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Posted By [Timothy Zick](#) On September 13, 2011 @ 9:57 am In [First Amendment](#) | [2 Comments](#)

In my [last post](#) ^[1], I posited the existence of three distinct First Amendments and focused on a number of issues relating to the First Amendment's trans-border dimension. In this post, I will sketch a conception or orientation regarding the First Amendment that I contend ought to be applied in considering and resolving those and related issues. Although my theory or conception may have certain local, domestic implications it is applicable primarily to and in the trans-border dimension.

My book will advance a First Amendment conception that I call "cosmopolitan." I use this term recognizing the sometimes misleading and distracting nature of labels. In this case, the label is descriptively and normatively pertinent. To be clear, I am using the label "cosmopolitan" more in the ordinary dictionary than in the philosophical sense. In that more limited sense, I will offer a conception of the First Amendment that is (a) free from local prejudices or attachments, (b) widely distributed in terms of geographic domain, (c) to some extent a product of influences beyond our borders, and (d) part of an international system of human rights. I will compare this cosmopolitan orientation with its antonym – the "provincial" First Amendment. Here, too, I think the label is descriptively and normatively apt. Some have suggested that I use "democratic" instead. However, for reasons that will become apparent, I critique the conceptions of "democracy" and self-government adopted under the traditional, provincial approach to trans-border First Amendment concerns. A summary of the provincial and cosmopolitan approaches follows after the break.

The basic precepts of First Amendment cosmopolitanism can be best understood by comparing them to the traditional, provincial approach to trans-border expressive and religious liberties. According to the provincial account, the First Amendment has little application or relevance in trans-border contexts. As the label implies, a provincial conception of the First Amendment treats its guarantees solely as a set of limitations on domestic governance. Under this view, First Amendment liberties are localized and territorially determined. This means that under a provincial orientation, the protections of the First Amendment are generally limited to domestic speakers addressing domestic audiences, localized associations and press activities, and the exercise of religious liberties within U.S. borders. Under this conception, trans-border liberties are considered peripheral rather than core First Amendment concerns.

First Amendment provincialism favors robust and preemptive exercises of federal immigration, national security, and diplomatic powers. Thus, under a provincial view, ideological immigration exclusions and restrictions on cross-border information sharing do not raise substantial First Amendment concerns. Provincialism also accepts and vigorously defends the principle that the nation must speak with a single voice in terms of its foreign affairs and relations. Further, although provincialism supports U.S. efforts to export First Amendment standards and norms, it rejects the notion that aliens enjoy First Amendment liberties at home or abroad. According to the provincial account, the First Amendment has a very limited extraterritorial domain — and essentially no domain at all insofar as aliens abroad are concerned.

In addition to this narrow conception of First Amendment liberties, provincialism generally rejects engagement with the trans-national. It staunchly defends and seeks to protect First Amendment exceptionalism with regard to expressive and religious liberties. However, in its strongest form provincialism resembles a form of rights imperialism. The recently enacted federal SPEECH Act, which forbids recognition by U.S. courts of foreign libel judgments obtained in nations that do not provide [N.Y. Times v.] *Sullivan*-like protections for libelous speech, is arguably one example of this orientation. So is Oklahoma's "Save Our State Amendment," which forbids judicial recognition in that state's courts of Sharia and indeed all forms of foreign law. These and similar measures question the legitimacy of foreign judgments and foreign expressive and religious norms. They apply U.S. norms even when

the U.S. has a very limited connection to the underlying transaction or activity, and even though singling out “foreign” religious beliefs for discriminatory treatment flies in the face of the First Amendment’s religious liberty guarantees.

In contrast, cosmopolitanism views the exercise of trans-border expressive and religious liberties as significant rather than peripheral First Amendment concerns. First Amendment cosmopolitanism is based upon principles of freedom of movement across borders, free trans-border information flow, portability of First Amendment rights and obligations, and respect for foreign expressive and religious norms. As these precepts suggest, First Amendment cosmopolitanism rejects the notion that expressive and religious liberties are strictly defined or determined by reference to territorial borders. Indeed, it rejects the notion that we can identify strictly demarcated “domestic” and “foreign” spheres. This is especially so in our globalized or digitized era, in which expressive and religious activities and exercises of governmental power increasingly transcend territorial borders.

Under a cosmopolitan orientation, government power is not considered unchecked or plenary at or beyond our borders — even in traditional areas of “plenary” power such as immigration, national security, and foreign relations. First Amendment cosmopolitanism contemplates that laws restricting international travel and cross-border exchange, as well as limits on extraterritorial expressive and religious liberties, would be domesticated — in the sense that something closer to ordinary standards of judicial review would apply to them.

In addition, under a cosmopolitan approach, the First Amendment’s conceptual and operative domains would be considered more geographically expansive. Citizens, and even aliens in some circumstances, would enjoy First Amendment liberties regardless of frontiers or location. In the realm of foreign affairs, First Amendment cosmopolitanism rejects the unitary voice principle and views participation by sub-national governments and private actors in foreign policy debates as beneficial to democratic and national interests. In these and other respects, cosmopolitanism views the First Amendment as internationally relevant and at home in the world beyond our borders.

Consistent with this outlook, while First Amendment cosmopolitanism acknowledges the tensions between American exceptionalism and foreign expressive and religious norms, it rejects American isolationism, rights imperialism, and xenophobia. Instead, cosmopolitanism supports engagement with trans-national speakers, audiences, judgments, and legal sources. This will pose some uncomfortable questions regarding American sovereignty and First Amendment exceptionalism. However, those questions are already on the table and must be answered. To be clear, cosmopolitan principles do not invariably lead to a global speech standard or the diminution of First Amendment exceptionalism. However, neither do those principles reject importation of foreign norms, judgments, or sources merely because they are foreign.

Of course, I recognize that some — perhaps even many — of the precepts of First Amendment cosmopolitanism, not to mention specific applications, will be contested. We live in an era of increasing social and political tension with respect to foreign persons, ideologies, cultures, and religions. Students of the First Amendment’s history will recognize that this is a cyclical phenomenon. Today’s controversies regarding incendiary jihadist speech, association with foreign enemies of the U.S., the political influence of aliens, and importation of foreign expressive and religious norms mirror those dating from the founding era’s Alien and Sedition Act controversies, up through twentieth-century campaigns against communism and syndicalism.

Particularly during times of economic distress, foreign persons and ideas have been the focus of public angst and concern. Many Americans have looked back on such periods with a mixture of surprise and regret — surprise that our forebears treated foreign ideologies as *per se* threats, and regret that draconian measures such as imprisonment and deportation were imposed on the basis of speech, belief, and association. The reaction may well be similar when the specter of terrorism and the perceived threat from “foreign” religious beliefs give way to the next perceived threat emanating from beyond our borders.

Still, I recognize that some readers will reject the notion that our First Amendment has anything to do with “foreign” persons, ideologies, actions, and beliefs. This outlook ignores our past. Worse, it may actually imperil our future. Our First Amendment is intricately connected to emerging global marketplaces of ideas, increasingly relevant to matters of global as opposed to purely domestic concern, and frequently in competition with other liberty regimes across the globe. Contemporary discussions regarding the First Amendment

must take into account twenty-first century realities regarding the social and political activities of speakers and activists, the changing nature of the press and press freedoms, the decline of strict territorial governance, and the rise of robust international engagement by citizens and public officials at all levels of government.

In sum, it is time to turn our attention outward insofar as First Amendment liberties are concerned. One of the principal goals of my book is to expand our collective vision regarding the contemporary First Amendment's domain of operation and influence. Working through unresolved trans-border problems and attending to the First Amendment's largely overlooked trans-border dimension can help us to critically analyze and understand the substance and strength of our national commitment to speech, press, and religious liberties. It is my hope that this project will produce a conception of the First Amendment that is responsive to the challenges of an increasingly globalized world, liberating to an increasingly digitized citizenry, and properly constraining with respect to a government whose powers affect the speech, association, press and religious liberties of citizens and aliens across the globe.

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