

2013

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Repository Citation

Zick, Timothy, "The First Amendment's Global Dimension" (2013). *Popular Media*. 149.

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The First Amendment's Global Dimension

Timothy Zick

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In my forthcoming book, *The Cosmopolitan First Amendment* (Cambridge Univ. Press, 2013—Part I of the book is available [here](#)), I discuss the manner in which the First Amendment's various guarantees relate to and intersect with international borders. The book takes an extended and systematic look at what might be called the non-domestic aspects of expressive and religious liberties. Although the Internet has forced this subject to the fore, particularly insofar as freedom of speech is concerned, digital expression is not the only relevant concern. In a more general sense, what is at stake is the extent to which the First Amendment protects Americans' (and perhaps, in some cases, aliens') ability to speak, associate, collaborate, and commingle with people located around the world.

Only some of this activity takes place online. Americans travel abroad in search of information and for purposes of religious fellowship. They invite foreign visitors to the United States. Many Americans, including government officials, collaborate and associate with foreign NGOs, international activists, foreign government officials, foreign religious leaders, and international organizations that focus on issues ranging from democracy to disease prevention. Some of this activity occurs solely in domestic forums. However, much of this activity crosses international borders and some occurs beyond U.S. shores.

In the United States, judicial precedents grant notably weak protection to activities that cross or occur beyond international borders. For example, the United States Supreme Court has held that U.S. citizens do not have a First Amendment right to travel abroad (merely a weaker due process "freedom" not to have egress denied arbitrarily). Aliens who have taken controversial positions in their home nations have been excluded from the United States, sometimes based upon the thinnest of governmental justifications. According to the Supreme Court, any "facially valid and bona fide" reason will suffice. Although the Supreme Court has held that U.S. citizens have a right under the First Amendment to associate with aliens, that right is subject to restrictions that do not apply to solely domestic collaborations. Citizens have a First Amendment right to receive some information from foreign sources. However, some courts and commentators have questioned whether cross-border communications come fully within the domain of the Free Speech Clause. The constitutional status of association, press, petition, and free exercise liberties in this non-domestic realm also remains uncertain. Finally, whether the Free Speech Clause, the Establishment Clause, and other First Amendment limits apply to governmental action abroad has not been definitively settled. Immigration, national security, and foreign affairs concerns have all been cited as justifications for the differential, and often second-class, treatment of transborder liberties.

In the book, I focus on these and other transborder and transnational concerns. Two recent cases highlight what is at stake in this relatively uncharted First Amendment territory. The cases raise important questions concerning the right to collaborate with foreign citizens and organizations in peaceful endeavors, the U.S. government's power to compel or communicate messages in global marketplaces, and the purported distinction between "domestic" and "foreign" First Amendment liberties.

In *Holder v. Humanitarian Law Project* (2010), the Supreme Court upheld against free speech and association challenges U.S. laws criminalizing the provision of "material support" to designated foreign terrorist organizations. The case involved a group of American citizens who wished, among other things, to assist certain foreign organizations with the filing of petitions at the United Nations and to educate foreign groups regarding peaceful methods of dispute resolution. The Court held that otherwise peaceful and lawful speech

that was “coordinated” with these groups could be subject to criminal penalty, even if there was no showing of intent to further the groups’ violent ends. The Court purported to carve out a safe harbor for “independent” communications supporting such organizations. The government argued that “coordinated” expression could “legitimize” foreign terrorist organizations and aid their terrorist operations. Although it purported to apply strict scrutiny, the Court deferred to the administration’s national security and foreign affairs concerns – including the concern that some foreign nations might take offense were the United States to permit its citizens to praise or legitimize organizations that participated in violent acts in those nations. For similar reasons, the Court also rejected the claim that the material support laws infringed the group members’ First Amendment rights of expressive association. At the end of its majority opinion, the Court observed, without elaboration, that it may not have reached the same result had the organizations and activities in question been solely “domestic” in nature.

The second case involves a less direct form of restriction on cross-border expression and association. The United States funds a variety of activities, initiatives, and campaigns abroad. For example, it provides funds for media outlets, organizations dedicated to spreading democratic principles, and educational initiatives. A portion of federal funds are directed to global efforts aimed at eradicating diseases, including HIV/AIDS. Pursuant to the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, the United States requires that all domestic and foreign organizations receiving such funds adopt a policy explicitly opposing prostitution. In *Alliance for Open Society v. U.S. Agency for International Development*, the Supreme Court will decide whether this requirement violates the First Amendment rights of domestic NGOs that participate in global HIV/AIDS prevention work. The dispute involves consideration of the byzantine “unconstitutional conditions” doctrine. Specifically, it raises the question whether the United States government can compel U.S. fund recipients to espouse a position abroad that they would not otherwise adopt, as a condition on receipt of federal funds.

Among other things, the material support laws and the Leadership Act demonstrate the effects that domestic laws can have on expressive and associative activities that cross international borders. Part of my argument in the book is that we ought to think more carefully about these effects, and to think of them as central or core rather than peripheral First Amendment concerns.

As a result of the material support laws, U.S. citizens must now take special care that their collaborative endeavors with certain disfavored foreign organizations do not cross the hazy line from “independent” to “coordinated” advocacy. This may chill Americans’ ability to editorialize, engage in legal advocacy, collaborate with foreign organizations, and participate in other expressive activities. Indeed, broad application of the material support laws to Americans’ expressive and associative activities could materially alter or even sever important cross-border links between U.S. citizens and foreign organizations. It is fundamentally inconsistent with the central justifications and principles of the First Amendment to presume that no designated foreign terrorist organization is open to peaceful persuasion or education. If this strikes some as naïve, it might be useful to recall American history with regard to anarchist, communist, and other organizations once considered radioactive by the U.S. government. Like these other ideologies, terrorism is a global threat that challenges our true commitment to persuasion, counter-speech, and other fundamental First Amendment principles.

Although the constitutionality of the Leadership Act’s anti-prostitution requirement will turn on the unconstitutional conditions doctrine, at a broader level this limitation also affects global speech and association. If the requirement is upheld, it will complicate and perhaps undermine global disease-prevention efforts. Aid organizations claim that this requirement harms their credibility as NGOs operating in foreign nations, in part by forcing them to adopt positions that offend host nations and foreign partners. It may also turn prostitutes, the very constituency these groups seek to persuade, away from domestic and foreign NGOs that have been compelled to adopt policies expressly denouncing them. As applied to foreign aid recipients, the anti-prostitution requirement extends U.S. authority in a manner that affects how even *non-U.S.* funds are used in communicating about the provision of health services.

The First Amendment's domain has never been strictly or narrowly limited to domestic places and concerns. First Amendment self-government, marketplace, and autonomy justifications apply across and beyond international borders. Particularly in an era of globalization and digitization, we need to think more expansively in terms of global speech marketplaces, international commingling, and international inquiry. We ought to think more carefully about how domestic laws affect international speech marketplaces and various forms of cross-border collaboration. In this environment, courts must be careful not to turn every utterance or activity that touches or crosses international borders into an occasion for foreign affairs or immigration deference. Interpretation of the First Amendment ought to facilitate and encourage U.S. citizens' active engagement with the rest of the world. And it ought to be sensitive to the manner in which U.S. laws may alter or skew global speech marketplaces.

The Internet has been a unique catalyst in terms of encouraging this more cosmopolitan worldview. It has been a tremendous boon to global free speech rights and democracy. However, we have launched into the Internet era without first thinking through how our First Amendment relates to international borders and indeed to the rest of the world. That, in the broadest terms, is my project.

Suggested Citation: Timothy Zick, *The First Amendment's Global Dimension*, Int'l J. Const. L. Blog, February 19, 2013, *available at* <http://www.icconnectblog.com/2013/02/the-first-amendments-global-dimension>.