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# Territoriality and the First Amendment: Free Speech At - And Beyond - Our Borders

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## INTRODUCTION

For most of our nation's history, territorial borders have marked the First Amendment's legal, practical, and theoretical domain. Information flow, whether in the form of persons or materials, and cross-border regulatory schemes have been physical and tangible in nature. Regulatory power at the borders has been grounded in detention, exclusion, and search and seizure. Traditional First Amendment theories or justifications have generally assumed that the First Amendment is a wholly domestic concern, one generally impervious to events, laws, or persons outside U.S. borders.[1]

Today, however, we live in a world characterized by extraordinary advances in communications technology, widespread global travel, increasing cross-border commerce, and frequent transnational involvements. Information flows at great speed, and in remarkable quantity, across our national borders. In a "flatter" world, a single speaker can potentially distribute information in digitized form to millions of people across the world with just a few strokes and clicks.[2] Millions of people can and do travel across international borders to associate with family members and others.[3] Journalists share and dis-

1 *See, e.g.*, Robert D. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 WM. & MARY L. REV. 863, 865 (1985) ("Most discussions of first amendment rights assume that the communication is addressed to a domestic audience or at least assume that the domestic or foreign nature of the audience is inconsequential.").

2 *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT (2007) (describing how globalization, fueled by technology, has led to an increasingly interconnected world).

3 In 2008, the U.S. Department of State estimated that sixty-four million trips were taken overseas by U.S. citizens. U.S. GOV'T ACCOUNTABILITY OFFICE, DOC. NO. 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.

tribute information across the globe.[4] The United States, like other nations, participates in interterritorial agreements, tribunals, and processes. Today, the First Amendment increasingly competes and often conflicts with the speech, privacy, and association laws of other nations.[5] Globalization, digitization, and other modern forces fundamentally alter the premise that the First Amendment is solely or principally a domestic concern bounded by territory.

The relationship between territory and the First Amendment has become more complicated. But what precisely is that relationship? In a digitized and globalized speech environment, to what extent can or does the United States continue to rely upon a territorially based regulatory model with respect to the cross-border flow of information? How "open" are our borders in terms of speech and association, both as a matter of law and, with the advent of the Web and other communications technologies, practically speaking? Is the First Amendment a set of domestic limitations or a universal human right that applies without regard to borders? Scholars have devoted far less effort to systematically analyzing the intersection of territorial borders and the First Amendment than they have to various domestic doctrines and concerns. What is immediately apparent is that we do not have a single, unitary First Amendment. Rather, we have at least *three* First Amendments: the intraterritorial, the territorial, and the extraterritorial.

The *intraterritorial* First Amendment affects speech and association within U.S. territorial borders and in U.S. territories. There is substantial intraterritorial uniformity with regard to speech and association rights, owing in part to the supremacy of the First Amendment. But inside the United States and its territories, speech and association rights still vary depending on one's status and geographic location. For instance, noncitizens may enjoy lesser First Amendment rights in certain circumstances than citizens,[6] different community norms may

4 *See generally* LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 68–107 (2010) (discussing the future of the press and freedom of speech in today's era of "new technologies of communication and globalization").

5 *See, e.g.*, John Schwartz, *Two German Killers Demanding Anonymity Sue Wikipedia's Parent*, N.Y. TIMES, Nov. 13, 2009, at A13 (reporting that German ex-convicts' attempt to enforce a German privacy law against a U.S. business conflicts with the First Amendment).

6 *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (rejecting Fifth and First Amendment challenges of resident aliens deported on the ground that they had once been members of the Communist Party).

be used to assess whether sexually explicit speech is obscene,[7] and some states provide for more robust speech rights than the First Amendment mandates as a floor.[8]

The *territorial* First Amendment refers to the vast regulatory scheme that affects cross-border speech and association. With whom may American speakers legally interact? What information may they share across territorial borders? What may foreign speakers convey across our borders? The contours of the territorial First Amendment are shaped by national security concerns, the federal government's plenary powers with regard to immigration and customs, and the deference generally given by courts to the national government's exercise of foreign relations powers. Simply put, the First Amendment has long operated very differently at the nation's borders.

Finally, the *extraterritorial* First Amendment refers to application of First Amendment restrictions outside U.S. territorial borders and the scope or domain of speech-protective First Amendment principles, standards, and norms. Is the First Amendment merely a domestic limitation, or is it a universal human right? Does the First Amendment follow the flag, or stop at the water's edge?

Although the issues raised by the intraterritorial First Amendment are important and sometimes overlap with other territorial concerns, this Article will focus primarily on the territorial and extraterritorial First Amendments. The primary concern will be the legislative, executive, and judicial treatment of what might generally be referred to as the First Amendment's "non-domestic" dimension.

Part I examines the territorial First Amendment, which defines the legal scope of speech and associational liberties at international borders and their functional equivalents. As we shall see, the formal core of the territorial First Amendment has remained remarkably stable over time. Today, as in the past, foreign scholars and other speakers have no constitutional right to cross U.S. borders to convey information or associate with U.S. audiences. The government may deny access to foreign speakers so long as it has a "facially legitimate

7 *See* Miller v. California, 413 U.S. 15, 24, 33 (1973) (explaining that obscenity is to be judged according to contemporary community standards).

8 In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court held that "a state's organic and general law can independently furnish a basis for protecting individual rights of speech and assembly." State v. Schmid, 423 A.2d 615, 624 (N.J. 1980) (citing *PruneYard*, 447 U.S. at 81). Some states have mandated greater access to private properties than the First Amendment floor requires. *See, e.g.*, N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 777 (N.J. 1994) (holding that private shopping centers are required to allow leafleting and associated expressive activities on their premises).

and bona fide reason" for doing so.[9] Current federal laws and regulations may also permit officials to exclude foreign speakers on solely ideological grounds, a feature of cross-border information control that dates to the late 1790s. Moreover, federal law prohibits foreign nationals from making direct contributions in U.S. elections[10] and limits distribution of "foreign political propaganda" inside the United States.[11]

Citizens' cross-border speech is also limited in various respects. For example, the Logan Act, enacted in 1799, criminalizes unauthorized "correspondence or intercourse" with foreign governments.[12] Although international travel is now commonplace, federal laws and regulations still place restrictions on travel to certain areas of the world. Federal law now prohibits denial or revocation of a passport based upon ideological or expressive grounds.[13] But the First Amendment does not proscribe restrictions on territorial egress even if the purpose of the proposed travel is to engage in expressive, journalistic, or associative activities.[14]

At U.S. territorial borders, federal officials retain broad authority to search expressive materials. Prior to and during the Cold War, customs and border laws were enforced to restrict or prohibit the importation and exportation of films, books, and magazines.[15] For a variety of reasons, the regulatory focus has shifted to the cross-border flow of technological data and information, particularly as these relate to materials that may have military applications.[16] Broad customs authority has been extended to laptops and other computing devices which are filled with personal data and other expressive materials,

9 Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

10 2 U.S.C. § 441e (2006).

11 22 U.S.C. § 614 (2006).

12 18 U.S.C. § 953 (2006).

13 *See* 22 U.S.C. § 2721 (providing that passports cannot be denied or revoked on basis of speech, belief, affiliation, or membership).

14 *See* Zemel v. Rusk, 381 U.S. 1, 16 (1965) (upholding Cuba travel restrictions).

15 *See* Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 728–34 (1985) (describing cross-border speech and association restrictions).

16 As some scholars have noted, U.S. authorities have altered enforcement strategies to account for the digitization and cross-border sharing of information via the Internet. *See generally* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? (2006) (arguing that the Internet has not diminished the authority or relevance of national governments and that territorial governance remains the norm).

such as medical records, diaries, and photographs.[17] Courts have refused to apply a First Amendment "exception" to these border searches.[18] Finally, various laws restrict the ability of U.S. citizens and resident aliens to maintain contact and associate, both domestically and abroad, with foreign missions and other organizations.

Although the core of the territorial First Amendment remains largely intact, Part I shows that territorial borders are not the strong regulatory barriers to cross-border information flow that they once were. In the mid-1980s, some were bemoaning the existence of a "nylon curtain" of federal laws and regulations that operated as an ideological barrier at the nation's borders.[19] During the past two decades or so, territorial borders have been transformed from relatively hard to much softer barriers. As we shall see, although the courts have played some role in terms of territorial liberalization, the most important actors have been legislative and executive officials. Formal ideological barriers, in particular, have nearly disappeared. More generally, legal and regulatory amendments have facilitated the cross-border flow of a variety of informational materials. The gradual lifting of travel barriers has also increased cross-border association and inquiry. In addition to various legal and regulatory changes, digitization and globalization have fundamentally changed the practice and governance of cross-border information flow. In combination, these legal and social forces have altered the territorial framework that has traditionally governed speech, press, and associational liberties. Although we do not have open borders insofar as information flow is concerned, the First Amendment is far less territorial than perhaps at any time in our nation's history.

Part II examines the extraterritorial First Amendment. Extraterritoriality consists of two basic elements. The first element of extraterritoriality relates to exportation of First Amendment norms, principles, and standards. First Amendment exportation has long been part of our nation's domestic and foreign policies. For example, some U.S. laws apply to foreign speech owing to its domestic effects.

17 Rasha Alzahabi, Note, *Should You Leave Your Laptop at Home when Traveling Abroad?: The Fourth Amendment and Border Searches of Laptop Computers*, 41 IND. L. REV. 161, 185 (2008).

18 *See infra* Part I.C.

19 Neuborne & Shapiro, *supra* note 15, at 720 (lamenting that the U.S. border has become "a serious barrier to free trade in ideas"); *see also* 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, 256 (1993) (criticizing various limitations, including immigration and travel restrictions, on citizen participation in foreign affairs).

Moreover, through a variety of means, including funding decisions, proposed restrictions on the forms of assistance that domestic technology companies may provide to speech-repressive regimes abroad, and efforts to enshrine First Amendment press and expressive freedoms in international agreements, the United States has historically characterized and sought to position the First Amendment as a universal human right. In the latest instance, courts and legislatures have refused to grant recognition to and enforce foreign libel judgments on the ground that they were obtained pursuant to foreign speech laws that lack First Amendment protections. In sum, policymakers have long recognized and supported an extraterritorial First Amendment.

The second element is the extraterritorial application of First Amendment limitations. With regard to citizens, although First Amendment rights have not frequently been enforced extraterritorially the assumption is that the First Amendment formally applies to expressive activities beyond U.S. borders.[20] By contrast, aliens abroad are presumed not to enjoy First Amendment rights. Thus, although they favor exportation of First Amendment norms in general, policymakers have been reluctant to acknowledge that First Amendment limitations apply extraterritorially.

Part III synthesizes the territorial and extraterritorial dimensions and reconsiders the modern relationship between territorial borders and First Amendment liberties. As noted, the First Amendment is certainly less territorial as a result of recent political and judicial judgments. That trend is likely to continue. As policymakers continue to recognize that Americans' informational, commercial, educational, cultural, and artistic interests do not stop at the water's edge, the First Amendment will continue to become more cosmopolitan in character. Political and judicial interpretations of free speech, press, and association guarantees will embrace and facilitate the cross-border flow of information. Although territorial governance remains intact—and likely will so long as there are states—governments will also likely continue to experience diminished capacity to control cross-border information flow. In the globalized and digitized era, the most important First Amendment questions will likely relate to the First Amendment's extraterritorial domain. The First Amendment may become more cosmopolitan in this realm as well, in terms of its influence

20 *See* Haig v. Agee, 453 U.S. 280, 308 (1981) (assuming arguendo that the First Amendment applies overseas); *see also* Lamont v. Woods, 948 F.2d 825, 835 (2d Cir. 1991) (concluding that the First Amendment's Establishment Clause "should apply extraterritorially").

beyond U.S. borders. However, the United States obviously cannot unilaterally export First Amendment norms and principles abroad. Moreover, courts are likely to remain hesitant to expand First Amendment guarantees beyond U.S. borders. Indeed there are constitutional, diplomatic, theoretical, and other obstacles to further expansion of the extraterritorial First Amendment. But these are not insurmountable. The contours of the extraterritorial First Amendment are still developing, and there are avenues for further expansion. Of course, extraterritoriality may work in more than one direction. Legal, social, and political forces may bring foreign speech regimes to U.S. shores. Hence the First Amendment may also become cosmopolitan in the sense that it must compete with and may be influenced by other speech regimes. The question is whether, as a result, the First Amendment will lose some of its exclusive and exceptional intraterritorial domain.

## I. THE TERRITORIAL FIRST AMENDMENT

This Part describes the current state of our territorial First Amendment. The basic foundation or infrastructure of the territorial First Amendment was put in place during the early days of the Republic. Since that time, officials have exercised the power to exclude and remove aliens and to control the import and export of informational materials. The territorial First Amendment has not received sustained attention during the past two decades.[21] During that period, however, there have been significant legal, political, and social changes with regard to cross-border speech, press, and association. Foreign persons, influences, and ideas have given rise to numerous territorial restrictions, from ideological immigration exclusion laws to limits on the importation of foreign films and magazines. Although it has not disappeared, fear of foreign persons and ideas has dissipated somewhat over time. Indeed in today's globalized society, many citizens eagerly seek out foreign news, ideas, and contacts. As we shall see, in many respects cross-border channels of communication are more open today than at any time in our nation's history. Thus, while the basic territorial framework remains in place numerous fissures have appeared in its foundation. The broader implications of these developments will be addressed in Part III.

21 The most comprehensive treatment of the subject of restrictions on cross-border speech and association appears in a 1985 article by Burt Neuborne and Steven Shapiro. *See* Neuborne & Shapiro, *supra* note 15; *see also* Roth, *supra* note 19 (examining certain restrictions affecting citizen participation in foreign affairs).

### *A. Territorial Exclusion—Ingress*

The territorial First Amendment limits domestic access to foreign persons, ideas, and materials in a number of ways. There is, of course, no absolute right to speak to and associate with foreign audiences or to gather information from abroad. Persons and materials can be stopped at the international border or its functional equivalent, searched, and seized for a variety of reasons. For lawful entry, persons and physical materials must cross at designated immigration and customs checkpoints. Lawful material that finds its way onto U.S. soil must be made freely accessible. Thus, for example, the Supreme Court has held that the U.S. Post Office cannot refuse to deliver legal foreign propaganda materials to a domestic addressee absent her affirmative request.[22]

The right to see, hear, and associate with a foreign speaker on U.S. soil depends entirely upon the speaker's ability to (lawfully) gain entry into the United States.[23] The sovereign is entitled to control access to its territory. Control over international borders includes the basic power to determine who may enter.[24] As a matter of territorial sovereignty, most if not all nation-states exercise some degree of control over the ingress of aliens.[25] The grounds for denial of entry vary. In many countries, including some Western democracies, it is rather common for speakers to be denied entry or excluded based solely upon ideological concerns. Britain, Canada, and South Africa all have recently refused entry to speakers based upon their public statements regarding, respectively, Islam, terrorist organizations, and Tibet.[26]

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22 *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (holding that a Post Office requirement that required an addressee to affirmatively request receipt of foreign communist political propaganda abridged the First Amendment).

23 The unlawful entrant may, of course, be removed from the United States thus terminating the association.

24 *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (discussing relationship between political membership and territorial borders); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("Admission of aliens to the United States is a privilege granted by the sovereign . . . .").

25 *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 12 (1999) (describing this conception of sovereignty as "interdependence sovereignty"). The United States, like other nations, also exercises the power of removal. This is a matter that relates primarily to what I have referred to as the "intraterritorial" First Amendment.

26 *See* John F. Burns, *Britain Refuses Entry to Dutch Lawmaker Whose Remarks and Film Have Angered Muslims*, N.Y. TIMES, Feb. 13, 2009, at A8 (reporting that British authorities had barred the entry of an alleged anti-Muslim lawmaker); Celia W. Dugger, *South Africa Bars Dalai Lama from a Peace Conference*, N.Y. TIMES, Mar. 24, 2009, at A10 (reporting that the Dalai Lama was barred from a conference because his presence

British officials have published a master list of those excluded from entering the country, in part to demonstrate to the world the nation's "values and standards."[27] These and other nations typically cite concerns regarding national security and other broad public interests as the bases for territorial exclusions.

The United States has excluded or removed alien persons, often for purely ideological reasons, throughout its history. Reflecting a deep-seated fear of foreign ideas and influences, the Alien and Sedition Acts of 1798[28] authorized the President to remove any alien considered dangerous to the peace and safety of the United States.[29] To this day, the President is granted authority to remove citizens of enemy nations, without so much as a pre-removal hearing.[30]

In addition to imposing racial restrictions, early immigration laws imposed blanket exclusions on classes of aliens who were believed to espouse certain ideologies and to be involved in disfavored associations.[31] From World War I through the end of the Cold War, Congress authorized visa denials, immigration exclusions, and deportations of anarchists and Communists, and other persons deemed a threat to the interests and security of the United States.[32]

During the Cold War, the United States became a closed and insular society in certain respects. The national mood was unmistakably manifested at the borders, which were closed to foreign ideologies like communism and socialism. Section 212(a)(27) of the McCarran-

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would not be in South Africa's "best interests"); Robert Mackey, *Canada Bars 'Infandous' British Politician, Journalists Reach for Dictionaries*, LEDE: N.Y. TIMES NEWS BLOG, Mar. 20, 2009, http://thelede.blogs.nytimes.com/2009/03/20/canada-bars-infandous-british-politician-journalists-reach-for-dictionaries/ (reporting that Canadian officials had barred the entry of a member of the British Parliament who had allegedly openly supported Hamas).

27 John F. Burns, *Britain Identifies 16 People Barred from Entering the Country in the Past 6 Months*, N.Y. TIMES, May 6, 2009, at A6.

28 Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801); Act of July 6, 1798, ch. 66, 1 Stat. 577 (expired 1801); Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired 1800); Act of June 18, 1798, ch. 54, 1 Stat. 566 (repealed 1802).

29 *See* Act of June 25, 1798, § 1, 1 Stat. at 570–71.

30 *See* 50 U.S.C. § 21 (2006). Fear of foreign influence extends to U.S. campaign laws. Federal campaign finance laws currently prohibit foreign nationals from making direct contributions in federal, state, and local elections. 2 U.S.C. § 441e (2006).

31 *See, e.g.*, Alien Immigration Act, ch. 1012, § 2, 32 Stat. 1213, 1214 (1903).

32 *See, e.g.*, Anarchist Act of 1918, ch. 186, 40 Stat. 1012 (authorizing the removal of alien anarchists); Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952) (rejecting a First Amendment challenge to a law providing for the deportation of communists); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290–91 (1904) (upholding the removal of an alien anarchist).

Walter Act,[33] enacted in 1952 over President Truman's veto, authorized exclusion of aliens who sought to enter the United States "solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."[34] Section 212(a)(28) of the McCarran-Walter Act authorized purely ideological exclusions of "anarchists" and communist affiliates.[35] From 1952 through the late 1970s, thousands of aliens were deemed excludable under section 212(a)(28) based principally or solely upon ideological grounds, forcing them to seek waivers from the Attorney General in order to enter the country.[36] During this period, State Department and immigration officials excluded numerous foreign scholars, artists, and musicians under the McCarran-Walter Act's ideological exclusion provisions.[37]

These enactments assumed, of course, that ideological exclusions were valid under the First Amendment. In *Kleindienst v. Mandel*,[38] the Supreme Court held that aliens have no First Amendment right to enter the country to convey ideas or information, or to associate with domestic persons and entities.[39] The Court also held, however, that audiences within the United States possess a First Amendment right to receive information from foreign speakers.[40] That includes, said the *Mandel* Court, the right "'to have the alien enter and to hear him explain and seek to defend his views.'"[41] In a portion of the opinion that may come to have particular salience in the digital era, the Court noted that the mere possibility that the message could be delivered by means other than face-to-face interaction with the speaker did not satisfy First Amendment concerns.[42]

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33 Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

34 *Id.* § 212(a)(27), 66 Stat. at 184 (repealed 1990).

35 *Id.* § 212(a)(28)(A)–(C), 66 Stat. at 184–85 (current version at 8 U.S.C. § 1182(a)(3)(D)).

36 Neuborne & Shapiro, *supra* note 15, at 723.

37 *See* John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1496–97 (1988) (discussing the effect of ideological deportation and exclusion on the academy and on academic freedom); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 935, 940–41 (1987) (discussing ideological exclusions).

38 408 U.S. 753 (1972).

39 *Id.* at 767–68.

40 *Id.* at 769; *see also* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (recognizing a right to receive information).

41 *Mandel*, 408 U.S. at 764–65 (quoting Mandel v. Mitchell, 325 F. Supp. 620, 631 (E.D.N.Y. 1971)).

42 *Id.* at 765.

Although it recognized domestic audiences' right to hear or receive, the *Mandel* Court made clear that visa denials and exclusions are not to be judged according to ordinary First Amendment standards. Rather, said the Court, in this context the government is only required to provide a "facially legitimate and bona fide reason" for the exclusion.[43] According to the Court, this standard acknowledges the government's plenary authority with regard to entry into the United States.[44] As scholars have noted, *Mandel* "raises as many questions as it answers."[45] It appears that the government is required to at least provide some basis or explanation for its exclusion. But it remains unclear, even today, whether the First Amendment prohibits the government from excluding an alien from the United States based *solely* upon ideological grounds.[46]

In the late 1970s, the political branches repealed the more blatant ideological barriers to entry. The McGovern Amendment,[47] enacted in 1977, restricted the government's ability to exclude suspected Communists or anarchists under section 212(a)(28) of the McCarran-Walter Act.[48] In a 1987 joint conference report, moreover, Congress concluded that the executive branch had misused section 212(a)(28) to exclude noncitizens based solely upon their ideology.[49] In the 1980s, the Reagan administration then turned to section 212(a)(27) of the Act, which, as noted, allowed for exclusion when aliens' activities in the United States would be "prejudicial to the public interest."[50] Many foreign officials and scholars were denied visas under this provision.[51] As several court decisions from the 1980s showed, the phrase "facially legitimate and bona fide reason" was not

43 *Id.* at 770.

44 *Id.* at 768–69; *see* Harisiades v. Shaughnessy, 342 U.S. 580, 585–92 (1952) (upholding the Alien Registration Act of 1940, which barred the entry of aliens who advocated for the violent overthrow of the U.S. government or associated with others who did so, against a First Amendment challenge). For a critical analysis of the government's interests in ideological exclusion, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 152–61 (1996).

45 Shapiro, *supra* note 37, at 936.

46 *See Mandel*, 408 U.S. at 770 ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.").

47 Pub. L. No. 95-105, 91 Stat. 844 (1977) (repealed 1990).

48 *Id.* § 112, 91 Stat. at 848.

49 H.R. REP. No. 100-475, at 162–63 (1987) (Conf. Rep.).

50 *See* Immigration and Nationality Act of 1952, ch. 477, § 212(a)(27), 66 Stat. 163, 184 (repealed 1990); *see also* Neuborne & Shapiro, *supra* note 15, at 726–27 (describing Reagan administration exclusions).

51 *See* Neuborne & Shapiro, *supra* note 15, at 726–27.

particularly helpful in resolving the scope of the government's authority to engage in ideological exclusion.[52]

In 1990, Congress passed the Moynihan-Frank Amendment,[53] which expressly prohibited 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."[54] With that amendment, the United States eliminated a significant ideological territorial barrier.[55] Absent a clear constitutional mandate, however, Congress was of course always free to change course.

Indeed, when concerns regarding terrorism mounted in the late 1990s, Congress enacted new territorial exclusion provisions. In 1996, Congress delegated to the State Department the authority to exclude "representative[s]" and "member[s]" of terrorist organizations.[56] Shortly after the September 11, 2001 attacks, Congress imposed additional restrictions on entry.[57] The war on terrorism is, in part, a war of ideas and ideology. Thus, it should not be surprising that affiliation with terrorist causes and groups has become a possible ground for

52 *Compare* El-Werfalli v. Smith, 547 F. Supp. 152, 153–54 (S.D.N.Y. 1982) (concluding that *Mandel* does not permit courts to probe the wisdom or basis of proffered reasons for exclusion), *with* Allende v. Shultz, 605 F. Supp. 1220, 1225 (D. Mass. 1985) (holding that mere membership in an organization alleged to be a communist-front association was not a sufficient statutory basis for denial under the McCarran-Walter Act), *and* Abourezk v. Reagan, 592 F. Supp. 880, 887 (D.D.C. 1984) (holding that the government lacks authority to exclude an alien under section 212(a)(27) of the McCarran-Walter Act based solely on a proposed message), *vacated*, 785 F.2d 1043 (D.C. Cir. 1986).

53 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

54 *Id.* § 601, 104 Stat. at 5071. Immigration laws were generally amended in the 1990s to limit excludable offenses primarily to conduct rather than speech or ideology. For example, current immigration laws make a person who has engaged in terrorist activities ineligible for certain visas. 8 U.S.C. § 1182(a)(3)(B)(i)(I) (2006). Ineligibility may be waived by the Secretary of Homeland Security at the recommendation of the State Department. *See* 22 C.F.R. § 40.301 (2009).

55 Immigration laws continue to grant officials discretion to exclude aliens based upon "potentially serious adverse foreign policy consequences." 8 U.S.C. § 1182(a)(3)(C)(i).

56 *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 411, 110 Stat. 1214, 1268–69 (codified as amended at 8 U.S.C. § 1182 (2006)).

57 *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 12, 15, 18, 22, 28, 31, 42, 49, and 50 U.S.C.) (imposing more restrictive rules on the immigration of suspected terrorists).

exclusion. A provision of the USA PATRIOT Act[58] permits the Department of Homeland Security to bar from the United States any alien that has used a "position of prominence within any country to endorse or espouse terrorist activity."[59] The U.S. State Department has interpreted this provision to authorize exclusion of aliens based upon "irresponsible expressions of opinion by prominent aliens who are able to influence the actions of others."[60] The REAL ID Act of 2005[61] rendered aliens excludable on the same substantive grounds, regardless of whether they held a "position of prominence" in their home countries.[62]

The extent to which federal officials have relied upon the "endorse or espouse" provision is unclear. Civil libertarians claim that during the past several years "dozens" of scholars, journalists, and other putative speakers have been excluded based solely upon ideological grounds.[63] In some cases, however, it appears that either no explanation for the exclusion was given or the government purported to rely upon other provisions of federal law to deny entry. This was true, for example, in two recent high-profile cases involving scholars denied entry to the United States.[64] In one case, the government initially failed to provide *any* reason for the exclusion.[65] In the other, although the government initially appeared to rely upon the USA PATRIOT and REAL ID exclusion provisions, it later asserted that the alien scholar was barred under laws prohibiting entry to those who give financial support to known terrorist organizations.[66]

The executive branch has consistently asserted that it has the authority to engage in ideological exclusion. An appellate brief filed

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58 Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 12, 15, 18, 22, 28, 31, 42, 49, and 50 U.S.C.).

59 *Id.* § 411(a)(1)(A), 115 Stat. at 345–46.

60 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 40.32 at n.6.2(3) (2005).

61 Pub. L. No. 109-13, div. B, 119 Stat. 302 (codified as amended in scattered sections of 8 and 49 U.S.C.).

62 *See id.* § 103(a), 119 Stat. at 306–07.

63 AM. CIVIL LIBERTIES UNION, THE EXCLUDED 8 (2007), *available at* http://www.aclu.org/files/pdfs/safefree/the_excluded_report.pdf.

64 *See* Am. Sociological Ass'n v. Chertoff, 588 F. Supp. 2d 166, 172–73 (D. Mass. 2008) (ordering the government to provide some specific basis for exclusion); Am. Acad. of Religion v. Chertoff, No. 06 CV 588(PAC), 2007 WL 4527504, at *15–16 (S.D.N.Y. Dec. 20, 2007) (finding that alien was excluded not under PATRIOT Act's "endorse or espouse" provision, but on basis of donations made to organizations supporting known terrorist groups), *vacated sub nom.* Am. Acad. of Religion v. Napolitano, 573 F.3d 115 (2d Cir. 2009).

65 *See Am. Sociological Ass'n*, 588 F. Supp. 2d at 170.

66 *See Am. Acad. of Religion*, 2007 WL 4527504, at *3–4.

by the George W. Bush administration claimed that Congress may constitutionally exclude persons based solely upon ideology, beliefs, or memberships.[67] The Obama administration has been urged to renounce and disclaim this authority but has thus far refused to do so.[68] That does not mean, however, that the administration is currently engaging in ideological exclusion. Indeed in two recent cases, the Obama administration lifted bans on prominent Muslim scholars who had been denied entry visas by the previous administration.[69]

Whatever other constitutional ambiguities it may contain, *Mandel* reaffirmed Congress's longstanding power "'to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country.'"[70] Like other nations, the United States continues to exercise this broad sovereign power. As recently as the 1980s, the federal government frequently engaged in ideological exclusions.[71] Changes to immigration laws, some enacted in furtherance of international commitments to facilitate cross-border information flow, have denied the executive branch general authority to exclude aliens based solely upon ideology.[72] Moreover, recent administrations have seemed reluctant to rely upon any supposed authority in the USA PATRIOT and REAL ID Acts to exclude aliens based solely upon their beliefs or associations. Future administrations will undoubtedly face pressure to exclude aliens based upon their associations and beliefs. For now, whether the territorial First Amendment permits the government to deny domestic audiences an opportunity to hear or associate with an alien in person based solely upon what she has to say remains an open question.

### *B. Travel Restrictions—Egress*

Visiting with alien speakers is of course not the only way to gather information and share ideas with foreigners. For scholars, politicians, artists, and many others, cross-border travel is a significant avenue of communication and information gathering.

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67 *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).

68 John Schwartz, *U.S. Is Urged to Lift Antiterror Ban on Foreign Scholars*, N.Y. TIMES, Mar. 18, 2009, at A19.

69 Sarah Lyall, *In Shift, U.S. Lifts Visa Curbs on Professor*, N.Y. TIMES, Jan. 21, 2010, at A6.

70 Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895)).

71 *See* Neuborne & Shapiro, *supra* note 15, at 726–27.

72 *See supra* note 54 and accompanying text.

Although it is difficult to imagine, early in our nation's history the federal government did not formally or systematically regulate foreign travel. Prior to World War I, international travel from the United States was regulated pursuant to a set of ad hoc and informal practices involving the State Department's authority to grant or deny passports.[73] During World War I, Congress enacted the first law prohibiting foreign travel without a valid passport.[74] After the war, the State Department imposed certain geographic limits on travel under U.S. passports.[75] Ideological restrictions on travel were common during certain historical periods. During the Cold War, in particular, State Department officials frequently prevented American communists from traveling abroad.[76] Prominent Americans who were denied passports during the McCarthy era included Arthur Miller, Paul Robeson, and Linus Pauling.[77]

In the late 1970s, Congress substantially revised executive authority with respect to foreign travel. The 1978 Amendment to the Passport Act[78] prohibited executive officials from unilaterally imposing area restrictions on travel, except during certain declared emergencies.[79] But laws and regulations imposing economic sanctions and trade embargoes have often acted as de facto international travel bans. In the 1980s, for example, the Treasury Department promulgated regulations that treated a host of expenditures related to travel to Cuba as prohibited economic transactions.[80] Depending on the nature and number of expenditures covered, these sorts of regulations can effectively create a travel ban with respect to the disfavored nations. The principal goal of such trade embargoes, which currently apply to several nations, is to isolate targeted countries economically and to deprive them of the benefit of U.S. dollars. The embargoes also further diplomatic interests. The First Amendment speech, press, and association costs of these measures can be quite substantial, inso-

73 *See* Neuborne & Shapiro, *supra* note 15, at 734–35 (discussing the history of limitations on foreign travel).

74 *See* Act of May 22, 1918, ch. 81, §§ 1–2, 40 Stat. 559, 559.

75 Neuborne & Shapiro, *supra* note 15, at 734.

76 *See* Aptheker v. Sec'y of State, 378 U.S. 500, 501–02 (1964); Kent v. Dulles, 357 U.S. 116, 117–20 (1958).

77 Neuborne & Shapiro, *supra* note 15, at 739.

78 Pub. L. No. 95-426, 92 Stat. 963 (codified as amended at 22 U.S.C. § 211a).

79 *Id.* § 124, 92 Stat. at 971. Today, area restrictions may only be imposed with the acquiescence of Congress pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706 (2006).

80 *See, e.g.*, 31 C.F.R. § 515.560 (2009) (listing restricted activities and expenses relating to travel to Cuba); *see also* Regan v. Wald, 468 U.S. 222, 242–43 (1984) (holding that Cuba travel restrictions do not violate the right to travel abroad).

far as citizens and resident aliens wish to travel abroad for expressive, journalistic, academic, or associative purposes.

The First Amendment arguably places greater constraints on the government's control over citizens' territorial egress than it does on ingress from foreign nations. In contrast to foreign aliens, of course, U.S. citizens possess First and Fifth Amendment rights. In reviewing passport revocations and denials, the Supreme Court has grudgingly *assumed* that "First Amendment protections reach beyond our national boundaries."[81] The Court has also recognized that the freedom to travel abroad "is a constitutional liberty closely related to rights of free speech and association."[82] It has acknowledged that foreign travel is protected by the Due Process Clause of the Fifth Amendment.[83] The Court has not, however, recognized any fundamental First Amendment right to travel abroad.[84]

The Court has held that the First Amendment is implicated when a citizen's right to travel abroad is expressly conditioned upon the surrender of First Amendment rights.[85] Nevertheless, First Amendment liberties are not as robust at the territorial borders as they are within the United States.[86] For example, the First Amendment protects a U.S. citizen who wishes to travel from California to New York to study and write about New York City's culture. In contrast, the Supreme Court has held that a citizen's mere desire to travel for purposes of gathering information does not implicate significant First

81 Haig v. Agee, 453 U.S. 280, 308 (1981).

82 Aptheker v. Sec'y of State, 378 U.S. 500, 517 (1964).

83 *See id.* (noting the connection between the First Amendment and international travel).

84 Kamenshine, *supra* note 1, at 893.

85 *See Aptheker*, 378 U.S. at 507 (holding that the denial of a passport on the basis of communist affiliation violates the Fifth Amendment and that First Amendment interests could not be dismissed by asserting that the right to travel could be exercised by relinquishment of affiliation with the organization); Kent v. Dulles, 357 U.S. 116, 130 (1958) (holding that the Secretary of State lacked authority to refuse the issuance of a passport on the basis of alleged beliefs, associations, or ideological matters). The Court has expressly recognized a Fifth Amendment liberty interest in traveling abroad. *See id.* at 125 ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.").

86 The issue is *territorial* rather than *intraterritorial* owing to the fact that the traveler, while presently located within the United States, seeks to cross the territorial border. She is free to move up until the time she encounters the border. In contrast, the alien subject to deportation is presently located on U.S. soil and is subject to discharge against her will to some other territory.

Amendment concerns.[87] It has also held that the government may restrict foreign travel when a speaker's conduct or speech may pose a threat to foreign diplomacy or national security.[88] The President may also prohibit travel in national emergencies, as President George W. Bush did in 2003 with respect to travel to Iraq, without running afoul of the First Amendment.[89]

Although the United States has historically exercised significant control over its citizens' territorial egress, including enforcement of some ideological barriers, in recent decades the federal government has not placed substantial restrictions on foreign travel. Indeed, today there are very few international travel restrictions in place. None of the existing restrictions are formally or explicitly grounded solely on ideological concerns. In 1991, Congress specified as impermissible bases for passport denial, revocation, or restriction "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."[90]

Although the State Department warns against travel to certain countries, such as North Korea and Iran, the government does not enforce an outright travel ban with respect to these or any other nations.[91] The recent trend has been to lift or liberalize general travel bans. For example, a ban on travel to Libya was lifted in 2004.[92] Further, the Obama administration has recently granted a general license

87 Zemel v. Rusk, 381 U.S. 1, 16 (1965); *see also* Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441 (9th Cir. 1996) (holding that Cuba travel restrictions did not implicate the First Amendment).

88 *See* Haig v. Agee, 453 U.S. 280, 309–10 (1981) (upholding the denial of a passport to person who engaged in repeated disclosures of intelligence operations and names of intelligence personnel). The *Agee* Court concluded that the denial was based in part on the putative traveler's conduct and that any speech involved was not protected by the First Amendment. *Id.* at 308–09.

89 *See* Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 605 (7th Cir. 2009) (rejecting a First Amendment challenge to the imposition of sanctions on a person who traveled to Iraq to act as a "human shield," on the ground that sanctions applied to conduct rather than speech).

90 22 U.S.C. § 2721 (2006). Not all associational grounds have been eliminated from the immigration exclusion provisions. For example, an alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is deemed excludable on the ground of participation in terrorist activity. 8 U.S.C. § 1182 (a)(3)(B)(i) (2006).

91 However, citizens travel to some of these places at their peril. *See* Choe Sang-Hun, *North Korea Says It Is Holding Two American TV Reporters*, N.Y. TIMES, Mar. 22, 2009, at A13.

92 Fred Barbash & Peter Slevin, *U.S. Lifts Ban on Travel to Libya*, WASH. POST, Feb. 27, 2004, at A16.

for travel to Cuba to all U.S. citizens with "close relatives" there.[93] This will obviously facilitate "intimate" association outside U.S. territory.[94] Bipartisan legislation recently introduced in the House of Representatives would lift all remaining restrictions on travel to and expenditures in Cuba.[95] The Obama administration also recently lifted a twenty-two year ban on entry into the United States by H.I.V.-positive people, a decision that will allow international AIDS researchers and activists to meet in the United States.[96] The emerging trend, at least during the past decade or so, has favored liberalization of cross-border travel. This is important not only to economic opportunities abroad, but to cross-border information sharing and association as well.

Existing regulations concerning economic embargoes and foreign travel expenditures are also relatively permissive, particularly with regard to travel for speech, information-gathering, academic, and other expressive purposes. For example, current federal regulations regarding travel to Cuba, which at this point remains subject to a trade embargo, allow for the issuance of general or specific licenses to scholars, professionals, journalists, and others.[97] Specific licenses may also be granted for travel relating to familial obligations, religious activities, humanitarian projects, and cultural performances or exhibitions.[98] The list of travelers eligible for general or specific licenses has steadily expanded in recent years, with specific regard for press, academic, and expressive activities.

Of course, the requirement that citizens and resident aliens obtain a license to engage in cross-border expressive activities can itself be a substantial restriction, one that would be an invalid prior

93 OFFICE OF FOREIGN ASSETS CONTROL, DEP'T OF THE TREASURY, GUIDANCE ON IMPLEMENTATION OF CUBA TRAVEL AND TRADE-RELATED PROVISIONS OF THE OMNIBUS APPROPRIATIONS ACT, 2009, at 1 (2009), *available at* http://www.treas.gov/offices/enforcement/ofac/programs/cuba/omni_guide.pdf; *see* Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 621, 123 Stat. 524, 678 (directing the Treasury Department to defund certain travel restrictions); *see also* William E. Gibson, *More Cuba Trips Expected*, L.A. TIMES, Mar. 15, 2009, at A20 (suggesting that the Obama administration may lift the Cuba travel embargo).

94 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) (recognizing "intimate" and "expressive" associations).

95 *See* Freedom to Travel to Cuba Act, H.R. 874, 111th Cong. § 2 (2009); Liza Gross, *Bill Aims to End Cuba Travel Ban*, MIAMI HERALD, Feb. 11, 2009, at 7A.

96 Julia Preston, *Obama Lifts a 22-Year Ban on Entry into U.S. by H.I.V.-Positive People*, N.Y. TIMES, Oct. 31, 2009, at A9.

97 *See* 31 C.F.R. §§ 515.560(a)(1)–(12) (2009) (providing for general and specific licenses for a variety of individuals and organizations).

98 *See id.* §§ 515.561, 515.566, 515.575, 515.567.

restraint if enforced within U.S. borders. Moreover, despite recent liberalization, current licensing restrictions can still substantially affect vital First Amendment interests relating to free speech, inquiry, association, and academic freedom.[99]

In addition to economic embargoes and licensing restrictions, travel from (and to) the United States today is subject to new technologically enhanced controls. In particular, federal officials currently utilize computerized terrorist "watchlists," including the so-called "No Fly List,"[100] to regulate air travel from and to the United States. Travelers have their names checked against a federal database and can be denied egress or ingress if found to be on the watchlist.[101] Civil libertarians have asserted that protesters and activists have been placed on the list for purely ideological reasons, a claim that has been difficult to assess owing to the lack of transparency concerning the list.[102]

In sum, the basic territorial framework relating to physical egress remains in place. The territorial First Amendment recognizes that domestic residents have an interest in cross-border travel and movement. The right resides formally in the Fifth Amendment, although it has a First Amendment component. One cannot be denied the right of egress on condition that she disassociate from a lawful group or enterprise or, presumably, take an oath of loyalty to the United States. It does not appear that the United States currently imposes any purely ideological restrictions on exit from the country. Travel rights can, however, be outweighed by countervailing governmental interests in diplomacy and national security. Economic embargoes, licensure requirements, and "no fly" restrictions continue to limit the cross-border exchange of persons, information, and ideas. Nevertheless, the trend with regard to most of these measures has been to liberalize restrictions on cross-border movement and exchange.

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99 *See, e.g.*, Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4, 13–14 (D.C. Cir. 2008) (holding that regulations restricting educational programs offered in Cuba by U.S. academic institutions did not violate the First Amendment); *see also* Roth, *supra* note 19, at 276 (criticizing narrowness of some travel embargo exemptions).

100 *See* Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271, 321–22 (2008) (describing the compilation and use of the No Fly List).

101 *See* 19 C.F.R. §§ 122.49a, 122.75a (2009).

102 Eric Lichtblau, *Terror List Wrongly Includes 24,000, While Some Actual Suspects Escaped It*, N.Y. TIMES, May 7, 2009, at A22. Critics have also claimed that the terrorist watchlist is plagued by serious problems of over- and under-inclusiveness. *Id.*

### C. *Commerce: Import and Export Controls*

The territorial First Amendment restricts cross-border contacts in a variety of ways. As discussed above, travel restrictions can significantly affect in-person information exchange and association. Restrictions on cross-border commercial exchange can also have an effect on First Amendment speech, press, and associational interests. This section discusses the principal import and export controls associated with the territorial First Amendment.

The United States has a vast and complex regulatory system with respect to the cross-border exchange of tangible and intangible products, data, and informational materials. Historically, federal laws and regulations have restricted the cross-border exchange of a wide variety of First Amendment materials, including books, magazines, various artistic works, television broadcasts, and computer code. Since the founding, Congress has authorized broad search and seizure authority at U.S. territorial borders.[103] Congress has express constitutional authority to regulate commerce with foreign nations.[104] It also possesses the inherent sovereign power to protect the nation from harmful articles of commerce. In this context, as in others, the territorial First Amendment is of a markedly different character than its intraterritorial counterpart. As the Supreme Court observed in a decision upholding the seizure of allegedly obscene films by customs agents: "Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations."[105]

#### 1. Trading with the Enemy

Much of the modern legal and regulatory architecture for the regulation of information flow at the national borders was constructed during and as a direct response to World War I. The Trading with the Enemy Act[106] (TWEA), enacted in 1917, regulates commercial trade with designated "enemy" nations.[107] The restrictions imposed under TWEA have varied in response to shifting foreign policies over the years. Some of the travel and trade restrictions discussed in the preceding sections were authorized pursuant to TWEA.[108]

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103 *See, e.g.*, United States v. Ramsey, 431 U.S. 606, 616 (1977) (noting that federal laws authorize "plenary customs power" at the border).

104 U.S. CONST. art. I, § 8, cl. 3.

105 United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 125 (1973).

106 50 U.S.C. app. §§ 1–44 (2006).

107 *See id.* § 2 (defining "enemy" within the statute).

108 Neuborne & Shapiro, *supra* note 15, at 728–29, 734–35.

As noted, the central goal of these border controls and embargoes is to isolate certain disfavored or enemy regimes economically. First Amendment interests can be significantly affected by TWEA's enforcement. For example, TWEA's trade restrictions have been used over the years to ban or restrict the cross-border exchange of a broad array of informational materials, including books, films, periodicals, and other expressive material.[109] At the height of the Vietnam War in the 1960s, federal officials seized books and newspapers produced in North Vietnam and China and refused to allow their entry into the United States until the addressees obtained import licenses.[110] Addressees were required to identify themselves to government officials—and to persuade them that the country from which the information had been exported was not receiving any financial benefit from the importation.[111] Border seizures and restrictions were common during the period of war and civil unrest that prevailed in the 1960s and 1970s. Aggressive enforcement continued into the 1980s, when the Office of Foreign Asset Control (OFAC) seized a variety of books and magazines imported from Cuba.[112]

In response to federal enforcement activities under TWEA, Congress enacted two laws that were generally intended to facilitate the exchange of information with foreign nations (including those subject to economic embargoes). The Berman Amendment,[113] enacted in 1988, precludes the executive from interfering with the import or export of lawful "informational materials" under TWEA and other federal laws.[114] The class of "informational materials" is broadly defined in regulations to include, without regard to the format or medium of expression, "[p]ublications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact discs, CD ROMs, artworks, and news wire feeds."[115]

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109 *Id.* at 728–33.

110 *Id.* at 730.

111 *Id. But cf.* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (invalidating a statute directing the Post Office not to deliver foreign communist political propaganda unless the addressee specifically requested its delivery).

112 Neuborne & Shapiro, *supra* note 15, at 731.

113 Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2502, 102 Stat. 1107, 1371 (codified at 50 U.S.C. app. § 5 (2006)).

114 *See* Laura A. Michalec, Note, *Trade with Cuba Under the Trading with the Enemy Act: A Free Flow of Ideas and Information?*, 15 FORDHAM INT'L L.J. 808, 816–19 (1991–1992) (describing the history of the Berman Amendment).

115 31 C.F.R. § 500.332 (2009) (defining "informational materials"). *But see id.* § 500.332(b)(1) (stating that the exemption does not apply to certain controlled commodities under the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401–2420 (2006)).

Contrary to the apparent intent of the Berman Amendment, OFAC continued after its passage to interpret "informational materials" quite narrowly. For example, the agency claimed that the Berman Amendment's prohibition was not applicable to original artwork.[116] That interpretation was rejected by a federal district court.[117] It also claimed that the broadcast of the 1991 Pan American Games from Cuba was not within the regulatory exemption relating to "informational materials," an interpretation one court deemed to be reasonable.[118] In the Free Trade in Ideas Act of 1994,[119] Congress responded to the agency's interpretations by essentially reiterating the broad regulatory exemption with respect to "informational materials."[120]

As a result of these enactments and implementing regulations, federal regulatory agencies are required to exempt an array of "informational materials" from all U.S. import and export controls. Thus, the territorial First Amendment permits federal officials to monitor and regulate trade with designated enemy nations. In recognition of the substantial First Amendment interests at stake with regard to cross-border information exchange, however, Congress (and in some cases the courts) have constrained agencies' power to prohibit import or export of certain trade materials that are "informational" in nature. The Berman Amendment, the Free Trade in Ideas Act, and implementing regulations effectively ended the practice of seizing foreign novels, pamphlets, and magazines at the territorial border. As the discussion that follows demonstrates, however, some significant restrictions on the cross-border exchange of information remain in place.

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116 *See* Cernuda v. Heavy, 720 F. Supp. 1544, 1546, 1549 (S.D. Fla. 1989).

117 *See id.* at 1554 (rejecting an agency interpretation that artwork did not constitute informational material).

118 *See* Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1014–15 (S.D.N.Y. 1990) (holding that an OFAC interpretation regarding broadcasts was reasonable).

119 Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (codified as amended at 12 U.S.C. § 95a (4) (2006), 50 U.S.C. § 1702 (2006)).

120 12 U.S.C. § 95a(4). Notwithstanding this legislative history, OFAC continues to limit some forms of collaboration with foreign publishers, including government officials from foreign nations. *See* Tracy J. Chin, Note, *An Unfree Trade in Ideas: How OFAC's Regulations Restrain First Amendment Rights*, 83 N.Y.U. L. REV. 1883, 1890 (2008) (critiquing agency interpretations limiting collaboration with some foreign publishers); *see also* 31 C.F.R. § 515.577(a) (stating that the general license for publishing does not apply to publishing activities by the "Government of Cuba"); *id.* § 500.206(c) (stating that the exemption does not apply to "substantive or artistic alteration" of materials).

2. The Tariff Act and "Immoral" Materials

Customs and immigration officials still possess broad authority under the Tariff Act of 1930[121] to conduct border searches and to seize any unauthorized items of commerce.[122] The Tariff Act expressly restricts the importation of certain "immoral" articles of commerce.[123] The law attempts to track First Amendment doctrines by distinguishing between protected and unprotected materials. Thus, among other things the Tariff Act bans the importation of materials that incite insurrection, convey a true threat, constitute obscenity, may be used to procure an unlawful abortion, or advertise a lottery.[124] Pursuant to the authority granted by the Tariff Act, customs agents have seized books, newspapers, and other materials from journalists and authors that were deemed subversive or obscene.[125]

As a manifestation of the fact that the First Amendment operates differently at the border, certain provisions of the Tariff Act vest broad discretion in the Secretary of the Treasury. For example, despite the import ban applicable to "immoral" and illegal items, the Act allows the Secretary to permit importation of "the so-called classics or books of recognized and established literary or scientific merit."[126] Regulations also purport to authorize the Secretary to release a book initially seized as "obscene" to its original consignee—if the Secretary is satisfied that the book is a "classic" or has "recognized and estab-

121 19 U.S.C. §§ 1202–1681b (2006).

122 *See id.* § 1305.

123 *Id.* § 1305(a).

124 *Id.* The prohibition reads, in relevant part:

> All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery.

*Id.*

125 Neuborne & Shapiro, *supra* note 15, at 733. In 1973, the Supreme Court held that the Tariff Act was constitutional as applied to the importation of obscene materials for private use. United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 139 (1973).

126 19 U.S.C. § 1305(a).

lished literary or scientific merit."[127] It is not clear whether, and if so, how often, such discretionary authority has actually been exercised. The "classics" provisions do not appear to have been challenged in any court.

The territorial infrastructure relating to broad customs authority to seize certain materials remains largely intact. As noted earlier, the Tariff Act provides ample authority to restrict the importation of illegal items of commerce. Customs officials continue to search materials and seize illegal items at the territorial borders. However, broad exemptions for "informational materials" have substantially limited the materials subject to seizure at the borders. Of course, today much of this material travels across borders in digital form. This does not mean that it is exempt from regulation or seizure; but it has become far more difficult to regulate. I will consider digitization's effect on the territorial First Amendment in Part III.[128]

### 3. Border Searches and New Technologies: A First Amendment "Exception"?

The era of the personal computer has raised some new concerns regarding the territorial First Amendment. In a globalized society, international travelers routinely carry computing devices, which are typically filled with expressive material, at the border. The question has arisen whether the First Amendment requires an exception to the broad search and seizure authority customs officials possess at the nation's borders.

Ordinary Fourth Amendment requirements, such as probable cause and the issuance of warrants, do not generally apply to routine searches and seizures at the border.[129] As the Supreme Court has said, "[i]t is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity."[130] At least since the framing of the Fourth Amendment, Congress has delegated broad authority to customs officials to search persons and items at the border.[131]

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127 19 C.F.R. § 12.40(g) (2009).

128 *See infra* Part III.A.2.

129 *See* United States v. Flores-Montano, 541 U.S. 149, 152 (2004) ("The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.").

130 *Id.* at 153.

131 The current version of the customs statute is expansive:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters . . . or at any other authorized place . . . and examine the manifest and other docu-

Although most of the constitutional concerns regarding border searches relate to the Fourth Amendment, serious First Amendment issues can also arise. As we have seen, information and ideas flow across the border in many different forms. Traditionally, this has included written and recorded materials. In *United States v. Ramsey*,[132] the Supreme Court held that the probable cause and warrant requirements did not apply to the opening of incoming international letter-class mail by customs officials.[133] Such searches were deemed reasonable merely by virtue of their location.[134] The *Ramsey* Court summarily dismissed any First Amendment concerns, reasoning that the detailed regulatory restrictions on opening letter mail negated any concern regarding the chilling of expression.[135] "Accordingly," the Court said, "we find it unnecessary to consider the constitutional reach of the First Amendment in this area in the absence of the existing statutory and regulatory protection."[136]

*Ramsey* thus declined an invitation to de-territorialize constitutional scrutiny of border searches involving expressive materials. The invitation has recently been proffered anew—and again declined—in cases involving more modern forms of communication. Laptops and other computing devices now routinely carried by international travelers contain private and expressive material including diaries, medical information, personal correspondence, and financial records. Travelers subjected to warrantless border searches have challenged the searches on both Fourth Amendment and First Amendment grounds.

So far, courts have refused to recognize any First Amendment exception to the broad border search authority of customs and other officials.[137] In *United States v. Ickes*,[138] Mr. Ickes attempted to enter the United States from Canada.[139] When U.S. Customs agents searched

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ments and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board . . . .

19 U.S.C. § 1581(a).

132 431 U.S. 606 (1977).

133 *See id.* at 619.

134 *See id.* ("Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside.").

135 *Id.* at 623.

136 *Id.* at 624.

137 This would be in the nature of an exception to an exception, in that the First Amendment would dictate that courts not follow the border search exception to the warrant and probable cause requirements.

138 393 F.3d 501 (4th Cir. 2005).

139 *Id.* at 502.

his van, they found several images of child pornography stored in photo albums and on Ickes's computer.[140] The court upheld the warrantless search of Ickes's computer under the Fourth Amendment's border search exception.[141] It also rejected Ickes's argument that the bare "reasonableness" standard was not appropriate as applied to "expressive" material.[142] To hold otherwise, the court said, would "create a sanctuary at the border for all expressive material—even for terrorist plans."[143] It would also, said the court, create "significant headaches" for those required to determine the scope of the proposed exception.[144] "These sorts of legal wrangles at the border," the court said, "are exactly what the Supreme Court wished to avoid by sanctioning expansive border searches."[145]

In *United States v. Arnold*,[146] the Ninth Circuit reached the same conclusion. Customs officers at Los Angeles International Airport examined the contents of Arnold's laptop computer without reasonable suspicion.[147] After requiring Arnold to boot up the computer, agents clicked on two desktop folders labeled "Kodak Pictures" and "Kodak Memories."[148] Believing that these folders contained images of child pornography, the agents referred Arnold to U.S. Department of Homeland Security and immigration officials for interrogation.[149] Arnold, who had traveled from the Philippines, was later charged with knowingly transporting images of child pornography in foreign commerce.[150] The Ninth Circuit held that reasonable suspicion was not required to conduct a search of Arnold's laptop at the "functional equivalent" of the international border.[151] The court held that the search was not sufficiently intrusive of privacy concerns to require any degree of suspicion.[152] With regard to Arnold's argument that the First Amendment required some level of suspicion prior to search, the

140 *Id.*

141 *Id.*

142 *Id.* at 506.

143 *Id.*

144 *Id.*

145 *Id.*

146 533 F.3d 1003 (9th Cir. 2008).

147 *Id.* at 1005.

148 *Id.*

149 *Id.*

150 *Id.*

151 *See id.* at 1006, 1008. The Supreme Court has stated that international airports are the "functional equivalent" of the border. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

152 *Arnold*, 533 F.3d at 1009.

Ninth Circuit simply reiterated and adopted the reasoning of the Fourth Circuit in *Ickes*.[153]

In this context, at least, it is apparent that globalization and digitization have not altered the territorial First Amendment. Expressive interests are enforced differently, if at all, at the territorial borders.[154] Like other border searches, warrantless and suspicionless searches of computing devices have been deemed valid merely by virtue of their location. This is so despite the fact that the search of computing devices is in some cases a more substantial invasion than, say, a search of papers or international mail.

### 4. Export Administration

A variety of technical regulations restrict the cross-border exchange of certain types of otherwise lawful speech and information. The Export Administration Act of 1979[155] (EAA), a successor to earlier and much more stringent Cold War export control laws, provides the current statutory authority for export controls on sensitive materials and technologies, some of which have both civilian and military applications.[156] Other federal laws and regulations restrict or prohibit the cross-border exchange of military materials.[157] The common purpose of these laws is to regulate, generally through a system of licensure, any exchanges of information that could be detrimental to the security of the United States.[158]

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153 *See id.* at 1010; *see also* United States v. Seljan, 547 F.3d 993, 1011–12 (9th Cir. 2008) (Callahan, J., concurring) (affirming that there is no First Amendment exception to border search authority).

154 *But see* Tabbaa v. Chertoff, 509 F.3d 89, 101–02 & n.5 (2d Cir. 2007) (applying ordinary First Amendment standards to a claim that border detention violated associative rights, but noting that less rigorous scrutiny may be appropriate in the border context).

155 Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. app. §§ 2401–2420 (2006)).

156 The EAA, which originally expired in 1989, has been periodically reauthorized for short periods of time. IAN F. FERGUSSON, CONG. RESEARCH SERV., THE EXPORT ADMINISTRATION ACT 1 (2009), *available at* http://www.fas.org/sgp/crs/secrecy/RL31832.pdf. At other times, including currently, the export licensing system created under the authority of the EAA has been continued by the invocation of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1707 (2006). FERGUSSON, *supra*, at 1.

157 The International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. §§ 2751–2799aa-2 (2006), which is administered by the Departments of State and Defense, regulates this material.

158 *Cf.* Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915, 916–918 (7th Cir. 1984) (upholding, under commercial speech standard, the application of EAA and imple-

The EAA prohibits the sharing, without a license, of "information and know-how (whether in tangible form . . . or in intangible form . . .) that can be used to design, produce, manufacture, utilize, or reconstruct goods, including computer software and technical data."[159] According to the most recent figures, there are approximately 2400 dual-use items on what is known as the "Commerce Control List," which is compiled pursuant to export control regulations.[160] Owing to their dual-use capabilities, computers, computer technology, and technological data are of particular concern under the EAA and its implementing regulations.[161]

Under the current Export Administration Regulations (EAR), promulgated pursuant to the EAA, computer software, equipment, and technical data that have both civilian and military applications cannot be exported to certain countries without an export license.[162] A similar license, known as a "deemed export" license, is required whenever sensitive technology is shared with foreign nationals working in U.S. schools or laboratories—apparently on the ground that the foreign national may return home and reproduce the technology there.[163] In effect, the "deemed export" rule moves the territorial border inward and treats exchanges inside the United States as "exports" of restricted technology.

The effect these licensing provisions have on cross-border information exchange and First Amendment liberties may be relatively minor. Most EAR license applications are ultimately approved, and relatively few appear to involve the delicate First Amendment issues raised by the "deemed export" rules (discussed below).[164] Some specific licensing provisions have raised First Amendment issues, how-

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menting regulations to a domestic corporation's provision of business data to a foreign organization).

159 50 U.S.C. app. § 2415.

160 IAN F. FERGUSSON, CONG. RESEARCH SERV., THE EXPORT ADMINISTRATION ACT 8 (2008), *available at* http://www.policyarchive.org/handle/10207/bitstreams/1671.pdf.

161 *See* FERGUSSON, *supra* note 156, at 14–19.

162 *See* 15 C.F.R. §§ 730.1–774.1 (2009). A separate set of regulations, the International Traffic in Arms Regulations, governs military technology and equipment. *See* 22 C.F.R. §§ 120.1–130.17 (2009).

163 *See* 15 C.F.R. § 734.2 (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).

164 *See* FERGUSSON, *supra* note 156, at 10, 18 (noting that in 2008, officials approved 84% of all license applications and that in 2007, officials reviewed 1056 "deemed export licenses," which constituted 5.4% of all submitted license applications).

ever. For example, export controls relating to technical data have raised concerns regarding licensure of computer code and other expressive technologies.[165] Some of these constitutional concerns have been resolved or substantially ameliorated through amendment of the EAR. For example, earlier versions of the EAR applicable to source and encryption computer code were successfully challenged as unconstitutional prior restraints on speech.[166] In response both to these legal challenges and international market conditions in which computer source code has become a significant export commodity, the EAR now generally permit the cross-border publication and sharing of computer source code.[167]

Licensing of encryption technology has also been decontrolled under the EAR; today, retail encryption products and technology can be exported to Western countries and nongovernmental end-users pursuant to a general license exemption.[168] The current version of the EAR also contains broad exemptions for "[p]ublicly available" technology; software and other material that "arise[s] during, or result[s] from, fundamental research;" and for educational information.[169] Finally, consistent with the approach taken under other trade laws, the EAR generally exempt from licensure a host of "informational materials" which do not implicate national security and defense concerns.[170]

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165 *See* Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 905–12 (1986) (discussing First Amendment concerns with regard to federal laws regulating the export of technical data). *See generally* E. John Park, *Protecting the Core Values of the First Amendment in an Age of New Technologies: Scientific Expression vs. National Security*, 2 VA. J.L. & TECH. 3 (1997) (discussing the First Amendment implications of federal export controls regarding encryption technology and other scientific expression).

166 *See* Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000) (holding that source code is expressive and remanding for consideration in light of EAR source code amendments); Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132, 1147 (9th Cir. 1999) (holding that source code is expressive and that the EAR constituted an unconstitutional prior restraint), *reh'g granted, opinion withdrawn by* 192 F.3d 1308 (9th Cir. 1999).

167 *See* 15 C.F.R. § 740.17 (authorizing the export of source code to private end-users under license exception, but only after technical review).

168 *Id.*

169 *See id.* § 734.3(b)(3) (exempting "[p]ublicly available" technology and software that arises during or results from "fundamental research"); *id.* § 734.8 (defining "[f]undamental research"); *id.* § 734.9 (defining exempt "[e]ducational information").

170 Specifically, the EAR exempt the following materials:

> Prerecorded phonograph records reproducing in whole or in part, the content of printed books, pamphlets, and miscellaneous publications, including

Although they have liberalized and decontrolled certain aspects of cross-border information exchange, these EAR amendments and exemptions have not resolved all First Amendment issues relating to current export controls.[171] In particular, the First Amendment implications of the "deemed export" regulations have not been tested in court.

The EAR prohibit private parties like universities and research laboratories from sharing information with foreign students without first obtaining a license from regulators.[172] To treat the sharing of information with resident aliens within American research and academic institutions as a restricted "export" may trench upon academic freedom and other fundamental First Amendment interests. The Reagan administration invoked the EAR against scientists and academics who merely delivered academic papers to foreign audiences without first obtaining an export license.[173] Note that the information in question is neither classified nor owned by the government (although some of it has been produced using federal funds).[174] In other contexts, the First Amendment would likely protect one private party from sharing information with another private party—even if there was some possibility that the information might be used for evil or illegal purposes.[175] At the border and its "deemed" equivalent, however, First Amendment considerations may be quite different.[176] The

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> newspapers and periodicals; printed books, pamphlets, and miscellaneous publications including bound newspapers and periodicals; children's picture and painting books; newspaper and periodicals, unbound, excluding waste; music books; sheet music; calendars and calendar blocks, paper; maps, hydrographical charts, atlases, gazetteers, globe covers, and globes (terrestrial and celestial); exposed and developed microfilm reproducing, in whole or in part, the content of any of the above; exposed and developed motion picture film and soundtrack; and advertising printed matter exclusively related thereto.

*Id.* § 734.3(b)(2).

171 For a general discussion of the First Amendment concerns relating to export controls on the exchange of scientific and technical information, see Kamenshine, *supra* note 1.

172 15 C.F.R. § 734.2(b).

173 Neuborne & Shapiro, *supra* note 15, at 741.

174 *See* Kamenshine, *supra* note 1, at 886–90 (discussing regulation of the speech of private grantees under conditional grants).

175 *See, e.g.*, Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 97 (1977) (invalidating municipal ban on posting of "for sale" or "sold" signs on homeowners' properties, put in place to prevent so-called "white flight").

176 *See* Kamenshine, *supra* note 1, at 876 (arguing that regulation of the import and export of scientific and technological information should generally be subject to rational basis review).

territorial First Amendment may permit regulators to control certain information exchanges that implicate national security at the fictional "border" within research institutions.[177]

As in other cross-border contexts, a territorial framework continues to govern export of a variety of materials that may implicate national security. Export controls have been liberalized to some extent to allow for the sharing of nonmilitary informational materials, including some computer code. But export licensure provisions still restrict the exchange of critical digital-era information, including "know-how" and technical data that constitute otherwise lawful expression. Moreover, the "deemed export" rule demonstrates how the territorial border can be redefined or manipulated to restrict otherwise lawful *intraterritorial* information exchange.

### 5. Cross-Border Artistic and Educational Exchanges: The Beirut Agreement

As noted, the territorial First Amendment sometimes implicates cross-border educational and artistic exchanges. The sharing of films, music, books, and other works has sometimes been restricted under U.S. trade laws. In 1949, the United States signed the Beirut Agreement,[178] a multilateral treaty intended to facilitate international dissemination of films and other audiovisual materials of an educational, scientific, and cultural character.[179] Under the agreement and implementing regulations, qualifying materials were exempt from customs duties, import licenses, special rates, quantitative restrictions, and other costs.[180] For many domestic film distributors, these costs can substantially restrict the ability to place materials in foreign commerce.

In order to receive the benefits provided under the treaty, distributors had to obtain a certificate from the appropriate governmental agency in the country of the material's origin attesting to the item's educational, scientific, or cultural character.[181] Until 1999, when its

177 *See* Sunstein, *supra* note 165, at 905–12 (discussing the balance of First Amendment interests and national security concerns under export controls relating to informational exchange).

178 Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, *opened for signature* July 15, 1949, 17 U.S.T. 1578, 197 U.N.T.S. 3.

179 *See id.* Congress passed an implementing statute in 1966, and formal operations under the agreement began in 1967. *See* Joint Resolution of Oct. 8, 1966, Pub. L. No. 89-634, 80 Stat. 879 (formal ratification).

180 *See* Beirut Agreement, *supra* note 178, 17 U.S.T. at 1581–82, 197 U.N.T.S. at 6.

181 *See* 22 C.F.R. § 61 (2009).

functions were transferred to the State Department's Bureau of Educational and Cultural Affairs (BECA), the Beirut Agreement was enforced by the United States Information Agency (USIA).[182] The USIA's implementing regulations required that the agency apply a variety of "substantive criteria" for determining eligibility.[183] One regulation provided that the agency would not certify material that attempted to "influence opinion, conviction or policy;" "espouse a cause;" or "attack a particular persuasion."[184] Another provision denied certification to material "which may lend itself to misinterpretation, or misrepresentation of the United States or other countries."[185]

In 1988, a federal appeals court invalidated these regulations on the ground that they were content-based restrictions on speech that did not serve any compelling government interest.[186] The USIA then promulgated new regulations.[187] After these too were challenged as violating the First Amendment, the President signed into law the Foreign Relations Authorization Act.[188] The Act provides that the agency may not deny a customs exemption to materials because they advocate a particular position or viewpoint, might lend themselves to misinterpretation or to misrepresentation of the United States, are not representative, authentic, or accurate, do not augment international understanding or goodwill, or are in the opinion of the agency "propaganda."[189] The House Report accompanying the bill explains that the legislation is intended to ensure that U.S. obligations under the Beirut Agreement "are carried out in a manner that is consistent with the spirit of the Agreement and with the First Amendment to the Constitution of the United States."[190] Current regulations still allow for some minimal content review of materials. For example, officials may deny an exemption for materials that fail to "maintain, increase or

182 *Compare* 22 C.F.R. § 502.1 (1999) ("The [USIA] administers the 'Beirut Agreement of 1948' . . . ."), *with* 22 C.F.R. § 61.1 (2000) ("The Department of State administers the 'Beirut Agreement of 1948' . . . .").

183 22 C.F.R. § 502.6 (1988).

184 22 C.F.R. § 502.6(b)(3) (1987) (repealed).

185 *Id.* § 502.6(b)(5) (repealed).

186 *See* Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 512 (9th Cir. 1988).

187 *See* Propaganda as Educational and Cultural Material; World-Wide Free Flow (Export-Import) of Audio-Visual Materials, 52 Fed. Reg. 43,753, 43,757 (Nov. 16, 1987).

188 Pub. L. No. 102-138, 105 Stat. 647 (1991) (codified at 19 U.S.C. § 2051 (2006)).

189 19 U.S.C. §§ 2051(1)–(5).

190 H.R. Rep. No. 102-53, at 65–66 (1991), *reprinted in* 1991 U.S.C.C.A.N. 384, 419–20.

diffuse knowledge"[191] or "[have] as [their] primary purpose or effect to amuse or entertain."[192]

By signing the Beirut Agreement, the United States committed to facilitate cross-border exchange of artistic and educational materials. Although some content review is still authorized under agency regulations, courts have reviewed agency viewpoint discrimination with great skepticism. With judicial encouragement, the political branches have sought to bring enforcement of the Beirut Agreement into compliance with First Amendment standards.

6. Dissemination of Foreign "Propaganda"

As noted, during certain historical periods the United States has sought to erect territorial barriers to the dissemination of foreign ideas. This wariness with regard to foreign ideas and influences continues to be manifested in restrictions on the dissemination of certain foreign content inside the United States.

For example, the Foreign Agents Registration Act[193] (FARA) regulates the importation and dissemination of certain foreign books, films, and periodicals, including some materials not covered by TWEA. FARA was initially intended to restrict the importation of foreign political propaganda, in particular Nazi-sponsored materials.[194] FARA does not bar dissemination of foreign material. Rather, it requires that foreign "agents" register with the United States Attorney General and file with that office any "informational materials" that are to be distributed for or in the interest of foreign principals.[195]

At various historical junctures, FARA, like TWEA, was applied broadly to restrict the cross-border flow of informational materials. In the early 1980s, for example, FARA was enforced against the importers of three Canadian films that concerned acid rain and the threat of nuclear war.[196] In an enforcement challenge brought by the films' distributors, the Supreme Court rejected a First Amendment challenge to FARA's requirement that "foreign political propaganda" be labeled as such prior to distribution in the United States.[197] The Court concluded that Congress had not thereby burdened or substantially chilled the domestic dissemination of foreign speech; rather, it

191 22 C.F.R. § 61.3(b)(1) (2009).

192 *Id.* § 61.3(b)(4); *see also id.* § 61.3 (setting forth certification standards).

193 22 U.S.C. §§ 611–621 (2006).

194 *See* Neuborne & Shapiro, *supra* note 15, at 735.

195 22 U.S.C. §§ 612, 614; *see* Neuborne & Shapiro, *supra* note 15, at 736 (describing enforcement under the Act).

196 *See* Meese v. Keene, 481 U.S. 465, 475 (1987).

197 *Id.* at 480–81.

had "simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."[198]

Rodney Smolla, among others, has strongly assailed the Court's reasoning.[199] He traces the "foreign political propaganda" restrictions to the "ugly history" of the Alien and Sedition Acts of 1798, and more generally to a history of xenophobia and fear of foreign ideas.[200] But according to the Court the territorial First Amendment does not preclude the government from regulating, and perhaps implicitly commenting upon the value of, foreign speech that crosses the border. Commentators have noted, however, that FARA has been plagued by a variety of enforcement problems.[201] Thus, it does not appear that FARA substantially affects distribution of foreign propaganda materials in the United States.

### 7. Cross-Border Contacts and Associations

Finally, the territorial First Amendment limits the extent to which domestic persons may associate with foreign persons, entities, and organizations. In general, U.S. citizens and resident aliens have the right to speak to and associate with resident aliens and foreign entities located within U.S. territorial borders, assuming of course that such persons and entities are lawfully present and are not engaged in illegal activity. With regard to cross-border contacts, criminal laws proscribe a variety of illegal associations. As noted earlier, citizens and resident aliens have no First Amendment right to hear or associate in person with a foreign speaker who has been denied entry to the United States (although they have the right to receive information from foreign persons and organizations through other means).[202] National surveillance programs have apparently ensnared telephone and other communications between domestic speakers and foreign contacts; however, First Amendment challenges to such surveillance activities have generally failed for lack of standing.[203]

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198 *Id.* at 480.

199 *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 361–67 (1992).

200 *Id.* at 363–64.

201 *See* Charles Lawson, Note, *Shining the 'Spotlight of Pitiless Publicity' on Foreign Lobbyists? Evaluating the Impact of the Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT'L L. 1151, 1164–67 (1996) (discussing FARA enforcement problems).

202 *See supra* notes 23, 38–42 and accompanying text.

203 *See* ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 667–73 (6th Cir. 2007) (holding that the plaintiffs lacked standing to challenge the surveillance program on First Amendment grounds).

U.S. laws restrict the right to associate with foreign persons and entities in certain designated contexts. For example, spending conditions placed on foreign aid may affect the ability of domestic persons and organizations to associate with foreign activists and collaborators.[204] U.S. law also restricts the extent to which domestic citizens and resident aliens may represent foreign entities and interests *inside* the United States. For example, the Foreign Missions Act[205] authorizes the State Department to regulate foreign missions in the United States and to close them if "necessary to protect the interests of the United States."[206] The D.C. Circuit has held that U.S. citizens and resident aliens do not have a First Amendment speech or association right to represent a foreign entity on U.S. soil.[207] The court cited national security and foreign policy considerations as grounds for granting broad deference to agency decisions regarding such foreign contacts.[208]

The closure of a foreign mission does not restrict the ability to otherwise associate with foreign entities or to advocate their causes. However, terrorism-related laws impose substantial restrictions on contacts, collaboration, and cross-border advocacy. Specifically, federal laws and regulations restrict the financial and other support domestic persons and organizations may provide to foreign entities that have been designated "foreign terrorist organizations."[209]

The Antiterrorism and Effective Death Penalty Act of 1996,[210] as amended by the USA PATRIOT Act, prohibits the provision of "training," "expert advice and assistance," "financial services," "personnel," and other forms of assistance to designated terrorist organizations.[211] Several courts have rejected First Amendment, vagueness, and overbreadth challenges to the State Department's "foreign terrorist organ-

204 *See* DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 277, 282, 299 (D.C. Cir. 1989) (upholding family planning aid restrictions that allegedly interfered with the right of domestic organizations to associate with foreign organizations).

205 22 U.S.C. §§ 4301–4316 (2006).

206 *Id.* § 4305(b)(3).

207 *See* Palestine Info. Office v. Shultz, 853 F.2d 932, 941 (D.C. Cir. 1988) (upholding a State Department order closing a Palestinian mission).

208 *See id.* at 942 ("[O]ur deference to the State Department on questions of foreign policy is great.").

209 *See* 8 U.S.C. § 1189(a) (2006).

210 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 42, and 50 U.S.C.).

211 *See* 18 U.S.C. § 2339A(b)(1) (2006) (defining "material support or resources"); *id.* §§ 2339B(a)(1), (g)(4) (prohibiting the provision of various forms of "material support or resources" to foreign terrorist organizations).

ization" designations.[212] Some courts have held, however, that certain statutory definitions of prohibited "material support" to such organizations are unconstitutionally vague or overbroad.[213]

The government undoubtedly has the power to apply the material support prohibitions to conduct that facilitates terrorist activity. But the law as written appears to go much further. Indeed, as interpreted by the government, the restrictions would appear to prohibit U.S. residents from engaging in even pure political speech—i.e., assisting with the filing of United Nations claims and providing training in the use of international and humanitarian law—that promotes lawful and nonviolent activity.[214]

The obvious goal of the material support prohibition is to prevent contacts with and assistance to foreign organizations that are a threat to national security. The territorial First Amendment permits the government to regulate foreign contacts that are intended to facilitate terrorist activity or pose other national security threats. Whether, or to what extent, it may do so by targeting the communications or associations themselves is an issue the Supreme Court will likely soon decide.[215]

## II. THE EXTRATERRITORIAL FIRST AMENDMENT

The relationship between territory and the First Amendment extends beyond, and indeed is far more complex than, the regulatory concerns represented by the territorial First Amendment. Globalization, digitization, and other social and political forces have called into question some longstanding suppositions about the First Amendment's territorial scope or domain. As territorial borders have become softer in a regulatory sense, they have also begun to fade somewhat as markers of the First Amendment's spheres of application and influence. The issues addressed in this Part relate primarily to

212 *See, e.g.*, Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 736–37 (D.C. Cir. 2007) (upholding OFAC designation of a group as a branch of a "Specially Designated Global Terrorist"); United States v. Hammoud, 381 F.3d 316, 357 (4th Cir. 2004) (upholding a conviction for materially supporting a designated foreign terrorist organization); Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 85 (D.D.C. 2002) (upholding the designation of a Muslim group as a foreign terrorist organization).

213 *See* Humanitarian Law Project v. Mukasey, 552 F.3d 916, 928–31 (9th Cir. 2009) (upholding in part and invalidating in part definitions of various forms of assistance rendered to foreign terrorist organization), *cert. granted sub nom.*, Holder v. Humanitarian Law Project, 130 S. Ct. 48 (2009).

214 *Id.*

215 *See id.*

the relationship between the First Amendment and persons or activities beyond U.S. territorial borders. This is the First Amendment's *extraterritorial* dimension.

First Amendment norms and standards can cross borders in a variety of ways. For example, courts and lawmakers in countries outside the United States may be persuaded by and therefore adopt American speech principles and doctrines.[216] The process of norm transmission is an important aspect of the First Amendment's territorial dimension, one to which I will return in Part III. This Part examines four specific ways in which U.S. officials might expand the influence and scope of the First Amendment. It considers efforts or proposals to (1) extend U.S. laws, including the statutory framework for protection of intellectual property, beyond U.S. borders; (2) shield speakers and publishers in the United States from foreign libel judgments obtained abroad, hence exporting First Amendment libel standards; (3) export First Amendment norms through regulations of U.S. technology companies, diplomacy, export controls, and funding; and (4) export the First Amendment's substantive protections to restrictions on speech, press, and associational activities abroad, for the benefit of U.S. citizens, aliens, or both.

### *A. Regulating Foreign Speech*

The global scale of communications and the globalization of commerce have given rise to concerns regarding the extraterritorial reach of domestic speech laws. The once-clear line between domestic and foreign speech has begun to blur. Speech that is created in, and disseminated from, one corner of the world now routinely and effortlessly crosses international borders. Moreover, speech that originates and is disseminated in one nation can have substantial negative effects on persons, businesses, and organizations located across the globe.[217]

To what extent can U.S. laws be applied to foreign expression? The digitization of expression has produced two basic schools of thought regarding the traditional regime of territorial governance.[218] As David Post has observed, "unexceptionalists," as the label implies,

216 For a general consideration of the merits of First Amendment importation, see IMPORTING THE FIRST AMENDMENT (Ian Loveland ed., 1998) (examining freedom of speech in Britain, Europe, and the United States).

217 *See* Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 885, 952–53 (2004) (noting that some courts have been willing to "treat [trademark] doctrine more flexibly in order to accommodate the demands of global commerce").

218 The dilemma obviously extends beyond expressive concerns. Purely commercial activity, for example, may similarly be affected, chilled, or deterred.

do not consider it at all unusual that a nation would apply its speech laws to content that crosses its borders—even though it crosses many national borders at once.[219] Even in the digital era, unexceptionalists reason, national sovereignty encompasses the power to regulate and prohibit expression that crosses sovereign borders. This authority exists whether the expression happens to traverse borders digitally or by more traditional means, such as by mail.

"Exceptionalists," by contrast, claim that the Internet has fundamentally altered traditional conceptions of territorial governance.[220] Given that the Internet has essentially erased territorial borders, exceptionalists argue, the territorial model is no longer viable.[221] They insist that a speaker who uses the Internet ought not to be forced to comply with the obscenity, libel, hate speech, and other speech laws in force across the globe.[222] According to exceptionalists, a healthy, robust, global marketplace of ideas requires that we rethink and indeed replace traditional territorial governance models. What is needed, according to some exceptionalists, is a *uniform* global expressive standard.[223] As Post says: "Global law for a global Internet."[224]

This debate is hardly theoretical. For example, a French court ordered Yahoo! Inc. to remove Nazi paraphernalia from its U.S. servers so that French consumers would not be able to purchase them.[225] Although the material in question was protected by the First Amendment inside U.S. territory, the company was ordered to comply with *French* speech laws by making it unavailable inside France's borders.[226] The *Yahoo!* case highlights the burdens that may be placed on a speaker in the global marketplace. Without uniform laws on subjects such as hate speech, the speaker may be subject to liability in multiple jurisdictions. As exceptionalists claim, the problem is that each country may impose extraterritorial duties on speakers. As Post argues: "Unexceptionalist logic leads inexorably to the conclusion that (just about) everything you do on the Web may be subject to (just about) everybody's law."[227]

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219 DAVID G. POST, IN SEARCH OF JEFFERSON'S MOOSE 166–67 (2009).

220 *Id.* at 167–69.

221 *Id.* at 167–68.

222 *Id.*

223 *See id.* at 170.

224 *Id.*

225 *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1201–04, 1224 (9th Cir. 2006) (en banc) (plurality opinion) (dismissing a declaratory judgment action filed by Yahoo! on ripeness and jurisdictional grounds).

226 *See id.* at 1201–04.

227 POST, *supra* note 219, at 167.

The *Yahoo!* case demonstrates one way in which foreign laws might be imported to U.S. territories. The flip side of this scenario involves a situation in which speakers located outside U.S. borders are subjected to First Amendment laws and standards. Suppose a website operator in Thailand produces and distributes, via the Internet, a film depicting animal cruelty—an activity that is perfectly legal in the jurisdiction of origin but may violate U.S. law.[228] A U.S. law that criminalizes distribution of such depictions can presumably be applied to a foreign website operator, assuming she is present in the United States. The Thai speaker forced to comply with speech laws across the globe, including those in the United States, occupies essentially the same position as Yahoo! in its contest with French authorities. Assuming she cannot geographically target her content (as Yahoo! claimed it could not in the litigation), the speaker may be chilled from communicating the information at all or may feel compelled to alter the expression to meet U.S. speech standards. In this situation, the First Amendment has some extraterritorial impact.[229]

In the above example, one might argue that there is no exportation of First Amendment standards. After all, the speech has entered U.S. borders and is subject to U.S. laws on that basis. Exportation is perhaps clearer when U.S. laws are applied beyond the territory of the United States based either upon a clear congressional intent to legislate extraterritorially or based upon the intraterritorial effects produced by foreign expression.[230] Although there is a longstanding presumption against extraterritorial application of U.S. laws, several

228 The facts are similar to those in a case now pending before the Supreme Court. *See* United States v. Stevens, 533 F.3d 218, 220–21, 235 (3d Cir. 2008) (en banc) (invalidating a federal law barring depictions of animal cruelty, even when the depictions were legal in the place or territory of origin), *cert. granted*, 129 S. Ct. 1984 (2009); *see also* Adam Liptak, *First Amendment Claim in Cockfight Suit*, N.Y. TIMES, July 11, 2007, at A13 (describing a lawsuit filed by a company that broadcasts cockfights that challenges the constitutionality of the federal law that makes it a crime to sell depictions of animal cruelty).

229 Of course, the discussion assumes that the speaker will either be present within the United States or will have sufficient contacts with the country to make enforcement of any judgment against it possible. That may not be true in many cases, particularly those involving individual speakers rather than multinational corporations. Moreover, U.S. speech laws are quite liberal relative to those of other countries. It may be a relatively rare case in which expression that is legal in its country of origin nevertheless violates U.S. laws. But on such occasions, like the one hypothesized, where U.S. law may chill or prohibit speech that is legal elsewhere, the question of the First Amendment's territorial domain is squarely presented.

230 *See* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 111–15 (2009) (discussing the rise of extraterritorial application of U.S. laws).

federal laws, including provisions relating to employment, securities, and antitrust, have been given extraterritorial effect.[231]

Intellectual property laws regulate and in some cases restrict the sharing of ideas and information. Patent, copyright, and trademark laws are important components of the system of free expression in the United States. Although they are sometimes in sharp tension with First Amendment principles,[232] these laws seek to balance rights in intellectual property with the free flow of information.[233] Intellectual property is produced and regulated in an increasingly complex international system. The sole question here is: to what extent is the domestic balance manifested in U.S. intellectual property laws applicable beyond U.S. borders?

For the most part, U.S. intellectual property laws remain territorially bounded. Copyright and patent laws generally have no direct extraterritorial effect; courts have held that these laws may reach foreign conduct only when that conduct actively induces or contributes to infringements occurring within U.S. territory.[234] In other words, there must be an act of infringement within the United States for patent or copyright laws to apply. Although some commentators have argued that globalization and digitization require a more liberal approach to territoriality, thus far a strict territorial approach has largely been retained in the copyright and patent areas.[235] In contrast to other areas in which laws have been given express extraterritorial reach, the United States has sought protection for domestic copyright

231 *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248, 258 (1991) (reaffirming the territorial presumption); Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 511–13 (1997) (discussing the presumption against extraterritorial application of U.S. laws).

232 For an analysis of the tension between intellectual property rights and the First Amendment, see DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (2009).

233 *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("Indeed, copyright's purpose is to *promote* the creation and publication of free expression.").

234 *See* Bradley, *supra* note 231, at 523, 526. Patent law was given some limited extraterritorial application in 1984. *See* 35 U.S.C. § 271(f) (2006) (providing that exportation of unassembled components of patented invention is an infringement if the exporter actively induces assembly of the device outside the United States). *But see* Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 457–59 (2007) (applying the presumption against extraterritoriality despite the enactment of § 271(f)).

235 *See* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 477–89 (2000) (considering the effect of the Internet on copyright and territoriality); Timothy R. Holbrook, *Extraterritoriality in U.S. Patent Law*, 49 WM. & MARY L. REV. 2119, 2128 (2008) (arguing that absent any conflict with foreign law, U.S. courts should generally be willing to enforce patents extraterritorially).

and patent interests primarily in the international arena, through the negotiation of treaties and agreements.[236]

Trademark laws have been treated differently, however. In *Steele v. Bulova Watch Co.*,[237] the Supreme Court held that the Lanham Act[238] applied to the conduct of a U.S. citizen who had allegedly affixed a trademark to watches sold in Mexico.[239] Some lower courts have not interpreted the extraterritorial reach of the Lanham Act quite so expansively. These courts apply a balancing test that considers the domestic effects of the defendant's conduct, the defendant's citizenship, and the likelihood of a conflict between U.S. and foreign intellectual property law.[240] As Curtis Bradley notes, the effect of this ad hoc balancing is that "the extraterritorial scope of the Lanham Act varies to some extent from circuit to circuit."[241] Bradley argues that the extraterritorial application of trademark law is inconsistent with the presumption against extraterritoriality, public international law, and separation of powers principles.[242] Under the balancing test mentioned above, courts have tended to limit the extraterritorial reach of the Lanham Act, particularly where the plaintiff cannot demonstrate that the foreign activity had "substantial effects" within the United States.[243]

In both indirect and direct ways, the First Amendment can have some limited extraterritorial impact on foreign expression. Foreign speakers, particularly those that broadcast messages on the Web, must at least be cognizant of U.S. and other national laws and may be subject to them. U.S. intellectual property laws have some limited extraterritorial reach as well. The critical question with regard to extraterritorial application in these contexts is whether the foreign conduct produces some intraterritorial effects or consequences that the United States is entitled to prevent or punish. This "effects test," which permits a sovereign to regulate the conduct of persons not within its allegiance when such conduct has disfavored domestic

236 RAUSTIALA, *supra* note 230, at 121.

237 344 U.S. 280 (1952).

238 15 U.S.C. §§ 1051–1127 (2006).

239 *Steele*, 344 U.S. at 284–86. The defendant had purchased component parts in the United States and some of the watches had turned up in the United States. *Id.* at 285.

240 Bradley, *supra* note 231, at 528–29.

241 *Id.* at 529.

242 *Id.* at 531, 546–50, 562–65.

243 *See, e.g.*, Int'l Café, S.A.L. v. Hard Rock Café Int'l (U.S.A.), Inc., 252 F.3d 1274, 1278–79 (11th Cir. 2001) (refusing to apply the Lanham Act to foreign conduct where the plaintiff failed to demonstrate substantial effects within United States, aside from the earning of royalties and commissions).

effects, has long been used by U.S. officials and courts to reach foreign conduct.[244] It has become increasingly salient in the globalization era. As speech continues to become digitized, we might expect to see increased reliance upon the effects rationale in order to reach foreign speech, expressive commerce, and information sharing.

### *B. Libel Tourism: Extraterritorial Application of* New York Times Co. v. Sullivan

As noted, in the digital era, expression is often transmitted across the globe in a matter of seconds. A newspaper report on a U.S. website may be distributed to a global readership. A book published in the United States may be sold over the Internet in countries across the world. Some of these publications may contain allegedly defamatory statements or materials. Without a uniform or global libel law, a speaker faces potential liability pursuant to the libel laws of every nation in which publication occurs.

With increasing frequency, plaintiffs have sought and obtained judgments against U.S. authors under foreign libel laws that are less speech protective than U.S. laws. With regard to public officials and public figures, *New York Times Co. v. Sullivan*[245] requires that a plaintiff prove that the defendant uttered false statements with "actual malice," which is defined as knowledge of or reckless disregard as to falsity.[246] Owing to the United Kingdom's plaintiff-friendly libel laws, which place the burden on the defendant to prove truthfulness, Britain has been the most common forum chosen for pursuing libel suits against American speakers.[247] Critics have labeled the practice of obtaining (and seeking to enforce) foreign libel judgments "libel tourism."[248]

U.S. authors may have substantial grounds for concern and complaint. U.K. courts have entered libel judgments against foreign authors even when neither the authors nor the plaintiffs had particularly strong contacts with the jurisdiction. In one notorious case, a British court entered a libel judgment against a U.S. author whose book was sold over the Internet in very small quantities in the United Kingdom.[249] This phenomenon has prompted concerns in the

244 *See* RAUSTIALA, *supra* note 230, at 102–04 (discussing the origins of the effects test).

245 376 U.S. 254 (1964).

246 *Id.* at 279–80.

247 *See* Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 663 (Sup. Ct. 1992) (describing English libel law).

248 *See* Ehrenfeld v. Mahfouz, 518 F.3d 102, 104 (2d Cir. 2008).

249 *See id.* at 103–05 (affirming dismissal on the ground that the court lacked jurisdiction over the foreign judgment plaintiff).

United States regarding the possible chilling effects libel tourism might have on U.S. authors, scholars, and journalists, particularly those who research and write about matters of global concern.

The issue here is similar to that raised in the *Yahoo!* case discussed earlier: in a globalized and digitized world, does or should the First Amendment shield domestic speakers from less protective speech laws abroad? Courts in the United States have generally refused to enforce foreign libel judgments on the ground that they contravene the First Amendment and are thus contrary to public policy.[250] Although courts generally appear to assume that judicial enforcement of foreign libel judgments would constitute state action that violates the First Amendment, this premise may well be false.[251] In any event, courts have generally refused to permit the importation and enforcement of foreign libel judgments.

U.S. authors and publishers, still concerned that the foreign judgments remain enforceable in the issuing country and eager in any event to clear their names, have obtained additional protection from state and federal legislatures. New York enacted the Libel Terrorism Protection Act,[252] which provides that courts in New York need not recognize foreign libel judgments entered without the full protections granted under the First Amendment.[253] Illinois has enacted a similar

250 *See* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 478–80 (2d Cir. 2007); Matusevitch v. Telnikoff, 877 F. Supp. 1, 4–6 (D.D.C. 1995); Telnikoff v. Matusevitch, 702 A.2d 230, 240–51 (Md. 1997); *Bachchan*, 585 N.Y.S.2d at 663–65 (denying the enforcement of a British libel judgment under New York law because the judgment was not issued with the protections for free speech required by the U.S. and New York Constitutions); *cf.* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1189–90 (N.D. Cal. 2001) (holding unenforceable a French judgment requiring a service provider to remove Nazi-related items from its website), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (en banc).

251 Scholars have disagreed as to whether the enforcement of foreign libel judgments obtained in jurisdictions that do not have First Amendment–like protections for speakers would constitute "state action," thus arguably rendering enforcement unconstitutional. *Compare* Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 186 (2004) (arguing that enforcement would not constitute state action), *with* Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1245 (2007) (arguing that the state action doctrine precludes enforcement of some foreign libel judgments). *See also* 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, 703 (2003) (suggesting that enforcement of foreign judgments might be likened to other generally applicable laws that do not trigger meaningful First Amendment scrutiny).

252 N.Y. C.P.L.R. 302(d), 5304(b)(8) (Consol. 2010).

253 *See* N.Y. C.P.L.R. 5304(b)(8).

law.[254] Congressional proposals would provide similar, and in some cases additional, protections for U.S. speakers subject to foreign libel judgments. A bill in the U.S. House of Representatives provides that "a domestic court shall not recognize or enforce a foreign judgment concerning defamation unless the domestic court determines that the foreign judgment is consistent with the first amendment to the Constitution of the United States."[255] Other pending House and Senate bills would authorize federal court jurisdiction and create a cause of action for a declaratory judgment and substantial money damages on behalf of "[a]ny United States person" sued for defamation in a foreign country if such speech or writing by that person "has been published, uttered, or otherwise disseminated in the United States."[256]

Insofar as treatment of foreign judgments is concerned, the judicial and legislative responses to foreign libel judgments are exceptional. Foreign judgments are routinely enforced in the United States, even where the original claim could not have been maintained, as a matter of law or public policy, inside U.S. territory.[257] Moreover, under traditional conflicts principles, courts generally at least consider the forum's nexus to the dispute.[258] Yet the sweeping American approaches to foreign libel judgments would forbid enforcement even when the United States has a minimal territorial or other nexus to the dispute and the forum nation has a substantial nexus or interest.

For example, in one case a libel judgment was obtained by an English citizen against a journalist for Radio Free Europe/Radio Liberty.[259] The comments at issue were published in an English newspaper.[260] A Maryland court nevertheless refused to enforce the U.K.

254 *See* 735 ILL. COMP. STAT. 5/12-621(b)(7) (2009) (amending the state's version of the Uniform Foreign Money-Judgments Recognition Act to provide for nonenforcement of foreign libel judgments "unless a court sitting in this State first determines that the [foreign] defamation law . . . provides at least as much protection for freedom of speech and the press as provided for by both the United States and Illinois Constitutions").

255 H.R. 2765, 111th Cong. § 2 (2009).

256 S. 449, 111th Cong. § 3 (2009); H.R. 1304, 111th Cong. § 3 (2009). To the extent that the bills purport to assert jurisdiction over any person who has brought a foreign lawsuit against a "United States person," they may violate the Due Process Clause of the Fifth Amendment. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108–16 (1987) (discussing the minimum contacts necessary to assert personal jurisdiction over foreign defendants).

257 *See* Rosen, *supra* note 251, at 176–79 (noting that under conflicts-of-law and constitutional principles, U.S. courts almost always enforce foreign judgments).

258 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 149, 150 (1971) (pointing to the place of publication and the victim's domicile, respectively).

259 Telnikoff v. Matusevitch, 702 A.2d 230, 232 (Md. 1997).

260 *Id.*

judgment, because it found that Maryland and U.K. defamation law were rooted in fundamental public policy differences concerning protection for allegedly libelous speech.[261] The only connection with the United States in that particular case was the fact that the judgment debtor had moved to the United States and had assets there.[262]

Recent state laws and congressional proposals would impose flat bans on recognition of foreign libel judgments, without regard to any balancing of the territorial and sovereign interests of the respective nations. The additional and substantial deterrent of private damages actions in some congressional proposals is clearly intended to prevent foreign plaintiffs from filing libel claims in forums outside the United States, where *Sullivan*'s protections do not apply. Although the United States has a substantial interest in protecting domestic authors and publishers from unfair or unwarranted foreign judgments, extraterritorial application of the First Amendment is not the only or perhaps most appropriate means of pursuing that interest. British libel law may be moving closer to protective First Amendment standards.[263] Moreover, multilateral treaties regarding enforcement of foreign judgments might produce a more coherent and legitimate approach to the treatment of foreign libel judgments by U.S. courts and legislatures.

As things stand, U.S. judicial and legislative approaches to libel tourism may effectively render *Sullivan* applicable to the entire world. As Mark Rosen observes: "Categorically refusing to enforce such Un-American Judgments is tantamount to imposing U.S. constitutional norms on foreign countries."[264] The extraterritorial application of *Sullivan* may be viewed by other nations as a form of rights imperialism. It also raises an important question regarding how the First Amendment ought to be characterized. As one commentator put it, the refusal to enforce foreign libel judgments (and, one might add, efforts to deter them in the first place) may render the First Amend-

261 *Id.* at 249–50.

262 *Id.* at 232.

263 *See* Marin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 CONN. L. REV. 165, 206 (2007) (discussing recent changes in British defamation law); Sarah Lyall, *England, Long a Libel Mecca, Reviews Laws*, N.Y. TIMES, Dec. 11, 2009, at A1 (reporting that British lawmakers are considering rewriting country's libel laws).

264 Rosen, *supra* note 251, at 172.

ment "a universal declaration of human rights rather than a limitation designed specifically for American civil government."[265]

### C. *Exporting First Amendment Values and Norms*

Application of domestic law to foreign speech and refusal to enforce foreign judgments that do not comport with the First Amendment extend the reach or territorial domain of the First Amendment to some extent. There are several other ways in which First Amendment commitments, values, and norms can be applied beyond U.S. territorial borders.

The federal government may use its foreign affairs and spending powers to encourage other nations to adopt First Amendment principles and standards. Rather than impose First Amendment standards on foreign actors, the government may attempt to persuade other nations to adopt First Amendment norms. For example, after World War II the United States engaged in an ultimately unsuccessful attempt to export First Amendment press principles across the globe through the United Nations.[266] It has also funded the development and dissemination of communications technologies abroad, in the hope that this will facilitate free speech, association, and democratic governance on a First Amendment model.[267]

Diplomatic activities, including application of various types of international pressure and persuasion, may gradually result in exportation of U.S. free speech principles. For example, the United States may refuse to sign a treaty or multinational agreement that it deems to be inconsistent with First Amendment values and commitments. It may refuse to send representatives to international conferences whose underlying purpose it deems to be incompatible with First Amendment norms. More affirmatively, the United States has recently articulated a vision of making Internet freedom a plank of its foreign policy.[268] Government officials and nongovernmental activists frequently lobby nations to alter their speech rules. This has occurred,

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265 Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999, 1036 (1994).

266 *See generally* MARGARET A. BLANCHARD, EXPORTING THE FIRST AMENDMENT (1986).

267 *See* BOLLINGER, *supra* note 4, at 102–03 (discussing U.S. investment in international broadcast channels, including Voice of America); Mark Landler, *U.S. Hopes Exports of Internet Services Will Help Open Closed Societies*, N.Y. TIMES, Mar. 8, 2010, at A4 (reporting on Obama administration's efforts to allow export of online services to Iran, Cuba, and Sudan).

268 Mark Landler, *Clinton Makes Case for Internet Freedom as a Plank of American Foreign Policy*, N.Y. TIMES, Jan. 22, 2010, at A6.

for example, in response to the libel tourism phenomenon. In these contexts, the First Amendment may be exported through a process of persuasion, competition, and comparison with other speech regimes.

U.S. officials may also seek to impose First Amendment standards and norms on citizens who travel and work abroad. Consider, for example, the Global Online Freedom Act of 2007[269] (GOFA), a bill introduced in the House of Representatives. GOFA was a response to news reports that American businesses were assisting repressive regimes with Internet censorship and privacy violations. Yahoo! Inc. assisted the Chinese government in efforts to identify (and eventually convict) a Chinese reporter.[270] In 2006, Google announced that it would offer censored versions of its news and search sites in China.[271] Concerned that domestic companies were assisting the repressive Chinese government, legislators sought to restrict or limit the companies' participation in such activities, which were obviously contrary to U.S. speech and privacy norms.

GOFA sought to define certain standards that domestic companies must meet when operating in "Internet-restricting countries."[272] The law, which would authorize both civil and criminal penalties, would limit storage by U.S. companies of certain personal data within such countries and would also limit any disclosures of such information.[273] GOFA would also establish a new agency, the Office of Global Internet Freedom (OGIF), within the U.S. State Department.[274] The law would provide that any filtering or content censoring by U.S. companies that is undertaken at the request of an Internet-restricting country must be disclosed to OGIF.[275] GOFA would also prohibit U.S. companies from participating in any Internet jamming of U.S.-supported websites or content in these countries.[276] The law would provide for a private right of action in any U.S. federal court for any

269 H.R. 275, 110th Cong. (2007).

270 Tom Zeller Jr., *To Go Global, Do You Ignore Censorship?*, N.Y. TIMES, Oct. 24, 2005, at C3.

271 *See* William J. Cannici, Jr., Note, *The Global Online Freedom Act: A Critique of Its Objectives, Methods, and Ultimate Effectiveness Combating American Businesses That Facilitate Internet Censorship in the People's Republic of China*, 32 SETON HALL LEGIS. J. 123, 124–25 (2007) (recounting events leading up to the proposal of GOFA).

272 GOFA requires that a list be made of such countries, based upon evidence that "the government of the country is directly or indirectly responsible for a systematic pattern of substantial restrictions on Internet freedom during the preceding 1-year period." H.R. 275, § 105(a)(2).

273 *Id.* § 201.

274 *Id.* § 104.

275 *Id.* §§ 203–204.

276 *Id.* § 205.

person whose identifying information has been disclosed to an official in an Internet-restricting country, with the potential for recovery of punitive damages.[277]

The findings section of the bill indicates that the drafters and sponsors of GOFA perceive First Amendment freedoms as fundamental human rights, applicable without regard to territorial borders. GOFA's findings express support for the "fundamental human rights" of freedom of speech and freedom of the press.[278] They rely specifically upon Article 19 of the Universal Declaration of Human Rights,[279] which guarantees freedom to "'receive and impart information and ideas through any media *regardless of frontiers.*'"[280] Of course, because Google, Yahoo! Inc., and other technology companies are not state actors, the drafters could not rely directly upon the First Amendment in imposing GOFA's obligations and limitations. They relied instead on what the findings refer to as the "moral responsibility" of these companies to comply with the Universal Declaration of Human Rights.[281] But there is some indication that the drafters and sponsors of the law viewed the First Amendment as operating without regard to territorial borders. The ultimate finding states: "The United States supports the universal right to freedom of speech and freedom of the press."[282] There would seem to be little doubt that the freedoms GOFA contemplates are commensurate with those protected by the First Amendment.

These are merely some examples of the various ways in which U.S. officials may seek to extend First Amendment norms and principles abroad without formally applying or extending U.S. laws. Note that in these specific contexts the First Amendment liberties of U.S. citizens and resident aliens are not directly at stake. Rather, U.S. officials are seeking to extend First Amendment norms and principles beyond U.S. borders pursuant to a broad national policy of exporting liberty. They are generally acting out of concern for *foreign*, rather than domestic, speakers and audiences.

277 *Id.* § 202(c).

278 *Id.* § 2(1).

279 G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

280 H.R. 275, § 2(1) (emphasis added) (quoting Universal Declaration of Human Rights, *supra* note 279, art. 19, at 75).

281 *Id.* § 2(13).

282 *Id.* § 2(17).

### *D. Does the First Amendment Follow the Flag?*

Thus far, I have discussed rather limited exportation of First Amendment laws and principles, based primarily upon the domestic effects of foreign speech or a desire to propagate free speech norms beyond U.S. borders. The principal concern has been whether the First Amendment framework protects domestic speakers and intellectual property owners from foreign laws and conduct. I have also raised the question whether the First Amendment might be characterized as a universal human right rather than a domestic limitation. In this section, I will consider whether the *negative* First Amendment applies beyond U.S. borders. In other words, do First Amendment guarantees constrain the federal government anywhere outside the United States?[283] If so, where? And who, if anyone, may claim the protections of the First Amendment while abroad?

The precise nature of the Constitution's territorial scope or domain has been a critical—and vexing—question since the framing.[284] The Supreme Court has never squarely addressed whether the First Amendment, in particular, applies beyond U.S. borders. Recall that in *Haig v. Agee*,[285] the Court rather grudgingly assumed that the First Amendment protected a citizen's speech interests as they related to international travel.[286] A few courts have made a similar assumption with regard to U.S. press freedoms abroad.[287]

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283 I shall leave aside the intraterritorial concern regarding application of the First Amendment inside U.S. territories. In *Downes v. Bidwell*, 182 U.S. 244 (1901), one of the so-called *Insular Cases*, the Court strongly implied in dictum that the First Amendment applied in unincorporated territories. *Id.* at 277. The *Insular Cases*, which were decided in the early twentieth century, addressed whether various constitutional restrictions applied in the acquired territories—Florida, Hawaii, the Philippines, and Puerto Rico. *See generally* Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); *Downes*, 182 U.S. 244.

284 *See generally* LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 3 (1990) (discussing "constitutional uncertainties, frictions, and dissatisfactions that beset" the United States in conducting foreign affairs); NEUMAN, *supra* note 44, at 44–71 (outlining the American constitutional foundation of immigration law and aliens' rights); RAUSTIALA, *supra* note 230 (exploring the concept of territoriality and its historical evolution in American law from the founding era to the present); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (examining the history of inherent powers over foreign affairs and the Supreme Court's ratification of this doctrine in late nineteenth-century decisions).

285 453 U.S. 280 (1981).

286 *Id.* at 308.

287 *See, e.g.*, Flynt v. Rumsfeld, 180 F. Supp. 174, 175–76 (D.D.C. 2002) (noting that "in an appropriate case" the press may assert a First Amendment right to gather

Extension of First Amendment protections to U.S. citizens located abroad would seem to be supported by text, theory, and precedent. The First Amendment's text does not suggest any geographic limitation.[288] One or more of the principal justifications for First Amendment protection, including truth seeking,[289] self-governance,[290] and self-actualization,[291] would seem to support the application of First Amendment protections to citizens (and perhaps legal resident aliens) located abroad. Moreover, current judicial interpretations of constitutional domain strongly suggest that U.S. citizens, at least, do not forfeit all First Amendment protections simply by crossing the territorial border.[292]

From 1891 to 1957, few questioned the Supreme Court's statement in *In re Ross*[293] that "[t]he Constitution can have no operation in another country."[294] But after the United States became a superpower and extended its domain to various occupied territories, the Bill of Rights gradually became decoupled from traditional notions of territorial sovereignty.[295] Since the mid-1950s, the territorial domain of constitutional liberties, including those set forth in the Bill of Rights, has steadily expanded with respect to both citizens and aliens.[296] As Kal Raustiala has observed, "legal spatiality"—the notion that rights vary with location—has become a disfavored concept in a variety of legal contexts.[297]

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information abroad); Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) (declining to articulate the scope of any press freedoms abroad).

288 U.S. CONST. amend. I ("Congress shall make no law . . . .").

289 *See* Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring).

290 *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (arguing for broad protection of the freedom of speech due to the fact that governments derive their power from the people).

291 *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966, 990–1009 (1978) (defending the self-actualization justification).

292 *See* Reid v. Covert, 354 U.S. 1, 5–9 (1957) (plurality opinion) ("[T]he shield which the Bill of Rights and other parts of the Constitution provide to protect [a citizen's] life and liberty should not be stripped away just because [the citizen] happens to be in another land.").

293 140 U.S. 453 (1891).

294 *Id.* at 464.

295 *See* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 21 (1985) (explaining the relationship between the expansion of U.S. power and the domain of constitutional liberties).

296 *See* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2516–17 (2005).

297 *Id.* at 2504.

In *Reid v. Covert*,[298] the Court rejected the idea that citizens' constitutional liberties were strictly confined to U.S. territory.[299] *Reid* held that the guarantees of the Fifth and Sixth Amendments applied to the wife of an American serviceman accused of murder and subjected to a court-martial in England.[300] A plurality in *Reid* dismissed *In re Ross* as "a relic from a different era."[301] Justice Black, writing for a plurality in *Reid*, stated: "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."[302]

The most recent rejection of constitutional spatiality occurred in *Boumediene v. Bush*,[303] which held that the habeas guarantee extended to aliens being held beyond U.S. territorial borders.[304] The *Boumediene* Court again admonished that "[e]ven when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"[305]

Neither *Reid* nor *Boumediene* held, however, that the entire Bill of Rights was applicable abroad. *Reid* also suggested that constitutional guarantees do not apply with equal force when citizens were located outside U.S. territorial borders. In a reprise of the incorporation debate, some of the opinions suggested that the Bill of Rights might apply only partially and contingently.[306] Thus, although they may be applicable overseas, First Amendment guarantees may be somewhat less robust depending on the practical necessities and contingencies associated with specific locations and contexts.[307] In sum, following *Reid* and *Boumediene*, it is likely that the First Amendment applies to

298 354 U.S. 1 (1957).

299 *See id.* at 5–6 (plurality opinion) ("The United States is entirely a creature of the Constitution. . . . It can only act in accordance with all the limitations imposed by the Constitution.").

300 *Id.* at 18–19.

301 *Id.* at 12.

302 *Id.* at 6.

303 128 S. Ct. 2229 (2008).

304 *Id.* at 2262.

305 *Id.* at 2259 (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).

306 While Justice Black's opinion would have applied the Bill of Rights in toto, *Reid*, 354 U.S. at 9 (plurality opinion), Justices Frankfurter and Harlan would have applied the Bill of Rights more selectively, *see id.* at 53 (Frankfurter, J., concurring); *id.* at 75–76 (Harlan, J., concurring).

307 *See* Carlson v. Schlesinger, 511 F.2d 1327, 1331 (D.C. Cir. 1975) (noting that First Amendment guarantees are less robust in the overseas military context).

citizens abroad, although the extent of the application may turn on functional and contextual considerations.[308]

This conclusion is consistent with some lower court opinions. For example, in a case involving speech restrictions imposed on U.S. soldiers located on military bases during the Vietnam conflict, the D.C. Circuit assumed that First Amendment protections applied at least to some degree.[309] More recently, the Seventh Circuit applied First Amendment standards to a citizen's claim that travel restrictions had punished him for engaging in a foreign war protest.[310]

The more difficult question concerns the extraterritorial application of First Amendment guarantees to aliens abroad.[311] Courts and scholars have articulated several different approaches to determining the territorial scope of constitutional guarantees, including the Bill of Rights.[312] As Gerald Neuman has recently explained,[313] three basic approaches may be gleaned from the opinions in *Reid* and *United States v. Verdugo-Urquidez*,[314] which held that Fourth Amendment protections did not apply to the search of an alien's property in Mexico.[315]

One approach is to apply the Bill of Rights in foreign territories *only* to U.S. citizens and not foreign nationals.[316] In *Verdugo-Urquidez*, the Court concluded that noncitizens "can derive no comfort from the *Reid* holding."[317] A plurality of the Court found it significant that the Fourth Amendment refers to "the people"—language they con-

308 *See* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 282 (2009).

309 *See Carlson*, 511 F.2d at 1331–33 (applying time, place, and manner standards to soldiers' petitioning activities).

310 *See* Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 605 (7th Cir. 2009) (applying First Amendment standards to citizen's anti-war protest in Iraq).

311 Again, the rights of aliens located *within* the United States shall be set aside as a matter relating to the intraterritorial First Amendment.

312 *See* NEUMAN, *supra* note 44, at 5–8 (describing the universalism, membership, mutuality, and global due process approaches); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2042–59 (2005) (describing various approaches to extraterritoriality).

313 *See* Neuman, *supra* note 308, at 285.

314 494 U.S. 259 (1990).

315 *Id.* at 274–75.

316 Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2076–77 (2005).

317 *Verdugo-Urquidez*, 494 U.S. at 270. With regard to noncitizens located abroad, Justice Rehnquist's opinion in *Verdugo-Urquidez* also indicated that extension of Fourth Amendment rights required some "previous significant voluntary connection with the United States." *Id.* at 271. Aliens that have entered the United States, meanwhile, are entitled to some constitutional protections—whether they have entered

cluded would preclude application of the Fourth Amendment to aliens.[318] The First Amendment contains the same language, although one could argue that it applies only to the right of assembly.[319]

The citizenship or membership approach has been adopted by some lower courts reviewing aliens' First Amendment claims. For example, foreign nongovernmental family planning organizations have challenged U.S. funding policies relating to family planning.[320] In *DKT Memorial Fund Ltd. v. Agency for International Development*,[321] the District of Columbia Circuit dismissed First Amendment claims brought by foreign organizations that were prohibited during the period of any federal grant from using their own funds to perform or promote abortion as a method of family planning abroad.[322] Such a restriction would violate the First Amendment if applied to domestic organizations.[323]

Relying primarily on the alien exclusion cases discussed in Part I, the court held that the foreign organizations lacked standing to assert any First Amendment claims because they possessed no constitutional rights while they were located outside the United States and were not within the custody or control of U.S. officials.[324] Although not reaching the extraterritoriality question on the merits, then-Judge Ginsburg, after quoting the position of the *Third Restatement of Foreign*

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legally or not. *See* Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) (citing cases involving the constitutional rights of aliens).

318 *Verdugo-Urquidez*, 494 U.S. at 265–266. Justice Kennedy disagreed that "the people" restricted the Fourth Amendment's geographic domain. *Id.* at 276 (Kennedy, J., concurring).

319 *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . .").

320 Since 1984, the United States has intermittently adopted family planning policies that restrict the use of federal aid for abortion-related counseling and services. *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) (describing the background of the abortion "global gag rule"). Courts have generally upheld the policy against constitutional attacks by domestic organizations, reasoning that the federal government may insist pursuant to its spending power that organizations not fund abortion-related services with federal funds. *See, e.g.*, Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 915 F.2d 59, 65 (2d Cir. 1990) (upholding federal anti–abortion aid policy).

321 887 F.2d 275 (D.C. Cir. 1989).

322 *Id.* at 278.

323 *See* FCC v. League of Women Voters, 468 U.S. 364, 402 (1984) (invalidating rule that conditioned federal funding on the speakers' agreement not to editorialize, even with private funds).

324 *DKT Mem'l Fund*, 887 F.2d at 285.

*Relations Law of the United States*[325] that constitutional rights apply regardless of location, stated in her partial dissent that she "would hesitate long before holding that in a United States-foreign citizen encounter, the amendment we prize as 'first' has no force in court."[326]

A more functional and flexible approach, posited in concurrences by Justices Harlan and Frankfurter in *Reid*, and echoed by Justice Kennedy in his concurring opinion in *Verdugo-Urquidez*, would base extraterritorial application of constitutional liberties, such as those in the First Amendment, on contextual matters, such as "the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[327] This functional approach gained additional currency in *Boumediene*, which held that the writ of habeas corpus extended to alien detainees being held at Guantanamo, a territory under the control of the United States but over which it did not exercise sovereignty.[328] Writing for the Court, Justice Kennedy applied a multifactor approach similar to that articulated in the *Reid* concurrences 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.[329]

A third approach to extraterritoriality is worth mentioning. Some justices and commentators favor a "mutuality of obligation" approach, which essentially links extraterritorial enjoyment of constitutional liberties with the assertion of an obligation to obey U.S. law.[330] This approach, which has never commanded a majority of the Court, would extend most protections of the Bill of Rights—presumably including those in the First Amendment—to both citizens and

325 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 (1987).

326 *DKT Mem'l Fund*, 887 F.2d at 308 (Ginsburg, J., concurring in part and dissenting in part).

327 Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (highlighting the impracticability of applying the warrant requirement to a search conducted by U.S. officials in Mexico).

328 *See* Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

329 *Id.* at 2244, 2255, 2259.

330 Neuman, *supra* note 316, at 2077.

noncitizens, wherever located, if they are under U.S. control or subject to U.S. laws.[331]

Under current approaches to constitutional domain, it is likely that citizens enjoy at least some limited First Amendment protections when outside U.S. territorial borders. Whether First Amendment guarantees follow the flag more generally remains an open question. After *Boumediene*, it is at least plausible to argue that the First Amendment protects aliens abroad in some circumstances. In order to make the argument for extraterritorial application stronger, however, some theoretical groundwork must be laid. This theoretical gap will be addressed in greater detail in Part III.

## III. OUR LESS TERRITORIAL, AND MORE COSMOPOLITAN, FIRST AMENDMENT

The First Amendment remains territorial in certain traditional respects. Borders continue to serve as important markers of the domain of free speech, press, and other First Amendment guarantees. But the First Amendment has become far less territorial at, and perhaps even beyond, the nation's borders. As a result of legislative, regulatory, judicial, political, and social changes, the First Amendment is becoming more cosmopolitan in character and orientation. Political and judicial interpretations of the First Amendment have become less insular in nature and more facilitative of cross-border information flow. Owing to digitization and globalization, the First Amendment is part of a renewed and vigorous international dialogue regarding freedom of information. In short, de-territorialization has rendered the boundaries and domain of the First Amendment less certain.

There are, however, various obstacles to further movement in this more cosmopolitan direction.[332] These include fundamental interests relating to state sovereignty, diplomatic limitations, and theoretical gaps regarding the justification for a more robust or expansive extraterritorial First Amendment. Moreover, we ought to consider how cosmopolitanism might bend territorial borders in the opposite direction. Importation of foreign speech standards and norms may ultimately pose some threat to the First Amendment's intraterritorial

331 *See Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting) (reasoning that when the United States imposes obligations on foreign nationals to obey its laws, the government is obligated to respect rights).

332 I have attempted in this Article to describe the present-day relationship between territory and the First Amendment. I take no normative position with regard to the value of open borders or the diminishing salience of territoriality. Rather, I seek here only to assess the prospects for further liberalization of the territorial First Amendment and expansion of the First Amendment's territorial domain.

domain, thus rendering the First Amendment cosmopolitan in the sense that it is subject to foreign influences.

### *A. Soft Borders, Cross-Border Information Flow, and Sovereignty*

As we have seen, the territorial framework that governs cross-border information exchange, which was developed at the founding and fortified by twentieth century war and ideological conflicts, remains largely intact today. But as a result of legal liberalization and digitization, U.S. borders have become appreciably "softer" barriers to the cross-border exchange of persons, ideas, and information. This softening of U.S. borders implicates, but does not threaten to destroy, U.S. sovereignty. De-territorialization is by no means destined to continue. But there are many forces that will likely continue to push the First Amendment in a more cosmopolitan direction.

#### 1. Legal and Regulatory Liberalization

The core of the territorial First Amendment has been remarkably stable during the past century. As discussed in Part I, aliens still have no constitutional right of ingress. U.S. citizens possess only a limited right to travel for expressive purposes—a liberty that may be denied for national security or foreign policy reasons. Federal officials retain the same expansive border search authority granted by the very first Congress. By virtue of their *location*, searches and seizures of expressive materials are considered presumptively reasonable at the border and its functional equivalent. Finally, U.S. law continues to restrict certain cross-border contacts in the name of national security.

These and other basic territorial limitations have been with us time out of mind. Owing to their centrality to state sovereignty and territorial governance, it is perhaps no surprise that these aspects of the territorial First Amendment have not yet yielded to the forces of modernization. That does not mean, of course, that the First Amendment cannot play a more prominent role in opening borders to cross-border travel and protection of informational materials at the border. In any event, today cross-border information exchange is subject to fewer restrictions than perhaps at any time in the nation's history. Legal and regulatory liberalization, along with the rapid digitization of expression, has facilitated cross-border exchanges, information flow, and cultural mixing. Territorial borders have been transformed from hard to relatively soft barriers.

Legal liberalization actually began in the late 1950s, when the Supreme Court first held that the right of a citizen to travel abroad could not be denied under existing passport laws and regulations

based solely upon an applicant's ideology.[333] In 1965, the Court held that citizens had a right under the First Amendment to receive information, including communist political propaganda, from foreign sources.[334] In these decisions, the Court signaled that a policy of strict isolationism with respect to foreign ideas was inconsistent with Fifth and First Amendment values.

These were hopeful signs that America was shaking off its insular past. As we have seen, however, the federal government continued in ensuing decades to restrict cross-border informational exchange (based in many cases on the content of the materials) and immigration (including on purely ideological grounds). But as discussed in Part I, as a result of legislative amendments, changes to executive enforcement policies, and some court decisions during the 1990s, a broad category of "informational materials" were eventually exempted from content-based territorial regulations. In addition, travel and trade regulations were substantially liberalized by exempting or licensing journalistic, academic, artistic, and other core First Amendment pursuits.[335] Some longstanding travel and trade embargoes have been lifted or moderated. At this moment, there is even substantial political support for lifting travel restrictions that have prohibited cross-border exchanges with Cuba for many decades. Legislators and regulators have also substantially amended cross-border trade provisions in an effort to facilitate scientific and educational information sharing.[336] As a result, the categories of materials subject to territorial restrictions have been steadily shrinking.

Since the end of the Cold War, U.S. officials have also relied less on *ideology* as a basis for cross-border regulation. Decreased reliance on ideological exclusions has primarily been the result of political rather than judicial decisions. Federal laws and regulations expressly prohibit officials from basing certain immigration and regulatory decisions solely upon viewpoint or ideology.[337] To be sure, the executive continues to maintain that the First Amendment does not prohibit exclusion of aliens based solely upon their beliefs or associations. However, no presidential administration has expressly invoked such authority since the 1980s. This is truly remarkable, particularly in light of the fact that some Western democracies publicly trumpet ide-

333 *See* Kent v. Dulles, 357 U.S. 116, 129–30 (1958) (concluding that the passport laws did not delegate to the Secretary the power to withhold passports based on beliefs or associations).

334 Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965).

335 *See supra* notes 97–99 and accompanying text.

336 *See supra* Parts I.C.4–5.

337 *See supra* note 54 and accompanying text.

ological exclusions as a means of signaling their disapproval of certain beliefs.[338] In sum, ideology has played a declining role at the nation's borders during the past few decades.

Although many significant amendments of territorial laws and regulations resulted from political decisions, courts have played at least a minor role in softening U.S. border controls. Some laws and regulations were amended in response to particular judicial decisions.[339] To be sure, there has been no sea change in the deferential manner in which courts review territorial policies relating to cross-border exchanges that touch upon foreign affairs, national security, and immigration. The First Amendment still applies differently at the borders (and their functional equivalents) than it does intraterritorially. Nevertheless, beginning in the late 1980s, some courts began to acknowledge that speech, association, and other First Amendment guarantees were not isolated domestic concerns. The notion that the First Amendment does not apply at all, or applies with only minimal force, at and beyond our borders is not as dogmatically accepted by courts today as it was in the years leading up to globalization. Further "domestication" of the First Amendment scrutiny applied to remaining cross-border restrictions may lead to even greater liberalization of cross-border information exchange.[340]

The gradual softening of U.S. borders did not take place in isolation or result solely from domestic concerns. It was the product of what one scholar has referred to as "a growing consensus in the community of states to lift border controls for the flow of capital, information, and services and, more broadly, to further globalization."[341] New threats arising from cross-border exchanges, including terrorist activity and financial misconduct, have created additional regulatory challenges. But they do not appear to have undermined or eliminated the basic consensus, at least among liberal constitutional democracies, that cross-border information exchange ought to be encouraged and facilitated.

Border softening by means of legal and regulatory liberalization appears likely to continue on several fronts. As mentioned, Congress may soon revise or repeal travel restrictions that affect cross-border expression, inquiry, and association.[342] The Supreme Court has been

338 *See supra* notes 26–27 and accompanying text.

339 *See* Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 512 (9th Cir. 1988) (invalidating content-based customs exemptions regulations).

340 *See generally* Roth, *supra* note 19, at 257 (urging "domestication" of limits on citizens' participation in foreign affairs).

341 SASKIA SASSEN, LOSING CONTROL? 59 (1996).

342 *See supra* notes 93–98 and accompanying text.

asked to invalidate or at least narrow federal laws that limit the provision of basic advice and assistance to certain foreign organizations.[343] The nation's cross-border trade regulations have also come under increasing scrutiny by lawmakers and regulated industries. Owing to concerns regarding U.S. competitiveness in global markets, high-tech and other industries have lobbied aggressively for further liberalization or elimination of various trade restrictions, including the "deemed export" rules discussed in Part I.[344] New threats or foreign policy initiatives may result in some tightening of border controls. But in an increasingly globalized commercial and political marketplace, hard territorial borders will likely be increasingly unsustainable.

If not fully destroyed, the "nylon curtain"[345] that once hung over U.S. borders now lies substantially in tatters. Our borders are certainly not open, in the sense that persons, information, and materials may enter without limitation. Although fear of foreign persons and ideas has dissipated, it remains part of the First Amendment's territorial framework to some degree. Nor is it the case that the First Amendment applies with equal force at national and international borders as it does within the United States. The First Amendment will likely never be post-territorial in that broad sense. But as a legal or formal matter, U.S. borders are generally more open to expression, informational exchange, and a diversity of ideologies and viewpoints than they have ever been. Although many of the liberalizing decisions of the past few decades have been political rather than judicial or constitutional, most are not likely to be reversed. In addition to serving U.S. commercial interests, de-territorialization is consistent with U.S. international obligations to guarantee the free flow of information without regard to frontiers.

### 2. Digitization and Territoriality

The liberalization of cross-border information exchange is not solely the product of legal and regulatory amendments. As a formal matter, the United States still purports to control information flow at its borders. As a practical matter, however, the digitization of speech and communication technologies like the Internet pose substantial

343 *See* Humanitarian Law Project v. Mukasey, 552 F.3d 916, 920–21 (9th Cir. 2009), *cert. granted sub nom.*, Holder v. Humanitarian Law Project, 130 S. Ct. 48 (2009).

344 *See supra* notes 162–77 and accompanying text; *see also* Cornelia Dean & William J. Broad, *Obama Is Urged to Open High-Tech Exports*, N.Y. TIMES, Jan. 9, 2009, at A12 (reporting that the National Academy of Sciences is concerned that export and immigration controls are harming American innovation and economic competitiveness).

345 *See* Neuborne & Shapiro, *supra* note 15, at 719.

challenges to the territorial model of information control. It is one thing to prevent the entry of harmful persons, packages, and other tangible materials into the United States. It is quite another to stop bits and bytes at territorial borders.

Indeed, some scholars have claimed that digitization and the Internet will eliminate territorial sovereignty, and with it, territorial control of cross-border information flow.[346] As noted earlier, these exceptionalists view the Internet as a space that is not subject to traditional claims of territorial sovereignty.[347] In their view, all law that applies to Internet communications and transactions is essentially post-territorial. Skeptics of the post-territorial thesis argue that digitization has not altered territorial governance in general, or the territorial First Amendment.[348]

The truth lies somewhere in the middle of these extreme positions. Insofar as speech and association are concerned, digitization has not eliminated the territorial First Amendment. The United States continues to monitor and sometimes block cross-border exchanges, particularly those that implicate national security.[349] This occurs regardless of the form or means of communication. As well, some contacts and collaborations are primarily physical in nature; in these instances, virtual contact and information exchange are simply not adequate substitutes. Still, these instances are increasingly the exception rather than the norm. In general, the migration of human contact and information exchange to virtual spaces has significantly undermined the traditional territorial approach to regulating speech, press, and association.

Jack Goldsmith and Tim Wu have argued that while digitization and the Internet have altered the *methods* by which governments control cross-border expression and informational exchange, they have not brought about the demise of territorial governance itself.[350] Goldsmith and Wu argue that far from being a borderless space, the

346 *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1372 (1996) ("[E]fforts to control the flow of electronic information across physical borders—to map local regulation and physical boundaries onto Cyberspace—are likely to prove futile . . . .").

347 *See* POST, *supra* note 219, at 166–69 (distinguishing between "unexceptionalists," who argue that Internet transactions are subject to traditional territorial regulation, and "exceptionalists," who argue that the Internet is a distinct space not subject to traditional territorial rules).

348 *See* GOLDSMITH & WU, *supra* note 16, at 49–65; *see also* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1212–50 (1998) (challenging regulation skeptics).

349 *See supra* Part I.C.4.

350 *See* GOLDSMITH & WU, *supra* note 16, at 70.

Internet has developed such that geography and place (location) remain critical to the regulation of cross-border expression.[351] Their central claim is that governments continue to regulate speech, information, and commerce territorially, although they now do so by focusing on the activities of local "intermediaries" like Internet service providers, search engines, and browsers *within* sovereign territories.[352] Thus, although U.S. regulators and officials can neither see individual communications as they come across the border, nor directly control the foreign originators of many of these communications, Goldsmith and Wu argue that they can effectively regulate transactions and expression by controlling the domestic intermediaries over which they exercise regulatory authority.[353] Further, as they always have, officials can target individuals within their borders to influence the supply of, and demand for, offending commerce and expression.[354]

According to Goldsmith and Wu, the transmission of digitized speech via the Internet has merely prompted officials to shift their regulatory focus from the international border to domestic locations.[355] They observe that place or location still matters to cross-border exchanges, in the sense that websites often inquire where users are located in order to provide specialized services or appropriate languages.[356] Similarly, they note that "the efficacy of Internet communications depends on the real-space location of both data and the underlying Internet hardware through which the data travel."[357] Contrary to predictions that distance has been vanquished by a borderless cyberspace, Goldsmith and Wu point out that Internet efficacy, whether in terms of communication or commerce, depends on substantial concentrations of resources and people in real physical places.[358]

Goldsmith and Wu concede that a domestic enforcement strategy cannot prevent *all* harmful or illegal digitized speech from crossing

351 *See id.* at 62–63 ("[G]eography remains crucially important, especially in the Internet era.").

352 *See id.* at 68–72 (explaining the regulation of Internet sources, intermediaries, and targets).

353 *Id.* at 70.

354 *See id.* at 79–80 (discussing the strategy of targeting individuals).

355 *See id.* at 65–85.

356 *Id.* at 49.

357 *Id.* at 54; *see* SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS 343 (2006) (arguing that new communications technologies "will not inevitably globalize users and eliminate their articulation with particular localities, but they will make globality a resource for these users").

358 GOLDSMITH & WU, *supra* note 16, at 56–58.

territorial borders.[359] This is obviously also true of the more traditional territorial regulatory model described in Part I. Indeed, it may be that more traditional border control enforcement strategies are *less* effective than those described by Goldsmith and Wu. In some cases, such as export controls on dual-use materials, the penalties for noncompliance may be substantial enough to have a significant deterrent effect. But in other contexts, including enforcement of prohibitions on the importation of obscene materials, a territorial approach seems almost futile in the digital era.[360] Ultimately, Goldsmith and Wu claim that domestic enforcement strategies will "succeed[ ] by lowering the incidence of prohibited activities to an acceptable degree."[361] The claim is difficult to assess empirically; among other things, the authors do not suggest how we might quantify or prove an "acceptable degree" of deterrence.

In any event, note that according to Goldsmith and Wu's account, it is clear that territorial borders themselves have become less salient features of the regulation of cross-border exchanges. The domestic enforcement strategy is not based primarily upon preventing transmission of illegal or harmful content *across the border.* Borders themselves remain salient in the regulatory sense, but only insofar as one conceives of them as having been pushed inward to intraterritorial locations over which some sovereign exercises territorial control.[362] In many circumstances, the foreign speaker's content will actually reach its intended audience. Rather than suppressing content at the border by means of a national filter or some other technological mechanism, most governments will be forced to rely upon ex post measures geared toward shutting down intermediaries and preventing future dissemination.[363]

It is not entirely clear that regulation that occurs some place other than the physical border ought to be described as "territorial." Goldsmith and Wu focus on the domestic *effects* of the expression, which clearly fall within the territorial sovereignty of the recipient

359 *Id.* at 81.

360 Goldsmith and Wu concede that regulation will be imperfect for any number of reasons, including the size of the nation, the evasive actions of intermediaries, and the unwillingness of some countries (like the United States) to regulate for fear of suppressing legal speech or conduct. *Id.* at 81–84.

361 *Id.* at 81.

362 *Cf.* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 165 (2007) (discussing shifting concepts of the territorial border with regard to immigration enforcement).

363 *See* GOLDSMITH & WU, *supra* note 16, at 92–95 (describing China's very elaborate territorial cyber-barriers).

nation. U.S. officials have used this conception of territorial sovereignty to regulate everything from trademark violations, to sharing computer code, to terrorist financing of foreign entities. Perhaps we must reconceptualize the "territorial border" to account for new circumstances. In the immigration context, for example, the "border" is treated as a flexible concept that does not necessarily comport with cartographic facts.[364] Thus, immigrants who have already crossed the physical border may be treated *as if* they are still situated at the international border.

Similarly, digitized expression and information that has in fact already crossed international borders undetected may be viewed as not legitimately present. This sort of conceptual manipulation masks a significant territorial fact: namely, that borders can no longer function as relatively hard funnel points for cross-border expression. Modern delivery systems generally bypass or ignore borders, or speech is there so fleetingly that it cannot be controlled at the moment of entry. In sum, although unexceptionalists are correct that, as both a legal and practical matter, nations retain territorial sovereignty despite digitization, exceptionalists are also correct that the Internet has undermined traditional territorial regulation of cross-border information flow.

In the digitized environment, speakers and speech readily cross territorial borders. Along with legal and regulatory liberalization, the digitization of speech has fundamentally altered the scope of the First Amendment by reducing governmental power to bar information and ideas at the nation's territorial borders. Cross-border communication and receipt of foreign information have in some respects been unalterably de-territorialized.

### 3. Cross-Border Information Flow and "Interdependence Sovereignty"

Controlling cross-border information flow is an aspect of state sovereignty. Some might be concerned that a loss of territorial control implies or indicates a loss of sovereignty. Sovereignty concerns help to explain why the executive refuses to disclaim the power of ideological exclusion, and why laws and regulations continue to require licensure of certain types of cross-border speech and contacts. As the Supreme Court has said, "[i]t is axiomatic that the United States, as a sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity."[365] There may

364 *See* Shachar, *supra* note 362, at 166.

365 United States v. Flores-Montano, 541 U.S. 149, 153 (2004).

indeed be significant costs associated with a less territorial First Amendment, among them the cross-border transmission of illegal and harmful content. But as the events of the past two decades have demonstrated, the waning of the territorial First Amendment does not inexorably threaten U.S. sovereignty. Further liberalization of cross-border speech and association ought not to be rejected on sovereignty grounds.

Stephen Krasner describes the ability "to regulate the flow of goods, persons, pollutants, diseases, and ideas across territorial boundaries" as "interdependence sovereignty."[366] In Krasner's typology, this concept of sovereignty is distinct from its domestic, international (legal), and Westphalian meanings.[367] As Krasner notes, some commentators view the loss of border control occasioned by globalization as a loss of sovereignty.[368] Krasner agrees that loss of such control might affect domestic sovereignty, in the sense that "[i]f a state cannot regulate what passes across its borders, it will not be able to control what happens within them."[369] He is justifiably skeptical, however, that globalization has opened national borders to such an extent that states have been compromised or unduly strained.[370] In any event, Krasner claims that a loss of interdependence sovereignty does not necessarily compromise legal or Westphalian sovereignty. As he puts it: "Rulers can lose control of transborder flows and still be recognized and be able to exclude external actors."[371]

The United States has not generally lost control over cross-border movement and information exchange. It will, at a minimum, continue to enforce some border controls in order to ensure domestic security. While the Constitution protects First Amendment liberties, "it is not a suicide pact."[372] But such concerns do not necessarily warrant a strong territorial First Amendment. Although territorial borders are much softer than they were a mere two decades ago, the United States has not suffered any fundamental diminution in international status or domestic order.

U.S. "interdependence" sovereignty has been diminished somewhat, both voluntarily through legal liberalization and as a function of technological bypasses of traditional border controls. But a less territorial First Amendment, one characterized by borders that are gener-

366 *See* KRASNER, *supra* note 25, at 12.
367 *See id.* at 9–25 (discussing four meanings of sovereignty).
368 *Id.* at 12.
369 *Id.* at 13.
370 *Id.*
371 *Id.*
372 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

ally open, ought not to be rejected based upon fears that it portends the demise of U.S. sovereignty.

### *B. Expansion of the First Amendment's Territorial Domain*

There are other important respects in which the First Amendment has become less territorial. As we saw in Part II, officials have sought through various means to export the First Amendment as a global norm or universal guarantee. These efforts have included extraterritorial application of U.S. laws to foreign speech; prohibitions on domestic enforcement of foreign libel judgments; and foreign affairs funding, diplomacy, and proposed limits on the information activities of U.S. workers abroad. Some of the First Amendment's substantive guarantees might also be interpreted to apply to both citizens and aliens abroad.

Further expansion of the First Amendment's extraterritorial domain will be difficult to achieve. Exportation of First Amendment standards, values, and norms may conflict with the sovereign interests of other states. Thus the United States cannot export its First Amendment regime by simple decree. Moreover, limited extraterritorial application of U.S. trademark and other speech laws will likely have little effect on the First Amendment's general domain. Finally, although there is some jurisprudential support for extraterritorial application of the First Amendment's negative limitations, there are several practical and theoretical obstacles to such an expansion. If the First Amendment's territorial domain is to expand further it will likely be as a result of funding and regulatory decisions, along with the more gradual processes of norm transmission and internationalism.[373] As discussed below, however, some worry that these processes may result in a transnational First Amendment that is more cosmopolitan in the sense that its substantive standards are influenced by importation of foreign speech regimes. In the meantime, constitutional democracies will continue to afford different levels of protection to speech, privacy, press, and association.[374]

373 *See generally* Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985, 988–95 (2009) (discussing top-down and bottom-up processes impelling globalization).

374 For a comparative analysis of speech guarantees in several constitutional democracies, see generally RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE (2006).

### 1. Exporting First Amendment Laws, Norms, and Standards

The United States currently engages in a number of activities that are explicitly designed to expand the First Amendment's territorial domain.[375] These range from extraterritorial application of trademark laws, to routine diplomacy, to strict forms of libel protectionism. As a result of these efforts, the First Amendment is already extraterritorial to a certain extent. There are, however, serious obstacles to further expanding its domain through mechanisms of exportation.

Let us begin with perhaps the least effective means of exporting the First Amendment. Efforts to prevent domestic entities and their employees from assisting repressive states are intended to project First Amendment norms beyond U.S. territory. Recall, for example, that GOFA included an express finding that freedom of speech is a universal human right.[376] But measures like GOFA, if indeed they are ever enacted, will not prevent foreign authorities from erecting and enforcing territorial information barriers. As the situation in China demonstrates, a sovereign intent on erecting such barriers will find other means of doing so. Congress can at least ensure that U.S. capital does not contribute to foreign censorship. And it can signal its strong commitment to freedom of information through foreign policy, funding decisions, and diplomacy. In this sense, measures like GOFA are strong political statements that the U.S. views First Amendment guarantees as global human rights. But by themselves, they will likely not expand the First Amendment's territorial domain.

As discussed in Part II, extraterritorial enforcement of U.S. laws may have a limited impact on foreign speech. Like other nations, the United States regulates many types of foreign conduct on the ground that such conduct causes substantial harmful effects within U.S. territory. Speech is no exception to this general regulatory approach. But for substantive, jurisdictional, and technological reasons, effects-based regulation is not likely to result in any significant exportation of First Amendment standards. U.S. laws are generally more liberal than foreign speech laws. Instances in which foreign speech will be protected abroad but proscribed in the United States will thus be relatively rare. In jurisdictional terms, U.S. laws can only be applied to foreign speakers who have sufficient domestic contacts with the United States. Thus, the lone cyber-pamphleteer need not be terribly concerned about the reach of U.S. speech laws. Finally, foreign speakers are

375 *See supra* Part II.

376 *See* Global Online Freedom Act of 2007, H.R. 275, 110th Cong. § 2 (2007).

increasingly able, through geographical identification technologies, to limit the geographic distribution of their Internet communications.[377]

As we have seen, U.S. intellectual property laws also have some extraterritorial reach.[378] Thus far, however, only trademark laws have been given any extraterritorial effect—an apparent anomaly that some lower courts have responded to by generating balancing tests that limit trademark's extraterritorial application.[379] There does not appear to be any current legislative or judicial agenda to extend the U.S. intellectual property regime to foreign territories. Although some commentators decry the rigid territorialism of intellectual property laws, extraterritorial expansion in this area will likely occur, if at all, as a result of the negotiation of treaties rather than through extraterritoriality.[380] Unilateral expansion of the unique U.S. balance with regard to intellectual property and free speech faces numerous diplomatic and international hurdles.

The drive toward First Amendment globalism has been somewhat more successful with regard to U.S. libel law. As discussed in Part II, foreign libel tourism has been met in the United States by a form of reactive libel protectionism. Contrary to settled principles of foreign judgment recognition, courts have refused to enforce foreign libel judgments and legislators have enacted protectionist laws that deny any legal force to such judgments. Libel protectionism effectively supplants the speech laws and policies of other states, giving the First Amendment "a kind of global constitutional status."[381]

Of course, plaintiffs may still obtain and enforce libel judgments under the laws of foreign forums. Foreign states may also respond with anti-anti-libel tourism laws that prohibit domestic courts from giving legal effect to U.S. decrees. Insofar as domestic defendants are concerned, libel protectionism shields U.S. assets by attaching the *New York Times Co. v. Sullivan* regime to foreign judgments. But in the long run, meaningful protection from foreign libel laws will only result from foreign regimes amending their libel laws. To be sure, the passage of protectionist U.S. laws may play some role in ultimately defeating libel tourism. The U.S. response to libel tourism has placed significant pressure on British officials to shift the nation's libel stan-

377 *See* GOLDSMITH & WU, *supra* note 16, at 59–62 (discussing geographical identification technologies).

378 *See supra* notes 232–44 and accompanying text.

379 *See supra* notes 237–43 and accompanying text; *see also* RAUSTIALA, *supra* note 230, at 111 (noting that intellectual property law remains "resolutely territorial").

380 *See* RAUSTIALA, *supra* note 230, at 121 (noting that the United States has not sought changes in the copyright laws of foreign nations via extraterritoriality).

381 GOLDSMITH & WU, *supra* note 16, at 161.

dards toward the *Sullivan* regime. Indeed, there are signs that Parliament may modify British libel law in response to concerns regarding libel tourism.[382] In the community of states, however, the process of First Amendment norm transmission will involve persuasion rather than dictation.[383] If it is to occur at all, First Amendment globalism will result from diplomacy, contacts among judges and lawyers of various nations, transnational processes, and the work of nongovernmental organizations.[384]

Even assuming the First Amendment gains some foreign ground, it will likely not be the only speech regime that will experience territorial expansion. In the digital age the laws of *most* nations may have some extraterritorial force or effect.[385] As we saw in Part II, Yahoo! Inc. ultimately yielded to the judgment of a French court applying French law to its activities in the United States. As the Internet increases cross-border effects, it will also increase the competition among free speech laws and principles. As discussed below, the First Amendment may face strong competition from foreign speech regimes on its own turf.[386] As Mark Tushnet has observed, there is no certainty that the speech standards that will emerge from this process will converge with current First Amendment interpretations.[387]

The First Amendment's territorial domain has expanded to some extent through various exportation mechanisms. As a result, domestic speakers and intellectual property owners have gained some extraterritorial First Amendment protections. More significant expansion of the First Amendment's territorial domain will take place, if at all, as a result of carefully considered foreign policy decisions relating to freedom of information; it will generally take place on international stages rather than in domestic legislatures and courts.[388]

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382 *See* Lyall, *supra* note 263 (noting the effect of U.S. court decisions and libel tourism laws on British lawmakers).

383 On constitutional norm transmission generally, see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2004); Tushnet, *supra* note 373, at 988–95; Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (Sujit Choudhry ed., 2006).

384 *See* Tushnet, *supra* note 373, at 988–90 (describing various top-down processes that may lead to global constitutional harmonization).

385 *See* GOLDSMITH & WU, *supra* note 16, at 155 ("These inevitable cross-border effects do not undermine the legitimacy of a nation applying its laws to redress local harms.").

386 *See infra* Part III.C.

387 *See* Tushnet, *supra* note 373, at 1003.

388 *But see* BOLLINGER, *supra* note 4, at 116–19 (encouraging Supreme Court to advance cause of free press in global forum).

### 2. Extraterritoriality and the Negative First Amendment

As noted earlier, there is strong textual, theoretical, and precedential support for extraterritorial application of First Amendment expressive guarantees to citizens (and perhaps legal resident aliens) located abroad.[389] Although no court has expressly held as much, at least in this respect the First Amendment's negative proscriptions ought to apply without regard to territoriality. As noted earlier, the more difficult question is whether the First Amendment's domain might actually be more universal or global, insofar as its negative prohibitions may apply to aliens located abroad. Although there is some precedential support for such an expansion, there are also some substantive and theoretical obstacles that must be overcome if the territorial reach of the First Amendment is to be expanded in this sense.

#### a. First Amendment Functionality

As noted earlier, *Boumediene* clearly adopts a functional methodology for determining whether habeas corpus applies extraterritorially. As Gerald Neuman has observed, however, the decision leaves many questions unanswered.[390] One of the most important of these unresolved issues relates to the territorial scope of constitutional liberties other than the writ, in particular those set forth in the First Amendment and other Bill of Rights provisions.

The only non-immigration decision to consider in any depth whether the First Amendment's free speech guarantee applies to aliens abroad was decided prior to both *Verdugo-Urquidez* and *Boumediene*. As noted earlier, in *DKT Memorial Fund* the D.C. Circuit held that aliens located abroad lacked prudential standing to challenge U.S. funding restrictions on foreign speech.[391]

In a post–*Verdugo-Urquidez* case, *Lamont v. Woods*,[392] the Second Circuit addressed whether the First Amendment's Establishment Clause applied to what it referred to as "governmental activities having extraterritorial dimensions."[393] In *Lamont*, federal taxpayers challenged the appropriation and expenditure of public funds for the construction, maintenance, and operation of religious schools

389 *See supra* notes 288–92 and accompanying text.

390 *See* Neuman, *supra* note 308, at 286–87.

391 *See* DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 285 (D.C. Cir. 1989) (holding that aliens lacked prudential standing to bring First Amendment claims).

392 948 F.2d 825 (2d Cir. 1991).

393 *Id.* at 834.

abroad.[394] Using *Verdugo-Urquidez* as an analytical framework, the court held that the Establishment Clause "should apply extraterritorially."[395]

The court concluded that the challenged funding decisions occurred *in the United States.*[396] Still, the court held that the expenditure of tax dollars for support of religious schools offended the Establishment Clause "regardless of the physical situs of those institutions or activities."[397] It concluded that "general principles of Establishment Clause jurisprudence provide no basis for distinguishing between foreign and domestic establishments of religion."[398] According to *Lamont,* the Establishment Clause limited governmental power abroad because its proscription attached to funds being spent by aliens overseas.[399] The court was quick to note, however, that aliens would not be entitled to challenge either a grant or denial of aid.[400] It also noted that "the foreign policy ramifications of applying the Establishment Clause to [the subject grants] will be minimal."[401]

*Lamont* provides only limited support for extending First Amendment speech, press, and association protections to aliens beyond U.S. borders. Again, the actual governmental conduct in *Lamont* occurred *inside the United States* and the benefits of the Establishment Clause accrued only to domestic U.S. taxpayers. Moreover, the history of extraterritorial application, the nature of establishment itself, and the policies underlying the Establishment Clause do not necessarily extend to speech and other First Amendment liberties. Still, *Lamont* provides a functional framework for assessing the extraterritoriality of First Amendment guarantees that is more consistent with modern precedents than the decision in *DKT Memorial Fund,* which dismissed the First Amendment claims of foreign grant applicants largely on the basis of the immigration exclusion precedents.[402]

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394 *Id.* at 828.

395 *Id.* at 835.

396 *Id.* at 834. The court concluded that historical evidence that the Establishment Clause applied in U.S. territories suggested that the prohibition applied extraterritorially. *See id.* at 838. But application in U.S. territories speaks only to the *intraterritorial* First Amendment, not to whether the Establishment Clause applies in territories abroad.

397 *Id.* at 839.

398 *Id.* at 840.

399 *Id.*

400 *Id.*

401 *Id.* at 841.

402 *See supra* notes 321–26 and accompanying text.

*Boumediene* rejects the bright-line distinction between citizens and aliens set forth in Justice Rehnquist's opinion in *Verdugo-Urquidez*.[403] But the *Boumediene* decision is itself territorial, in the sense that it turns substantially on U.S. control over the territory at issue—Guantanamo Bay, Cuba. At a minimum, however, the Court's functional approach supports extraterritorial application of First Amendment speech and association guarantees in the case of aliens held in U.S. custody or within territory under U.S. control. Thus, the First Amendment would arguably apply were U.S. officials to abduct, detain, and prosecute alien critics of U.S. foreign policy in certain locations abroad or inside the United States.[404]

There is still the question of *degree* of application, however. As Gerald Neuman has observed, 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."[405] Substantive questions also abound. Does the prior restraint doctrine apply? Is the government generally prohibited in the foreign context from basing decisions on content or viewpoint? Can alien detainees or "enemy combatants" raise First Amendment defenses?

There will clearly be limits to the First Amendment's extraterritorial domain. Neuman posits, for example, that "First Amendment equality principles would not give nationals of countries where the United States subsidizes a pro-American political party a legal basis for objection," even though such biased funding would implicate the First Amendment within the United States.[406] Nor, presumably, would foreign nationals have a right to challenge U.S. propaganda activities, even if they would be illegal if conducted in the United States.[407] Similarly, *Boumediene*'s functional approach would not seem to lend any

403 *See* Neuman, *supra* note 308, at 272 ("*Boumediene* provides a long overdue repudiation of Rehnquist's opinion in *Verdugo-Urquidez* . . . .").

404 *Id.* at 287.

405 *Id.*; *see also id.* at 288 ("[T]he functional approach does not present a binary choice between nonapplication of a constitutional right and application of the right precisely as it operates in an analogous domestic setting."). The mutuality of obligation approach would also counsel in favor of application of the First Amendment in this context. *See* Neuman, *supra* note 316, at 2083.

406 Neuman, *supra* note 308, at 287.

407 *See* Jeff Gerth, *Military's Information War Is Vast and Often Secretive*, N.Y. TIMES, Dec. 11, 2005, at 1 (describing various aspects of a broad "information war" being conducted in various parts of the world). Domestic limits on government propagandizing are rather hazy. They reside principally in appropriations laws that forbid agencies from using federal funds for propaganda purposes. *See* KEVIN R. KOSAR, CONG. RESEARCH SERV., PUBLIC RELATIONS AND PROPAGANDA 4–5 (2005), *available at*

support to aliens' free speech and association challenges to U.S. funding conditions that restrict speech and association abroad—unless, perhaps, as in *Lamont* the court was to view the funding decisions as having occurred within the United States. There may also be practical obstacles to enforcement of First Amendment rights abroad, including diplomatic complications and international differences with regard to substantive speech protections.[408] Finally, it is not clear whether alien-to-alien communications that take place in foreign territories would be subject to any First Amendment protection at all.[409]

In sum, under existing precedents any extension of the First Amendment's territorial domain is likely to be rather minimal and incomplete. This is due, in large part, to the uncertainties attending *Boumediene*'s functional and practical standard. Whenever practical necessities weigh in the balance, predictions obviously become more difficult. We can say that in certain limited contexts the First Amendment likely follows the flag to some foreign territories; we just cannot say for certain whether or to what extent it might catch up to it.

b. Extraterritoriality and First Amendment Justifications

There is an additional, and in some sense antecedent, obstacle to expansion of First Amendment protections to speakers and audiences located abroad. Because the First Amendment has been treated primarily as a domestic concern, little attention has been paid to justifications for extraterritorial application. If the First Amendment's territorial domain is to be expanded, the extension must be accompanied (or perhaps preceded) by an adequate theory or justification. This point actually applies to cross-border information exchange generally; but it is particularly important in terms of expansion of the First Amendment's negative liberties. In short, expansion of the First Amendment's domain abroad must be preceded by more careful consideration of the relationship between the First Amendment and foreign speakers and audiences.

As noted earlier, traditional justifications for free speech include facilitating self-governance, the search for truth, and self-actualization.[410] The justifications for protecting free speech may differ

http://www.fas.org/sgp/crs/misc/RL32750.pdf (describing legal limits on agency propagandizing).

408 Neuman, *supra* note 308, at 288.

409 *See* Roosevelt, *supra* note 312, at 2066 (expressing doubt that alien-to-alien communications abroad serve either the democratic or the self-actualization purpose underlying the First Amendment).

410 *See supra* notes 289–91 and accompanying text.

depending on whether the speaker, the audience, or both are located within or outside U.S. territory.[411] Thus, we must first differentiate among five basic categories of speakers and audiences: (1) both speaker and audience are domestic; (2) the speaker is foreign and the audience domestic; (3) the speaker is domestic and the audience foreign; (4) the speaker is domestic and the audience is mixed (i.e., both domestic and foreign); and (5) both speaker and audience are foreign.[412]

We may easily dispense with Category 1, which does not raise any issues of extraterritorial application. Category 2 involves the First Amendment right of U.S. listeners to receive foreign speech. As noted in Part I, the Supreme Court has recognized this right in the context of attempted bans on the entry of visiting scholars and other alien speakers. It has held that the domestic audience has a right to receive the speech in person, subject to any reasonable and bona fide justifications for denial of entry.[413] This right presumably extends to receipt of foreign expression and ideas more generally.[414] Of course, this does not mean that import restrictions and even outright territorial barriers regarding certain materials cannot be justified. It means only that the government must justify such bans in light of First Amendment concerns. Although the Court itself has not explained the justification for the right to receive foreign speech, it may plausibly be considered either critical to the search for truth, on the understanding that the marketplace of ideas is not territorially confined to the United States, or as an aspect of citizens' interest in self-governance—i.e., in hearing for themselves what foreign speakers have to say, particularly, but not exclusively, about matters of public concern.

Categories 3 and 4 relate directly to the various import and export restrictions discussed in Part I. Given that an increasing amount of communication from domestic speakers to foreign audiences will occur via the Internet, in many cases it will not be possible to distinguish between domestic and foreign audiences. Hence the

411 They may also differ depending on the content of the speech. Political discourse, for example, tends to receive greater First Amendment consideration than commercial speech and other nonpolitical discourse. Here, however, I am primarily concerned with the territorial reach or domain of traditional First Amendment justifications or theories, rather than the results in any particular context.

412 The permutations are actually more numerous and complex. For example, a foreign audience might be composed of both aliens and citizens. For purposes of the present discussion, however, the five basic categories will suffice.

413 *See supra* notes 40–42 and accompanying text.

414 *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (recognizing a right to receive foreign communist propaganda).

audiences will be "mixed."[415] Thus, some Category 1 justifications will be present in these situations. In that event, traditional First Amendment justifications may support some protection for at least the purely domestic component of the expression.[416]

But suppose the audience the domestic speaker wishes to reach is composed *solely* of foreign listeners or recipients (Category 3). Addressing only the narrow but (as shown in Part I) important category of scientific and technical expression, Robert Kamenshine has argued that "generally cited first amendment values have little or no application" to this scenario.[417] He claims that even assuming the subject of the communication is foreign policy, "[n]o first amendment self-governance interest exists in informing foreign nationals on the debate."[418] Similarly, Kamenshine argues that "[a]ssisting foreign nationals to find truth . . . is not a first amendment goal."[419] That is so, he says, "*unless* we internationalize our concept of the first amendment."[420] Kamenshine also dismisses any self-fulfillment rationale for protecting speech to foreign audiences. Even assuming that a domestic speaker has an interest in self-fulfillment in Category 3, Kamenshine claims that "no United States constitutional interest arises in fostering the self-fulfillment of a foreign citizen."[421] For this and other reasons, he finds the self-fulfillment rationale substantially wanting.[422]

In sum, at least with regard to scientific and technical expression Kamenshine argues that traditional First Amendment theories or justifications—self-governance, the search for truth, and self-fulfillment—do not apply to domestic speech communicated solely to foreign audiences. But Kamenshine's position seems to apply more broadly to speech with foreign audiences, regardless of content. In general, he states: "We are not constitutionally committed to facilitating [First Amendment] objectives abroad."[423]

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415 *See* Kamenshine, *supra* note 1, at 873–75 (discussing First Amendment justifications in the context of mixed audiences).

416 *Id.*

417 *Id.* at 866.

418 *Id.* at 867.

419 *Id.* at 868.

420 *Id.* (emphasis added).

421 *Id.* at 873. He claims that the case for protection is particularly weak when the domestic speaker is a corporation. *Id.* at 869.

422 Kamenshine claims that the pure self-fulfillment scenario is quite rare, given the breadth of the self-democracy and marketplace justifications. *Id.* at 871. He also notes that the Supreme Court has never indicated how much weight ought to be given to pure self-actualization in free speech cases. *Id.*

423 *Id.* at 869.

Kamenshine's analysis predates globalization, digitization, the softening of U.S. borders, and the jurisprudential ascendance of the functional approach to constitutional domain. But it remains perhaps the most careful analysis of the territorial dimension of First Amendment justifications. Other commentators have agreed with Kamenshine's principal claim that First Amendment justifications do not apply to speech with foreign audiences or to alien-to-alien communications.[424]

In contrast, however, some courts have stated that the First Amendment protects cross-border communications with foreign audiences.[425] Moreover, First Amendment scrutiny was applied to some of the export controls discussed in Part I even though the recipients or audiences were solely foreign.[426] As discussed earlier, U.S. borders were softened in part owing to judicial recognition that the First Amendment applies to cross-border communications. But neither commentators nor courts have provided any real justification, with regard to Category 3 situations, for either a territorial or more global approach. This theoretical gap is a significant obstacle to expansion of the First Amendment's territorial domain.

Recent debate has centered on Category 5, which involves speech solely among foreigner speakers and audiences (alien-to-alien speech). Kermit Roosevelt claims that while the self-governance theory might justify granting some First Amendment protection to communications between foreign speakers and domestic audiences

424 Several commentators who have addressed the recognition and enforcement of foreign libel judgments appear to take the position that the traditional justifications for the First Amendment apply only to domestic speakers' communications to domestic audiences. *See* Derek Devgun, *United States Enforcement of English Defamation Judgments: Exporting the First Amendment?*, 23 ANGLO-AM. L. REV. 195, 203 (1994); 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); Jeremy Maltby, Note, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 2007 n.160 (1994); Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261, 267 (2002). *But see* Van Houweling, *supra* note 251, at 714 ("The First Amendment should protect speech to foreign audiences even if the amendment is concerned primarily with domestic self-government.").

425 *See, e.g.*, DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 295 (D.C. Cir. 1989) (recognizing "the right of Americans to maintain First Amendment relationships with foreigners"); Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 509 n.9 (9th Cir. 1988) (indicating approval of the district court's holding that the First Amendment protects communications with foreign audiences).

426 *See* Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000) (subjecting export restrictions to First Amendment scrutiny); Karn v. U.S. Dep't of State, 925 F. Supp. 1, 9–12 (D.D.C. 1996) (same).

(Category 2), it does not support application of the First Amendment to purely foreign communications.[427] As well, echoing Kamenshine, Roosevelt observes that "it is hard to see why the Constitution would be concerned with the self-actualization of aliens abroad."[428]

Gerald Neuman agrees that the U.S. government has no obligation to facilitate self-actualization abroad. But, he asks, "[I]s it so clear that no First Amendment concerns are raised when the government reaches out to *crush* aliens' self-actualization abroad?"[429] Neuman objects to Roosevelt's position in part on the ground that accepting it "exposes [nonresident aliens] to whatever prohibitions Congress decides to enact."[430] Certainly, he argues, if the United States were to enact and enforce a criminal law banning aliens' broadcast of certain videos or prohibiting espousal of certain ideas *and* sought to enforce such a law domestically, the First Amendment would apply.[431] He suggests it may also apply to prosecutions conducted outside U.S. borders.[432] In sum, it is a close question whether, even in Category 5 cases, there might be some justification for applying First Amendment restrictions.

A strict territorial approach seems out of step with the changes in the relationship between territory and the First Amendment discussed in this Article. Exemptions for "informational materials," prohibitions on ideological decisionmaking at the border, liberalization of travel restrictions, and prohibitions on viewpoint-based discrimination in customs laws and regulations are all obviously related to First Amendment concerns. Indeed, a prominent goal of liberalization and deterritorialization is to facilitate associations and communications with foreign speakers and audiences.

Moreover, courts and legislatures often appear to ascribe to a nonterritorial view of the First Amendment's justificatory domain. As noted, the First Amendment presumptively applies to citizens who travel abroad to communicate with foreign audiences. As noted, many courts have proceeded on the assumption that communications with foreign audiences are subject to the same or similar protection as those with domestic recipients. With regard to enforcement of foreign libel judgments, courts have expressed concern over the possibility that communications with foreign audiences will be chilled. Finally, the intent of proposals such as the Global Online Freedom

427 Roosevelt, *supra* note 312, at 2066.
428 *Id.*
429 Neuman, *supra* note 316, at 2082.
430 *Id.*
431 *Id.* at 2082–83.
432 *Id.* at 2083.

Act is to advance freedom of information solely among nonresident aliens—a pure Category 5 context. It is not so clear, then, that First Amendment justifications have no extraterritorial weight or application.

Certainly traditional First Amendment theories—self-governance, the search for truth, and self-actualization—were designed for domestic purposes and with domestic speech in mind. But the globalized world is some distance removed from Meiklejohn's model "town hall" meeting.[433] There is not adequate space in this Article to fully develop a plausible theoretical account that might justify expansion of the territorial domain of First Amendment guarantees. I will focus here on but one salient effort, namely the "democratic culture" theory articulated by Jack Balkin.[434] Balkin does not expressly claim that his theory applies in foreign contexts. But I believe it is broad enough to encompass some cross-border and extraterritorial concerns.

Balkin's central point is this: "The digital age provides a technological infrastructure that greatly expands the possibilities for individual participation in the growth and spread of culture and thus greatly expands the possibilities for the realization of a truly democratic culture."[435] He does not indicate *where* this "democratic culture" exists, or might exist.[436] But Balkin's focus on new technologies of communication and the diverse cultures they create suggests that his approach may be universally applicable. As Balkin states: "Like democracy itself, democratic culture exists in different societies in varying degrees; it is also an ideal toward which a society might strive."[437] Freedom of speech, Balkin notes, "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."[438] Balkin's focus on appropriation of materials and cooperation among speakers in geographically distinct societies—what he calls "glomming on"—also suggests an expansive conception of the

433 *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 25–27 (1960) (invoking town hall metaphor to explain the theory of democratic self-government).

434 *See* 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, 33–45 (2004).

435 *Id.* at 6.

436 Balkin does note, however, that the digital revolution makes it easier to cross cultural and national boundaries, and thus to "interact with and form new communities of interest with people around the globe." *Id.* at 7–8.

437 *Id.* at 4.

438 *Id.* (emphasis added).

expressive community with which the First Amendment is concerned.[439]

To be clear, I make no claim that Balkin's theory presents a wholly satisfactory justification for expansion of the First Amendment's territorial domain. It does suggest, however, that a narrow focus on the more traditional First Amendment justifications may obscure more contemporary justifications for protecting speech outside U.S. territorial borders.[440] On this view, opening our borders to facilitate the free flow of information does not necessarily have to be about citizens' self-governance or self-fulfillment (although these may also be viable justifications). Rather, the justification under a theory that better fits our digitized and globalized world may be that moderating border restrictions or applying the First Amendment even to alien-to-alien communications will lead to the spread of democratic cultures *regardless of location.* A more contemporary First Amendment theory like Balkin's suggests that laws that interfere with cross-cultural exchange or suppress participation in creating a democratic culture may be inherently suspect under the First Amendment.

At present, however, we do not have a full-blown justification for extending the First Amendment's domain to alien speakers and audiences abroad. If there is to be a further expansion of the First Amendment's extraterritorial domain, this theoretical gap will obviously have to be filled.

### *C. The Transnational First Amendment*

Finally, there is one other important sense in which our First Amendment may become less territorial and more cosmopolitan. As noted earlier, exportation of the First Amendment will generally occur as a result of international negotiations rather than domestic decrees. In a globalized world, the laws of many nations may have extraterritorial effect or influence. As has long been the case, the First Amendment will have to compete with other speech regimes for territorial influence. Thus far, I have discussed de-territorialization as a liberalizing force that will facilitate cross-border and perhaps even purely foreign expression. But de-territorialization may push in the opposite direction. Rather than exportation of the First Amendment, the flattening of territorial borders may lead to the importation of foreign speech standards and principles.

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439 *See id.* at 10–11.

440 *See* Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 438–39 (2009) (arguing that the self-government justification is too narrow in a digital age in which expression transcends the nation-state).

Importation of foreign speech regimes may occur in a variety of ways. As the *Yahoo!* case suggests, foreign courts may seek to apply foreign speech laws extraterritorially. More generally, processes and mechanisms associated with transnationalism, including multinational treaties that establish global speech standards, may pose some threat to First Amendment protections currently available within U.S. borders.[441]

As Harold Koh has explained, a nationalist approach looks inward and is characterized by a commitment to territoriality and resistance to international law and process as meaningful constraints on domestic authority.[442] A transnationalist approach, by contrast, "assumes America's political and economic interdependence with other nations operating within the international legal system."[443] The transnationalist accepts that "one prominent feature of a globalizing world is the emergence of a transnational law, particularly in the area of human rights, that merges the national and the international."[444] Koh has described a "transnational legal process" in which "domestic systems incorporate international rules into domestic law through a three-part process of interaction, interpretation, and norm internalization."[445]

Debates concerning transnationalism encompass some very broad themes, including the role of state sovereignty in an increasingly globalized world. Transnationalism touches upon everything from U.S. participation in international criminal tribunals, to citation of foreign authority by domestic courts.[446] Insofar as the First Amendment is concerned, the debate centers more narrowly on whether

441 For an elaboration of transnational legal process, see Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1399–1408 (1999); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1501–03 (2003).

442 *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 53–54 (2004) (explaining aspects of "transnationalist jurisprudence").

443 *Id.* at 53.

444 *Id.*

445 *Id.* at 55; *see supra* note 441.

446 On citation of foreign authority, see Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Eugene Kontorovich, *Disrespecting the "Opinions of Mankind": International Law in Constitutional Interpretation*, 8 GREEN BAG 2d 261 (2005); Sanford Levinson, *Looking Abroad when Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353 (2004); Mark Tushnet, *When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

international speech norms and rules will ultimately disregard U.S. territorial boundaries. The specific concern is that transnational processes may displace what has long been exceptional American tolerance for certain types of expression.[447] A transnational First Amendment would offer less protection for hate speech, expressions of religious and perhaps other forms of bigotry, commercial speech, and libelous speech. It would offer greater protection to equality and dignity interests, as is the case in other constitutional democracies.[448]

Transnational processes have already altered domestic speech policies in certain respects. Several laws and regulations discussed in Part I were moderated in response to the 1975 Helsinki Accords,[449] which required greater freedom of movement across national borders for people and ideas.[450] For example, the Moynihan-Frank Amendment prohibited the exclusion or deportation of any alien for her political beliefs or for any actions that, if engaged in by a U.S. citizen, would be protected by the First Amendment.[451] In this and other instances, international processes played some part in softening U.S. territorial borders.

Of course, moderating the territorial First Amendment is not the same as altering longstanding domestic standards regarding hate speech, incitement, libel, and commercial speech. By what mechanisms might international norms and standards be imported? What is the likelihood that they will actually come to govern domestic speech liberties?

The most direct mechanism for importing foreign speech norms and standards to the United States would be via treaty or other international agreement. The historical understanding is that treaties cannot override individual rights.[452] But in a globalized world, even this longstanding proposition has been contested. Peter Spiro has argued that with respect to some norms, "a case can be made for the international determination of baseline rights."[453] Spiro challenges what he

447 With respect to America's free speech exceptionalism, see generally Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005).

448 Tushnet, *supra* note 373, at 1003.

449 Conference on Security and Co-operation in Europe, Aug. 1, 1975, 14 I.L.M. 1292.

450 *See* SASSEN, *supra* note 341, at 68.

451 *Id.* at 68–69; *see supra* notes 53–54 and accompanying text.

452 *See* Reid v. Covert, 354 U.S. 1, 16–17 (1957) (plurality opinion) (asserting that in exercising power under an international agreement the United States must observe the Constitution's prohibitions).

453 Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2001 (2003).

calls the "doctrine of constitutional hegemony"—the notion that constitutional rights have always prevailed over treaty obligations.[454] Although he acknowledges that a consensus still exists among U.S. policymakers and judges that treaties cannot override constitutional rights, Spiro claims that constitutional hegemony is less categorical than often assumed.[455] He asserts, for example, that where a treaty provision conflicts with domestic constitutional liberties, courts are likely to modify constitutional doctrine rather than invalidate the treaty.[456]

With specific regard to the First Amendment, Spiro cites *Boos v. Barry*,[457] in which the Supreme Court struck down a law limiting protests within a certain distance of foreign embassies in Washington, D.C.[458] The *Boos* Court merely suggested that compliance with international law could be recognized as a compelling interest supporting the measure and that "the dictates of international law [might] require that First Amendment analysis be adjusted to accommodate the interests of foreign officials."[459] If this were the case, the First Amendment would be interpreted to conform to the treaty, rather than the other way around. In that event, Spiro claims that America might be "ceding rights autonomy."[460]

Spiro also provides a normative argument for subordinating domestic constitutional rights to treaty and other international obligations. Rather than achieve this through something like transnational legal process, Spiro points to the treaty power itself as the instrument of subordination.[461] He argues that in a world in which international human rights are being constitutionalized, and in which territorial borders and national institutions "do not necessarily enjoy normative foundations," there is no a priori reason for privileging domestic constitutional norms over international ones.[462] Spiro concludes that in this environment, "an international norm against hate speech would supply a basis for prohibiting it, the First Amendment notwithstanding."[463]

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454 *Id.* at 2017–27.

455 *See id.* at 2017–18.

456 *See id.* at 2019 (discussing the Chemical Weapons Convention and Fourth Amendment concerns).

457 485 U.S. 312 (1988).

458 *See id.* at 315, 329; Spiro, *supra* note 453, at 2019–20 (discussing *Boos*).

459 *See Boos*, 485 U.S. at 324.

460 Spiro, *supra* note 453, at 2020–22.

461 *See id.* at 2021–22.

462 *Id.* at 2022–23.

463 *Id.* at 2025.

These are, of course, fighting words to nationalists and territorialists. "Ceding rights autonomy" may be code for ceding territorial sovereignty itself. But there are several reasons why domestic-rights-subordinating treaty provisions and judicial pronouncements establishing a transnational First Amendment are not likely to materialize.

First, as even Spiro concedes, "[i]t is unlikely in the extreme that . . . treatymakers would undertake such a frontal assault against the supremacy of constitutional rights."[464] He notes that "it would take a constitutional moment of the highest order to overcome the supremacy norm."[465] The United States has proven time and again that Spiro's intuition is well founded. It has consistently rejected, or qualified its participation in, treaties and international agreements that threaten to depart from domestic speech norms.[466] As Spiro points out, the United States has been quite content to risk incurring economic or other costs from its refusal to subordinate domestic speech norms.[467]

Second, notwithstanding the willingness of some U.S. judges to engage foreign authority in resolving certain domestic constitutional issues, courts in particular would not seem to be very likely sources of constitutional rights subordination. Domestic courts are inclined to interpret human rights provisions in treaties as non-self-executing.[468] Moreover, the *Boos* example does not signal any broad movement toward an international or transnational First Amendment. It is one thing to express concern for the safety of foreign diplomats on U.S. soil in the face of public protests. It is quite another for a U.S. court to subordinate the law of libel, incitement, and other substantive speech doctrines to some supposed international consensus.[469] *Boos*

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464 *Id.*

465 *Id.*

466 *See id.* at 2018 (discussing, as an example, the International Covenant on Civil and Political Rights, which requires parties to prohibit so-called "hate speech"); *see also* Neil MacFarquhar, *Concerns Keep U.S. from Talks on Racism*, N.Y. TIMES, Apr. 20, 2009, at A7 (noting that the United States declined to participate in a conference owing to concerns regarding proposed condemnation of expressions of religious bigotry).

467 *See* Spiro, *supra* note 453, at 2018, 2020–21.

468 *See* Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 855 (1989) (discussing the United States' avoidance of human rights provisions).

469 In situations in which the Supreme Court has recently alluded to foreign precedents and practices to inform its constitutional decisions, it has reached for foreign sources in part because the history and tradition with respect to the relevant norm was arguably uncertain. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (referring to the opinion of the "world community" in assessing whether exe-

does not come close to supporting that degree of cession or subordination. Further, as we have seen, U.S. courts have almost uniformly refused to enforce foreign libel judgments obtained under laws contrary to the First Amendment—notwithstanding the fact that this ignores established rules relating to foreign judgment recognition and, in some cases, the strong interests of other nations.

Third, the internationalism or transnationalism approaches incorrectly assume that some global consensus on speech norms can be readily discovered, or already exists, even among comparable constitutional democracies. Contrary to the wishes of Internet exceptionalists, who long for a single speech standard for Internet communications, and transnationalists, who seek uniform human rights standards, speech norms remain diverse.[470] As Saskia Sassen has noted, even in a global era "[t]here is no global law."[471] We ought not to forget that the U.S. has tried, and failed, to export the First Amendment to nations that embrace different values with respect to freedom of information.[472]

Fourth, and finally, there is a rather curious assumption that internationalism will automatically result in the subordination of U.S. speech norms. As Sassen has pointed out, however, transnationalism and internationalism have generally been a form of *Americanization* in areas ranging from environmental protection to human rights.[473] Indeed, despite the recent citation of foreign authorities in U.S. judicial processes, the flow of constitutional norms, including First Amendment norms, has generally favored U.S. expansionism rather than transnationalism.[474] Thus, for example, international and transnational processes may ultimately result in the subordination or liberalization of British libel standards rather than diminished protection for false statements of fact inside the United States.

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cution of mentally retarded persons comports with evolving standards of decency). That is certainly not the case with regard to core free speech standards and principles, which have a long domestic pedigree. It is hard to imagine, for example, that the Court (or any legislature) could ever be persuaded to subordinate *New York Times Co. v. Sullivan* to foreign libel norms.

470 *See generally* KROTOSZYNSKI, *supra* note 374 (comparing how values such as militant democracy, culture, community, and a limited constitution shape speech norms in the United States, Canada, Germany, Japan, and the United Kingdom).

471 SASSEN, *supra* note 341, at 17.

472 *See generally* BLANCHARD, *supra* note 266 (describing unsuccessful efforts at the United Nations to export First Amendment free press principles).

473 SASSEN, *supra* note 341, at 18.

474 *See* Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 552–58 (1988) (discussing "overseas trade in American first amendment values").

None of these points refutes the argument that transnationalism and internationalism could affect domestic speech rights in some respects. As already mentioned, U.S. borders have been liberalized in part as a result of international accords and agreements. As *Boos* shows, a certain minimal respect for international law may lead to some consideration of foreign interests in speech cases. But at this point, any alarmism over invading foreign speech norms, the Europeanization of the First Amendment, and loss of constitutional sovereignty seems unwarranted. As in other respects, through the lenses of internationalism and transnationalism, the First Amendment appears less territorial. But America's domestic free speech exceptionalism is not in any imminent danger of being subordinated to international or transnational norms.[475]

## CONCLUSION

Far too little attention has been paid to the First Amendment's territorial dimension. The relationship between territorial borders and the First Amendment is complex. It has changed dramatically during the past few decades. Whether one is speaking of persons or materials, crossing the border remains a significant First Amendment event. A territorial framework, elements of which have been in place since the founding of the nation, continues to restrict cross-border movement and information exchange to some extent. But our First Amendment is more cosmopolitan today than perhaps any other time in the nation's history. Speech, press, and associational liberties are far less territorially constrained. Legal and regulatory liberalization, combined with modernizing forces such as globalization and digitization, have pulled back the "nylon curtain" that once served as a hard content and ideological barrier at the nation's borders. The gradual softening of U.S. borders has opened new markets for information exchange, decreased reliance on ideological exclusion, and facilitated cross-border expression and association. Regulatory de-territorialization of the First Amendment has not resulted in a loss of U.S. sovereignty, nor has it threatened our domestic security.

Globalization and digitization have flattened territorial borders in other respects as well. Regulatory laws and constitutional liberties increasingly extend beyond territorial borders. This form of de-territorialization has raised fundamental questions about the character

475 Transnationalism would not likely result in any complete subordination in any event. It is more likely that transnational processes may lead to some convergence of First Amendment norms, rather than wholesale displacement. *See* Tushnet, *supra* note 373, at 987 ("[G]lobalization does not entail uniformity.").

and dimension of First Amendment liberties. Is the First Amendment a domestic regime that benefits only citizens and legal resident aliens inside the United States? Or is it more akin to a universal human right? U.S. laws, policies, and precedents do not provide consistent answers to these questions. Efforts to export First Amendment norms, standards, and principles abroad suggest a more cosmopolitan conception of the First Amendment. On the other hand, some courts and scholars continue to resist the conclusion that the negative conception of the First Amendment fully constrains U.S. officials regardless of location.

Regardless of the position one takes on the proper dimensions of the extraterritorial First Amendment, it is clear that efforts to export the First Amendment by legislative fiat or judicial decree will be significantly hampered by diplomatic, international, political, jurisdictional, and theoretical limitations. De-territorialization has increased global competition among free speech regimes. In the future, some of the most important questions pertaining to the First Amendment's scope are likely to involve jurisdictional or conflicts of laws issues.[476] Moreover, the First Amendment's territorial fate rests partly upon the formulation of a theory or justification for its extraterritorial application. As well, in the international marketplace of free speech regimes the First Amendment will compete against foreign speech standards that may be imported as a result of internationalism or transnationalism. For now, at least, the First Amendment's intraterritorial exclusivity seems secure. But global competition will force the United States to reflect further upon, and be prepared to defend, its exceptional speech regime.

476 *See generally* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) (advocating a "cosmopolitan conception of jurisdiction"); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005) (advocating a more cosmopolitan approach to choice of law).