

2016

The First Amendment and the World

Timothy Zick

William & Mary Law School, tzick@wm.edu

Repository Citation

Zick, Timothy, "The First Amendment and the World" (2016). *Popular Media*. 394.
https://scholarship.law.wm.edu/popular_media/394

[Ten Miles Square Blog](#)

January 23, 2016 4:16 PM [The First Amendment and the World](#)

By Timothy Zick

America today is in the grip of a great fear—fear of foreign terrorism, specifically from the Islamic State and its allies, and generally from what some have called “radical Islam.” Candidates and political leaders are floating proposals for keeping Americans safe from foreign persons, ideologies, and religions: “shutting down” parts of the Internet; having Facebook and Twitter remove and ban content that advocates violence against the United States; changing the constitutional standard for unlawful incitement of violence; spying on and closing American Mosques; banning Muslims from entering the United States or serving as President; and banning enforcement of or even citation to foreign laws (particularly Sharia law). Some of these proposals are the product of a zany presidential primary season; some, however, pre-date it. Others come from more serious quarters.

These proposals may sound very un-American; but in historical terms, they are as American as apple pie. In 1789, French revolutionary ideas were the existential threat of the day; the Alien and Sedition Acts made it a crime to criticize the government - and authorized the imprisonment and deportation of non-citizen radicals. The United States has dealt with other foreign-origin ideologies - i.e., communism, syndicalism, anarchism - by banning the importation of foreign materials, deporting legally resident aliens, and criminalizing contacts between citizens and alien groups. Even the exclusion of Muslims would not be unprecedented - in the early twentieth century, the federal government sought to expel, deport, or exclude Mormons, based on their supposed foreign or “un-American” beliefs and practices.

Despite their long history, however, such proposals are deeply at odds with American constitutional values. In particular, they offend rights and values associated with the First Amendment’s guarantees - freedom of speech, press, and association, the free exercise of religion, and a ban on establishment of religion.

But wait, what do communications and contacts with foreign persons, ideas, and religions have to do with the First Amendment? The First Amendment applies at home, but surely it stops at the water’s edge: ISIL can’t complain if the U.S. takes steps to destroy its communications network abroad, and Sharia laws can’t replace American ones. Well, yes.

But the First Amendment is bigger and broader than this provincial caricature. It has a more cosmopolitan dimension, one that is concerned with preserving and protecting cross-border

expressive and religious rights.

The term “cosmopolitan” may make some Americans uneasy; let me clarify that it is not meant to suggest the displacement of American laws, values, or commitments. First Amendment guarantees are the widest protections of free speech and religious freedom in the world. I do not wish to bury First Amendment exceptionalism, but rather to situate it. “Cosmopolitan,” as I am using the term, conveys one basic idea: the First Amendment guarantees that Americans can speak, and listen, to the world outside as well as dialogue within its borders.

Many of our revolutionary forefathers were cosmopolitan figures in this sense. Benjamin Franklin was at home in colonial Philadelphia, imperial London, and royalist Paris. Jefferson treasured French ideas and Italian architecture. Adams had served as a diplomat in France, Britain, and the Netherlands. Hamilton, born in Nevis, knew the British Empire well. Although they were aware of foreign threats, these statesmen participated in a “Republic of Letters” that crossed oceans. They consumed foreign cultures and ideas. In the Declaration of Independence, they promised to show “a decent respect to the opinions of mankind.” Similarly, the framers of the American Constitution broke with some foreign traditions but also borrowed ideas - including some relating to freedoms of speech and press - from other nations. When they wrote the Constitution, the framers knew the world was watching; as the new kid on the block, they wanted to show that the United States was worthy of membership in the world community.

The First Amendment’s core justifications, which focus on things like the search for truth in the so-called “marketplace of ideas” and government by the people, are not territorially bounded. Americans’ interests and passions do not end at the country’s borders. They travel abroad, gather and consume news from foreign sources, and invite foreign visitors to come to America for political, academic, scientific, artistic, and religious reasons. In an age of globalization and digitized speech, these cosmopolitan activities are even more widespread. Today, cross-border conversation and commingling do not generally track or even respect territorial boundaries - just ask the Chinese government, which has tried to construct a virtual wall to “shut down” parts of the Internet.

Unfortunately, American courts and officials have been reluctant to proclaim or embrace cosmopolitan First Amendment rights and principles. The Supreme Court has merely implied that the First Amendment protects Americans’ rights to receive foreign materials, invite foreign visitors to American shores, gather information in foreign lands, and speak to foreign nationals while traveling abroad. As far as judicial decisions and traditional free speech rationales are concerned, an email sent from a U.S. citizen to a friend in France would not necessarily qualify for First Amendment protection. So much for the “Republic of Letters.” Nor have elected officials broken from America’s provincial past. Federal laws ban certain communications to foreign leaders, restrict domestic distribution of foreign films and other “propaganda,” penalize associations between Americans and foreign groups, limit cross-border religious charitable activity, bar enforcement of foreign libel judgments, and restrict travel to foreign countries. Some state laws ban any mention of foreign laws in judicial opinions, while others expressly single out Sharia law for special burdens.

Absence of official recognition of the cosmopolitan First Amendment has created political and cultural space for the recent spate of provincial proposals. A little history goes a long way here. Over time, the fighting faiths of communism, syndicalism, and anarchism were soundly defeated in the U.S. - not through deportations, exclusions, or other repressive measures, but through a clash of ideas that showed just how un-American these ideologies really are. But in order to have an effective dialog, Americans need access to ideas and persons from other nations. If the U.S. is to be at war with another “ism,” its people need to know who and what they are fighting against. Similarly, in order to benefit from the religious pluralism protected by the First Amendment’s religion clauses, Americans will need to show a “decent respect” for religious beliefs that appear, or may even be, “foreign.”

But what about the existential threat from radical terrorists? Recognizing the value in cross-

border conversation and commingling does not require that Americans enter into a suicide pact. Justice Oliver Wendell Holmes, Jr. once wrote that the First Amendment's Free Speech Clause does not protect a speaker's right to "falsely shout fire in a theater." Application of that principle in a new global theater poses some distinct challenges. Officials won't always know where a speaker is in relation to an audience, or what the chances are that a reader or viewer will react violently to speech. The danger from falsely yelling "Fire!" in the global theater will be harder to assess than it is in the local movie theater down the street. However, it would be a mistake to respond to this difficulty by criminalizing "radical" speech, cutting off access to foreign persons and ideas, and banning foreign visitors. Nor should the power to determine what Americans (and others) can read or view online be delegated to Facebook and Twitter - private entities that are beholden to markets and trends, and are not required to follow the First Amendment.

Instead, through decisions and laws, American courts and officials should communicate what two hundred-plus years of experience can teach what Jefferson called a "candid" (by which he meant unbiased) world - in particular about dealing with persons, ideas, and religions that cross borders. America should embrace a new Republic of Letters, to foster dialog about shared threats and struggles - including terrorism and religious pluralism. And its citizens should enjoy all the benefits of robust, cross-border First Amendment speech, press, and association rights.

[Timothy Zick](#) teaches constitutional law at William & Mary Law School. His most recent book is *The Cosmopolitan First Amendment: Protecting Transborder Expressive and Religious Liberties* (Cambridge University Press, 2014).