terry Jones of Gainesville, Florida, courted international controversy by first threatening to burn and later actually setting fire to a copy of the Koran. Although his actions were protected speech under the First Amendment, Jones had been warned by high-level government officials, including President Obama, not to go through with his controversial plans. The President warned that the burning of the Koran would be an international “recruitment bonanza” for Al Qaeda. Jones nevertheless held his Koran “trial” and carried out the punishment. His actions were broadcast around the world. After Jones’s threat to burn the Koran and again after the deed had actually been done, deadly riots broke out in Afghanistan. Several people were killed during those clashes.

Jones’s actions are part of a new category of incendiary domestic communications that, once globally distributed, sometimes lead or contribute to deadly events beyond U.S. borders. Like the Koran burning, the distribution of a movie trailer for *Innocence of Muslims*, a film that portrayed Mohammed as a greedy philanderer, was also linked to deadly riots in several Muslim nations. In addition, the Obama Administration initially linked the distribution of the trailer to the attack on the American Embassy in Benghazi, Libya. Although it later backed away from that claim, the distribution of the trailer on the Internet was linked to global protests and violence. Global distribution of offensive materials, such as the *Innocence of Muslims* trailer and images of the Koran burning have sparked a robust debate concerning American free speech exceptionalism and the need, according to some, for global speech standards in an interconnected world.

Tarek Mehanna is a Sudbury, Massachusetts pharmacist who traveled to Yemen in 2004 in an unsuccessful search for a jihadist training camp. Mehanna later translated several jihadist tracts and videos into English for distribution on the Internet. Mehanna was convicted of violating U.S. law by conspiring to provide material support to a foreign terrorist organization in violation of U.S. law. He was sentenced

to seventeen and a half years in prison. The government's case against Mehanna focused substantially on his writings and statements. The jury did not specify whether the conviction was based on Mehanna's trip to Yemen, the translation of Arabic documents, or some combination.

Many such material support prosecutions have been initiated in recent years. Prosecutors can point to a Supreme Court precedent, *Holder v. Humanitarian Law Project* (2010), which broadly rejected First Amendment free speech and free association challenges to material support laws. In that case, the Court held that prosecution of American citizens who sought to teach groups designated by the United States as foreign terrorist organizations how to file petitions with the United Nations and to peacefully resolve disputes in international forums, would not violate the First Amendment. Indeed, the government argued that the material support laws were broad enough to forbid the filing of an amicus brief on behalf of such groups in a U.S. court. According to the Court, all of this otherwise protected speech activity may be criminalized by the government even though there is no evidence that the speaker intended to further the organization's criminal or violent activities. Material support prosecutions raise important questions regarding the balance between national security, foreign affairs, and Americans' ability to communicate and associate with foreign nationals located beyond U.S. shores.

Julian Assange is an Australian-born journalist, publisher, and Internet activist. Assange became a controversial worldwide figure when his website, WikiLeaks, published a trove of documents relating to America's execution of the wars in Iraq and Afghanistan. Assange received the documents from a private in the U.S. Army, who has since pleaded guilty to disclosing the documents. Assange and WikiLeaks, along with major international media outlets including the *New York Times*, *Le Monde*, and *Der Spiegel*, later published a cache of U.S. diplomatic cables, some of which had been designated "confidential" or "secret" by the United States. The U.S. Department of Justice has opened a criminal investigation, and has indicated that Assange who is currently living inside the Ecuadorian embassy in London, might be prosecuted under the Espionage Act of 1917 or other U.S. criminal laws.

The WikiLeaks case raises a number of intriguing First Amendment questions and concerns. One question is whether Assange, a foreign

national, would be entitled to raise a First Amendment free speech or free press defense to prosecution. Further, the Espionage Act has never been used to prosecute a newspaper, website, blog, or other publisher of truthful information. Its application in the WikiLeaks case could jeopardize domestic press rights and weaken U.S. moral and diplomatic claims in international forums where it frequently presses for expansion of expressive liberties. The WikiLeaks case exposes a new model of global information distribution. The rise of a global fourth estate complicates state efforts to control access to information. It also highlights a shift of power, from state actors to private information intermediaries, in terms of regulating global communications.

The experiences of Ramadan, Jones, Mehanna, and Assange demonstrate some of the complexities associated with the exercise of First Amendment liberties in an emerging global theater. Like countless other aliens before him, Ramadan sought to cross American borders in order to engage in scholarly, cultural, and religious exchanges with American audiences. Jones was speaking not only to a domestic audience consisting of residents of Gainesville, citizens of Florida, or citizens of the United States, but to a worldwide audience consisting of a variety of cultures and religious faiths. Owing to potential national security and diplomatic concerns, his expressive conduct garnered the attention of government officials in the United States, including President Obama. It also contributed to violent reactions thousands of miles away, in nations that criminalize religious offense and ridicule. Mehanna's Internet postings regarding Islam and jihad led to his conviction for conspiring to provide material support to foreign terrorists he had never actually met. Finally, Assange's dissemination of secret information precipitated a debate regarding the extraterritorial application of U.S. laws and constitutional protections, the character and implications of a new global press, the scope of press freedoms, and the power of government to control cross-border information flow.⁹

Transborder Expressive and Religious Liberties

As these and other examples in the book demonstrate, the First Amendment has a critically important transborder dimension. Expressive and religious activities routinely traverse and, in the digital

era, may even transcend territorial borders. Communications that originate inside the United States can produce effects far beyond its shores. People converse and commingle across international borders. Films, political commentary, propaganda, scientific information, and other materials routinely cross these borders, both in traditional and digitized forms. Americans travel abroad for purposes of engaging in artistic expression, information-gathering, cultural exchange, protest, humanitarian aid, and religious communion. They communicate, associate, and worship, sometimes in person and with increasing frequency in virtual forums, with aliens located abroad. All of this traffic runs in two directions. Information flows from foreign locations across American borders, seeking access to U.S. audiences, marketplaces, and forums. Like Tariq Ramadan, individual aliens seek entry to the United States for purposes of academic, artistic, religious, and other forms of exchange.

Today, information flows across territorial borders with extraordinary speed and ease. Owing to globalization and digitization, the world is now connected as never before. Long-anticipated global marketplaces of ideas may now at last be emerging. The benefits of these emerging marketplaces are clear. They include the free cross-border flow of information, diverse forms of cultural commingling, and new forms of cross-border and beyond-border collaboration. But there are obvious costs as well. Some of this contact and commingling is potentially or actually harmful. As some of the preceding examples indicate, the global flow of information poses new regulatory challenges. Thus, in the context of the distribution of the *Innocence of Muslims* trailer, President Obama asserted before a United Nations assembly that governmental control of global information flow is now obsolete. This claim, if accurate, has serious implications, not only for the exercise of expressive and religious liberties, but also for state sovereignty, national security, foreign affairs, and international trade.

As they long have, First Amendment activities also continue to occur beyond U.S. shores. Americans travel abroad for purposes of gathering information, protesting, and engaging in other expressive and religious activities. The U.S. press operates foreign bureaus and publishes information abroad. Many American universities have opened foreign campuses. Many religious institutions and faiths operate on a global

scale. The U.S. government funds foreign speech and press activities, and often conditions that funding on certain requirements or limits. The government also engages more directly in expressive activities, including press and propaganda programs, abroad.

Owing to the prevalence and central importance of expressive activities in transborder contexts, First Amendment rights of speech, press, and association will be the principal focus of the book. However, religious liberties also have a transborder dimension. Limits on foreign travel, restrictions on various forms of cross-border communication and association, application of U.S. terrorism and other federal laws, and other restrictions affect the cross-border and beyond-border exercise of First Amendment religious liberties.

Moreover, as religious persons and practices traverse territorial borders, issues of tolerance, discrimination, and assimilation arise within the United States. Global connectivity and territorial fluidity have contributed to domestic conflicts regarding religious liberties. For example, debates regarding the location and building of mosques in the United States, and application of Shari'a law by U.S. courts, have been precipitated and influenced by events beyond American shores. Finally, U.S. citizens, employers, and government officials work, operate, and regulate in foreign nations. It is thus important that we examine the geographic scope or domain of the First Amendment's religion clauses, and how these provisions might apply abroad.

As I have indicated, at this point our conception of the First Amendment's nondomestic dimension is underdeveloped, particularly when considered relative to the domestic sphere. Earlier I noted some broad areas of inquiry. Among the more specific questions that have not yet been clearly answered, many relate to *cross-border* expressive and religious activities:

- Does the First Amendment prohibit exclusion or deportation of aliens on the basis of ideology, association, or religious beliefs?
- Does the free speech guarantee apply to citizens' speech that is directed *solely* to foreign audiences?
- Do citizens located in the United States have a First Amendment right to associate with aliens located abroad?
- Do aliens who are legally resident in the United States have full First Amendment rights?

- Does the federal ban on aliens' campaign contributions in American elections violate the First Amendment?
- Does the federal "deemed export" rule, which bars certain American institutions from sharing sensitive information with foreign nationals in their employ without a license, violate the First Amendment?
- Can domestic First Amendment rights be derogated by importation of international standards through treaty enactment?
- Does the First Amendment bar recognition and enforcement by U.S. courts of foreign speech laws or judgments based on foreign speech laws?
- Does the First Amendment permit U.S. localities to bar courts from citing or enforcing foreign religious laws and judgments?

Other questions relate to *beyond-border* or extraterritorial activities of U.S. citizens, aliens, and government officials:

- Does the First Amendment fully protect American citizens' speech, association, and press activities abroad?
- Can a U.S. citizen located abroad be subjected to targeted killing by the American government based solely on Internet communications and other speech activity?
- Are aliens detained by American forces outside the United States entitled to free speech protections?
- Does the doctrine of unconstitutional conditions, which limits the extent to which officials can condition receipt of U.S. funds, apply to subsidies provided to foreign speakers?
- Does the principle that the U.S. government must speak with a single voice in the foreign affairs realm mean that individuals, corporations, and subnational government have no free speech rights in such contexts?
- Does the First Amendment place any limits on the federal government's propaganda and other communications activities abroad?
- Does the Free Exercise Clause apply to citizens' or aliens' religious activities abroad?
- Does the Establishment Clause limit collaboration between U.S. officials and foreign religious leaders, institutions, or communities?

We ought to have clear answers to many or most of these questions. However, we have leapt headlong into a globalized and digitized era without resolving these and other fundamental issues. Answering these nondomestic First Amendment queries remains vitally important.