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Cosmopolitanism and First Amendment Exceptionalism

Posted By [Timothy Zick](#) On September 20, 2011 @ 2:56 pm In [First Amendment](#) | [No Comments](#)

In my [last post](#) ^[1], I discussed some of the ways in which First Amendment norms and standards might be exported beyond our shores. Of course, in a globalized and digitized world, constitutional norms and standards flow in many directions. The bending of territorial borders may result in importation of foreign expressive and religious norms. This transmission may pose a threat to America's exceptional protection for freedom of speech as well as national norms regarding religious liberty.

Challenges to First Amendment exceptionalism and religious liberty norms will come from many sources and directions. These include international treaties and multi-national agreements; transnational processes that bring American and foreign jurists and officials into more frequent contact with one another; judicial citation of and reliance upon foreign legal sources; enforcement of foreign judgments and religious principles in U.S. courts; and resolution of trans-national speech conflicts that will arise as digitized expression is distributed in multiple sovereign territories at once. In these and other respects, First Amendment norms and values will be in more frequent conflict and tension with foreign norms and values.

I do not suggest that any of these forces or events will ultimately dilute free speech exceptionalism or religious liberty within the U.S. As Mark Tushnet has observed, globalization is not likely to lead to uniformity or global constitutional norms (whether derived from the First Amendment or from foreign sources). Even if foreign speech norms could constitutionally be imported by treaty, in negotiations with other nations the U.S. remains steadfastly committed to resisting foreign speech norms and standards (through reservations and other mechanisms). Further, American courts are unlikely to adopt free speech or press principles that are at sharp variance with longstanding doctrines. But this does not mean that the forces of globalization, digitization, and internationalism can or will have no domestic effects in terms of expressive and religious liberties. It may be politically, diplomatically, and otherwise possible to maintain parochial resistance to foreign speech and religious norms. But ought that to be our posture?

In the book, I will argue that our approach to the various transnational engagements and conflicts summarized above ought to be informed by cosmopolitan First Amendment and choice of law principles. Although this part of the book, like others, is very much a work in progress, I intend to draw in particular on Vicki Jackson's work on transnational constitutional engagement and Paul Berman's cosmopolitan orientation with regard to conflicts of laws. Thus, in this context, cosmopolitan First Amendment principles would encourage U.S. courts and officials to view the First Amendment as situated in an interconnected system of expressive and religious regimes. In very brief terms, First Amendment cosmopolitanism would acknowledge the educational possibilities that attend transnational engagement, the benefits of comity in an international system, and the interests associated with diverse expressive and religious cultures and regimes across the globe.

I'll offer more concrete observations in the book. For example, under a cosmopolitan approach courts and officials would carefully assess the comparative merits of some of our exceptional free speech doctrines. This does not necessarily mean that they would, or should, change fundamental free speech principles or norms. Indeed, our commitment to them may only be strengthened by the comparative process. As Jackson points out, that is itself a benefit associated with transnational engagement. Under the proposed cosmopolitan-pluralistic approach to conflicts among free speech regimes, it is certainly possible that French speech laws [might be enforced](#) ^[2] with respect to domestic speech that has harmful extraterritorial effects, and that foreign libel and other judgments might sometimes be recognized by U.S. courts. I do not see this as a substantial threat to First Amendment exceptionalism, by the way, but rather as proper recognition of and

respect for foreign laws and legal sources. Finally, in this context First Amendment cosmopolitanism would reject isolationist and xenophobic measures like Oklahoma's "Save Our State Amendment," which purports to deny recognition to foreign laws and Sharia principles.

Adoption of a more cosmopolitan approach to transnational speech and religious concerns does not portend dilution or demise insofar as First Amendment exceptionalism is concerned. However, in an era of globalization, digitization, and internationalism foreign speech and religious norms will inevitably approach and in some cases traverse U.S. borders. My claim is that First Amendment cosmopolitanism is better situated than the traditional strict territorial approach to address the unique concerns of this era.

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[1] last post: <http://www.concurringopinions.com/archives/2011/09/exporting-the-first-amendment.html>

[2] might be enforced: <http://law.justia.com/cases/federal/appellate-courts/F3/433/1199/546158/>

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