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THE FIRST AMENDMENT IN TRANS-BORDER PERSPECTIVE: TOWARD A MORE COSMOPOLITAN ORIENTATION

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Abstract: This Article examines the First Amendment's critical trans-border dimension—its application to speech, association, press, and religious activities that cross or occur beyond territorial borders. Judicial and scholarly analysis of this aspect of the First Amendment has been limited, at least as compared to consideration of more domestic or purely local concerns. This Article identifies two basic orientations with respect to the First Amendment—the provincial and the cosmopolitan. The provincial orientation, which is the traditional account, generally views the First Amendment rather narrowly—i.e., as a collection of local liberties or a set of limitations on domestic governance. First Amendment provincialism does not fully embrace or protect trans-border speech, press, and religious activities; it views certain foreign ideas, influences, and ideologies with suspicion or hostility; and it envisions a rather minimal extraterritorial domain. First Amendment cosmopolitanism, which this Article offers as an alternative orientation, takes a more global perspective. It embraces and protects cross-border exchange and information flow and preserves citizens' speech and other First Amendment interests at home and abroad. At the same time, it respects foreign expressive and religious cultures and expands the First Amendment's extraterritorial domain. The Article critiques provincialism on various grounds. It offers a normative defense of First Amendment cosmopolitanism that is both consistent with traditional First Amendment principles and better suited to twenty-first century conditions and concerns. The Article demonstrates how a more cosmopolitan approach would concretely affect trans-border speech, association, press, and religious liberties.

Introduction

In its 2010 decision *Holder v. Humanitarian Law Project*, the U.S. Supreme Court upheld a federal law that criminalizes citizens' peaceful political speech when it is "coordinated" with organizations that have been designated by the U.S. State Department as "foreign terrorist or-

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ganizations."[1] The Court reasoned that (1) Congress and the executive could punish such "material support" to terrorist groups because, insofar as such organizations are concerned, words and weapons are fungible commodities; (2) providing these organizations with knowledge about international law and peaceful dispute resolution mechanisms could backfire; and (3) speaking to or on behalf of the groups would only serve to legitimize them.[2] As written, the law in question is broad enough to prohibit providing editorial space to the designated organizations' leaders in U.S. publications, collaborating with them on peacebuilding efforts in places like Afghanistan, and even filing an amicus brief on their behalf in U.S. and other courts.[3] Under this law, it makes no difference whether the citizen intends to further the terrorist ends of the designated foreign organization or seeks only to encourage peaceful dialogue. The Court was careful to note that its decision did not suggest that domestic terrorist organizations could be similarly treated.[4] Nevertheless, although the Court acknowledged that the law was a content-based regulation of citizens' peaceful political speech subject to heightened scrutiny, it upheld the law owing primarily to the foreign affairs and national security concerns expressed, if not proven, by Congress and the executive.[5] The material support law now stands alone as the only content-based measure upheld by a majority of the Supreme Court.[6]

Humanitarian Law Project is only the most recent precedent to treat First Amendment guarantees as rather provincial in the definitional sense that they are concerned primarily, if not exclusively, with domestic governance and other local democratic concerns.[7] Under Supreme Court and lower court precedents, most dating from the post-war and Cold War periods, U.S. citizens: (1) have only a limited First Amendment right to receive and distribute foreign materials inside the United

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[1] 130 S. Ct. 2705, 2726, 2731 (2010).

[2] *Id.* at 2725–26.

[3] *See* 18 U.S.C.A. § 2339B(a)(1) (West 2010).

[4] *Humanitarian Law Project*, 130 S. Ct. at 2730.

[5] *See id.*

[6] *See* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), which had upheld a content-based restriction on electoral speech). In *Burson v. Freeman*, only a plurality of the Court upheld a content-based regulation of speech at election sites. 504 U.S. 191, 211 (1992).

[7] *See* 130 S. Ct. at 2726, 2731. Throughout this Article, the terms "provincial" and "cosmopolitan" are used in their ordinary dictionary senses. The terms, however, do have a normative aspect as well. In Part III, I argue that the First Amendment ought to be conceptualized as a more cosmopolitan provision.

States,[8] (2) may be denied personal access to foreign speakers for any "facially legitimate and bona fide" reason,[9] (3) have merely a First Amendment "freedom" under the Due Process Clause to travel abroad for the purpose of gathering information about foreign cultures,[10] (4) are understood by some courts not to have any First Amendment right to send communications to audiences abroad consisting solely of aliens,[11] (5) have only a limited right to associate with aliens located abroad,[12] and (6) have no First Amendment right to access and distribute inside the United States propaganda materials disseminated by their government abroad.[13] Moreover, no court has ever invalidated the Logan Act, a criminal statute dating from 1799 that bans citizens' unauthorized communications with foreign regimes and their principals,[14] the ban on alien contributions in U.S. elections,[15] or the federal requirement that certain U.S. institutions obtain a license prior to sharing certain scientific and technical information with aliens working in the United States.[16] Under current First Amendment jurisprudence, there is no clear and unambiguous precedent holding that communications or associations that cross borders are protected in any meaningful way.

Further, if the First Amendment speaks at all beyond U.S. borders, it does so with only the faintest voice. The Supreme Court has assumed, without ever deciding, that U.S. citizens possess free speech rights

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[8] *See* Meese v. Keene, 481 U.S. 465, 480 (1987) (upholding limits on distribution of foreign political propaganda in the United States); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (invalidating a prior restraint requiring a recipient of foreign propaganda to affirmatively request delivery).

[9] Kleindienst v. Mandel, 408 U.S. 753, 769 (1972).

[10] Haig v. Agee, 453 U.S. 280, 306–07 (1981); Zemel v. Rusk, 381 U.S. 1, 16–17 (1965).

[11] *See* Robert D. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 Wm. & Mary L. Rev. 863, 867 (1985) (questioning whether First Amendment values extend to speech directed to aliens abroad). *Compare* Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915, 916 (7th Cir. 1984) (assuming the Free Speech Clause covers such communications), *and* United States v. Edler Indus., 579 F.2d 516, 519 (9th Cir. 1978) (same), *with* Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 433 F.3d 1199, 1217 (9th Cir. 2006) ("The extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue."), *and* Desai v. Hersh, 719 F. Supp. 670, 679–80 (N.D. Ill. 1989) (observing that not all speech published by citizens in foreign forums is covered by the First Amendment).

[12] DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 292 (D.C. Cir. 1989); Palestine Info. Office v. Shultz, 853 F.2d 932, 939 (D.C. Cir. 1988).

[13] Gartner v. U.S. Info. Agency, 726 F. Supp. 1183, 1189 (S.D. Iowa 1989).

[14] 18 U.S.C. § 953 (2006).

[15] 2 U.S.C. § 441e (2006).

[16] *See* 15 C.F.R. § 734.2 (2011) (stating that the release of technology or software to a foreign national in the United States may constitute a "deemed" export to the person's home country).

abroad.[17] Some courts have rejected the free speech claims of citizens who traveled abroad to serve as "human shields" as a protest against foreign wars.[18] Moreover, courts have not clearly resolved whether the First Amendment protects a right to receive information while abroad.[19] Although the press seems generally to be viewed as an institutional domestic watchdog, a few courts have suggested, again without expressly so holding, that U.S. reporters working abroad may have some limited First Amendment rights.[20]

As far as alien speakers and audiences are concerned, there appears to be little support for applying the First Amendment extraterritorially. In 1989, the U.S. Court of Appeals for the District of Columbia Circuit held in *DKT Memorial Fund v. Agency for International Development* that alien recipients of U.S. funds are not within the First Amendment's zone of protection and hence lack standing to assert free speech and association claims.[21] One district court has concluded that foreign nationals subject to the jurisdiction of a U.S. court may be barred by judicial order from petitioning foreign governments abroad.[22] Further, little consideration has been given to free exercise concerns affecting missionaries and other activists working abroad or to U.S. support for sectarian projects beyond our borders.[23] No court has ever decided in any written opinion whether the Free Exercise Clause applies abroad. Only one court has held that the Establishment Clause applies to projects abroad that are funded by the United States.[24] The Supreme Court has never adopted any position on these extraterritorial issues.

In general, courts and commentators have not treated trans-border activities as a distinct and significant aspect of the First Amendment. Many of the leading academic analyses date from the Cold War era.[25]

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[17] *Haig*, 453 U.S. at 308.

[18] *See* Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 604–05 (7th Cir. 2009).

[19] *See Yahoo!*, 433 F.3d at 1217 (noting that the extent to which the First Amendment protects the right to receive information abroad is an open question).

[20] Flynt v. Rumsfeld, 180 F. Supp. 2d 174, 175–76 (D.D.C. 2002), *aff'd*, 355 F.3d 697 (D.C. Cir. 2004); Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1571–74 (S.D.N.Y. 1991).

[21] 887 F.2d at 283–84.

[22] Laker Airways Ltd. v. Pan Am. World Airways, Inc., 604 F. Supp. 280, 287–88 (D.D.C. 1984).

[23] *But cf.* J. Bruce Nichols, The Uneasy Alliance: Religion, Refugee Work, and U.S. Foreign Policy 8 (1988).

[24] Lamont v. Woods, 948 F.2d 825, 843 (2d Cir. 1991).

[25] *See generally* Kamenshine, *supra* note 11; Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 Wm. & Mary L. Rev. 719 (1985); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States*, 31 Law & Contemp. Probs. 530 (1966).

Not surprisingly, the conception of the First Amendment that emerged from that period was narrow and provincial. Despite globalization and the steady rise of Internet-based communication, many academics continue to interpret the First Amendment's Free Speech Clause in this manner.[26] Although some commentators have argued that the First Amendment applies to certain cross-border activities or concerns, they have tended to rely upon traditional theories or justifications.[27] But traditional free speech justifications, particularly those concerned with domestic self-governance, were designed to apply to speech by citizens located within the United States who are communicating with other citizens inside the United States.[28] Those justifications do not expressly contemplate a world in which speech and associations frequently transcend territorial borders. Thus, we may need to reconsider traditional justifications in light of contemporary conditions, or to develop a separate set of justifications relating to the First Amendment's cross-border domain. The few commentators who have considered the extraterritorial application of the Free Speech Clause have differed regarding who may benefit from its protections abroad and under what circumstances, and none have supported more than minimal coverage.[29] Finally, some

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[26] *See, e.g.*, Sharon E. Foster, *Does the First Amendment Restrict Recognition and Enforcement of Foreign Copyright Judgments and Arbitration Awards?*, 10 PACE INT'L L. REV. 361, 390 (1998) ("[F]ree speech in the United States . . . should be the focus of the Court's concern."); Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 2007 n.160 (1994) (arguing that the First Amendment "has a limited role abroad"); Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261, 267 (2002) (arguing that Yahoo's right to disseminate reprehensible ideas "is a national right and does not extend extra-territorially beyond the U.S. border").

[27] *See* Neuborne & Shapiro, *supra* note 25, at 765–77 (advocating robust judicial review of certain cross-border speech restrictions); Brad R. Roth, *The First Amendment in the Foreign Affairs Realm: "Domesticating" the Restrictions on Citizen Participation*, 2 TEMP. POL. & CIV. RTS. L. REV. 255, 276–77 (1993) (arguing that citizen speech that relates to foreign affairs deserves First Amendment protection); Molly S. Van Houweling, *Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next* Yahoo! v. LICRA, 24 MICH. J. INT'L L. 697, 714 (2003) ("The First Amendment should protect speech to foreign audiences even if the amendment is concerned primarily with domestic self-government.").

[28] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22–25 (1948) (discussing self-government in the "traditional American town meeting").

[29] *Compare* Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2076–77 (2005), *with* Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2066 (2005). Some commentators view the Constitution itself as a social compact with an extensive extraterritorial reach. They would presumably support a more robust extraterritorial First Amendment. *See* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 34 (1985).

commentators have challenged the notion that the Establishment Clause ought to apply with much force abroad.[30]

The provincial orientation with regard to First Amendment liberties and restrictions is, to some extent, understandable. Many of the principal concerns relating to free speech, press, and religion are indeed purely domestic in nature.[31] The First Amendment's trans-border dimension, however, has become increasingly important. The United States is not now, and in fact has never been, a hermetically sealed political community. Today millions of Americans travel and live abroad.[32] Citizens and many resident aliens communicate with aliens abroad, obtain information from sources located overseas, collaborate across borders, associate with aliens residing in the United States and abroad, protest in foreign nations, and report from foreign lands. Digitization has increased reliance upon cross-border speech and given rise to new forms of cross-border association. The speech of U.S. citizens now routinely crosses borders, and the speech of foreigners easily reaches our shores. As they long have, citizen-missionaries and other religious activists work and minister in places across the globe.

At the same time, U.S. power has steadily expanded outward and beyond our borders. U.S. aid policies, as well as more direct forms of regulation, often affect the expressive and religious liberties of citizens and aliens residing both at home and abroad.

Congress and the executive have responded to some degree to these developments, and as a result, U.S. territorial borders are not the hard ideological barriers they were prior to the Cold War.[33] Largely in response to economic and international pressures, the political branches have liberalized or repealed a variety of cross-border restrictions on immigration, trade, and other activities.[34] As a result of these legislative changes and broader social changes, including globalization and digitization, the United States has become a less insular society.

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[30] *See* Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1, 115–16 (2005) (questioning whether the Establishment Clause ought to apply with full force in foreign countries).

[31] *See infra* notes 46–186 and accompanying text.

[32] U.S. Gov't Accountability Office, GAO-09-989, Wide Range of Emergency Services Provided to American Citizens Overseas, but Improved Monitoring Is Needed 1 (2009), *available at* http://www.gao.gov/new.items/d09989.pdf (noting that in 2008, the U.S. Department of State estimated that 64 million trips were taken overseas by U.S. citizens).

[33] *See* Neuborne & Shapiro, *supra* note 25, at 728–34 (describing Cold War cross-border speech and association restrictions).

[34] *See generally* Timothy Zick, *The First Amendment and Territoriality: Free Speech at—and Beyond—Our Borders*, 85 Notre Dame L. Rev. 1543 (2010).

Nonetheless, we still lack a coherent foundation for analyzing the First Amendment's trans-border dimension. Although our social and political circumstances have changed dramatically since the Cold War ended, our understanding of the First Amendment's trans-border dimension has remained largely unchanged for decades.[35] First Amendment provincialism is increasingly problematic as the Internet does not grant legal immunity to speech or association that transcends borders. Additionally, legislative and executive border liberalization is a matter of political grace subject to potential reversal in response to new threats. Borders may open and close with changes in presidential administrations. As *Humanitarian Law Project* shows, particularly during times of foreign conflict and cross-border tensions, legislative and executive interpretations of the First Amendment may collide with longstanding First Amendment principles.[36] Although U.S. borders are more open to foreign persons and materials, many current statutes and administrative regulations contain restrictions on cross-border speech and association.[37] Moreover, although they are not explicitly enforced, traditional cross-border restrictions, including ideological immigration exclusions, have not been entirely eradicated.[38] Though there may be fewer border seizures of protected materials today, cross-border speech may now be intercepted electronically.[39] And, even though we may have fewer foreign travel restrictions, officials have developed ever-expanding watch lists and no-fly lists.[40]

The consequences of some of these restrictions are widely felt. Decisions like *Humanitarian Law Project* affect not only the ability of citizens at home to reach across borders, but also the thousands of citizens abroad working on peace-building efforts in places like Afghanistan. Restrictions on foreign travel can affect a wide range of educational, ar-

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[35] *See Humanitarian Law Project*, 130 S. Ct. at 2722–30 (upholding, under a strict scrutiny standard, restrictions on citizens' speech to and association with foreign terrorist organizations).

[36] *See id.* at 2712–13.

[37] *See* Roth, *supra* note 27, at 268–80 (describing limitations on cross-border speech).

[38] *See* Zick, *supra* note 34, at 1551–57 (discussing past and present regulations affecting immigration, including legal restrictions based expressly upon speech or association).

[39] *See* Foreign Intelligence Surveillance Act (FISA) of 1978 Amendments Act of 2008, 50 U.S.C.A. §§ 1881–1881g, 1812, 1885–1885c (West 2010); ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 682 (6th Cir. 2007). For more on the First Amendment implications of FISA, see generally Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. Rev. 741 (2008).

[40] *See* Scott Shane, *An American Abroad May Remain So Until He's off the No-Fly List*, N.Y. Times, June 16, 2010, at A6 (reporting on the plight of a citizen placed on the government no-fly list, which apparently consists of 8000 names).

tistic, and familial activities. Even in the digital era, many First Amendment activities remain dependent upon face-to-face and other tangible forms of interaction. Moreover, federal officials working abroad need guidance regarding their extraterritorial obligations under the Establishment Clause and other First Amendment provisions. For example, U.S. aid agencies have recently sought legal guidance from the U.S. Department of Justice regarding the extent to which the Establishment Clause applies to the funding of mosques and the administration of certain educational programs in Iraq and Afghanistan.[41]

This Article examines the existing jurisprudence and academic commentary regarding the First Amendment's trans-border dimension. Part I discusses the treatment of cross-border and beyond-border speech, press, association, and religious liberties.[42] As noted, the resulting conception of the First Amendment is provincial, in the sense that it views the First Amendment as a set of domestic constraints on domestic governance and grants only the most limited protection to trans-border expressive and religious activities.

Part II criticizes the provincial conception or orientation on various grounds.[43] First Amendment provincialism is the product of a flawed jurisprudential modality of quasi-recognition that has significantly limited and devalued trans-border First Amendment liberties. Provincialism is based upon the existence of a stark foreign-domestic divide that ignores our history and does not comport with our social, legal, and constitutional realities. The provincial orientation validates and perpetuates a fear or wariness of foreign speech and ideas. Further, provincialism is rooted in traditional theories of constitutional rights and obligations that are narrow and territorially bounded. In sum, First Amendment provincialism is a dated conception that fails to appreciate the importance of trans-border liberties.

Part III proposes a more cosmopolitan conception of the First Amendment.[44] In general, First Amendment cosmopolitanism looks outward and adopts a more global perspective with regard to expressive and religious liberties. It recognizes the declining salience of territorial borders insofar as expressive and religious liberties are concerned, and the need to facilitate and encourage trans-border political, artistic, educational, and social exchange. First Amendment cosmopolitanism en-

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[41] *See* Office of Inspector Gen., No. 9-000-09-009-P, Audit of USAID's Faith-Based and Community Initiatives, Audit Report 5–7 (2009).

[42] *See infra* notes 45–257 and accompanying text.

[43] *See infra* notes 258–338 and accompanying text.

[44] *See infra* notes 339–448 and accompanying text.

courages citizens to be active participants in global forums, requires that U.S. officials respect foreign expressive and religious cultures when regulating abroad, and extends some protections to aliens directly affected by governmental restrictions on their ability to speak and associate abroad. This change in orientation is not radical, subversive, or threatening to U.S. interests. To the contrary, it is wholly consistent with core First Amendment values including the facilitation of free inquiry and information-sharing, freedom to participate in dialogue and debate, governmental transparency, and self-governance in an increasingly globalized world. It is also consistent with U.S. obligations under international agreements regarding freedom of movement, the free flow of information without regard to frontiers, freedom of the press, and freedom of belief. Part III concludes by proposing concrete steps for removing restrictions on cross-border inquiry and exchange and mapping the First Amendment's extraterritorial domain.

I. The Provincial First Amendment

This Part discusses the jurisprudential contours of the First Amendment's trans-border dimension. It begins by examining judicial and academic analyses of various cross-border expressive and religious activities. These include receipt and dissemination of foreign materials, travel for expressive purposes, citizens' speech directed to alien audiences located abroad, expressive associations involving aliens, and the exercise of cross-border religious liberties. The Part then turns to an analysis of the First Amendment's extraterritorial domain, which encompasses the exercise of expressive and religious liberties abroad. In general, courts and scholars have interpreted the First Amendment as a set of domestic constraints on domestic governance. Under this traditional provincial account, trans-border concerns are generally relegated to the periphery of the First Amendment.

A. *Cross-Border First Amendment Liberties*

Supreme Court and lower court precedents discussed in this Section indicate that citizens enjoy only limited cross-border expressive and religious liberties. Thus, they have (1) a right to receive foreign political propaganda that is addressed to them so long as it has made it into the hands of U.S. postal officials, (2) a limited right to distribute foreign political propaganda inside the United States, (3) no First Amendment right to travel abroad even for expressive purposes, (4) limited rights of access and distribution with regard to U.S. propaganda distributed abroad, (5) limited rights to speak to and associate with aliens located

abroad, and (6) limited cross-border free exercise rights.[45] Under the provincial interpretation of the First Amendment, citizens are generally treated as passive recipients of foreign information who often need to be protected from foreign persons and influences—including their own government's foreign propaganda messages.

1. Cross-Border Receipt and Distribution of Foreign Materials

In 1965, the U.S. Supreme Court recognized for the first time that citizens have a First Amendment right to receive foreign speech.[46] In *Lamont v. Postmaster General*, the Court held that the U.S. Postal Service could not condition receipt of communist political propaganda sent from abroad on the addressee's filling out a reply card and affirmatively requesting delivery.[47] The Court compared the statutory process to state licensing schemes, taxes, and other prior restraints that it had consistently invalidated.[48] Given the nature of the restriction, *Lamont* was an easy case. The federal statute, which incidentally was the first ever invalidated by the Supreme Court on First Amendment grounds, was a presumptively unconstitutional prior restraint.[49]

Lamont was undoubtedly an important precedent insofar as cross-border speech is concerned.[50] This decision has not, however, spawned any movement toward recognizing robust cross-border speech and association rights. In part, this is because the decision is subject to a provincial interpretation. The result seemed to turn more on the effect of the prior restraint on the U.S. postal stream than on the foreign source of the material.[51] Indeed, one scholar has suggested that *Lamont* turns on certain unique institutional attributes of the U.S. Postal Service.[52] In any event, the Court did not offer a positive or affirmative case for receipt of foreign ideas or materials. The majority did not explain what precisely justified recognition of a right to receive foreign-source politi-

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[45] *See infra* notes 46–186 and accompanying text.

[46] Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965).

[47] *Id.*

[48] *Id.* at 306.

[49] *See id.* at 307.

[50] Murray L. Schwartz & James C.N. Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 U. Pa. L. Rev. 621, 633–49 (1959) (noting that prior to *Lamont*, foreign materials deemed to be communist propaganda were frequently seized or subjected to licensure and other domestic restrictions).

[51] *See Lamont*, 381 U.S. at 306–07.

[52] Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 Hastings L.J. 671, 724 (2007).

cal, cultural, or religious information.[53] It did not mention any connection between foreign speech and domestic self-governance, nor did it appear to rest on the Holmesian notion that citizens had nothing to fear from foreign ideas or ideologies.[54] The Court's principal concern, aside from the noxious form of restraint, seemed to be that domestic recipients, and in particular persons in "sensitive positions," might be deterred from accessing foreign materials if required to affirmatively request them.[55] Thus, *Lamont* can be interpreted as a narrow decision that made no grand statement regarding the importance of cross-border communication.[56] Indeed, the fact that neither the majority nor dissenting opinions in the Court's 2010 decision *Holder v. Humanitarian Law Project* even cited *Lamont* may suggest such an interpretation.[57]

The statute in *Lamont*, which limited receipt of foreign political propaganda, resurfaced two decades later in a case involving dissemination of such material within the United States. In 1987, the Supreme Court held in *Meese v. Keene* that the Foreign Agent Registration Act (FARA),[58] an anti-Nazi enactment that requires any "agent of a foreign principal" residing within the United States to register with the Attorney General and comply with certain registration, filing, and disclosure requirements prior to distributing foreign propaganda in the United States, does not violate the First Amendment.[59] With regard to disclo-

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[53] *See* John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DePaul L. Rev. 1, 19 (1986) ("[T]here are no judicial statements about an unlimited governmental power to exclude information that originates outside the country, such as mail or electronic transmissions, including information important to religion.").

[54] *See Lamont*, 381 U.S. at 305–07; Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

[55] *Lamont*, 381 U.S. at 307.

[56] *See id.* ("We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered.").

[57] *See generally* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010). Events subsequent to *Lamont* provide additional support for the interpretation that the Court recognized a relatively narrow First Amendment right. *See* Teague v. Reg'l Comm'r of Customs, 404 F.2d 441, 447 (2d Cir. 1968) (upholding similar regulations requiring addressees of publications originating in North Vietnam and China to obtain a license prior to receipt). Moreover, as the Court noted, its holding left undisturbed the substantial power U.S. officials had long possessed to search and seize materials at the nation's borders. *Lamont*, 381 U.S. at 307. From the 1960s to the 1980s foreign materials were frequently seized at the border or subjected to additional domestic restrictions based upon their content or origin. *See generally* Neuborne & Shapiro, *supra* note 25 (discussing various cross-border restrictions).

[58] 481 U.S. 465, 485 (1987); Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611–621(2006).

[59] 22 U.S.C. §§ 611(c)(1), 614(a)–(b).

sure, FARA provides that foreign "political propaganda" must be labeled such that it conveys the fact that the distributor is registered with the Attorney General under the statute and that registration does not indicate approval of the material by the U.S. government.[60] Barry Keene, a California attorney and member of the state senate, sought to distribute three Canadian films identified by the Department of Justice as "political propaganda."[61] The subject of two of the films was acid rain; the other dealt with nuclear war.[62] Keene argued that the registration and labeling scheme deterred or chilled his distribution of the films in the United States and adversely affected his personal, professional, and political reputations.[63]

The Supreme Court disagreed, reasoning that "propaganda" had two meanings, one pejorative and another more neutral meaning that includes any material distributed with the intent of influencing public opinion.[64] The Court distinguished the statute invalidated in *Lamont*, which required that the foreign materials actually be detained until a recipient came forward to claim them.[65] In contrast, the Court in *Keene* stated FARA "simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."[66] The Court concluded that

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[60] *Id.* As Congress explained, the regulatory scheme is intended to protect the national defense and internal security of the United States, and to inform the government and the people of the identity and associations of disseminators of political propaganda so that they may "appraise their statements and actions in the light of their associations and activities." *Id.* § 611.

[61] *Keene*, 481 U.S. at 467. Under FARA, "political propaganda" includes material that

> is reasonably adapted to . . . influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government or a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions.

22 U.S.C. § 611(j). It also includes material that

> advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.

Id.

[62] *Keene*, 481 U.S. at 468.

[63] *Id.* at 473.

[64] *Id.* at 477–78.

[65] *Id.* at 480.

[66] *Id.*

there was no evidence that the label "political propaganda" had any chilling effect on distribution of foreign materials inside the United States.[67] This drew a sharp rebuke from Justice Blackmun, joined in dissent by Justices Brennan and Marshall, who accused the majority of "ignoring the realities of public reaction to the designation."[68] The dissenters argued that the "legislative history of the Act indicates that Congress fully intended to discourage communications by foreign agents."[69] Just as the scheme invalidated in *Lamont* deterred recipients from coming forward to claim materials from abroad, the dissenters reasoned, the actual burden on speech flowing from the public's perception of the labeled material would deter distributors from communicating disfavored messages to U.S. audiences.[70]

Restrictions on the receipt and dissemination of foreign propaganda are not limited to materials originating from alien sources. For more than five decades, federal laws and regulations have authorized the U.S. government to spend tax dollars to disseminate positive messages about America to international audiences.[71] Although Congress has over time exempted certain materials and recipients, a federal ban on receipt and dissemination of international propaganda within the United States of America remains in effect today.[72] The only reported decision addressing a First Amendment challenge to the statutory ban, the U.S. District Court for the Southern District of Iowa's 1989 decision, *Gartner v. U.S. Information Agency*, held that members of the print press and a state senator were not entitled to make copies of international propaganda materials made available to them at an agency office.[73] Relying on *Zemel v. Rusk*, a 1965 Supreme Court decision involving limits on foreign travel, [74] the court concluded that the First Amendment did not grant citizens an "unrestrained right to gather information" about their government.[75]

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[67] *Id.* at 484.

[68] *Keene*, 481 U.S. at 486 (Blackmun, J., dissenting).

[69] *Id.*

[70] *Id.* at 488–89.

[71] Smith-Mundt Act, ch. 36, § 501, 62 Stat. 6, 9 (1948) (codified at 22 U.S.C. § 1461 (2006)).

[72] 22 U.S.C. § 1461-1a.

[73] Gartner v. U.S. Info. Agency, 726 F. Supp. 1183, 1189 (S.D. Iowa 1989).

[74] 381 U.S. 1, 2 (1965).

[75] *Gartner*, 726 F. Supp. at 1189 (quoting *Zemel*, 381 U.S. at 17). Efforts to force disclosure of U.S. propaganda materials under freedom of information laws have also failed. *See, e.g.*, Essential Info., Inc. v. U.S. Info. Agency, 134 F.3d 1165, 1169 (D.C. Cir. 1998); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 168 (D.D.C. 2004).

Although *Lamont* presented an opportunity to bring cross-border speech and association within the First Amendment's core domain and to signal support for an international marketplace of ideas, the decision has not subsequently been interpreted this broadly.[76] Indeed, cases like *Keene* and *Humanitarian Law Project* suggest that connections and collaborations between citizens in the United States and aliens abroad may be restricted in a manner that would plainly violate the First Amendment were they enforced with respect to purely domestic activities.[77] The rejection of challenges to the longstanding ban on domestic dissemination of U.S. propaganda materials is further evidence that the provincial interpretation of the Free Speech Clause countenances restrictions on domestic access to political speech based in part on the material's place of origin and its supposed dangerousness to the domestic marketplace of ideas.

2. Cross-Border Travel and the First Amendment

Of course, United States citizens need not and often do not wait passively for foreign information to reach them. In 2008, the most recent year for which data are available, the U.S. Department of State estimated that U.S. citizens took 64 million overseas trips.[78] In addition to business and recreational interests, citizens travel abroad to gather information about other cultures; to engage with foreigners in scholarly, religious, artistic, educational and other endeavors; and even to participate in political protests.[79]

Historically, the State Department exercised unbridled discretion with regard to the issuance and revocation of passports.[80] Applications for passports were frequently denied on ideological, associational, and even religious grounds.[81] Current U.S. passport laws and regulations prohibit the denial or revocation of a passport on ideological, associa-

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[76] *See, e.g.*, *Humanitarian Law Project*, 130 S. Ct. at 2708 (upholding a statute that makes it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization"); *Keene*, 481 U.S. at 485 (rejecting First Amendment challenges to statutes that required an "agent of a foreign principal" residing within the United States to register with the Attorney General and comply with certain registration, filing, and disclosure requirements prior to distributing foreign propaganda in the United States).

[77] *See Humanitarian Law Project*, 130 S. Ct. at 2708; *Keene*, 481 U.S. at 485.

[78] *See* U.S. Gov't Accountability Office, *supra* note 32, at 1.

[79] *See id.*; *see also* Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 605 (7th Cir. 2009) (applying the Free Speech Clause to a citizen's protest in Iraq).

[80] Louis L. Jaffe, *The Right to Travel: The Passport Problem*, 35 Foreign Aff. 1, 17–28 (1956).

[81] *Id.*

tional, or religious grounds, although they continue to allow denial based upon broader national security interests.[82]

Notwithstanding the current statutory protection afforded to territorial egress, the First Amendment itself has not been interpreted to protect any right to foreign travel. To be sure, the Court acknowledged the First Amendment aspects of foreign travel in its earliest cases addressing restrictions on egress. In 1958, the Court held in *Kent v. Dulles* that the Secretary of State lacked statutory authority to deny passports to Communists or others wishing to travel abroad to further Communist ideals or causes.[83] Justice Douglas's opinion for the Court emphasized the strong connection between foreign travel, information-gathering, and association.[84] Ultimately, however, the Court recognized only that the right to foreign travel was part of the liberty protected by the Fifth Amendment's Due Process Clause.[85] Similarly, in 1964 in *Aptheker v. Secretary of State*, the Court invalidated a federal statute making it unlawful for a Communist Party member to apply for a U.S. passport.[86] The Court again stated that citizens possess a Fifth Amendment interest in foreign travel and held that the liberty of cross-border movement could not be conditioned upon renunciation of one's First Amendment right of political association.[87]

In 1965, the same year *Lamont* was decided, the Court decided *Zemel v. Rusk*.[88] *Zemel* held that an American citizen who sought to travel to Cuba "to satisfy [his] curiosity about the state of affairs in Cuba and to make [him] a better informed citizen" but whose passport application was denied had failed to state a First Amendment claim.[89] With regard to the claim that the travel restriction violated Zemel's free speech

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[82] *See* 22 U.S.C. § 2721 (2006) ("A passport may not be denied issuance, revoked, restricted, or otherwise limited because of any speech, activity, belief, affiliation, or membership, within or outside the United States, which, if held or conducted within the United States, would be protected by the first amendment to the Constitution of the United States."); 22 C.F.R. § 51.60(c)(4) (2011) (permitting the Secretary of State to refuse to issue a passport where it is determined "that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States").

[83] 357 U.S. 116, 130 (1958).

[84] *Id.* at 125–30.

[85] *Id.* at 125.

[86] 378 U.S. 500, 505 (1964).

[87] *Id.* at 505–08. Although the Court has never addressed the issue, the same due process protection would presumably apply to compelled renunciation of one's religious beliefs or associations.

[88] *Zemel*, 381 U.S. at 1.

[89] *Id.* at 3, 4, 16. Zemel averred that he wished to acquaint himself with "the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." *Id.* at 16.

rights, the Court said only this: "[W]e cannot accept the contention of appellant that it is a First Amendment right which is involved."[90] This was so even though the Court conceded that the travel restrictions reduced "the flow of information" concerning Cuba.[91] It characterized the passport denial as "an inhibition of action" rather than expression and compared the foreign travel restriction to a prohibition on physical access to the White House.[92] "The right to speak and publish," said the Court, "does not carry with it the unrestrained right to gather information."[93]

Three years later, in *United States v. O'Brien*, the Court announced a general rule that restrictions that are unrelated to the suppression of expression but that burden speech incidentally are subject to an intermediate level of First Amendment scrutiny.[94] In 1981, the Court indicated in *Haig v. Agee* that this domestic rule did not apply to foreign travel undertaken for expressive purposes or to expressive activities abroad.[95] Agee's U.S. passport was revoked while he was residing abroad on the ground that he had imperiled U.S. national security by revealing the names of undercover CIA operatives working in foreign nations and by protesting CIA programs and activities.[96] The Court grudgingly *assumed* that as a citizen Agee enjoyed some Free Speech Clause protection beyond U.S. borders.[97] Although the record indicated that at least some of Agee's disclosures were already a matter of public record, the Court nevertheless characterized his speech as an unprotected attempt to obstruct intelligence operations.[98] Further, it characterized any inhibition resulting from the passport revocation as affecting merely action rather than speech.[99] Most importantly, the Court clarified that the Fifth Amendment "*freedom* to travel outside the United States" was far weaker than the "*right* to travel within the United States."[100] It stated that although the right to domestic travel was considered "virtually unquali-

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[90] *Id.* at 16.
[91] *Id.*
[92] *Id.* at 17.
[93] *Id.*
[94] 391 U.S. 367, 376 (1968).
[95] 453 U.S. 280, 310 (1981).
[96] *Id.* at 284.
[97] *See id.* at 308.
[98] *Id.* at 309.
[99] *Id.*
[100] *See id.* at 306.

fied," the freedom to travel abroad was "no more than an aspect of 'liberty' protected by the Due Process Clause."[101]

Thus, the seemingly close connection between foreign travel and First Amendment interests acknowledged in *Kent* and *Aptheker* was considerably less clear after *Zemel* and *Haig*. According to the Court, the "freedom" to travel outside the United States for the purposes of gathering information, participating in educational or cultural activities, or exercising one's religious beliefs does not implicate any strong First Amendment interests.[102] This means that insofar as the Constitution is concerned, so long as due process is afforded, a passport denial or revocation would be deemed valid. Although lower courts applying these precedents have sometimes disagreed regarding the applicability of the First Amendment, they have routinely upheld foreign travel restrictions.[103] In sum, if the First Amendment applies at all in this context, it is merely as a faint background principle.

3. Cross-Border Speech Directed to Alien Audiences Abroad

Citizens' speech crosses international borders by traditional means (letters, packages, and the like) and through more modern technological channels (such as websites, blogs, and emails). Suppose that a U.S. citizen sends a letter or an email to an alien living in France. Is this cross-border speech protected by the First Amendment? In 2006, the U.S. Court of Appeals for the Ninth Circuit noted in *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, a case involving materials made available in France through a U.S.-based website, that "[t]he extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue."[104]

Courts have provided little useful guidance with respect to the scope of protection afforded to cross-border speech directed to alien audiences. A few courts have simply assumed without explanation that

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[101] *Haig*, 453 U.S. at 307 (quoting Califano v. Aznavorian, 439 U.S. 170, 176 (1978)); *cf.* Regan v. Wald, 468 U.S. 222, 243 (1984) (upholding restrictions on travel to Cuba on statutory grounds).

[102] *See Zemel*, 381 U.S. at 16–17.

[103] *See* Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441 (9th Cir. 1996) (holding that travel restrictions imposed under Cuban Asset Control Regulations did not implicate the First Amendment); Walsh v. Brady, 927 F.2d 1229, 1235–36, 38 (D.C. Cir. 1991) (applying intermediate scrutiny and rejecting a poster importer's claim that Cuba travel restrictions violated the First Amendment).

[104] 433 F.3d 1199, 1217 (9th Cir. 2006).

the Free Speech Clause applies in these circumstances.[105] In 1986, in *Bullfrog Films, Inc. v. Wick*, the U.S. District Court for the Central District of California was more explicit, holding in response to a challenge to content-based U.S. customs regulations that citizens' communications directed to foreign audiences are protected by the Free Speech Clause.[106] The court rejected the government's argument that "when United States citizens direct their speech to foreign audiences, the government may regulate such speech on the basis of content."[107] It did not explain, however, whether or how protection for such communications was justified under traditional First Amendment justifications such as self-government, the search for truth in the marketplace of ideas, or speaker self-actualization. Instead, the court simply asserted that "in the absence of some overriding governmental interest such as national security, the First Amendment protects communications with foreign audiences to the same extent as communications within our borders."[108] In so stating, it suggested that First Amendment protection was based upon the assumption that the entire world is a "First Amendment forum."[109]

In contrast, notable First Amendment scholars have argued that in situations where the intended recipient is an alien located abroad, the Free Speech Clause has no force. William W. Van Alstyne has suggested that a hypothetical prohibition on citizen war propaganda directed to aliens abroad would likely not give rise to any cognizable free speech claim owing in part to the fact that "such speech is not addressed to our

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[105] *See* Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915, 917 (7th Cir. 1984) (assuming that application of export controls to an American company's desire to respond to a questionnaire from an Arab trade group regarding its business dealings with Israel raised a justiciable First Amendment question); United States v. Edler Indus., 579 F.2d 516, 519–20 (9th Cir. 1978) (applying the First Amendment to regulations that prohibited communication of technical data by a U.S. company to a French company).

[106] Bullfrog Films, Inc. v. Wick, 646 F. Supp. 492, 503 (C.D. Cal. 1986), *aff'd*, 847 F.2d 502, 512 (9th Cir. 1988); *cf.* Times Newspapers Ltd. (of Gr. Brit.) v. McDonnell Douglas Corp., 387 F. Supp. 189, 192 (C.D. Cal. 1974) (suggesting, in dicta, that foreign press within the United States have First Amendment access rights notwithstanding that their target audiences are primarily composed of aliens located abroad).

[107] *Bullfrog Films*, 646 F. Supp. at 503. The court specifically rejected the government's contention that the federal government's foreign affairs powers authorized suppression of speech directed to foreign lands. *Id.* at 503 n.16.

[108] *Id.* at 502.

[109] *See id.* at 503 n.16 (rejecting the government's claim that "the world at large is not a 'First Amendment forum'"). The court observed that "matters occurring abroad, *e.g.*, government 'news leaks' to the foreign press, are likely to find their way into this country and become a part of our domestic political debate." *Id.*

public forum, to sear *our* consciences."[110] Robert Kamenshine has similarly questioned whether one could "justify a concern over restrictions on the flow of information and ideas out of the country."[111] Kamenshine argued, in the context of export restrictions on scientific and technical information, that traditional First Amendment justifications do not extend to speech directed to a foreign audience comprising solely alien recipients.[112] Specifically, he claimed that "[n]o first amendment self-governance interest exists in informing foreign nationals" of debates regarding U.S. politics and foreign policy, that "[a]ssisting foreign nationals to find truth . . . is not a first amendment goal," and that the self-fulfillment or autonomy rationale "does not provide a persuasive basis for affording protection to the purely foreign dissemination of information."[113] Although Kamenshine specifically addressed restrictions on the cross-border flow of scientific and technical information from a U.S. corporation to a foreign audience, his concerns are not necessarily confined to that narrow context. Indeed, several scholars appear to take the position that the Free Speech Clause applies only to domestic speakers' communications to domestic audiences.[114]

Thus far we have considered speech that is intended to actually cross U.S. borders and reach foreign audiences located abroad. Current U.S. laws and regulations, however, do not require that communications actually exit the United States to be considered exports.[115] U.S. export controls provide that educational and research institutions that share scientific and technical information with certain foreign national employees are legally *deemed* to have exported the material to a foreign nation.[116] Institutions must receive what is known as a "deemed export"

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[110] Van Alstyne, *supra* note 25, at 540–41.

[111] Kamenshine, *supra* note 11, at 867.

[112] *Id.* at 867–73.

[113] *Id.* at 867–68.

[114] *See* Foster, *supra* note 26, at 390; Maltby, *supra* note 26, at 2007 n.160; Reidenberg, *supra* note 26, at 267. Commentators who have adopted a somewhat broader view of the First Amendment's scope have either rested on broad suppositions or disagreed regarding the scope of traditional theories. *See* Neuborne & Shapiro, *supra* note 25, at 744 (arguing that certain restrictions on cross-border expression and association are inconsistent with self-government theories); Roth, *supra* note 27, at 257 (arguing that laws and regulations restricting cross-border exchange ought to be "domesticated" in order to facilitate citizen participation in foreign affairs); Van Houweling, *supra* note 27, at 714 ("The First Amendment should protect speech to foreign audiences even if the amendment is concerned primarily with domestic self-government.").

[115] *See* 15 C.F.R. § 734.2 (2011) (stating that the release of technology or software to a foreign national in the United States can constitute a "deemed" export to the person's home country).

[116] *See id.*

license before sharing the covered information with certain foreign nationals.[117] The license is apparently required owing to the concern that foreign nationals will export the sensitive information when they leave the United States or will share it with a foreign power while still in the United States.

If the same exchange were to take place between two citizens residing in the United States, the general First Amendment rule that restrictions on sharing legal speech based upon anticipated unlawful use are typically invalid would certainly apply.[118] Based on the foregoing discussion, however, one might argue that the First Amendment does not apply to a restriction on speech directed to a "foreign" audience composed solely of alien recipients. No court has ever addressed this issue in a reported decision. Nevertheless, one prominent commentator has taken a rather provincial approach to the deemed export rule. Cass Sunstein has argued that the rule does not offend what he called "Madisonian" free speech principles because the licensure scheme does not restrict domestic political discussion.[119]

Citizens are also expressly prohibited under U.S. law from contacting certain foreign audiences. For example, the Logan Act of 1799 prohibits any citizen, "wherever he may be," from engaging in unauthorized "correspondence or intercourse with any foreign government or any officer or agent thereof" with the intention of influencing the foreign affairs of the United States.[120] A citizen concerned about nuclear proliferation could thus technically be prosecuted and sent to prison for sending an email to the Kremlin urging Russian officials to resist U.S. efforts to place strategic missile defense systems in neighboring countries. Owing among other things to doubts about the constitutional validity of the Logan Act, the threat of such prosecution is not particularly high.[121] Under a provincial approach, however, the Free

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[117] *See id.*

[118] *See* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 97 (1977) (holding that a municipal ban on the posting of "for sale" or "sold" signs on homeowners' properties, put in place to prevent so-called "white flight," violated the First Amendment).

[119] Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 905–12 (1986).

[120] 18 U.S.C. § 953 (2006).

[121] At the moment, such prosecution is highly unlikely. Although no court has ever ruled on the Act's constitutionality, one court has expressed doubts regarding its validity. *See* Waldron v. British Petroleum Co., 231 F. Supp. 72, 89 (S.D.N.Y. 1964) (remarking upon the vagueness of certain terms in the Act). As one commentator notes, the Act's history "has been marked by sound and fury, but no actual enforcement." Roth, *supra* note 27, at 267. *See generally* Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT'L L. 268 (1966) (noting the lack of prosecution under the Act).

Speech Clause would not seem to apply to the Logan Act and similar content-based speech restrictions. Thus, for example, Congress could conceivably enact a statute prohibiting communications by citizens to alien audiences abroad that advocate, encourage, or espouse terrorist acts against the United States.

To be sure, the category of vulnerable cross-border speech under consideration may be quite small by comparison to the marketplace as a whole. Targeted emails and other narrowly directed cross-border communications such as phone calls might be considered unprotected, as might certain "deemed" cross-border communications to foreign nationals in the United States. Additionally, some scholars have suggested that the free speech calculus may be different where the audience consists not solely of aliens but of a mixture of aliens and citizens.[122] Many Internet-based communications would satisfy this mixed audience condition.

Nonetheless, it remains difficult to try to predict the consequences of applying this provincial approach to the category of cross-border speech targeting aliens alone. Such an interpretation of the Free Speech Clause may leave a substantial amount of citizens' cross-border speech vulnerable to regulation or even outright suppression. Even those courts and commentators who would hold that the Free Speech Clause applies to such expression have not offered a substantive justification for protecting speech that does not relate specifically to domestic governance or other local democratic concerns.

4. Contacts and Associations Involving Aliens Located Abroad

U.S. citizens frequently reach across international borders to participate in associations with aliens located abroad and invite aliens to come to the United States. These contacts continue to engender First Amendment controversies, including allegations of ideological exclusion of alien visitors and criminalization of peaceful speech on behalf of certain foreign organizations.[123] Influenced largely by the federal government's immigration, national security, and foreign affairs concerns, courts have granted little First Amendment protection to these contacts and collaborations.

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[122] *See* Kamenshine, *supra* note 11, at 873–75 (explaining that restrictions on speech to mixed audiences generally raise First Amendment concerns).

[123] *See, e.g.*, Juan Forero, *U.S. Denies Visa for Colombian Writer*, WASH. POST, July 10, 2010, at A7 (explaining that prominent Colombian journalist Hollman Morris, who had planned to study at Harvard University, was ineligible for a U.S. student visa under the "terrorist activities" section of the USA Patriot Act).

The principal Supreme Court precedent relating to ideological immigration exclusion is *Kleindienst v. Mandel*, which was decided in 1972.[124] In *Mandel*, a Belgian journalist and self-described "revolutionary Marxist" sought a visa to enter the United States for a limited period in order to participate in academic conferences and discussions with American scholars.[125] The visa application was denied—for ideological reasons according to the academics who issued the invitation, and for reasons relating to Mandel's conduct on earlier trips to the United States according to the government.[126] The Court first held that aliens have no cognizable First Amendment right to enter the United States for the purpose of speaking to or associating with American audiences.[127] The Court acknowledged, however, that U.S. citizens have a First Amendment interest in hearing, face-to-face, the speech of foreign visitors whom they have invited to come to the United States.[128] According to the Court, this was so whether or not technological means existed for remotely distributing the alien's speech.[129]

As in *Lamont*, however, the Court in *Mandel* did not justify protection for the right at issue on the ground that interaction with aliens or receipt of foreign speech served any particular First Amendment values.[130] Indeed, the Court strongly signaled that any First Amendment interest was rather weak and easily overridden. Rather than balance the audience's interest in hearing the alien's ideas in person against the government's interest in denying the visa, *Mandel* held that the government needed only to provide a "facially legitimate and bona fide" reason for the exclusion.[131] Once it did so, the Court indicated, courts were not authorized to look behind the government's explanation.[132]

Mandel's "facially legitimate and bona fide" standard is a stranger to First Amendment doctrine, and commentators have decried it as inconsistent with core speech and association values.[133] *Mandel* places virtually no constitutional burden on the government to justify excluding

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[124] 408 U.S. 753, 758–59 (1972).

[125] *Id.* at 756.

[126] *Id.* at 758–59.

[127] *Id.* at 762; *see* United States *ex rel.* Turner v. Williams, 194 U.S. 279, 279 (1904) (upholding ideological exclusion of alien).

[128] *Mandel*, 408 U.S. at 763–64.

[129] *Id.* at 765 (emphasizing the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning").

[130] *See id.* at 763–65.

[131] *Id.* at 769–70.

[132] *Id.* at 770.

[133] *See, e.g.*, Neuborne & Shapiro, *supra* note 25, at 750–51.

foreign scholars, activists, artists, and other speakers.[134] One of the most important questions left open by the decision is whether the U.S. government may exclude an alien owing solely to ideological concerns. Notwithstanding a statutory prohibition on ideological immigration exclusions,[135] the executive branch continues to claim that it may deny entry to aliens on any basis, including ideological, associational, and presumably even religious grounds.[136] Such actions would undoubtedly violate the First Amendment in domestic contexts.

Contacts and relationships with aliens are restricted in other respects as well. Travel restrictions, funding conditions, registration requirements, national security laws, and other provisions may inhibit or suppress intimate and expressive associational activities involving foreign persons and organizations.[137] Few cases have analyzed associational rights or interests in cross-border contexts. No law or regulation affecting such associations has ever been invalidated on First Amendment grounds in any reported decision.

Some travel restrictions affect cross-border familial or intimate associations.[138] No court has ever addressed whether a travel embargo implicates intimate association rights under the First Amendment. As noted above, the Supreme Court has indicated that restrictions on foreign travel do not generally give rise to First Amendment claims and that foreign travel is merely an aspect of "liberty" under the Due Proc-

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[134] *See Mandel*, 408 U.S. at 766–70.

[135] In 1990, Congress passed the Moynihan-Frank Amendment, Immigration Act of 1990, which expressly prohibits the deportation or exclusion of noncitizens "because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States." Act of Nov. 29, 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067–77 (codified as amended at 8 U.S.C.A. §§ 1101, 1182 (West 2010)). The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, however, allows exclusion where an alien endorses or espouses terrorism. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 411(a)(1)(A), 115 Stat. 272, 345–46 (codified as amended at 8 U.S.C.A. § 1182(a)).

[136] *See* Brief for Defendants-Appellees at 52–59, Am. Acad. of Religion v. Napolitano, 573 F.3d 115 (2d Cir. 2009) (No. 08-0826-CV). An appellate brief filed by the George W. Bush administration claimed that Congress may and indeed had constitutionally authorized the executive branch to exclude persons based solely upon ideology, beliefs, or memberships. *See id.* Although the Obama administration has been urged to renounce and disclaim this authority, it has thus far refused to do so. John Schwartz, *U.S. Is Urged to Lift Antiterror Ban on Foreign Scholars*, N.Y. Times, Mar. 18, 2009, at A19.

[137] *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 88–98 (1961) (upholding, against First Amendment and other constitutional challenges, a federal scheme requiring that the Communist Party register with the Attorney General).

[138] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (recognizing "intimate" associational rights under the First Amendment).

ess Clause.[139] Thus, it is not likely that any challenge to travel restrictions, economic embargoes, or other laws inhibiting cross-border intimate associations would be successful.

On a few occasions, courts have adjudicated disputes regarding citizens' First Amendment rights to participate in expressive associations with foreign persons or entities. Although they have not dismissed such claims out of hand, courts have regarded the right to associate or collaborate with foreign persons and entities with considerable skepticism. In 1989 in *DKT Memorial Fund, Ltd. v. Agency for International Development*, for example, the D.C. Circuit rejected a claim by domestic nongovernmental organizations (NGOs) that U.S. funding restrictions regarding population-planning services violated their right to associate with foreign organizations.[140] The court first expressed doubt regarding any precedential support for the proposition that two organizations may claim a First Amendment right to associate.[141] Although it characterized *Lamont* as recognizing a "right of Americans to maintain First Amendment relationships with foreigners," the court observed that the right to associate with nonresident aliens was not absolute.[142] It rejected the claim that the funding restrictions at issue, which essentially bought up the market of foreign NGOs that might be willing to participate with domestic partners in abortion-related projects, interfered with any First Amendment right to associate with "fair-weather foreign associates."[143] Rather than balance the interests in expressive association against the government's foreign policy interests, the court relied on *Mandel*, which upheld the denial of an alien's visa, as support for rejecting the associational claim.[144]

Similarly, in 1988 in *Palestine Information Office v. Shultz* (*PIO*), the D.C. Circuit rejected a First Amendment associational claim and upheld the closure of a foreign mission under the Foreign Missions Act.[145] In *PIO*, the State Department determined that the organization, which was registered under FARA as an agent of the Palestinian Liberation Organization (PLO), was a "foreign mission" under the Act and that the national security interests of the United States required its immediate

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[139] *Haig*, 453 U.S. at 306.

[140] 887 F.2d 275, 299 (D.C. Cir. 1989).

[141] *Id.* at 292. Political parties, NGOs, and other organizations can of course advance the rights of the individuals they represent. *Cf.* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98 (1982).

[142] *DKT*, 887 F.2d at 295.

[143] *Id.* at 294.

[144] *Id.* at 295.

[145] 22 U.S.C. §§ 4301–4304 (2006); 853 F.2d 932, 945 (D.C. Cir. 1988).

closure.[146] The Department based its decision on "U.S. concern over terrorism committed and supported by individuals and organizations affiliated with the PLO, and as an expression of our overall policy condemning terrorism."[147] PIO challenged the closure on First Amendment grounds. The D.C. Circuit emphasized that the Foreign Missions Act "operates in that subtle realm in which foreign policy matters brush up against rights of free speech and free expression."[148]

The court held that the closure of the foreign mission did not infringe upon PIO members' rights to free speech, association, or receipt of information.[149] Nor, the court held, did it violate any right to associate with the PLO itself.[150] It described the closure of the mission as merely "an incidental restriction" on members' speech rights.[151] The court characterized the act of representing a foreign mission as conduct rather than expression and held that the closure easily satisfied intermediate scrutiny.[152] It relied on *Zemel*, a travel case, and *Mandel*, an immigration exclusion case, in concluding that PIO had only a minimal First Amendment interest in associating with a foreign entity.[153] It also added that there was no "right to *represent* a foreign entity on American soil."[154] Finally, the court emphasized that the government had a substantial interest in conveying a message of disapproval of terrorism through closure of the PIO.[155]

Additionally, current federal laws and regulations prohibit the provision of funding or other forms of "material support" to groups the government has labeled "foreign terrorist organizations."[156] The Secre-

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[146] *PIO*, 853 F.2d at 934–35.

[147] *Id.* at 936.

[148] *Id.* at 935.

[149] *Id.* at 939–40.

[150] *Id.* at 939, 941 (reasoning that PIO members, who were U.S. citizens and resident aliens, remained free to disseminate information and advocacy materials in the U.S. and to associate with one another).

[151] *Id.* at 939.

[152] *PIO*, 853 F.2d. at 939–40.

[153] *Id.* at 941–42.

[154] *Id.* at 941.

[155] *Id.* at 942. In a concurrence, Judge Laurence H. Silberman disagreed that the mission closure imposed a merely "incidental" restriction on PIO's speech and associational rights, especially in light of the fact that the closure required PIO to dispose of its assets and cease operating, thus depriving it of the very means it had used to communicate. *Id.* at 945 (Silberman, J., concurring). He also rejected the majority's conclusion that operating the mission was conduct, not speech; rather, he said, it was precisely PIO's speech that the government sought to suppress. *Id.* at 946.

[156] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) §§ 302–303, 8 U.S.C. § 1189 (2006), 18 U.S.C.A. § 2339B (West 2010). Congress amended the AEDPA in the USA

tary of State is authorized to designate as "terrorist" any group (1) that is foreign, (2) that "engages in terrorist activity," and (3) whose activities threaten "national security."[157] Once the Secretary designates a group as "terrorist," it becomes a crime to "knowingly provide[] material support or resources to" the group.[158] Federal law defines "material support or resources" to include "service . . . training, expert advice or assistance . . . [and] personnel."[159]

In *Humanitarian Law Project*, the Supreme Court held that the material assistance prohibition could be applied even to pure political speech, so long as it was "coordinated" with a designated foreign terrorist organization.[160] Specifically, the plaintiffs in *Humanitarian Law Project* wished to assist foreign organizations in bringing human rights complaints at the United Nations, to engage in political advocacy in the United States and elsewhere on their behalf, and to offer their legal expertise in negotiating peace agreements.[161] The Court held that application of the material support provisions to these proposed speech activities did not violate the Free Speech Clause.[162] It characterized the law as limiting only speech that is coordinated with a designated foreign terrorist organization, not any independent advocacy plaintiffs may wish to engage in on behalf of the foreign organizations.[163] According to the Court, the material support provisions do not prohibit citizens from advocating independently on behalf of the designated organizations before the United Nations or other international bodies,

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PATRIOT Act of 2001, Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272, 377 (codified as amended at 18 U.S.C.A. §§ 1956, 2339A, (West 2010)), and again in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638, 3762–64 (codified as amended at 18 U.S.C.A. § 2339A (West 2010)).

[157] 8 U.S.C.A. § 1182(a)(3)(B)(III)–(VI) (defining "terrorist activity"); *id.* § 1189(a)(1) (criteria for designation); *id.* § 1189(d)(2) (defining "national security").

[158] 18 U.S.C.A. § 2339B(a)(1).

[159] *Id.* § 2339A(b)(1). The definition expressly excludes religious materials. *Id.* Several courts have held that the provision of material support, as defined in the statute, implicates conduct rather than speech or expressive association. *See, e.g.*, United States v. Chandia, 514 F.3d 365, 371 (4th Cir. 2008) (holding that material support provisions regulate conduct rather than protected association); People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1244–45 (D.C. Cir. 2003) (holding that material support provisions regulate conduct rather than speech or association); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000) (explaining that government may regulate contributions to organizations that engage in lawful—but non-speech related—activities).

[160] *Humanitarian Law Project*, 130 S. Ct. at 2726.

[161] *Id.* at 2714.

[162] *Id.* at 2728–29.

[163] *Id.* at 2726.

nor do the provisions even prohibit them from becoming members of the designated organizations.[164]

The Court rejected the government's argument that the material support provisions regulated conduct rather than speech.[165] It characterized the law as one that regulated speech based upon its content.[166] As such, the law presumably had to survive the strictest form of judicial scrutiny. The Court held that the government's interest in combating terrorism was "an urgent objective of the highest order."[167] It deferred substantially to Congress's judgment that any form of support, including speech, would further the violent goals of the designated foreign terrorist organizations.[168] The Court reasoned that material assistance in the form of advocacy and other speech "frees up other resources within the organization that may be put to violent ends."[169] Moreover, it concluded that speech on behalf of the designated organizations "helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks."[170] Finally, the Court accepted Congress's determination that limiting speech and advocacy coordinated with foreign terrorist organizations was necessary to sustain and support relationships with U.S. allies abroad.[171] The Court characterized deference to the policy determinations of the legislative and executive branches as particularly appropriate in light of the "acute foreign policy" and national security concerns addressed by the material support provisions.[172]

With regard to the specific activities plaintiffs intended to engage in, the Court held that Congress could conclude that training members of foreign terrorist organizations on how to use humanitarian and international law to peacefully resolve disputes could assist those organizations in promoting terrorism by, among other things, "lulling opponents into complacency."[173] The Court also reasoned that foreign ter-

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[164] *Id.* at 2723.

[165] *Id.*

[166] *Humanitarian Law Project*, 130 S. Ct. at 2724.

[167] *Id.*

[168] *Id.* at 2725.

[169] *Id.*

[170] *Id.* Of course, the same conclusion obviously applies to all *independent* speech on behalf of the designated organizations.

[171] *See id.* at 2726–27 (noting that Turkey and other allies might "react sharply" to Americans furnishing material support to certain foreign groups).

[172] *Humanitarian Law Project*, 130 S. Ct. at 2727.

[173] *Id.* at 2729.

rorist organizations might use their knowledge of the structures of the international legal system "to threaten, manipulate, and disrupt."[174] Similarly, the Court concluded that teaching members of foreign terrorist organizations how to petition international relief organizations, and engaging in political advocacy on their behalf, might further the violent goals of the terrorist organizations.[175]

The Court also rejected claims that the material support provisions violated citizens' right to associate with foreign organizations.[176] The Court explained that the law did not prohibit or otherwise regulate citizens' membership in the designated foreign terrorist organizations, but only the act of providing material support to such organizations.[177] In any event, the Court held that any burden on plaintiffs' freedom of association was justified because Congress deemed such burdens necessary to further national security and foreign affairs interests.[178]

The *Humanitarian Law Project* Court held that application of the material support provisions to plaintiffs' proposed speech activities served a compelling objective and was necessary to curb the terrorist activities of designated foreign terrorist organizations.[179] The Court also pointed out, though, that its decision should not be read to suggest that a similar prohibition on assistance to domestic organizations would necessarily satisfy the requirements of the Free Speech Clause.[180] Indeed, the decision seemed to turn largely on the fact that citizens had associated with foreign persons and entities the federal government had deemed off limits. The logic of the Court's arguments—that weapons and words are fungible, that speech that legitimizes foreign terrorist organizations can be criminalized, and that citizens' speech can be suppressed in the interest of appeasing our allies abroad—is incompatible with domestic Free Speech Clause principles and doctrines. The *Humanitarian Law Project* decision places in jeopardy a wide range of exchanges and interactions between citizens, both at home and abroad, and aliens that the U.S. government has designated as dangerous to national security. Journalists, aid workers, humanitarian relief workers, and even lawyers must now be careful not to coordinate their speech with such persons.

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[174] *Id.*
[175] *Id.*
[176] *Id.* at 2730–31.
[177] *Id.* at 2730.
[178] *Humanitarian Law Project*, 130 S. Ct. at 2731.
[179] *Id.* at 2730.
[180] *Id.*

The relatively few courts to have considered the matter have held that citizens and permanent U.S. residents have a limited, perhaps even de minimis, First Amendment interest in relating to and associating with foreign entities and organizations.[181] In the course of rejecting cross-border speech and associational claims, courts have questioned the existence of a right to associate with aliens abroad, sometimes characterized associations with aliens abroad as conduct rather than expression, and relied upon travel and immigration exclusion precedents in upholding restrictions on cross-border contacts.

5. Free Exercise of Religion Across Borders

Courts have had few opportunities to consider Free Exercise Clause claims arising from restrictions on cross-border activities and communications.[182] Such claims would likely involve either foreign travel—discussed earlier—or the distribution of religious materials.

With regard to travel restrictions, *Zemel* and current free exercise doctrine strongly suggest that an allegation that a travel embargo interferes with the desire to minister or practice one's religion abroad would not state a First Amendment claim.[183] There is only one reported case involving the application of U.S. export laws to religious materials. In 1970, the U.S. District Court for the District of Columbia decided *Welch v. Kennedy*, a case in which a Quaker claimed that enforcement of a trade embargo affecting distribution of funds and materials to North and South Vietnam violated his free exercise rights.[184] The distributor claimed that the government did not have the power to regulate the provision of humanitarian relief that is motivated by religious conscience.[185] The district court assumed that the Free Exercise Clause applied to the cross-border distribution of religiously motivated humanitarian aid, but dismissed the claim on the ground that the trade laws imposed only an incidental burden on religious practices and beliefs.[186]

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[181] *See DKT*, 887 F.2d at 295 (acknowledging that Americans have a limited right "to maintain First Amendment relationships with foreigners").

[182] *See* Mansfield, *supra* note 53, at 19 (noting the lack of precedents regarding the "unlimited governmental power to exclude information that originates outside the country, such as mail or electronic transmissions, including information important to religion").

[183] Emp't Div. v. Smith, 494 U.S. 872, 893 (1990) (suggesting that measures such as travel and trade laws would be considered "generally applicable" laws that do not implicate the Free Exercise Clause).

[184] 319 F. Supp. 945, 946 (D.D.C. 1970).

[185] *Id.*

[186] *Id.* at 947–48.

Although *Welch* did not address the issue, there may be reason to question whether the Free Exercise Clause even applies to the cross-border provision of religious aid or materials. If, as some claim, the First Amendment's Free Speech Clause is solely concerned with communications that take place between U.S. speakers and audiences, then might a similar logic apply to religious expression and practice? Alternatively, it is possible that the free exercise guarantee is more universal than the speech guarantee, which has been interpreted as limited by self-governance, marketplace, and other pragmatic concerns. Neither courts nor commentators have ever developed any coherent basis for assessing or adjudicating cross-border free exercise concerns.

B. *Beyond-Border First Amendment Liberties*

The First Amendment's extraterritorial dimension has received relatively little judicial or academic attention. The First Amendment liberties enjoyed by citizens abroad—the right to speak, to receive speech, to publish information, to gather and report information from distant locations, and to practice their religious beliefs—are not necessarily as robust as citizens likely assume.[187] Further, whether U.S. taxpayers are entitled to the benefit of the anti-establishment principle abroad is a close question and one of increasing delicacy and importance.[188] Finally, there appears to be little support for extending any First Amendment rights to aliens located beyond U.S. shores. Like its cross-border dimension, the First Amendment's extraterritorial dimension is largely underdeveloped. The structure and logic that presently exist are distinctly provincial in character. The central supposition is that the First Amendment is a set of domestic guarantees limiting domestic governance.

1. Citizens' Speech and Press Activities Abroad

Remarkably, whether U.S. citizens are protected by the Free Speech Clause when they engage in speech activities abroad remains an unresolved issue.[189] As noted earlier, in *Haig v. Agee*, the Supreme Court assumed for the sake of argument that the First Amendment applied to at

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[187] *See infra* notes 189–215 and accompanying text.

[188] *See infra* notes 238–253 and accompanying text.

[189] *See* Laker Airways Ltd. v. Pan Am. World Airways, Inc., 604 F. Supp. 280, 287 (D.D.C. 1984) (noting that it is not clear "whether even American citizens are protected specifically by the First Amendment with respect to their activities abroad").

least some citizen speech that is subject to U.S. laws and regulations beyond U.S. territorial borders.[190] The Court has never revisited the issue.

A few lower courts have likewise assumed that the First Amendment applies where the federal government seeks to restrict the speech of U.S. citizens, including soldiers, located abroad.[191] In some recent cases, citizens have unsuccessfully tested the reach of the Free Speech Clause by traveling abroad to serve as "human shields" as a form of protest against U.S. involvement in foreign wars and conflicts.[192] Like the cases involving the First Amendment's applicability to cross-border expression, these decisions more or less assumed that the Free Speech Clause applies abroad.[193] The courts did not carefully analyze or provide a rationale for extraterritorial application.[194]

Other courts, in contrast, have suggested that the Free Speech Clause does not automatically apply to citizens' speech activities abroad. In 1989, the U.S. District Court for the Northern District of Illinois in *Desai v. Hersh* concluded that speech deliberately published or republished abroad by U.S. citizens may not be protected by the First Amendment.[195] The court stated that "first amendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution."[196]

Desai involved an Indian citizen who brought a defamation suit in U.S. federal court against an American author, Seymour Hersh, who had written a book about U.S. foreign policy during the Nixon Admini-

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[190] *Haig*, 453 U.S. at 308.

[191] *See* Carlson v. Schlesinger, 511 F.2d 1327, 1331–33 (D.C. Cir. 1975) (applying First Amendment time, place, and manner standards to restrictions on soldiers' pamphleteering on military bases). In *Bullfrog Films*, discussed *supra* notes 106–109 and accompanying text, the district court mistakenly treated application of a customs exemption law as raising an issue of the Free Speech Clause's extraterritorial domain. *See* 646 F. Supp. at 502. In deciding that the Free Speech Clause applied extraterritorially, the court relied upon the incorrect proposition that "the Bill of Rights applies abroad." *See id.* at 503. The Supreme Court has applied the Bill of Rights abroad selectively, not in its totality. *See* Reid v. Covert, 354 U.S. 1, 6–7 (1957).

[192] *See Clancy*, 559 F.3d at 605 (holding that sanctions imposed for travel to Iraq in violation of an executive order restricted conduct rather than speech); Karpova v. Snow, 402 F. Supp. 2d 459, 473–74 (S.D.N.Y. 2005) (holding that enforcement of regulations restricting travel to Iraq did not give rise to any First Amendment claim and that insofar as traveler's actions as a human shield were expressive conduct, the travel regulations satisfied First Amendment standards).

[193] *See Clancy*, 559 F.3d at 605; *Karpova*, 402 F. Supp. 2d at 473–74.

[194] *See Clancy*, 559 F.3d at 605; *Karpova*, 402 F. Supp. 2d at 473–74.

[195] 719 F. Supp. 670, 676 (N.D. Ill. 1989).

[196] *Id.*

stration.[197] The book was published in both India and the United States, and the plaintiff sought recovery under both Indian and U.S. defamation law.[198] One of the issues was whether the court could apply Indian defamation law, which is less protective than First Amendment defamation doctrine, to speech that is distributed and received abroad.[199] The court noted that:

> Had defendant written a book and published it solely in India concerning plaintiff's activities as a public official in the government of India, but minimally related to a matter of public concern in [the United States], the need for protection of first amendment interests would be greatly lessened, if not entirely absent.[200]

This was so, it reasoned, because the First Amendment "shields the actions of speakers for the benefit of their audience."[201]

In other words, the court reasoned that where the speech or publication does not affect the free flow of information inside the United States, the First Amendment does not apply.[202] Moreover, the court also held that if the defendant had "intentionally published the speech in the foreign country in a manner sufficient to indicate abandonment of first amendment protection," the First Amendment would not apply.[203] Ultimately, the court acknowledged that failing to grant First Amendment protection to speech published abroad might chill speech both inside the United States and abroad.[204] It noted: "Our world is shrinking every day as a result of improvements in mass communications and travel."[205] Nevertheless, the court was not willing to provide automatic protection to citizens' speech deliberately published abroad.[206]

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[197] *Id.* at 672.

[198] *Id.*

[199] *Id.* at 675.

[200] *Id.* at 676.

[201] *Desai*, 719 F. Supp. at 676.

[202] *See id.* at 678 (holding that application of the First Amendment to speech published abroad depended as a threshold matter upon whether it was "newsworthy and of public concern in the United States"). The court adopted an elastic conception of the U.S. information market. For example, it treated as within the U.S. speech marketplace a book "being sent to, or brought into, a foreign country by an American diplomat, an American national studying abroad, or even an American doing a little reading on a vacation." *Id.* at 676.

[203] *Id.* at 680.

[204] *Id.* at 676–77.

[205] *Id.* at 677.

[206] *Id.* at 680–81. Contrast the approach taken in *Desai* with that taken by U.S. courts, state legislatures, and Congress with respect to libel judgments obtained in foreign courts.

It is also not clear that U.S. citizens located abroad have a First Amendment right to receive information from either citizens at home or aliens abroad. As noted earlier, the Ninth Circuit stated in its *Yahoo!* decision that "[t]he extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue."[207] *Yahoo!* raised the question whether enforcement of a French court's judgment purporting to limit access to the speech of an American company in foreign locations violated the First Amendment rights of the recipients.[208] The court did not clarify whether the foreign audience at issue consisted solely of aliens or a mixture of aliens and citizens. It merely observed that insofar as it required some restriction on access to the material in question, the French court's order might require a determination "whether the First Amendment has extraterritorial application."[209] Ultimately, the decision did not address whether U.S. citizens or aliens located abroad have a First Amendment right to receive information that originates within the United States.[210]

The issue of extraterritorial press rights has also arisen on various occasions, most recently in connection with the strict limitations im-

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Judicial decisions and statutes flatly refuse to recognize libel judgments obtained under foreign laws that do not provide the same robust protections as the First Amendment, whether or not the speaker or speech has any significant connection to the U.S. speech marketplace. *See* Matusevitch v. Telnikoff, 877 F. Supp. 1, 4 (D.D.C. 1995) (holding that in light of the differences between British and U.S. libel law, the recognition and enforcement of the foreign judgment would deprive the plaintiff of his constitutional rights); Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992) ("The protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution."); *see also* Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, 28 U.S.C.A. §§ 4101–4105 (West 2010) (prohibiting U.S. courts from enforcing any foreign libel judgment unless the judgment was obtained in accordance with American First Amendment protections). Some commentators have decried the approach as a form of rights imperialism, while others have supported non-recognition of foreign libel judgments that do not meet American free speech standards. *Compare* Eric P. Enson, *A Roadblock on the Detour Around the First Amendment: Is the Enforcement of English Libel Judgments in the United States Unconstitutional?*, 21 Loy. L.A. Int'l & Comp. L.J. 159, 160 (1999) ("[U]nder the First Amendment to the United States Constitution and some views of the 'state action' doctrine, the American enforcement of English libel judgments is itself unconstitutional."), *with* Mark D. Rosen, *Exporting the Constitution*, 53 Emory L.J. 171, 172 (2004) ("Categorically refusing to enforce such Un-American Judgments is tantamount to imposing U.S. constitutional norms on foreign countries.").

[207] *Yahoo!*, 433 F.3d at 1217.

[208] *Id.*

[209] *Id.*

[210] *Id.* at 1217–18.

posed on reporters at military tribunal proceedings at Guantanamo Bay, Cuba.[211] In general, the First Amendment rights of the American press are no different from those enjoyed by other citizens.[212] American journalists, however, play a uniquely important role in reporting on events that take place abroad. They frequently travel or are posted abroad to conduct research and report on location from foreign sites.

Suppose U.S. officials impose content-based or more general restrictions on American journalists' access to information or reporting in foreign lands.[213] Do the journalists have any First Amendment rights? Certain published opinions suggest that a plausible argument might be made, in an appropriate case, for enforcing press rights abroad; thus far, however, no court has ever accepted such an argument or actually enforced extraterritorial press rights.[214] At present, nothing would seem to preclude the federal government from prohibiting the press from reporting on wartime activities, detention facilities, and other foreign activities.[215]

In sum, the basic assumption articulated in some judicial decisions is that the First Amendment may limit the government's power to directly regulate citizens' speech or American press activities abroad. Courts, however, do not appear ever actually to have enforced citizens' speech or press rights extraterritorially. Additionally, courts and commentators have expressed some doubt regarding whether anyone has a right to receive speech abroad and whether the Free Speech Clause even applies to speech that does not concern an issue of public concern within the United States and is deliberately published in foreign nations.

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[211] Jeremy W. Peters, *News Media Seek Loosening of the Pentagon's Rules at Guantanamo*, N.Y. Times, July 21, 2010, at A15.

[212] *See* Citizens United v. FEC, 130 S. Ct. 876, 905–06 (2010) (rejecting the proposition that the institutional press has any constitutional privilege beyond that of other speakers).

[213] *See* Leo Shane III, *Army Used Profiles to Reject Reports*, Stars & Stripes (Mideast ed.), Aug. 29, 2009, at 1, 2 (reporting that the Pentagon used secret profiles of journalists' work to influence coverage of the war in Afghanistan).

[214] *See* Flynt v. Rumsfeld, 180 F. Supp. 2d 174, 175–76 (D.D.C. 2002), *aff'd*, 355 F.3d 697 (D.C. Cir. 2004) (declining publisher's request to enjoin the Secretary of Defense from interfering with a plan to have correspondents accompany American troops during combat in Afghanistan); Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) (acknowledging that the "affirmative right to gather news, ideas and information" was implicated by Defense Department restrictions on coverage of Operation Desert Storm, but refusing to grant the journalists' requested injunctive relief).

[215] *See* David A. Anderson, *Freedom of the Press in Wartime*, 77 U. Colo. L. Rev. 49, 66 (2006) ("So far as existing case law is concerned, there appears to be nothing to prevent the Pentagon from eliminating on-scene coverage of military operations, detention facilities, military hospitals, and other auxiliaries of war.").

2. Speech by Aliens in the United States and Abroad

The First Amendment rights of aliens, whether resident in the United States or abroad, are not well settled. The Supreme Court and some lower courts have suggested that aliens may be deported from the United States for ideological or associational reasons, and the Court has held that aliens may not challenge their deportation on the ground that they have been singled out for their statements or associations.[216] Under these precedents, the First Amendment does not clearly prohibit ideological deportation.

With regard to aliens located abroad, the Court held in *Mandel* that they have no cognizable First Amendment right to enter the United States.[217] Although alien speakers and audiences residing abroad can be substantially and directly affected by U.S. regulations and policies, the Supreme Court has never decided whether the First Amendment applies to any alien speech activity abroad.[218] Courts and commentators, however, have generally been skeptical that aliens located abroad enjoy free speech protections.[219] Indeed, one commentator summarized what might be considered the prevailing provincial senti-

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[216] *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488–92 (1999) (holding that a person may not challenge deportation on grounds that he or she was selectively prosecuted based on otherwise protected speech). *Compare* Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952) (rejecting a First Amendment challenge to deportation), *and* Price v. U.S. Immigration & Naturalization Serv., 941 F.2d 878, 884 n.7 (9th Cir. 1991) (suggesting that *Harisiades* gives government nearly unlimited authority over immigration), *with* Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1064 (9th Cir. 1995), *rev'd on other grounds*, 525 U.S. 471 (suggesting that *Harisiades* does not allow the government to deport aliens based on otherwise protected speech), *and* Parcham v. U.S. Immigration & Naturalization Serv., 769 F.2d 1001, 1011 (4th Cir. 1985) (same).

[217] *Mandel*, 408 U.S. at 762.

[218] *See Harisiades*, 342 U.S. at 592 (rejecting a First Amendment challenge to a law providing for the deportation of communists); *Williams*, 194 U.S. at 290–91 (upholding the removal of an alien anarchist). At the beginning of the twentieth century, the Court suggested that the Free Speech Clause applies in at least some U.S. territories. *See* Downes v. Bidwell, 182 U.S. 244, 277 (1901) (suggesting that the First Amendment applied in both incorporated and unincorporated territories); *id.* at 294 (White, J., concurring) (noting that "general prohibitions in the Constitution" were "an absolute denial of all authority" to Congress to do certain things); *see also* Virgin Islands Elective Governor Act § 11, 48 U.S.C. § 1561 (2006) (signaling congressional intent to extend Bill of Rights protections to residents of the Virgin Islands); Guam Elective Governor Act § 10, 48 U.S.C. § 1421b (2006) (extending protections of Bill of Rights to Guam).

[219] *But see* Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 99–100 (1996) (defending an approach that "extends constitutional rights to aliens abroad only in those situations in which the United States claims an individual's obedience to its commands on the basis of its legitimate authority").

ment: "The First Amendment, designed by 'We the People,' for the people, has a limited role abroad."[220]

As a textual matter, the First Amendment itself ("Congress shall make no law . . .") contains neither a geographic limitation nor one defining its beneficiaries.[221] It does contain some political membership (i.e., "the people") language, but only in reference to the seemingly localized rights of assembly and petition.[222] In any event, reliance on membership in the political community to determine the Constitution's extraterritorial application has not garnered more than a plurality of Supreme Court votes in other disputes involving extraterritorial application of the Bill of Rights.[223]

Neither courts nor commentators have relied on any supposed textual limitation with regard to aliens' free speech rights. A few lower courts, however, have expressly rejected claims by alien speakers that they are entitled to First Amendment protections while abroad and not under U.S. custody or control. In its 1989 decision in *DKT Memorial Fund*, the D.C. Circuit held that foreign speakers lacked prudential standing to challenge a U.S. funding condition that prohibited them from using even their own private funds to discuss abortion.[224] In a 1984 decision, *Laker Airways Ltd. v. Pan American World Airways*, the U.S. District Court for the District of Columbia held that the First Amendment did not bar it from enforcing an order that foreign defendants under its jurisdiction were prohibited from speaking to or petitioning their own governments abroad.[225]

These decisions predate significant Supreme Court precedents regarding the extraterritorial application of the Constitution. In 1990 in *United States v. Verdugo-Urquidez*, a case actually on appeal when one of the aforementioned cases was decided, the Court held that certain Fourth Amendment protections did not apply to the search of an alien's property in Mexico.[226] Justice Kennedy, who provided the decisive vote, relied upon a functional and pragmatic approach to extraterritorial application of the Fourth Amendment, under which the Court ultimately

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[220] Maltby, *supra* note 26, at 2007 n.160.

[221] *See* U.S. CONST. amend. I.

[222] *See id.* ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[223] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1990) (plurality opinion) (relying on Fourth Amendment language limiting its protections to "the people"). *But see id.* at 276 (Kennedy, J., concurring) (rejecting membership approach).

[224] 887 F.2d at 283–85.

[225] 604 F. Supp. at 287, 290.

[226] 494 U.S. at 274–75.

concluded that it was impracticable to apply the warrant requirement to searches of aliens' property overseas.[227] More recently, in its 2008 decision *Boumediene v. Bush*, the Court held that the writ of habeas corpus extended to alien detainees being held at U.S. facilities at Guantanamo Bay, a territory under the legal control of the United States but over which it does not exercise sovereignty.[228] Writing for the Court, Justice Kennedy again applied a multi-factor pragmatic approach to determine the scope or domain of the habeas guarantee. The relevant factors included the nature and degree of control the United States exercises over the territory in question, the importance of the writ itself, the status of the detainees, the location of the arrests and detentions, and any practical obstacles to administration of the writ.[229]

No court has yet addressed what, if any, effect *Verdugo-Urquidez* and *Boumediene* might have on the free speech rights of aliens located abroad. The commentators who have discussed the matter have disagreed regarding the scope, substance, and proper justifications for extraterritorial application of the First Amendment's expressive guarantees to aliens.[230]

Kermit Roosevelt has argued that although the Free Speech Clause might protect some communications between aliens and citizens, the First Amendment's self-governance justification simply does not apply to alien-to-alien speech abroad.[231] Further, Roosevelt claims that "it is hard to see why the Constitution would be concerned with the self-actualization of aliens abroad."[232] In a response to Roosevelt, Gerald Neuman does not contest the limited relevance of self-government principles in the context of alien-to-alien communications.[233] He also agrees that the First Amendment does not obligate the United States to

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[227] *Id.* at 276 (Kennedy, J., concurring).

[228] 553 U.S. 723, 792 (2008).

[229] *Id.* at 739, 758–59, 765. The D.C. Circuit, applying this test, recently held that the writ of habeas corpus does not extend to aliens being held at Bagram Air Force Base in Afghanistan. Al Maqaleh v. Gates, 605 F.3d 84, 98 (D.C. Cir. 2010).

[230] *See* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 287 (2009) (arguing that the extent of First Amendment protection abroad may depend on such factors as "where the speech originated, where its intended audience was, and the location of detention and trial"). *Compare* Neuman, *supra* note 29, at 2082–83 (suggesting that some alien communications abroad may be protected by the First Amendment), *with* Roosevelt, *supra* note 29, at 2066 (expressing doubt that alien-to-alien communications abroad are protected under traditional First Amendment justifications).

[231] Roosevelt, *supra* note 29, at 2066.

[232] *Id.*

[233] Neuman, *supra* note 29, at 2082.

facilitate aliens' self-actualization abroad.[234] Neuman, however, is open to extending some narrow protection to alien communications abroad. In particular, he asks: "[I]s it so clear that no First Amendment concerns are raised when the [U.S.] government reaches out to crush aliens' self-actualization abroad?"[235] Neuman posits that although not all free speech protections would apply to aliens abroad, foreign speakers who are subject to U.S. detention and punishment for speech abroad, or who are taken into U.S. custody and prosecuted in the United States for their foreign communications, are entitled to some level of First Amendment protection.[236]

In sum, the few reported decisions and existing academic commentary seem generally to be in agreement that expressive guarantees do not apply extraterritorially to aliens.[237] This means that American officials can condition aliens' receipt of benefits on waiver of First Amendment rights and that aliens in foreign territories do not enjoy any protections against suppression, censorship, or other restrictions on speech and association. It is not clear whether the pragmatic approach to constitutional domain adopted by the Supreme Court in cases like *Verdugo-Urquidez* and *Boumediene* might affect this conclusion, and if so, to what extent.

3. Extraterritorial Application of the Religion Clauses

The United States appropriates and spends substantial sums of money to support a variety of projects and missions abroad. Some of these projects involve direct or indirect funding of sectarian schools and other institutions.[238] As the United States pursues its foreign policy objectives in Iraq, Afghanistan, and elsewhere around the world, Establishment Clause concerns will likely arise with increasing frequency. In addition, U.S. missionaries and religious organizations have long been active in foreign nations. Their activities may conflict with the policies and objectives of U.S. military and federal agencies working abroad. Given the importance of the relationship between foreign missions and U.S. officials, litigation seems unlikely. Nevertheless, in structuring their interactions and carrying out their missions, individuals and agencies

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[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *See supra* notes 216–236 and accompanying text.
[238] Office of Inspector Gen., *supra* note 41, at 5–7.

ought to know whether the Free Exercise Clause has any force beyond American shores.

The *Restatement (Third) of Foreign Relations* declares matter-of-factly that "the right not to be subject to an establishment of religion [is] protected against infringement in the exercise of foreign relations power as in domestic affairs."[239] To date only two courts have considered whether the Establishment Clause applies abroad. In 1975, the U.S. Court of Appeals for the Fifth Circuit in *Dickson v. Ford* dismissed an establishment claim challenging the appropriation of funds for emergency military assistance to the state of Israel on the ground that it was a political question implicating the balance of power in the Middle East.[240] In its 1991 decision *Lamont v. Woods*, however, the U.S. Court of Appeals for the Second Circuit reached the merits and held that the Establishment Clause applies to U.S.-funded programs and facilities abroad.[241] As the only precedent to have reached the merits on this issue, *Woods* deserves close attention.

In *Woods*, taxpayers challenged U.S. grants to twenty foreign schools—eleven Israeli schools and nine schools affiliated with the Roman Catholic Church—located in various U.S. territories and foreign countries that received grants under the American Schools and Hospitals Abroad (ASHA) program authorized by the Foreign Assistance Act.[242] The grants were made to individuals or groups inside the United States for the benefit of foreign schools. The U.S. sponsors were responsible for transferring the funds to the schools abroad and had virtually no contact with the foreign affiliates.[243] Agency guidance proscribed the use of ASHA grants to train persons for religious pursuits or to construct

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[239] Restatement (Third) of Foreign Relations Law of the United States § 721 & cmts. a, b & d (1987 & Supp. 2008).

[240] 521 F.2d 234, 235 (5th Cir. 1975) (per curiam).

[241] 948 F.2d 825, 843 (2d Cir. 1991).

[242] The schools were located in the Philippines, Egypt, Jamaica, Micronesia, and South Korea. *Id.* at 828. The ASHA program authorizes the president to furnish assistance to schools outside the United States or sponsored by U.S. citizens and serving as study and demonstration centers for ideas and practices of the United States. 22 U.S.C. § 2174(a) (2006). The foreign affiliates are required to operate as "centers for American educational ideas and practices, with programs of study that reflect favorably on and increase understanding of the United States." Final Program Criteria for Screening of Applications for Grants Made by American Schools and Hospitals Abroad (ASHA) Program, 44 Fed. Reg. 67,543, 67,544 (Nov. 26, 1979).

[243] *Woods*, 948 F.2d at 828.

buildings or other facilities intended for worship or religious instruction.[244]

The court in *Woods* noted that the Establishment Clause clearly applied to the ASHA grants to domestic recipients because the funding decision was made in the United States.[245] Indeed, the court observed that "any alleged Establishment Clause violations in this case, if established, would have occurred in the United States—i.e., at the time that appellants granted money to United States entities for the benefit of foreign sectarian institutions—and not abroad—i.e., at the time the money was received or expended."[246] The court concluded that the grants in question implicated the Establishment Clause's extraterritorial dimension because they only benefited foreign institutions.[247] Using the analytical framework from *Verdugo-Urquidez*, the court examined the First Amendment's text, the operation of the Establishment Clause domestically and abroad, the history of the Establishment Clause, the extent to which support for religion overseas relates to and benefits religious institutions in the United States, and policy considerations pertaining to extraterritorial application of the anti-establishment principle.[248]

Having determined based on these considerations that the Establishment Clause applied, the court stated that the provision might nevertheless function somewhat differently abroad.[249] Specifically, the court suggested that the lower court take into account any special circumstances relating to the presence or functioning of religious institutions in foreign countries.[250] It explained, for instance, that U.S. agencies would be entitled to show a "compelling reason" why, based on the local circumstances, the risks attendant to the funding of sectarian schools should be borne in some cases.[251]

At present, *Woods* is the only guidance U.S. aid officials and grantees have with regard to the extraterritorial reach of the Establishment Clause. Although much of the analysis might be considered dictum and is not beyond reproach, the decision makes a plausible case for extend-

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[244] Final Program Criteria for Screening of Applications for Grants Made by American Schools and Hospitals Abroad (ASHA) Program, 44 Fed. Reg. at 67,544.

[245] *Woods*, 948 F.2d at 834.

[246] *Id.*

[247] *Id.* at 835.

[248] *Id.* at 834–41.

[249] *Id.* at 841–42.

[250] *Id.* at 842.

[251] *Woods*, 948 F.2d at 842.

ing Establishment Clause protection overseas.[252] It is an exception to the provincial thinking that has otherwise been applied in analyses of beyond-border First Amendment liberties. The decision has been criticized, however, by some commentators who question whether its reasoning has been eroded by domestic jurisprudential developments and who contend that officials may be entitled to near-absolute foreign affairs-type deference when funding sectarian programs abroad.[253]

Extraterritorial application of the Free Exercise Clause may be supported in part by the Supreme Court's 1878 decision *Reynolds v. United States*, which held that the Free Exercise Clause applies in U.S. territories on the path to statehood.[254] Nonetheless, neither *Reynolds* nor any other precedent explicitly addresses whether the Free Exercise Clause grants any enforceable rights to either citizens or aliens located abroad. With regard to citizens, at least, *Reynolds* points in the direction of more universal application.[255] In addition, the pre-colonial history of religious persecution abroad may suggest that the Free Exercise Clause ought to protect citizens living and working abroad.

Still, there is nothing in *Reynolds* itself to indicate whether, for example, a U.S. missionary located in the Sudan may bring a free exercise claim when ordered by U.S. military or other officials not to proselytize or minister in a certain area for fear of inciting religious hostility or for other reasons. Nor do any decisions or academic commentaries address whether aliens located abroad, including U.S. detainees, are entitled to free exercise rights or statutory religious freedom protections.[256] Of course, as noted, national security and foreign affairs exigencies will often determine the scope of protection for religious free exercise in foreign territories. A religious mission dependent upon federal logistical and other support will be disinclined to assert any free exercise rights abroad, and pragmatic concerns might weigh heavily against granting free exercise rights to aliens in U.S. custody or under U.S.

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[252] For example, the Second Circuit in *Woods* treated certain U.S. territories, including the Philippines, as if they were located abroad rather than within U.S. territorial limits. *Id.* at 828. It also failed to clarify whether the situs of the funding was a crucial aspect of its decision—in other words, whether the same rationale would apply where funds are given directly to foreign recipients rather than U.S. sponsors. *See id.* at 834.

[253] *E.g.*, Lupu & Tuttle, *supra* note 30, at 116–17.

[254] 98 U.S. 145, 168 (1878).

[255] *See id.*

[256] *Cf.* Rasul v. Myers, 512 F.3d 644, 668–69 (D.C. Cir. 2008) (declining to decide whether the federal Religious Freedom Restoration Act applied extraterritorially to aliens held at Guantanamo Bay, Cuba).

control.[257] In sum, at this moment, there is no clear answer regarding whether the free exercise guarantee traverses territorial borders.

II. Fundamental Problems with First Amendment Provincialism

Although the jurisprudential contours of the trans-border dimension are not fully developed, judicial decisions and academic commentary generally locate trans-border liberties at the First Amendment's distant periphery rather than near its core. Of course, many of the principal concerns relating to expressive and religious liberties are domestic in nature and do indeed relate to local democratic concerns. This, however, does not exhaust the First Amendment's potential domain of influence. This Part argues that trans-border liberties have been devalued and consigned to the First Amendment's periphery as a result of a flawed modality of provincial quasi-recognition. That modality, in turn, is based upon a supposed foreign-domestic divide that ignores American history and does not comport with present social, legal, and constitutional realities. First Amendment provincialism validates and perpetuates a fear or wariness of foreign persons, speech, contacts, ideas, and faiths. Further, it is based upon dated and static accounts of First Amendment theories and justifications. At a time when citizens and officials are increasingly engaging with the world, provincialism's quasi-recognition of the First Amendment's trans-border dimension gives rise to troubling uncertainty regarding the rights of citizens and the obligations of U.S. officials when acting or regulating abroad.

A. *The Jurisprudence of Quasi-Recognition*

As Part I demonstrates, courts and commentators have been reluctant to recognize trans-border First Amendment liberties. In the courts, the First Amendment's trans-border dimension has been defined primarily by an interpretive methodology of quasi-recognition. This has created uncertainty with regard to the degree of protection, even with respect to citizens, of the exercise of trans-border First Amendment liberties. In general, quasi-recognition entails the following: (1) a refusal or reluctance to expressly recognize, justify, and enforce trans-border First Amendment guarantees; (2) the devaluation of constitutional rights that are integral to trans-border speech and other expressive liberties; (3) an over-reliance upon the First Amendment's speech-conduct dis-

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[257] *See* Nichols, *supra* note 23, at 8 (noting that domestic and international law may be of limited value in terms of enforcing religious liberties in foreign contexts).

tinction; (4) reflexive deference to foreign affairs and national security concerns; and (5) an unwarranted extension of the scope of plenary immigration powers and precedents.

As discussed in Part I, on many occasions courts have simply assumed rather than expressly held that the First Amendment applies to trans-border speech, press, and religious activities. Thus, some courts have assumed or acknowledged the possibility that the First Amendment *might* apply to the following activities: citizens' right to hear foreign speakers in person, citizens' speech directed solely to foreign audiences, citizens' right to associate with foreign entities and persons, citizens' right to send religious materials abroad, citizens' right to speak and associate abroad, certain extraterritorial American press freedoms, foreign audiences' receipt of information from U.S. distributors, and foreign press activities on U.S. soil.[258] Courts and commentators, however, have not generally been willing to take the next step and formally recognize these liberties.

Although courts often strive to avoid constitutional questions, the practice of avoidance cannot fully explain this quasi-recognition. Even when the issue has been squarely presented, courts seem to prefer assumption to express recognition. For example, in 1981 the U.S. Supreme Court in *Haig v. Agee* assumed that citizens have speech rights abroad; nevertheless, the Court concluded that the case was not an appropriate one for balancing the speaker's interests against the government's concerns.[259] Similarly, some courts have assumed that U.S. reporters stationed abroad might in an appropriate case be entitled to some First Amendment protection.[260] As discussed above, courts that have recognized citizens' right to communicate with foreign audiences composed solely of aliens have not even attempted to justify First Amendment protection.[261] Further, the few courts that have purported to recognize the extraterritorial speech rights of U.S. citizens, whether

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[258] *See supra* notes 45–257 and accompanying text.

[259] 453 U.S. 280, 308 (1981).

[260] *See, e.g.*, Flynt v. Rumsfeld, 180 F. Supp. 2d 174, 175–76 (D.D.C. 2002) (declining to decide whether the American press had access rights abroad); Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1571–74 (S.D.N.Y. 1991) (stating that, in the context of gathering news, "it is arguable that generally there is at least some minimal constitutional right to access").

[261] *See* Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915, 917 (7th Cir. 1984) (assuming that application of export controls to an American company's desire to respond to a questionnaire from an Arab trade group regarding its business dealings with Israel raised a justiciable First Amendment question); United States v. Edler Indus., 579 F.2d 516, 519–20 (9th Cir. 1978) (applying the First Amendment to regulations that prohibited communication of technical data by a U.S. company to a French company).

on military bases or elsewhere, have offered no substantive justification for granting these rights.[262] As a result, most trans-border First Amendment liberties are loosely rooted in dicta and judicial suppositions.

Of course, to assume a right exists is not the same thing as expressly recognizing, substantively justifying, and judicially enforcing it. The judicial assumption is that a justification might be made for applying and enforcing First Amendment protection in some future appropriate case. The appropriate case, however, never seems to arise. As a class, trans-border liberties are more like constitutional possibilities than enforceable First Amendment rights. Thus, no court has granted any specific relief to citizens located on foreign soil in response to free press, speech, or associational claims.

Quasi-recognized liberty interests do not warrant the same sort of constitutional protection granted in domestic First Amendment contexts. Even trans-border First Amendment liberties that courts have purported to recognize explicitly turn out on closer inspection to be pale versions of their purely domestic counterparts. Although the Court invalidated a postal prior restraint in 1965 in *Lamont v. Postmaster General*, it did not offer any broad protection for cross-border communications or any substantive justification for protecting such exchanges.[263] Similarly, although the Supreme Court in its 1972 decision in *Kleindienst v. Mandel* recognized that citizens have a First Amendment interest in meeting face-to-face with an alien speaker, it stated that the government needs only a "facially valid and bona fide" reason to overcome that interest.[264] Finally, even though in 1991 the Second Circuit in *Lamont v. Woods* recognized that the Establishment Clause may have some extraterritorial applicability, it was not clear that the court's analysis would apply to programs funded directly by the United States in foreign locations.[265] Nor did the *Woods* court make clear just how much flexibility there might be in judicial application of the Establishment Clause beyond U.S. borders.[266]

Moreover, in contrast to analyses of First Amendment liberties in domestic contexts, courts seem almost determined to discover new limits on cross-border collaborations. For example, one court suggested

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[262] *See* Carlson v. Schlesinger, 511 F.2d 1327, 1331–33 (D.C. Cir. 1975); Bullfrog Films, Inc. v. Wick, 646 F. Supp. 492, 502 (C.D. Cal. 1986), *aff'd*, 847 F.2d 502, 512 (9th Cir. 1988).

[263] *See supra* notes 45–57 and accompanying text.

[264] 408 U.S. 753, 769 (1972).

[265] 948 F.2d 825, 835 (2d Cir. 1991).

[266] *See id.*

that expressive associations involving more than one entity may not be protected at all and that cross-border associations may be restricted whenever foreign affairs concerns are present.[267] The latter limitation might apply any time an association's activities cross territorial borders.

Some trans-border First Amendment rights that once seemed on the verge of express recognition have been gradually devalued and demoted. For example, early Supreme Court cases like *Kent v. Dulles* in 1958 and *Aptheker v. Secretary of State* in 1964 suggested a close link among travel, speech, and association.[268] The Supreme Court later explained, however, that the right to travel beyond U.S. territorial borders is protected under the Due Process Clause rather than the First Amendment, and that cross-border travel was not a strong "right," like the one that protects interstate travel within the United States, but a much weaker form of "freedom."[269] These terms make a substantial difference in the amount of constitutional protection afforded to international travel for expressive purposes. The Due Process Clause provides only a thin layer of protection for the "freedom" to travel abroad.[270]

In addition to judicial supposition and demotion, quasi-recognition results in part from turning the traditional all-conduct-may-be-characterized-as-speech concern on its head in trans-border contexts. Thus, the following have all been characterized as regulations of conduct rather than speech: restricting a citizen's travel abroad for the express purpose of gathering information,[271] revoking a passport in response to disclosure of sensitive information about American clandestine operations,[272] closing down a foreign mission,[273] and traveling abroad to engage in a "human shield" protest.[274] Of course, no court would ever think of characterizing censorship of a book as a regulation of the conduct of writing, or a parade permit requirement as a mere regulation of public movement. In trans-border contexts, however, the speech-conduct characterization is often inverted. The judicial default rule seems to be that all speech may be characterized as conduct. The one notable exception is the Supreme Court's 2010 decision, *Holder v. Humanitarian Law Project*, which rejected the government's argument that speaking to a foreign

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[267] DKT Mem. Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 290, 292 (D.C. Cir. 1989).
[268] *See supra* notes 83–87 and accompanying text.
[269] *See Agee*, 453 U.S. at 306–07.
[270] *See id.*
[271] Zemel v. Rusk, 381 U.S. 1, 16–17 (1965).
[272] *Agee*, 453 U.S. at 309.
[273] Palestine Info. Office v. Shultz, 853 F.2d 932, 939–40 (D.C. Cir. 1988).
[274] Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 604–05 (7th Cir. 2009).

terrorist organization amounted to unprotected conduct.[275] Nevertheless, the Court upheld federal material support laws as applied to expression and cross-border association.[276]

Courts have also mistakenly extended the travel and immigration precedents to a broad range of inapposite trans-border contexts. Decisions like *Mandel*, which concerned the sovereign power to determine who may enter or leave the country, have been applied by courts to resolve such disparate matters as challenges by aliens to U.S. funding conditions and certain cross-border association claims.[277] Extending the reach of these precedents has resulted in aliens' First Amendment claims either being rejected on prudential standing grounds, or being subjected to something like *Mandel*'s "facially valid and bona fide reason" standard.[278] That standard, as argued above, is questionable even in its own domain. Extension of the plenary power doctrine to trans-border First Amendment contexts that do not implicate the sovereign power to deal with territorial ingress and egress has thus contributed to the quasi-status of other trans-border First Amendment liberties.

In general, courts tend to tread lightly in foreign affairs, national security, and immigration contexts. Quasi-recognition of trans-border liberties is obviously a more conservative judicial approach than full-throated recognition and enforcement. Courts must necessarily defer to the expertise and considered judgments of the military and other officials charged with protecting the nation's borders and carrying out its foreign missions. Under the quasi-recognition modality, however, courts seem inclined to turn every utterance or association that intersects with territorial borders into a matter of national security or foreign affairs. As elsewhere, deference is due in trans-border contexts when the basis for it has been demonstrated. The mere fact that expressive and religious activities intersect with the nation's borders, however, is not alone a proper ground for quasi-recognition. Nor is the fact that U.S. allies might object to extension of protection for cross-border speech and association a proper basis for suppression or regulation.[279] Based on the foregoing, although courts must be mindful of trans-border regulatory

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[275] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724 (2010).

[276] *Id.* at 2723, 2731.

[277] *See DKT*, 887 F.2d at 295; *PIO*, 853 F.2d at 940.

[278] *See Clancy*, 559 F.2d at 604 (noting that travel restrictions need only be based upon a "rational foreign policy consideration").

[279] *See Humanitarian Law Project*, 130 S. Ct. at 2726 (observing that other nations might "react sharply" to the provision of material support, in the form of speech and association, to foreign terrorist groups).

and sovereignty interests, there are no broad foreign affairs, national security, or immigration exceptions to the First Amendment.[280]

Quasi-recognition of trans-border First Amendment liberties has engendered confusion regarding the status of certain common cross-border communications. This includes speech directed by citizens to aliens abroad, as well as cross-border expressive associations. What does it mean to say that intentional publication of speech abroad may result in a waiver or "abandonment" of a citizen's First Amendment protections?[281] Does anyone in fact have a right to receive expression abroad that originates in the United States? Despite the Court's assurances to the contrary, *Humanitarian Law Project* seems to imperil a broad range of speech or associational activities by citizens that might in any way assist or legitimize foreign terrorist organizations or offend our allies abroad.[282] Finally, citizens have no real assurance that Establishment Clause and other religious liberties will be respected in foreign locations.

B. *The Foreign and the Domestic*

Both the modality of quasi-recognition and the more general provincial conception of the First Amendment rest upon certain flawed and dated suppositions. One such supposition relates to the strict separation between the foreign and domestic insofar as First Amendment activities and liberties are concerned. That supposition ignores important historical lessons as well as present-day social and political realities.

1. Trans-Border Historical Influences

It would obviously be ahistorical to suggest that the framing generation was thinking primarily of trans-border concerns when they drafted and ratified the First Amendment. It would also, however, be a mistake to view the framing of the Constitution and the ratification of the First Amendment as events wholly isolated from world influences. The First Amendment is, in part, a trans-border creation.

During the Revolutionary period, many leading figures held a cosmopolitan outlook and led worldly lives.[283] Prominent framers also trav-

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[280] Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("[A]s against dangers peculiar to war, as against others, the principle of the right to free speech is always the same.").

[281] *See* Desai v. Hersh, 719 F. Supp. 670, 679–80 (N.D. Ill. 1989).

[282] *See supra* notes 160–181 and accompanying text.

[283] *See* Gordon S. Wood, The Radicalism of the American Revolution 222 (1991) ("The revolutionary generation was the most cosmopolitan of any in American history.").

eled abroad and maintained contacts with foreign principals, friends, and acquaintances. The framers, as well as early jurists and commentators, were curious about the world, in particular the lessons they might learn from foreign political systems, forms, and principles.[284] They borrowed concepts and ideas, including some fundamental First Amendment principles such as the prohibition on prior restraints, from foreign legal systems.[285] They sought to avoid religious persecution and other evils that had been experienced in foreign lands. Although the plan was obviously to forge a domestic political community of self-governing citizens, the founding itself was no mere provincial event.

Trans-border influence extended well beyond trans-national borrowing of concepts, concerns, and attitudes regarding free speech and religious liberty. The First Amendment was not forged, and certainly did not mature, in isolation from the rest of the world. Speech, press, association, and religious activities have had a critical trans-border dimension since the founding. This dimension, though infrequently taught in law schools or discussed in academic commentaries, has profoundly shaped the modern First Amendment as it has been applied in a variety of domestic contexts.

Trans-border influence extends as far back as the nation's early debates regarding the xenophobic Alien Act and the Alien and Sedition Act of 1798.[286] These repressive measures, which authorized the expulsion of aliens and the suppression of speech critical of the government, raised the delicate question whether alien persons and ideas were themselves dangerous to domestic security. Early condemnation of these measures charted a path for free speech that would ultimately lead to protection for ideas and ideologies considered dangerous to the nation's security or even the nation itself.[287]

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[284] *See* Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 18–22 (1996) (discussing influence of international thinkers and practices on the formation of the Constitution).

[285] *See* Joseph Story, Commentaries on the Constitution of the United States § 1879 (1833) (defining liberty of press as "the right to publish without any previous restraint or license").

[286] Act of July 14, 1798, ch. 74, 1 Stat. 596; Act of July 6, 1798, ch. 66, 1 Stat. 577; Act of Act of June 25, 1798, ch. 58, 1 Stat. 570; Act of June 18, 1798, ch. 54, 1 Stat. 566.

[287] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (acknowledging that "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); Leonard W. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 258 (1960) (noting that controversy regarding the Sedition Act helped focus national attention on the central meaning of freedom of speech).

Moreover, many of the perceived public threats addressed during the modern First Amendment's formative years in the twentieth century came directly from foreign ideologies, including radicalism, socialism, and Communism, which were treated (much like terrorism is today) as radioactive belief systems.[288] In these trans-national ideological battles, the Supreme Court eventually prohibited various forms of ideological discrimination and guilt-by-association—many targeting foreign persons, groups, and ideas.[289] As noted earlier, the first congressional enactment the Supreme Court ever invalidated on First Amendment grounds was the postal law limiting receipt of foreign propaganda challenged in *Lamont*.[290]

The supposed foreign-domestic divide is not so clear with regard to other First Amendment guarantees either. As the Court recognized in *New York Times Co. v. United States*, its 1971 decision addressing the publication of the Pentagon Papers, the Free Press Clause was intended to ensure Americans' access to news and information regarding the government's actions not just inside the United States but beyond its borders as well.[291] Further, as noted, explicit protection for religious liberties in America and its new territories was plainly motivated to a substantial degree by notorious examples of religious persecution abroad.[292] In sum, the First Amendment has a rich trans-border heritage.

2. The Social Realities of Globalization and Digitization

The problem with provincialism runs much deeper than its historical blinders. Modern political and social realities have blurred the supposedly strict divide between foreign and domestic First Amendment activities and concerns upon which provincialism is based.

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[288] *See generally* Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); *Abrams*, 250 U.S. 616; Debs v. United States, 249 U.S. 211 (1919).

[289] *See* Scales v. United States, 367 U.S. 203, 229–30 (1961) (noting that the statute in question "does not make criminal all association with an organization which has been shown to engage in illegal advocacy," and that "[t]here must be clear proof that a defendant 'specifically intend(s) to accomplish (the aims of the organization) by resort to violence'").

[290] 381 U.S. at 305. Indeed, citizens' right to receive information originated with Corliss Lamont's desire to obtain Chinese political propaganda from abroad. *See id.*

[291] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (praising the publication of the Pentagon Papers by the press as "precisely that which the Founders hoped and trusted they would do").

[292] *See* Reynolds v. United States, 98 U.S. 145, 162–64 (1878).

First Amendment provincialism generally assumes that citizens' activities and interests remain primarily local in nature. Thus, as we have seen, if it did not occur inside our borders, is not intended to take place there, or does not relate to a matter of "domestic" public concern, the First Amendment may fade from focus or simply disappear altogether.[293] Moreover, as *Humanitarian Law Project* and other cases show, even when the First Amendment rights of citizens are directly at stake, the presence of some foreign factor, contact, or influence can result in far less robust scrutiny and consequently less protection for speech, press, associational, and other liberties.[294]

Globalization and the digitization of expression have decreased the significance of territorial borders insofar as First Amendment activities are concerned. In the modern era, speech and association are less frequently confined inside territorial borders. In the emerging global theater, a domestic speaker can easily reach a worldwide audience. The widespread use of the Internet and the proliferation of media outlets make it more difficult to confine domestic disputes and controversies to local, state, or even national boundaries. For example, a pastor from a small Florida town set off an international firestorm when he threatened to burn the Qu'ran as a sign of his disapproval of Islam.[295] Similarly, local debates regarding the location of an Islamic center in Manhattan quickly became matters of global and diplomatic concern.[296] The marketplace of ideas is rapidly becoming more global.

Moreover, citizens' concerns are also increasingly global in character and orientation. Local attachments and issues, although still undoubtedly central to many Americans, are no longer of singular impor-

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[293] *See Desai*, 719 F. Supp. at 679 ("[O]nly where speech published in a foreign country is about a matter of public concern in the United States can first amendment protections 'spill over' our borders.").

[294] *See, e.g.*, *Humanitarian Law Project*, 130 S. Ct. at 2730 (holding that a statute prohibiting particular forms of support to foreign terrorists groups did not violate freedom of speech, but clarifying that "[w]e also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations"); Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 433 F.3d 1199, 1217 (9th Cir. 2006) (noting that whether U.S. citizens or aliens located abroad have a First Amendment right to receive information that originates within the United States is "unresolved").

[295] *See* Brian Stelter, *A Fringe Pastor, a Fiery Stunt and the Media's Spotlight Glare*, N.Y. Times, Sept. 10, 2010, at A1 (reporting that the planned burning had received "an extraordinary amount of attention").

[296] *See* Michael Barbaro, *Debate Heats up About Mosque near Ground Zero*, N.Y. Times, July 30, 2010, at A1 (noting both the "heated opposition" and "forceful defense" of the proposed project by religious organizations and politicians).

tance for many citizens.[297] Citizens frequently share common causes—for example, human rights, climate change, freedom of information, religious liberty—with others across the world.[298] As a result of immigration patterns, U.S. citizens are coming into more frequent contact with aliens inside our borders.[299] In this new environment, even speech that takes place abroad and relates solely to so-called "foreign" events and concerns may be of considerable interest to sizeable constituencies within the United States.

In sum, it has become increasingly difficult to identify issues or matters that are of purely domestic or purely foreign concern, and doing so is likely to become even more difficult in the future.

3. The Limits of Territoriality

It has also become increasingly difficult to maintain a neat physical separation between the foreign and domestic insofar as First Amendment activities are concerned. As a result, some territorial laws and doctrines are likely to be ill-suited to the new realities of trans-border information flow and exchange.

Contrary to judicial and academic assumptions, we can no longer simply assume that an audience is either domestic *or* foreign. Millions of U.S. citizens travel and reside abroad, often for the express purpose of seeking out foreign ideas, experiences, and cultures.[300] Many hold citizenship status in more than one nation and have close relatives abroad.[301] (The same is true, of course, for many aliens residing in the United States.) Thus, audiences across the globe increasingly comprise a mixture of U.S. citizens and aliens. Courts and legislatures will have to take that reality into account when examining trans-border First Amendment issues. Further, although their numbers have recently de-

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[297] *See* Lee C. Bollinger, Uninhibited, Robust, and Wide-Open: A Free Press for a New Century 5 (2010) (noting that globalization is "tightening connections among open markets and systems of communication and helping us to perceive issues and problems as transcending national borders").

[298] *See* Steven Kull & I.M. Destler, Misreading the Public: The Myth of a New Isolationism 122–24 (1999).

[299] *See* Sabrina Tavernise & Robert Gebeloff, *Immigrants Make Paths to Suburbia, Not Cities*, N.Y. Times, Dec. 15, 2010, at A15 (noting that census data showed immigrants "fanned out across the United States in the last decade, settling in greater numbers in small towns and suburbs").

[300] *See* U.S. Gov't Accountability Office, *supra* note 32.

[301] *See* Peter J. Spiro, Beyond Citizenship: American Identity After Globalization 60 (2008) (describing plural citizenship as "a sort of international version of the First Amendment protection for free association").

clined (in part owing to economic setbacks at home) a substantial portion of the U.S. press continues to report on global events from foreign locations.[302] Reports by the U.S. press corps are routinely directed not only to U.S. citizens at home but also to global audiences, often by way of networking media including web sites and blogs. Similarly, large numbers of U.S. missionaries and other human rights activists presently live and work abroad. In sum, the provincial image of a sedentary, passive, and mostly provincial populace can no longer be squared with the social realities of territoriality.

First Amendment provincialism also rests upon a formalistic understanding of the relationship between territorial and governmental power. Provincialism generally assumes that exercises of U.S. sovereign power are *either* domestic or foreign in nature. Further, provincialism generally assumes that purely domestic exercises of power are the only ones that fall legitimately within the First Amendment's domain.

In reality, these foreign and domestic spheres are often blurred or intricately connected. Funding decisions made by U.S. agency officials inside the United States may profoundly affect expressive and religious liberties abroad.[303] Conditions placed upon foreign recipients' speech abroad may have a substantial impact on discussions regarding certain issues across the globe.[304] Similarly, decisions taken with respect to regulation of Internet access at home, or domestic policies regarding Internet domain names, may well impact U.S. anti-censorship and free information initiatives abroad.

A refusal to apply First Amendment protection to citizens' speech that is published or republished in a foreign country may substantially affect the marketplace of ideas both abroad and inside the United States.[305] Moreover, as *Lamont v. Woods* recognized in extending the Establishment Clause to some U.S.-funded projects abroad, funding of religious endeavors abroad may strengthen the standing and fiscal health of denominations with substantial ties inside the United States.[306]

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[302] Bollinger, *supra* note 297, at 5.

[303] *See* Nina J. Crimm, *The Global Gag Rule: Undermining National Interests by Doing unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 Cornell Int'l L.J. 587, 592–608 (2007) (explaining that the "global gag rule" prevents foreign NGOs from using U.S. government funds to provide abortion counseling to women, to lobby for or against legalized abortions, and to facilitate or offer abortions to women).

[304] *See DKT*, 887 F.2d at 301–02, 306–07 (Ginsburg, J., dissenting) (describing the significant cross-border effects of U.S. funding conditions on reproductive services).

[305] *See Desai*, 719 F. Supp. at 676–77 (acknowledging the interconnected nature of domestic and foreign speech marketplaces).

[306] *See Woods*, 948 F.2d at 834 (noting that religion "transcends national boundaries").

Finally, owing to new technologies that allow information disseminated abroad to easily find its way back into the United States, prohibitions like the one affecting domestic dissemination of U.S. foreign propaganda currently seem to make little or no sense.[307]

In conclusion, First Amendment liberties were forged against the backdrop of a trans-border dimension that included a cosmopolitan framing generation, conflicts regarding foreign persons and ideologies, and a desire to avoid and check governmental abuses with respect to expressive and religious liberties abroad. In these important senses, the modern First Amendment is a product of influences and concerns that transcend territorial borders. Provincialism fails to acknowledge this progeny, to account for modern communicative and other social realities, and to appreciate that governmental regulations and First Amendment activities routinely traverse territorial borders. To be clear, this critique does not suggest that no relevant distinctions can be drawn between aliens and citizens insofar as the First Amendment is concerned or that the First Amendment ought to be interpreted by reference to foreign standards or laws. This Article's goal is a narrower one, namely to cast doubt upon the provincial supposition that the First Amendment pertains almost exclusively to territorially defined domestic activities, regulations, and concerns.

C. *Provincial Attitudes Regarding Foreign Contacts*

America has historically vacillated between a cosmopolitan openness to foreign contacts and cultures and various degrees of ideological wariness and isolationism.[308] That debate obviously continues to this day. In his opinion for the Court in *Humanitarian Law Project*, Chief Justice Roberts derided "the dissent's world," where cross-border collaboration "is all to the good."[309] He sharply noted that "Congress and the Executive, however, have concluded that we live in a different world" in

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[307] Allen W. Palmer & Edward L. Carter, *The Smith-Mundt Act's Ban on Domestic Propaganda: An Analysis of the Cold War Statute Limiting Access to Public Diplomacy*, 11 COMM. L. & POL'Y 1, 29–30 (2006) ("[A]s more and more U.S. international propaganda materials become available within the country's own borders, the domestic dissemination ban will become increasingly difficult to justify and defend.").

[308] This wariness with regard to foreign influences is actually inscribed in constitutional text. *See* U.S. CONST., art. I, § 9, cl. 8 (forbidding grants of titles of nobility from kings, princes, and foreign states).

[309] 130 S. Ct. at 2729.

which certain foreign organizations are so tainted by their criminal element as to warrant isolation.[310]

As noted earlier, over time our free speech jurisprudence embraced the idea, first suggested in Justice Holmes's famous dissent in *Abrams v. United States*, which was decided in 1919, that citizens ought to embrace head-on the challenges posed by foreign ideologies such as communism and anarchism and soundly defeat them in the marketplace of ideas.[311] In cases like *Aptheker* and *Kent*, the notion that foreign ideologies were themselves an inherent danger was criticized and seemingly vanquished.[312] Indeed, after the Cold War, Congress and executive agencies began to respond to economic incentives, international pressures, and First Amendment concerns by removing certain ideological and other barriers to cross-border information flow.[313]

As we have seen, however, First Amendment provincialism still evinces a strong skepticism toward foreign communications, contacts, and influences. As presently interpreted by the Supreme Court, the First Amendment does not clearly deny officials power to exclude persons from our shores based solely upon their beliefs or associations.[314] Foreign propaganda is still singled out as a threat to the United States and its citizens.[315] Election campaign contributions by resident and foreign aliens are absolutely banned under U.S. law.[316] The ban on direct contributions ostensibly exists to protect U.S elections from foreign influence, a problem first identified during hearings held by Senator Fulbright in 1966.[317] As revealed during those hearings, foreign nationals were then apparently seeking to influence domestic policy on import

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[310] *Id.*

[311] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[312] *See* Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964) (invalidating a statute that made it unlawful for a Communist Party member to apply for a passport); Kent v. Dulles, 357 U.S. 116, 130 (1958) (holding that the Secretary of State could not deny passports to those wishing to travel abroad to further Communist ideals).

[313] *See supra* notes 33–34 and accompanying text.

[314] *See Mandel*, 408 U.S. at 762.

[315] *See supra* notes 78–139 and accompanying text; *cf.* W. Scott Hastings, Note, *Foreign Ownership of Broadcasting: The Telecommunications Act of 1996 and Beyond*, 29 VAND. J. TRANSNAT'L L. 817, 821 (1996) (explaining limits on foreign ownership of U.S. media).

[316] 2 U.S.C. § 441e (2006). Foreign nationals are defined as either alien residents not permanently admitted to the United States or foreign principals, which include foreign governments, foreign political parties, non-citizens located abroad, and foreign corporations, partnerships, and associations. Foreign Agents Registration Act § 1, 22 U.S.C. § 611(b) (2006); 11 C.F.R. § 110.20(a)(3)(i)–(ii) (2009).

[317] *See* Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 21–25 (1989).

quotas.[318] The ban on alien contributions has received renewed attention of late. In 2010 in *Citizens United v. FEC*, a majority of the Supreme Court reserved the question whether the ban is unconstitutional;[319] Justice Stevens argued in dissent that it would indeed likely survive First Amendment scrutiny.[320]

Terrorism is, of course, the newest ideological and physical threat to the United States. In upholding a criminal ban on peaceful speech coordinated with designated foreign terrorist organizations, the majority of the Court in *Humanitarian Law Project* cited James Madison's observation, in *The Federalist No. 41*, that "[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union."[321] We ought to be clear about the nature of the foreign danger the Court identified. According to the Court, one such danger was that citizens' political speech might legitimize the targeted foreign organizations.[322] Moreover, the Court for the first time treated words and weapons as fungible.[323] Under this worldview, Congress could prohibit citizens from engaging in even the most peaceful collaborations with certain officially disfavored foreign groups.

Fear of foreign ideas, ideologies, and organizations is deeply entrenched in our First Amendment history and jurisprudence. *Humanitarian Law Project* shows that we have not yet moved beyond the provincial worldview. As Justice Breyer observed in his dissent, the Court's decision strongly suggests that some of the important lessons of history seem to have been lost on the majority.[324]

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[318] *Id.* at 22.

[319] 130 S. Ct. 876, 911 (2010).

[320] *Id.* at 947 (Stevens, J., dissenting).

[321] *See* 130 S. Ct. at 2731 (quoting THE FEDERALIST No. 41 (James Madison) (internal quotation marks omitted)).

[322] *Id.* at 2725.

[323] *Id.* at 2725–26. *But see* United States v. Robel, 389 U.S. 258, 264 (1967) (holding that national security interests did not justify an overbroad criminal prohibition on members of Communist-affiliated organizations working in any defense-related facility); Keyishian v. Bd. of Regents, 385 U. S. 589, 605–10 (1967) (noting that legislation sanctioning membership in the absence of specific intent to further the organization's unlawful goals is unconstitutional); Elfbrandt v. Russell, 384 U.S. 11, 17 (1966) ("Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat."); *Scales*, 367 U.S. at 228–30 (upholding a statute that reaches only "active" members and does not impose criminal penalties for "merely an expression of sympathy with the alleged criminal enterprise").

[324] 130 S. Ct. at 2738 (Breyer, J., dissenting).

D. *Theoretical Parochialism*

Finally, provincialism suffers from a strain of theoretical parochialism that unduly narrows the First Amendment's potential domain. As noted earlier, relatively few courts or commentators have explicitly addressed the theoretical issues associated with trans-border expression and religious liberties. Judicial and academic analyses have generally assumed that trans-border activities must satisfy traditional First Amendment justifications, such as those relating to self-government and the search for truth in the free speech context. No one has yet endeavored to develop a theory or justification that applies specifically to trans-border First Amendment liberties.

Traditional First Amendment justifications were developed largely within the confines of domestic debates concerning the scope of First Amendment freedoms. As a result, it is hardly surprising that many have found it difficult to extend the scope of these justifications to trans-border liberties. For example, Robert Kamenshine concluded that when a domestic speaker seeks to communicate with an audience composed solely of aliens located abroad, "generally cited First Amendment values have little or no application."[325] In general, he observed: "We are not constitutionally committed to facilitating [First Amendment] objectives abroad."[326] That opinion seems to be shared by a number of other commentators, who have suggested that traditional free speech justifications are limited to parochial concerns and the operation of domestic marketplaces of ideas.[327] Free press justifications have also traditionally focused on national concerns rather than global ones.[328] Finally, although *Woods* is exceptional insofar as it suggested that anti-establishment principles applied extraterritorially, some scholars have questioned whether extension of such principles to foreign contexts is appropriate.[329]

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[325] Kamenshine, *supra* note 11, at 866.

[326] *Id.* at 869.

[327] *See* Foster, *supra* note 26, at 390 ("[F]ree speech in the U.S. should be the focus of the Court's concern."); Maltby, *supra* note 26, at 2007 n.160 (suggesting that First Amendment concerns are limited to the domestic sphere); Reidenberg, *supra* note 26, at 267 (arguing that Yahoo!'s right to disseminate reprehensible ideas "is a national right and does not extend extraterritorially beyond the U.S. border"); Roosevelt, *supra* note 29, at 2066 (contending that free speech justifications do not apply to alien-to-alien communications abroad); *cf.* Van Alstyne, *supra* note 25, at 540–41 (arguing that the federal government likely could prohibit citizens from sending propaganda abroad).

[328] Bollinger, *supra* note 297, at 116–17 (urging the Court to shift the "constitutional paradigm" from a national to a global forum with regard to press freedoms).

[329] *See generally* Lupu & Tuttle, *supra* note 30.

Again, there is no question that domestic concerns were central to the First Amendment's ratification and early interpretation. The question is whether those concerns exhaust the First Amendment's theoretical sphere or domain. Traditional free speech justifications have been robustly criticized, even as applied to domestic concerns.[330] Additionally, as Jack Balkin has observed, the traditional self-governance justification for freedom of speech may simply be "too narrow in the age of the Internet."[331] One might make the same claim with regard to other traditional free speech justifications, including the search for truth and individual autonomy. In addition, the press has long been a check on government wherever it is acting. Finally, there is no a priori reason why justifications for protecting religious liberties in purely domestic contexts cannot apply to trans-border activities.

This does not mean, however, that we must abandon all of the traditional justifications and start from scratch when considering the First Amendment's trans-border dimension. For example, some commentators have argued that purely ideological alien exclusions violate traditional First Amendment values pertaining to citizen self-governance and the search for truth.[332] In general, the scope of traditional concepts such as self-governance might be expanded, the boundaries of the marketplace of ideas might be extended, and the domain of expressive and religious autonomy might be interpreted to reach certain trans-border activities.[333]

Provincial First Amendment precedents, however, offer little if any support for such expansion. *Lamont* did not offer a robust justification for protecting cross-border exchanges;[334] nor do we have a *New York Times Co. v. Sullivan*[335] that justifies robust press freedoms in trans-

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[330] *See, e.g.*, Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. Ill. L. Rev. 799 (critiquing the marketplace metaphor); Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 Nw. U. L. Rev. 1303, 1304 (2009) (critiquing self-governance theory).

[331] Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 Pepp. L. Rev. 427, 438 (2009).

[332] *See* Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930, 930 (1987).

[333] *See* Rodney A. Smolla, Free Speech in an Open Society 361–67 (1992) (discussing concept of a global marketplace of ideas and the importance of nations respecting the "free flow of information across all international borders").

[334] *See supra* notes 46–57 and accompanying text.

[335] 376 U.S. at 270 ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

border contexts.[336] Further, international travel cases like *Zemel* and *Haig* strongly suggest that individual autonomy principles do not carry much force in the trans-border realm.[337] Finally, very little has been written regarding the applicability of traditional First Amendment justifications for protection of religious liberties in trans-border contexts.[338] Neither courts nor commentators have addressed whether or to what extent coercion, neutrality, and endorsement concerns extend beyond U.S. borders. At present, First Amendment justifications remain provincial or parochial in orientation.

III. Toward a More Cosmopolitan Conception of the First Amendment

This final Part describes and normatively defends a more cosmopolitan conception of the First Amendment that differs in fundamental respects from the traditional provincial orientation. The proposed conception is cosmopolitan in the definitional rather than the philosophical sense. It posits a First Amendment that is not limited solely to local or provincial concerns and is more at home in various parts of the world. The normative basis for First Amendment cosmopolitanism rests upon both traditional First Amendment values and the existence of international obligations with respect to expressive and religious liberties. These values and obligations include maximizing citizens' participation in global affairs and debates, facilitating the discovery and reporting of information without regard to location or audience, avoiding arbitrary interferences with citizens' and aliens' freedom of expression and belief both at home and abroad, and governmental transparency. The basic operational principles underlying First Amendment cosmopolitanism are freedom of movement, free flow of information across borders, portability of First Amendment rights and obligations, and respect for foreign expressive and religious cultures. This Part demonstrates how the adoption of First Amendment cosmopolitanism by legislatures and courts might affect the rights of various constituencies: U.S. citizens traveling and residing abroad, citizens and aliens participating in cross-border exchanges, citizens engaging in dialogue with disfavored aliens at home and abroad, the American press, and expressive and religious

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[336] Bollinger, *supra* note 297, at 117 ("[W]e need a *New York Times v. Sullivan* for the twenty-first century.").

[337] *See Agee*, 453 U.S. at 297; *Zemel*, 381 U.S. at 15–17.

[338] The primary exceptions are Nichols, *supra* note 23, at 8, and Mansfield, *supra* note 53, at 19.

cultures abroad. Finally, it briefly summarizes some of the broader implications of First Amendment cosmopolitanism.

A. *First Amendment Values in an Emerging Global Theater*

As noted, globalization, digitization, and internationalism have substantially altered the First Amendment's relationship to territorial borders.[339] Speakers, speech, press activities, and a host of unique associations (real and virtual) increasingly transcend the nation-state. American power continues to extend to distant shores, where it intersects with foreign expressive and religious cultures. De-territorialization is a social, political, and legal fact that undermines the traditional notion that where one is located determines what constitutional rights he enjoys.[340] We need a fundamental change in orientation with regard to First Amendment liberties, one that comports with these twenty-first century realities.[341]

Now more than ever, it is imperative that citizens be able to participate fully and confidently in global debates and affairs.[342] To do this, they will need access to foreign persons, information, and ideas. They will need firm assurances that when they, or their speech or other activities, cross international borders, this will not result in a waiver or abandonment of First Amendment protections. Uncertainty with regard to trans-border liberties may decrease global exchange and interaction by chilling expression or limiting debate to domestic marketplaces. Just as it broadens opportunities in traditional domestic contexts, the First Amendment ought to maximize participation in cross-border political, artistic, scientific, educational, and religious exchanges. It ought also to protect against governmental coercion, or lack of neutrality, with regard to religious practices that take place abroad.

Adopting a more global and cosmopolitan perspective would not entail a radical shift in the way we think about core First Amendment values and principles. Neither scholars nor courts have ever sought to develop any coherent or holistic approach to the First Amendment's trans-border dimension. Fortunately, we need not start entirely from scratch to justify a more cosmopolitan conception of the First Amend-

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[339] *See supra* notes 293–307.

[340] *See generally* Kal Raustiala, Does the Constitution Follow the Flag? (2009).

[341] *Cf.* Bollinger, *supra* note 297, at 131 (arguing that, with respect to a free press, "[w]hat is fundamentally needed is a change in our orientation, characterized by the task of opening up the world to a press that is independent and free").

[342] *See* Roth, *supra* note 27, at 282–91 (emphasizing the importance of citizens' participation in world affairs).

ment. Although current provincial justifications and theories may not be completely up to this task, these justifications are susceptible to more cosmopolitan interpretations. Notwithstanding that traditional free speech theories may have been designed with purely domestic concerns and conditions in mind, the core values underlying them actually have considerable force in many trans-border contexts. Provincialism has simply denied or obscured the salience of such values in a number of trans-border contexts.

In the free speech and association contexts, self-governance values are often implicated in trans-border contexts. In the twenty-first century, the domain of self-governance has vastly expanded. As noted earlier, to many in the United States, matters of public concern and politics are not narrowly confined inside the nation's territorial borders. In our interconnected world, a self-governing person must not only have access to information regarding the local community, but she must also have at least a working knowledge of issues of global scope and significance. She must know, for example, what her own national government is saying on her behalf in foreign lands. She ought to have some sense of how domestic policies and politics will affect foreign peoples, cultures, and communities. Only some of this information can be acquired from inside the United States or from U.S. sources. Insofar as matters of public concern to U.S. citizens have a global scope or proportion, twenty-first century self-governance requires a robust trans-border exchange of ideas and information. We ought to recognize that Alexander Meiklejohn's town meeting is becoming more like a global theater.[343]

Moreover, it makes less and less sense to think of the marketplace of ideas as a physical place strictly bounded by territory. Rather, the modern marketplace extends to trans-border spaces.[344] In addition, Americans' search for truth plainly does not end at the water's edge. In the trans-border marketplace, the ideas and ideologies of citizens at home and aliens abroad can be tested against one another. Consistent with longstanding free speech values preferring robust engagement to isolation, foreign persons and ideas ought to be welcomed to this trans-border dialogue rather than restricted or banned from it.

Individual autonomy concerns relate to core speech and religious liberties, which similarly extend to all corners of the globe. Even if one does not self-identify as a global citizen, the process of self-actualization

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[343] *See* MEIKLEJOHN, *supra* note 28, at 22–25.

[344] *See* SMOLLA, *supra* note 333, at 367.

and the pursuit of one's beliefs often involves connections and activities that cross or traverse U.S. borders. Moreover, to check governmental abuses, citizens and the press often need access to information and materials that are only available beyond U.S. borders.[345]

Thus, even under traditional justifications it is far from clear that trans-border activities and liberties lie closer to the periphery of the First Amendment than its core. Extending traditional theories, however, will not alone lead to full embrace of trans-border First Amendment liberties and activities. This will require distinct and more deterritorialized justifications for protecting expressive and religious liberties. As Jack Balkin has observed, the traditional self-governance justification for freedom of speech is simply "too narrow in the age of the Internet."[346] He observes: "[W]hat people do on the Internet transcends the nation state; they participate in discussions, debate, and collective activity that does not respect national borders."[347] Balkin persuasively argues that these activities "should not be protected only because and to the degree that they might contribute to debate about American politics, or even American foreign policy."[348] Rather, Balkin claims that expressive activities ought to be protected insofar as they contribute to what he calls "democratic culture."[349] One could similarly argue that concerns regarding religious liberty transcend the nation-state and are deserving of respect and protection without regard to where governmental coercion or purposeful interference occurs.

Although Balkin's theory has attractive cosmopolitan characteristics, it is too narrowly concerned with technological collaboration to serve as a basis for defending the full range of cross-border information flow addressed in this Article. The free cross-border flow of information is a First Amendment concern of the highest order because it facilitates participation in global conversations, debates, and dialogues. Only some of this participation involves or depends upon new technologies. Moreover, freedom of movement—of persons and papers as well as bytes—is critical to the free exchange of information across diverse cultures. Cross-border exchange ought to be valued in its own right—regardless of content (assuming it is legal where sent and received), context, or the

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[345] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521, 529–44.

[346] *See* Balkin, *supra* note 331, at 438.

[347] *Id.*

[348] *Id.* at 438–39.

[349] *See generally* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1 (2004).

type of culture it facilitates or creates. Ultimately, political, artistic, academic, commercial, and religious exchanges may or may not produce democratic and egalitarian cultures. Nonetheless, these interactions offer critical opportunities to engage with foreign persons and ideas, to participate in debates and dialogues on matters of global concern, and to discover what is being conveyed across and beyond one's own borders. The First Amendment ought to be interpreted such that it applies whenever laws and regulations interfere with such opportunities.

Under a more cosmopolitan interpretation, we ought to think of the First Amendment's core guarantees as globally operative. By this I do not mean that they are universal human rights applicable anywhere in the world and to anyone regardless of circumstance. Rather, the critical point is that the importance of expressive and religious freedoms does not simply dissipate at the international border. Indeed, these liberties are properly viewed by the community of nations, including the United States, as trans-border and universal concerns.

By virtue of various statutes and international covenants, the United States is formally committed to this more cosmopolitan conception of First Amendment liberties. As a participant in the Helsinki Accords, the United States agreed to loosen restrictions on trans-national travel and information-sharing; indeed, Congress has amended certain laws to reflect this commitment.[350] Moreover, the United States was the driving force behind the Universal Declaration of Human Rights provision relating to freedom of information, which provides: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media *regardless of frontiers.*"[351] Similarly, the International Covenant on Civil and Political Rights, which the United States has ratified, provides that everyone has the right to hold opinions "without interference" and that freedom of expression includes the "freedom to seek, receive and impart information of all kinds, *regardless of frontiers*, either orally, in writing or in print,

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[350] Final Act on the Conference on Security and Co-operation in Europe, Aug. 1, 1975, 14 I.L.M. 1292; *see* Saskia Sassen, Territory, Authority, Rights: From Medieval to Global Assemblages 68 (2006).

[351] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948), art. 19 [hereinafter UDHR] (emphasis added); *see* Wilson Dizard, Jr., Digital Diplomacy: U.S. Foreign Policy in the Information Age 73–74 (2001).

in the form of art, or through any other media of his choice."[352] Together, these international commitments obligate the United States to liberalize or eliminate restrictions on cross-border movement and information flow.

Similarly, with regard to religious freedoms, the United States supports article 18 of the Universal Declaration of Human Rights, which recognizes that "[e]veryone has the right to freedom of thought, conscience, and religion," including the right to teach, practice and observe religion or belief in public or private contexts.[353] In addition, Congress enacted the International Religious Freedom Act of 1998 (IRFA).[354] IRFA obligates Congress and the President to "oppose violations of religious freedom that are or have been engaged in or tolerated by the governments of foreign countries" and "to promote the right to freedom of religion in those countries."[355]

To be sure, enforcement mechanisms under these covenants and statutes are notoriously weak, and the United States has joined or enacted the measures on the condition that they must be interpreted with reference to existing First Amendment principles and doctrines.[356] This Article does not claim that these covenants and agreements are legally enforceable in the United States absent statutory consent. The commitments we have made to trans-border expressive and religious liberties, however, ought to inform the manner in which legislatures and courts approach trans-border First Amendment issues. If the proposed cosmopolitan turn is to occur, we must first address the inconsistency between domestic principles and modalities, such as quasi-recognition, and our international commitments. Strictly provincial accounts of the First Amendment are inconsistent with the fact that freedom of expression and religion are now recognized as international human rights that ought to be preserved and enforced without regard to frontiers. A more cosmopolitan First Amendment would acknowledge the deterritorialization of liberties of movement, information, and belief.

In combination with the proposed extension of the scope of traditional First Amendment justifications, the existing human rights

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[352] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, art. 19, ¶¶ 1–2 (Dec. 16, 1966) [hereinafter ICCPR] (emphasis added).

[353] UDHR, *supra* note 351, art. 18.

[354] International Religious Freedom Act (IRFA) of 1998 § 401, Pub. L. No. 105-292, 112 Stat. 2787 (codified as amended in scattered sections of 8 and 22 U.S.C.).

[355] 22 U.S.C. § 6441(a)(i)–(ii) (2006).

[356] *See* BOLLINGER, *supra* note 297, at 139–41 (lamenting the lack of enforcement under international human rights covenants).

framework provides a basis for recognizing and enforcing expressive and religious liberties in some trans-border contexts. Viewing trans-border liberties as closer to the First Amendment's core than its periphery provides a justification for revisiting and, this Article will argue, in some cases rejecting provincial precedents and laws. As discussed below, this cosmopolitan orientation has broader implications as well.

B. *The Principles, and Principal Effects, of First Amendment Cosmopolitanism*

This Section sets forth more concrete principles and arguments in favor of the proposed cosmopolitan turn. It also discusses some of the concrete legal and doctrinal changes that ought to follow.

1. Cross-Border Movement, "Commingling," and Information-Gathering

Cross-border engagement, collaboration, and to some extent information-gathering depend critically upon freedom of movement. Indeed, the first condition that must be met for full and open participation in global debates and affairs is robust protection for a right to cross borders to engage in expression, inquiry, and free exercise of religion.

The prospects for recognition of a First Amendment right to traverse international borders were strongest in the late 1950s and early 1960s when the Supreme Court decided *Kent v. Dulles* in 1958 and *Aptheker v. Secretary of State* in 1964.[357] Later decisions, including the Court's 1965 decision in *Zemel v. Rusk*, and 1981 decision in *Haig v. Agee*, effectively reversed course, though, and recognized only the more provincial due process-based "freedom" to travel abroad.[358] These decisions effectively neutered any First Amendment liberty to travel abroad for purposes of inquiry and information-gathering. Later, in 1972, the Court in *Kleindienst v. Mandel* failed to clearly condemn ideological exclusion of foreign speakers, scholars, and artists.[359]

Today, it may be tempting to reason that because speech can transcend territorial borders via the Internet, there is less need for a fundamental right of cross-border movement. But even in the digital era, freedom of speech and other First Amendment liberties still depend

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[357] *See* Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964) (invalidating a statute that made it unlawful for a Communist Party member to apply for a U.S. passport); Kent v. Dulles, 357 U.S. 116, 130 (1958) (holding that the Secretary of State could not deny passports to those wishing to travel abroad to further Communist ideals).

[358] *See* Haig v. Agee, 453 U.S. 280, 306 (1981); Zemel v. Rusk, 381 U.S. 1, 28 (1965).

[359] *See* 408 U.S. 753, 762, 766, 700 (1972).

upon rights of cross-border movement and trans-border information-gathering. Citizens, including institutional press members, academics, and religious activists exit the United States by the millions each year. Alien artists, scholars, and officials continue to seek entry to the United States in substantial numbers—although one wonders how long this will be the case should officials steadfastly claim the right to deny entry on ideological grounds.

The Internet greatly facilitates cross-border expression and association. As Saskia Sassen has noted, however, "[d]igital domains cannot (at least for now) fully encompass the lived experience of users or the domain of institutional orders and cultural formations."[360] As *Mandel* expressly recognized, the fact that technology facilitates distanced or, presumably, even virtual connectivity does not negate the value of in-person expression and association.[361] In the contexts of national egress and ingress, it may be tempting to rely upon statutory limits on expressive and religious discrimination. But as recent history relating to ideological immigration exclusions shows, statutory and regulatory protections do not provide any guarantee against such discrimination. Moreover, restrictions on cross-border movement are most likely to be enacted when political tensions with regard to immigration and national security are heightened. Thus, it remains important that we have a constitutional foundation for cross-border movement and intermingling.

That foundation ought not to rest on the thin branch of the Due Process Clause, which imposes only limited constraints on government. Rather, it ought to rest upon the firmer foundation of the First Amendment. The most eloquent defense of this position was provided by Zecharia Chafee, who authored an insightful defense of some basic human rights as reflected in the original Constitution,[362] and Justice Douglas, who articulated a cosmopolitan view of the right to travel for the Court in *Kent* and for himself in *Aptheker*.[363]

Chafee cited freedom of movement—as citizens to leave the country and travel abroad and as aliens to enter without being subjected to arbitrary barriers—as among the Constitution's original human rights.[364] First Amendment values substantially influenced his conception of freedom of movement.[365] The freedom to travel abroad was important, he

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[360] Sassen, *supra* note 350, at 379.

[361] *Mandel*, 408 U.S. at 765.

[362] Zecharia Chafee, Three Human Rights in the Constitution of 1787 (1956).

[363] *See Aptheker*, 378 U.S. at 519 (Douglas, J., concurring); *Kent*, 357 U.S. at 126.

[364] Chafee, *supra* note 362, at 187–204.

[365] *Id.* at 196.

wrote, to "foreign correspondents and lecturers of public affairs" who needed first-hand information.[366] Chafee also recognized the importance of foreign travel to scientists, scholars, and academic pursuits: "Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities."[367] In addition, Chafee mentioned the importance of "reuniting families," which directly affects rights of intimate association.[368] Ultimately, he concluded: "Our nation has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."[369]

Chafee viewed Americans not as homebound and passive recipients, but as active participants in trans-border exchanges and affairs. Although he recognized the critical connection between cross-border movement and freedoms of speech and association, Chafee did not advance a thoroughly outward-looking justification for protecting foreign travel. Rather, he considered the right to cross-border movement to be especially critical to domestic self-governance. Chafee noted that the right to travel abroad helped U.S. citizens to be well informed on the domestic issues of the day and to understand that people like themselves live abroad.[370] The ability to go abroad and to literally see things for themselves meant that American citizens were not limited to government-provided information or information collected by a few correspondents.[371] Ultimately, Chafee believed that "views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems."[372] Contacts abroad, he wrote, "contribute to sounder decisions at home."[373]

Justice Douglas, who also described a more cosmopolitan conception of the intersection between foreign travel and First Amendment liberties, quoted the above observations by Chafee at some length in his opinion for the Court in *Kent*.[374] In his concurring opinion in *Aptheker*, Douglas wrote that the importance of cross-border travel was important

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[366] *Id.* at 195.
[367] *Id.*
[368] *Id.*
[369] *Id.* at 197.
[370] Chafee, *supra* note 362, at 195–96.
[371] *Id.* at 196.
[372] *Id.*
[373] *Id.*
[374] *Kent*, 357 U.S. at 126–27 (noting that Chafee had shown "how deeply engrained in our history this freedom of movement is").

not merely for self-governance purposes, but for "cultural, political, and social activities—for all the commingling which gregarious man enjoys."[375] He described liberty of egress as "kin to the right of assembly and the right of association."[376]

To those who argued that limiting the government's power to restrict egress diminished national sovereignty, Douglas responded: "America is of course sovereign; but her sovereignty is woven in an international web that makes her one of the family of nations."[377] As the first stirrings of what would later be known as "globalization" were being felt in the United States and across the world, Douglas wrote: "The ties with all the continents are close—commercially, as well as culturally. Our concerns are planetary, beyond sunrises and sunsets. Citizenship implicates us in those problems and perplexities, as well as in domestic ones."[378] According to Douglas it was an inescapable fact, even then, that neither the American people nor the matters that were of greatest concern to them were purely domestic or provincial. His was an early, and hopeful, cosmopolitan interpretation of the right to travel.

Today an impressive amount of information is available at one's fingertips through the Internet. Most of that information, however, is mediated or filtered in some fashion. Personal travel remains the only certain way to receive raw, unvarnished information. Justice Douglas, dissenting in *Zemel*, acknowledged the critical importance of First Amendment protection for this sort of foreign inquiry: "The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press."[379] According to Douglas, the "ability to understand this pluralistic world, filled with clashing ideologies, is a prerequisite of citizenship . . . ."[380]

Although the Court dismissively brushed the idea aside in *Zemel*, one commentator has argued that cross-border movement is an expressive activity entitled to First Amendment protection.[381] Although this

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[375] *Aptheker*, 378 U.S. at 519–20 (Douglas, J., concurring).

[376] *Id.* at 520.

[377] *Id.*

[378] *Id.*

[379] *Zemel*, 381 U.S. at 24 (Douglas, J., dissenting).

[380] *Id.*

[381] *See id.* at 17 ("[The] right to speak and publish does not carry with it the unrestrained right to gather information [through travel]."); Jeanne M. Woods, *Travel That Talks: Toward First Amendment Protection for Freedom of Movement*, 65 GEO. WASH. L. REV. 106, 110 (1996).

may be so in a particular case, courts are not as a general matter likely to view travel itself as a form of symbolic conduct. A First Amendment right to cross-border travel, however, would rest on firmer ground insofar as it served more specific expressive interests.

Some commentators have advanced proposals for extending First Amendment protection to travel insofar as it facilitates foreign inquiry and information-gathering.[382] Unfortunately, the proposals have been rather narrow and tentative. For example, Barry McDonald would limit the right to gather information abroad to circumstances in which (1) the putative recipient intends to broadly disseminate the information gathered inside the United States, (2) the information pertains to a matter of political concern within the United States, and (3) the information is sought by a member of some group whose function it is to obtain such information for the purpose of public dissemination.[383] Under this rather provincial formulation, the institutional press reporting on matters relating to the foreign operations of the U.S. government abroad would have the strongest—indeed perhaps the only—claim to First Amendment protection. Even if an individual traveler intended to blog about her experience to an audience composed of fellow citizens, no individual right to gather information abroad would be recognized under this approach.

There are certainly reasons to proceed with caution in recognizing something as broad as a right to gather information on foreign soil. Nevertheless, it is not clear why the interest in information-gathering ought to be so limited. The category of subjects that are of concern to a great many Americans cannot be narrowly confined to domestic politics.[384] Moreover, whether or not one has press credentials ought not to determine whether one has a First Amendment interest in gathering information abroad. As in the domestic context, the institutional press has no monopoly on foreign information-gathering. Particularly in the digital era, "the press" does not necessarily comprise solely institutional outlets whose function it is to disseminate the news to broad segments of the American public. Finally, why should *domestic* dissemination be a prerequisite? This seems to assume that (1) the First Amendment is in no way concerned with the global dissemination of information,

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[382] *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 Ohio St. L.J. 249, 340–55 (2004).

[383] *Id.* at 345, 348, 350.

[384] *See* Bollinger, *supra* note 297, at 5 (noting that large numbers of U.S. press report on global events from foreign locations).

and/or (2) foreign audiences are always composed solely of aliens. For the reasons discussed earlier, First Amendment cosmopolitanism rejects these suppositions on the ground that they are contrary to twenty-first century realities.[385]

The millions of Americans who travel abroad each year might be surprised to learn that they have only a weak due process interest in leaving the country, even if for the express purpose of engaging in expressive or religious activities.[386] Under the Court's precedents, one has the First Amendment right to access information received through the mail or some other domestic vehicle.[387] The provincial First Amendment, however, does not affirmatively protect one's right to seek out information or relationships by going directly and in person to foreign sources.[388] In an era in which federal watch lists and other limits on international travel are expanding, statutory protections may prove too weak to protect basic rights of cross-border movement, commingling, and information-gathering.

Chafee and Douglas were prescient in their assertions that foreign travel ought to have a constitutional status commensurate with its importance to human rights. The artist, scholar, or protester who seeks to go abroad for the purpose of commingling, lecturing, or engaging in public dissent is engaging in First Amendment activities. Recognition of this fact would not mean that the painter, the professor, and the "human shield" would have a constitutionally protected right to go anywhere they please to engage in these activities, but it would at least require that the government articulate some basis for restricting movement that outweighs the citizen's interest in travel for expressive purposes.

The First Amendment right to travel abroad ought to be given special solicitude insofar as travel is undertaken for the purpose of gathering information.[389] This right would encompass traveling for the express purpose of gathering information about foreign cultures, participating in foreign debates or cultural activities, and collaborating with foreign religious institutions. Its recognition would clearly benefit

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[385] *See supra* notes 258–338 and accompanying text.

[386] *See Agee*, 453 U.S. at 306–07.

[387] *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965).

[388] *See Mandel*, 408 U.S. at 763–65.

[389] *See* BOLLINGER, *supra* note 297, at 120–21 (arguing that the Court should recognize a broad, international newsgathering right under the First Amendment).

the press, which ought to at least have some limited right to report on matters relating to the conduct of war abroad.[390]

Although the press would certainly benefit from such recognition, this aspect of the right to travel ought not to be limited to the institutional press. Nor should its recognition and enforcement depend upon a proven intent to disseminate any gathered information to domestic audiences. The international human right to seek information without regard to borders is not conditioned upon membership in the institutional press or reporting to domestic audiences. Furthermore, the great promise of the digital era is that information can be distributed without regard to territorial borders to mixed audiences across the globe. A more cosmopolitan interpretation of the First Amendment interest in foreign travel would facilitate that goal by recognizing a right to travel abroad, gather information, and communicate that information to global audiences.

Once again, recognizing an interest in foreign information-gathering does not mean that citizens will ultimately be successful in challenging foreign travel restrictions. It does mean, however, that the traveler's First Amendment rights and interests cannot be dismissed as mere conduct. As in other contexts, the government ought to be compelled to justify limits on protected First Amendment interests in cross-border travel.

Of course, travel, inquiry, and information-gathering flow in more than one direction. Like the freedom to exit or leave the country, the freedom to enter makes it possible, as the U.N. Declaration of Human Rights states, to "seek, receive and impart information and ideas through any media and regardless of frontiers."[391] Even during a time when strict limits on immigration were in place, Chafee noted that there was still "plenty of room . . . for temporary visitors from abroad to land, look around, talk, learn, and let us learn from them."[392] He lamented that, in the 1950s, many scholars and lecturers had been "refused invitations to lecture or attend conferences because they would not go through scores of humiliating questions and endless delays."[393] As discussed in Part I, this concern has not entirely dissipated.[394] Moreover, concerns regarding global terrorism may well exacerbate it.

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[390] *See* Anderson, *supra* note 215, at 91–98 (suggesting some proposals for articulating and enforcing a press right of access to wartime facilities and activities).

[391] *See* UDHR, *supra* note 351, art. 19.

[392] CHAFEE, *supra* note 362, at 198.

[393] *Id.* at 199–200.

[394] *See supra* notes 124–136 and accompanying text.

Writing at a time when fear of Communists was rampant, Chafee argued that differences in outlook or ideology were not proper bases for exclusion. "Indeed," he wrote, "differences in outlook may have advantages when our purpose is to build up mutual understanding as a basis for trust and friendship and to increase our knowledge from what foreign travelers tell us."[395] According to Chafee, the only proper ground for denial of entry was that the alien posed a clear danger to the public safety.[396] Then as now, temporary visitors armed only with words and ideas could be said to pose no clear and present danger to the nation's security.

Unfortunately, this cosmopolitan attitude is not reflected in recent decisions like the Supreme Court's 2010 decision, *Holder v. Humanitarian Law Project*, or many older precedents that treat exchanges with foreigners as dangerous interactions rather than opportunities for dialogue.[397] Further, as Part I notes, despite a statutory ban on ideological exclusions, legal and constitutional uncertainty with regard to the executive's power to engage in ideological exclusion persists.[398]

In an appropriate case, the Supreme Court ought to expressly hold that ideology, belief, and association do not constitute "facially valid and bona fide" reasons for visa denials and other forms of alien exclusion. Some might object that this is a form of unilateral disarmament by the United States, or an improper limitation on the sovereign's authority to control its borders. It is neither. It is certainly true that the United States is not the only nation that has restricted ingress based solely on ideas, thoughts, and associations. The United States, however, frequently takes the official position that its speech guarantees are broader and, on that basis, preferable to those of other nations. As noted, like other nations, the United States is internationally committed to freedom of movement and the free cross-border flow of information.[399] Rejecting ideological exclusion would not prevent officials from denying ingress to aliens who pose a danger to public safety or national security that is unrelated to their speech, associations, or beliefs. In addi-

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[395] CHAFEE, *supra* note 362, at 200.

[396] *Id.* at 201.

[397] *See, e.g.*, 130 S. Ct. 2705, 2725 (2010) (upholding a prohibition on provision of "material support" to foreign terrorist organizations); Meese v. Keene, 481 U.S. 465, 465 (1987) (rejecting a First Amendment challenge to an Act that required any "agent of a foreign principal" residing in the United States to register with the Attorney General and comply with certain registration, filing, and disclosure requirements prior to distributing foreign propaganda within the United States).

[398] *See supra* notes 45–77 and accompanying text.

[399] *See supra* notes 350–356 and accompanying text.

tion to reaping the benefits that ingress of foreign visitors would provide, a clear rejection of ideological exclusions would demonstrate that our people have nothing to fear from a foreign visitor who merely intends to speak and associate with audiences in the United States.

Cross-border travel, information-gathering, and "commingling" are not mere luxuries for the leisure class or the concern of a few foreign academics wishing to enter the United States. Particularly in a globalized era that revolves around international contacts and collaborations, the interests and concerns of "gregarious man" extend beyond U.S. territorial borders.

2. Freedom of Information, Association, and Belief Without Regard to Frontiers

As Justice Marshall wrote in his *Mandel* dissent, "[t]he progress of knowledge is an international venture."[400] In a globalized era, it is critical that the First Amendment be interpreted and enforced in a manner that protects and facilitates robust liberties to impart and to receive information across borders. Freedom of movement across borders is only one aspect of this concern.

As noted, the United States and other signatories of human rights covenants formally recognize rights to the free flow of information and belief without regard to frontiers.[401] Nevertheless, current First Amendment jurisprudence does not extend robust protection to these rights. In this regard, the Court's 1965 decision in *Lamont v. Postmaster General* to invalidate a prior restraint on receipt of foreign propaganda is critical.[402] Or at least it might be, if it were to be interpreted broadly to commit the United States, both domestically and internationally, to facilitating the free cross-border flow of information. As noted in Part I, however, neither *Lamont* nor any subsequent decision makes such a strong statement.

Lee Bollinger has recently suggested that with regard to freedom of the press, we need an affirmative judicial statement that shifts the discussion "from the constitutional paradigm of a national public forum to a global one."[403] He contends that we need a *New York Times Co. v. Sullivan* for the twenty-first century.[404] That would certainly benefit

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[400] *Mandel*, 408 U.S. at 784–85 (Marshall, J., dissenting).
[401] *See* UDHR, *supra* note 351, art. 19.
[402] *See* 381 U.S. at 305.
[403] Bollinger, *supra* note 297, at 116–17.
[404] *Id.* at 117.

the institutional press and the citizen press, particularly as they seek access to places and sources abroad. Depending on how such a decision is crafted, it might, as *Sullivan* has over the years, produce benefits for broader categories of speakers and speech.

What is really needed, however, is a *Lamont* for the twenty-first century. We need a decision that offers clear and robust protection for cross-border information flow and international relationships. That decision ought to characterize cross-border political, artistic, cultural, and religious information flow as core First Amendment concerns. Moreover, it ought to confirm that the Free Speech Clause applies not only to citizens' receipt of foreign materials and information, but also to communications from citizens to foreign audiences (whether consisting solely of aliens or a mix of citizens and aliens). In an era of globalization and mass cross-border communications, these should no longer be considered open questions.

A more cosmopolitan interpretation of the First Amendment would lead to invalidation or repeal of certain antiquated prohibitions and restrictions on cross-border communication. Among the measures discussed in Part I, this would include the Logan Act, an eighteenth century relic that purports to criminally proscribe citizens' communications with foreign governments and principals;[405] FARA's political propaganda regulations, which burden distribution of foreign political speech inside the United States;[406] and certain provisions of the Smith-Mundt Act that limit domestic receipt and dissemination of U.S. foreign propaganda messages.[407] All of these restrictions unduly interfere with cross-border information flow and are based upon the provincial notions that citizens have no legitimate interest in participating in global political dialogue, that all foreign propaganda is dangerous, and

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[405] *See* 18 U.S.C. § 953 (2006) (prohibiting any citizen from engaging in unauthorized "correspondence or intercourse with any foreign government or any officer or agent thereof," with the intention of influencing the foreign affairs of the United States); *see also supra* notes 120–121 and accompanying text. In an era in which multinational corporations and NGOs wield significant power and influence abroad, the U.S. government cannot possibly expect to monopolize discussions with foreign principals, regimes, and groups. This is likely the case not only with respect to private voices, but sub-national ones as well. *But see* Zschernig v. Miller, 389 U.S. 429, 435 (1968) (holding that judicial statements regarding foreign regimes violated the principle that the federal government must speak with a single voice in foreign affairs).

[406] 22 U.S.C. §§ 611(c)(1), 614(a)–(b); s*ee also supra* notes 58–70 and accompanying text.

[407] Palmer & Carter, *supra* note 307, at 33; *see also* Charles F. Gormly, Comment, *The United States Information Agency Domestic Dissemination Ban: Arguments for Repeal*, 9 Admin. L.J. Am. U. 191, 209–16 (1995).

that citizens need to be paternalistically shielded from their own government's propaganda.

The First Amendment ought to be interpreted such that it protects the rights of citizens to speak to and associate with aliens located abroad. Courts should reject the argument that these contacts are a form of mere conduct beyond the protection of the First Amendment. Of course, like other rights, the right to enter cross-border expressive relationships must be balanced against foreign policy, national security, and other federal interests. Citizens ought not, however, lose basic First Amendment protections owing to the mere fact that certain officially disfavored foreign persons or organizations are involved in the relationship. We ought to avoid repeating the mistakes of our past by not treating association with foreign organizations as automatically depriving citizens of full First Amendment protections.

In this respect, the Supreme Court's decision in *Humanitarian Law Project* is particularly troubling. The decision has the potential to jeopardize a wide range of pure speech that may be "coordinated" with foreign terrorist organizations.[408] The criminalization of peaceful and legal speech that is coordinated with foreign terrorist organizations is inconsistent with both traditional and cosmopolitan free speech principles favoring open interaction and dialogue across borders.[409] At the very least, Congress ought to amend the material assistance laws to clarify the types of communications that are banned and to require that the government prove that such communications were undertaken with the intent to further the terrorist activities of the organizations.[410]

Finally, under a more cosmopolitan interpretation of the First Amendment, officials ought to facilitate, or at least refrain from interfering with, the speech and other liberties of foreign nationals residing on U.S. soil. At a minimum, aliens ought not to be subject to expulsion owing solely to their speech, associations, or beliefs. Foreign press lawfully in the United States ought to be granted the same rights of access to events and proceedings that are otherwise granted to the domestic press and the public.[411] Congress should consider abolishing or amending

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[408] *See* 130 S. Ct. at 2726 (upholding a statute prohibiting any "material support coordinated with or under the direction of a foreign terrorist organization").

[409] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (extolling the virtues of "deliberative forces").

[410] *See Humanitarian Law Project*, 130 S. Ct. at 2740 (Breyer, J., dissenting) (proposing to read the statute as criminalizing protected pure speech and association only when there is specific intent that these activities will assist unlawful terrorist actions).

[411] Times Newspapers Ltd. (of Gr. Brit.) v. McDonnell Douglas Corp., 387 F. Supp. 189, 192 (C.D. Cal. 1974).

the "deemed export" rule that restricts the distribution of lawful material to foreign nationals in the United States based on the mere possibility that an alien might do something unlawful with the information.[412] Under a cosmopolitan approach, we cannot say that foreign nationals, whether living in the United States or abroad, have *no* cognizable interest in the outcome of many U.S. elections. Thus, any court presented with a justiciable claim ought to carefully consider whether the flat ban on contributions by foreign nationals in U.S. campaigns is adequately tailored to address demonstrable governmental concerns relating to foreign influences in such campaigns.[413]

3. The Portability of First Amendment Rights and Obligations

As citizens, speech, press, and U.S. power have become more internationally dispersed, the question whether the First Amendment "follows the flag" has become an increasingly salient one. Portability of both rights and governmental obligations is a key aspect of First Amendment cosmopolitanism. To fully participate in global conversations and relationships, citizens must enjoy extraterritorial protection with regard to their expressive and religious liberties. This is a concern for a large category of citizens, including diplomats abroad, military personnel, citizen protesters, and citizens involved in peace-building efforts in places like Iraq and Afghanistan.[414] Moreover, as discussed in Part I, global exercises of U.S. power can impact the expressive and religious liberties of aliens abroad.[415] At present, it is not clear whether (1) speakers, press members, and other actors possess First Amendment rights abroad; (2) the First Amendment's protections attach to speech that moves in international channels (whether via the Internet or otherwise); (3) religious neutrality and anti-establishment principles have any extraterritorial force; or (4) aliens are entitled to any First Amendment protections.

The basic theories regarding the extraterritorial domain of the Bill of Rights and other provisions—i.e., universalism, global due process, membership, and mutuality of obligation—have been much discussed in judicial decisions and academic literature.[416] There has been little

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[412] *See supra* notes 115–119 and accompanying text.

[413] *See supra* notes 316–320 and accompanying text.

[414] *See* Lisa Schirch, *Supreme Court Ruling Impacts Peacebuilding in Afghanistan*, HuffPost World (July 19, 2010), http://www.huffingtonpost.com/lisa-schirch/supreme-court-ruling-impa_b_648747.html.

[415] *See supra* notes 238–257 and accompanying text.

[416] *See, e.g.*, Raustiala, *supra* note 340; Neuman, *supra* note 230, at 285.

judicial or academic analysis, however, of how these approaches relate specifically to the First Amendment.[417] The approach to extraterritorial scope or domain that best comports with the values and principles of First Amendment cosmopolitanism is the mutuality of obligation approach that is perhaps most closely identified with Gerald Neuman. As Neuman has explained, the mutuality approach might be described as "identifying a sphere in which a nation's law operates, which was once defined in geographical terms but now is viewed more broadly."[418] Under a mutuality approach, citizens are always considered to be subject to U.S. law, wherever located, and thus entitled to First Amendment protections.[419] Aliens, as Neuman has explained, "are within the sphere either when they are within the nation's territory or on specific occasions when the nation attempts to extract obedience to its laws."[420] Although I will refine and expand upon the mutuality approach in certain respects in order to tailor it to First Amendment concerns, it is a satisfactory foundation for the principle of portability.

With regard to citizens, although the Supreme Court has never expressly so held, it appears to be well accepted that they enjoy rights against federal action in foreign countries.[421] So it is something of a mystery that courts have felt constrained to assume rather than hold that citizens formally possess First Amendment rights abroad, that the Free Speech Clause applies extraterritorially to citizens' speech that is distributed abroad, and that the religious liberties of citizens are generally protected abroad.[422] There is no reason to hesitate in holding that the First Amendment's domain extends to citizens living and working abroad. That does not mean that expressive and religious protections apply in precisely the same manner half a world away as they do at home. Nevertheless, insofar as practicable, citizens ought to enjoy First Amendment protections regardless of borders or frontiers. Like the rights to travel and to contribute to cross-border information flow, such rights would have to be balanced against national interests rather than automatically subjugated to them.

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[417] *See supra* notes 47–181 and accompanying text.

[418] NEUMAN, *supra* note 219, at 109.

[419] *Id.*

[420] *Id.*

[421] *See id.* at 104 (noting that by 1987, the American Law Institute stated as to citizens: "The provisions of the United States Constitution safeguarding individual rights . . . generally limit governmental authority whether it is exercised in the United States or abroad").

[422] *See supra* notes 94–101, 189–215 and accompanying text.

Mutuality of obligation is a general approach to constitutional domain. Portability of First Amendment liberties, in particular, would rest as well upon more specific justifications. It is not simply a matter of receiving the benefits of obedience to U.S. law. One of the goals of First Amendment cosmopolitanism is to protect and encourage commingling and cross-cultural exchange. Rights portability would provide assurance to citizens engaged in foreign travel and inquiry, the cross-border sharing of information and ideas, and global collaboration, that their First Amendment rights have not been waived or otherwise jeopardized as a result of crossing international borders.

Moreover, as the world continues to shrink, domestic speech will increasingly appear in foreign marketplaces. Without some positive assurance that speech published or republished abroad remains protected by the First Amendment, domestic speakers may be discouraged from participating in global forums and marketplaces of ideas and may institute technological and other measures to sharply limit distribution of their speech to the safe haven of the domestic United States. First Amendment portability would thus require that speech that either originates domestically and "travels" abroad, or is published by a citizen abroad, retains its First Amendment protection. Courts ought to reject the notion that citizens may waive or abandon Free Speech Clause protections either by publishing material abroad that does not relate to any issue of public concern in the United States or intentionally targeting foreign audiences.[423] So long as the United States has a discernible connection to the speech in question, the First Amendment ought to follow it through foreign channels of communication.

Armed with the assurance of portability, press members would also be able to confidently assert access and other rights in foreign locations, including perhaps at American detention centers at Guantanamo and abroad. This access could be critical to informing not just U.S. audiences, but global ones as well, about foreign conflicts in which the United States is a participant.

First Amendment portability would also affect religious liberties. Citizen-missionaries and others who work for religious institutions abroad would be entitled to protection against coercion or discrimination by U.S. officials operating in foreign nations. Further, insofar as the obligation to avoid official establishments of religion is deemed to be portable, U.S. citizens would gain some measure of confidence that anti-establishment principles will be respected even in foreign locations

[423] *See* Desai v. Hersh, 719 F. Supp. 670, 679 (N.D. Ill. 1989).

where oversight is difficult or impossible and transparency is at a minimum.

Finally, express recognition of the portability of citizens' First Amendment rights would also produce important symbolic benefits. It would signify that the United States takes seriously international covenants regarding the free flow of information without regard to frontiers. As Lee Bollinger has recently observed, denying access rights to the U.S. press beyond U.S. borders "undermines the perception abroad of the U.S. commitment to a free and independent press, making America look the same as authoritarian regimes."[424] If the United States intends to continue to press for more open exchange of information and religious freedom in authoritarian and other foreign regimes, it ought to afford its own citizens those liberties while they are abroad.

The principle of portability with regard to aliens is a more complicated matter. First Amendment cosmopolitanism does not envision that aliens would be entitled to First Amendment rights in all of their various dealings with U.S. officials. In other words, cosmopolitanism does not entail universalism. As Gerald Neuman has observed, "the requirements of religious and ideological neutrality read out of the speech and religion clauses of the First Amendment cannot be applied to all contexts of human interaction."[425] As he has noted, imposing free speech and free exercise constraints wherever the United States acts would "overburden the government by attempting to enforce in the broader context constraints chosen for the narrower one."[426] Universal extension of free speech and other rights to aliens might also produce dilution of constitutional guarantees at home, as limits imposed abroad may filter back "to undermine the original core."[427]

This does not mean we are left with the provincial approach of granting no protection at all to aliens' expressive and religious liberties. Under a mutuality of obligation approach, U.S. officials are at least obligated to comply with First Amendment commands insofar as aliens are within U.S. custody or inside American borders, "or when the nation attempts to exact obedience to its laws."[428] Under this approach, the First Amendment would, at a minimum, be at home wherever the United States asserts its sovereignty in such a way that aliens' expressive and religious liberties are directly and substantially affected. First

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[424] Bollinger, *supra* note 297, at 121.
[425] Neuman, *supra* note 219, at 110–11.
[426] *Id.* at 111.
[427] *Id.*
[428] *Id.* at 109.

Amendment obligations would thus be portable insofar as the United States demands obedience to its laws, for example, when it detains, prosecutes or otherwise punishes aliens for expressive or religious activities abroad. Even if general First Amendment standards regarding content neutrality and religious neutrality are not fully portable, officials ought to at least avoid purposeful censorship and suppression of aliens' expression and beliefs when exercising sovereign power abroad.

Under First Amendment cosmopolitanism, U.S. mutuality obligations would be interpreted broadly. Alien speakers and religious leaders contribute to trans-border dialogues in which U.S. citizens are active participants. Some commentators implicitly acknowledge this contribution when they recognize that the Free Speech Clause is applicable to at least some alien-to-citizen speech.[429] Particularly in light of the long-standing U.S. commitment to facilitating and protecting participatory democracies abroad, the Free Speech Clause ought to extend to at least some alien-to-alien communications.[430] As Jack Balkin has suggested, we ought to ensure that the First Amendment "protects the ability of individuals to participate *in the culture in which they live* and promotes the development of a culture that is more democratic and participatory."[431]

To consider one concrete example, U.S. funding and aid projects can have a profound impact on foreign expressive cultures. Under international covenants regarding freedom of speech, information, and religion, it is important to ensure that this means of extending U.S. power abroad does not distort foreign speech marketplaces or foreign religious cultures. Aliens located abroad ought to be allowed to challenge U.S. funding conditions that purport to suppress even privately funded expression in foreign locations. Under a cosmopolitan interpretation of mutuality and portability, such conditions constitute an exercise of sovereign power. They present foreign speakers with a Hobson's choice: either refuse critical U.S. funds and retain their speech rights abroad, or accept the funds and suffer suppression under a worldwide

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[429] Roosevelt, *supra* note 29, at 2066.

[430] This does not mean the United States has an affirmative obligation to facilitate speech abroad or to protect aliens from repressive regimes. *But see* William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 Vand. J. Transnat'l L. 255, 290–91 (2010) (proposing an international duty to intervene on behalf of free speech rights in repressive regimes).

[431] Balkin, *supra* note 349, at 1 (emphasis added). Balkin does not indicate whether the relevant "democratic culture" is domestic, foreign, or both. *See id.* at 7–8. He strongly implies, however, that democratic culture is a global or cosmopolitan good. Balkin writes: "Like democracy itself, democratic culture exists in different societies in varying degrees; it is also an ideal toward which a society might strive." *Id.* at 4.

gag rule. Respect for foreign speech cultures, which is discussed below, requires that officials refrain from imposing unconstitutional conditions even on foreign speakers.[432] To protect against distortion of distant expressive and religious cultures, U.S. courts ought to treat alien standing in such cases more flexibly. They ought also to avoid limiting the First Amendment's zone of interest by relying on inapposite immigration and travel cases.[433] Further, under a cosmopolitan interpretation of the First Amendment, protection under the Free Exercise Clause ought to be afforded to aliens against purposeful interferences with religious beliefs or practices—even if the religious culture in which the alien participates is deemed to be offensive to Americans or U.S. officials.[434]

In some circumstances, aliens residing inside the United States ought to enjoy the benefits of First Amendment mutuality and portability. For example, aliens who are subject to deportation ought to enjoy free speech and other First Amendment protections. Further, the Free Speech Clause ought to apply to aliens who are subject to the jurisdiction of U.S. courts.[435] American courts have no more power to suppress the speech rights of aliens by ordering them not to communicate with their own governments abroad than they have to deny American citizens the right to petition Congress.

Consequently, under a cosmopolitan interpretation of mutuality, First Amendment rights and obligations would be considered generally portable with regard to citizens, and at least partially portable with regard to aliens.[436]

4. Respect for Foreign Speech and Religious Cultures

Application of the First Amendment in trans-border contexts will require heightened sensitivity to foreign expressive and religious cultures. The provincial supposition that U.S. power operates in separate foreign and domestic spheres is in many cases incorrect, as many domestic programs impact foreign expressive and religious cultures. In-

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[432] *See* DKT Mem'l Fund Ltd. V. Agency for Int'l Dev., 887 F.2d 275, 308 (D.C. Cir. 1989) (Ginsburg, J., dissenting).

[433] *See supra* notes 78–103 and accompanying text.

[434] Mansfield, *supra* note 53, at 32.

[435] *But cf.* Laker Airways Ltd. v. Pan Am. World Airways, Inc., 604 F. Supp. 280, 287 (D.D.C. 1984) (explaining that a U.S. tribunal is not "compelled by the First Amendment to protect an alien's desire to speak in a foreign country").

[436] Of course, the United States could, and I would argue should, voluntarily extend the First Amendment's extraterritorial domain beyond these minimal standards of portability.

deed, some U.S. programs and policies, including those requiring that favorable information about the United States be disseminated abroad, are specifically designed for this purpose.

Under a more cosmopolitan approach to the First Amendment, judges and public officials would be required to carefully consider, and where appropriate demonstrate respect for, foreign speech and religious cultures.[437] Sensitivity to and respect for foreign cultures will affect the expressive liberties of both citizens and aliens. Again, domestic and foreign speech marketplaces are increasingly interconnected. Officials ought to be mindful that U.S. spending conditions can impact both domestic and foreign NGOs and speech marketplaces.[438] Similarly, a decision by a U.S. court to deny Free Speech Clause protection to allegedly libelous domestic speech that has been republished abroad could substantially affect both domestic and foreign channels of communication.[439]

Attention to foreign religious cultures will also impact the enforcement of the Establishment Clause where projects are funded abroad. One scholar has proposed that U.S. support for sectarian activities ought to be upheld so long as it does not violate the laws or constitution of the foreign regime.[440] This approach, however, takes respect for foreign cultures too far and jeopardizes the core principles of the Establishment Clause.

Lamont v. Woods applied a more plausible notion of respect when it recognized that foreign circumstances may provide a compelling reason for allowing the United States to channel funds to sectarian schools abroad—even if such funding would violate the Establishment Clause if the schools were located in the United States.[441] As *Woods* properly recognized, a "mechanical" approach to establishment issues in foreign contexts is inappropriate.[442] Respect for foreign church-state models or cultures may dictate reversal of the usual presumption of establishment

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[437] To accurately assess claims involving disparate but interconnected cultures, courts will need adequate information regarding how particular U.S. laws and policies affect foreign information markets. If they are to apply the Establishment Clause abroad, they will need information regarding foreign religious practices and cultures. This information will sometimes be difficult to obtain. Courts can, of course, require that litigants present factual information regarding these issues. They may also consult public reports, and will likely benefit from amicus briefs filed by foreign NGOs and other interested parties.

[438] *See DKT*, 887 F.2d at 308 (Ginsburg, J., dissenting).

[439] *See Desai*, 719 F. Supp. at 677.

[440] *See* Mansfield, *supra* note 53, at 25–26.

[441] 948 F.2d 825, 841–42 (2d Cir. 1991).

[442] *See id.* at 842.

in direct funding cases.[443] Thus, for example, if the grantee is the only practically available channel for the aid, or "a given country has no secular educational system at all," then the grant may be allowed.[444] This interpretation of the Establishment Clause would preserve the core anti-establishment principle while showing respect for the foreign religious cultures in which U.S. funding and other activities take place.[445] The approach may raise some concerns regarding dilution of domestic Establishment Clause principles and doctrines. Courts must require that the circumstances be truly extraordinary in order to alter the usual rules and presumptions regarding state support for sectarian projects and missions.

A modality or approach to foreign cultures that is based upon principles of understanding and respect will not impose a constitutional or cultural relativism beyond U.S. borders. Nor will it lead to the supplanting of domestic speech and religious standards in favor of foreign alternatives. Rather, the approach is fundamentally grounded upon the recognition that U.S. policies and powers increasingly affect both foreign and domestic institutions and cultures. A more cosmopolitan interpretation of the First Amendment would protect core First Amendment speech and religious liberties, while at the same time showing appropriate awareness of and respect for foreign expressive and religious cultures.

C. *Beyond Individual Liberties*

Although this Article has focused on the effects a cosmopolitan turn might have on the recognition and enforcement of particular First Amendment liberties—i.e., the right to travel, to report from foreign locations, and to freely practice religious beliefs regardless of location—cosmopolitanism has much broader implications. Indeed, the core values and principles of First Amendment cosmopolitanism could inform or affect a range of issues far beyond the realm of individual liberties. There is only limited space here to identify some of these broader concerns.

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[443] *Id.*

[444] *See id.*; *see also* Mansfield, *supra* note 53, at 34 (urging a flexible interpretation of the Establishment Clause based on "respect for the ways of other nations").

[445] There are obviously a host of issues that would need to be worked out in applying the establishment principle in foreign contexts. For example, what if any role would concerns regarding psychological coercion play in school contexts abroad? Is the "reasonable observer," which we may assume to be a U.S. citizen or permanent resident alien, deemed to have knowledge of foreign religious cultures?

For example, American foreign policy with regard to repressive regimes abroad is a work in progress. There may be an inclination to punish and isolate such regimes. First Amendment cosmopolitanism, however, might point in a different direction. Officials, with the cooperation of technology companies, might seek to enable citizens in such regimes to participate in global dialogue by facilitating their access to new technologies.[446] Indeed, global access to new technologies might become a formal plank in U.S. foreign policy. Additionally, First Amendment cosmopolitanism could inform current debates regarding the proper role of states, localities, and private actors in the foreign affairs realm. In a globalized society, questions of who may properly participate in global debates are likely to become increasingly important. First Amendment cosmopolitanism suggests that sub-national and other actors ought to be invited to participate in robust foreign affairs forums in which a diversity of views are presented.[447]

In the domestic sphere, cosmopolitan values and principles could help shape American policies regarding global access to the Internet and enforcement of intellectual property rights at home and abroad. Officials will have to determine the extent to which they can and should export First Amendment standards and values through Internet access controls and other mechanisms. As recent controversies regarding enforcement of foreign libel judgments and Sharia principles demonstrate, officials will also need to develop a coherent approach to assimilation or rejection of foreign expressive and religious standards.[448] First Amendment cosmopolitanism, based in part upon international commitments to freedom of information, press, and religion without regard to borders, may offer a workable framework for resolving such issues.

The First Amendment's intersection with territorial borders is dynamic and rapidly changing. As that relationship evolves, we will have to resolve some old as well as new and presently unanticipated questions.

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[446] Mark Landler, *Google Searches for a Foreign Policy*, N.Y. Times, Mar. 28, 2010, at WK4.

[447] *See supra* notes 339–449 and accompanying text. *See generally* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. Pa. L. Rev. 245 (2001) (noting that state and local governments have frequently expressed their views on matters of global concern).

[448] *See* Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act of 2010, 28 U.S.C.A. §§ 4101–4105 (West 2010) (prohibiting U.S. courts from enforcing any foreign libel judgment unless the judgment was obtained in accordance with American First Amendment protections); James C. McKinley, Jr., *Judge Blocks Oklahoma's Ban on Using Sharia Law in Court*, N.Y. Times, Nov. 29, 2010, at A22.

Conclusion

In a globalized and digitized era, many Americans probably take for granted that the First Amendment protects their ability to travel abroad, speak to and collaborate with aliens abroad, report from foreign locations, and participate in expressive and religious activities abroad. In fact, the First Amendment's trans-border dimension remains surprisingly under-developed. The traditional orientation with respect to First Amendment liberties can be described as provincial. The basic assumption seems to be that the First Amendment consists of a set of restrictions on domestic governance with regard to expressive and religious liberties.

This Article has offered a critique of provincialism, and an alternative orientation with respect to the First Amendment's trans-border dimension. The Article has labeled this outlook "cosmopolitan." The label is less important than the ideal, which is to move cross-border and beyond-border concerns closer to the core than to the periphery of our contemporary First Amendment. A twenty-first century account of the First Amendment's trans-border dimension must acknowledge the blurring of territorial boundaries, changing notions of territorial sovereignty, the influence of international cooperation and commitments, and the impact of digitization on expressive and religious liberties. As we advance further into a globalized and digitized era in which expressive and religious activities transcend territorial borders, we will need to clarify the contours of the First Amendment's trans-border dimension. As citizens, we need to know to what extent expressive and religious liberties survive the crossing of territorial borders. Public officials who are making or implementing federal policy abroad also require greater clarity with regard to the First Amendment's regulatory domain.

Largely as a result of the interpretations and policies of the political branches, the First Amendment is presently more cosmopolitan than it was in the mid-twentieth century. What is missing, however, is a firmer jurisprudential foundation that will facilitate formal recognition and enforcement of trans-border First Amendment rights. Cosmopolitan principles of free movement, liberal cross-border information flow, portability of rights and obligations, and respect for foreign cultures would transform the First Amendment's trans-border dimension in a manner that facilitates global dialogue, advances citizen self-governance, and increases personal autonomy. These principles would also place some limits on the extraterritorial regulation of citizens' and aliens' expressive and religious activities. In short, cosmopolitanism would at last

treat trans-border liberties as serious and significant First Amendment concerns.

This Article has offered a jurisprudential blueprint for a more cosmopolitan First Amendment. Some powerful forces, including isolationism, nativism, and longstanding principles of official provincialism are arrayed against this orientation. If the experience of the twentieth century is any guide, though, some equally powerful forces are likely to push the First Amendment in a more cosmopolitan direction in the twenty-first century.