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### Transborder Speech

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**Transborder Speech**

Ronald J. Krotoszynski, Jr.

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## ARTICLES

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### TRANSBORDER SPEECH

Ronald J. Krotoszynski, Jr.\*

*In an increasingly globalized marketplace of ideas, First Amendment law and theory must recognize that the freedom of speech does not end at the water's edge. Simply put, the locus of expressive activity should not prefigure the government's ability to engage in censorship. Nevertheless, under current First Amendment law and practice, the accident of geography may serve as a constitutionally acceptable basis for content-based censorship of speech. If, as the Supreme Court argued with such ferocity in Citizens United, the value of speech to an audience does not depend on the speaker's identity or motive for speaking, then by parity of constitutional logic, the locus of speech activity should be deemed no less irrelevant to its protected status under the First Amendment. After all, democratic deliberation, essential to the project of democratic self-government, requires that information, ideas, and ideologies should be able to circulate freely among and between voters in order to ensure that, to borrow a phrase from the iconic free speech theorist Alexander Meiklejohn, "everything worth saying shall be said."<sup>1</sup> The foreign or domestic origin of speech and speakers alike cannot serve as a constitutionally permissible basis for government censorship of speech because, as Meiklejohn explained, "[t]o be afraid of ideas, any idea, is to be unfit for self-government."<sup>2</sup>*

*The Warren Court pioneered the application of the First Amendment to protect transborder speech (meaning speech that involves ideas, information, and speakers crossing national bound-*

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1 ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

2 *Id.* at 27.

aries). To be sure, the Warren Court's decisions were not particularly robust—yet they plainly recognized that the value of speech to the electorate is simply not a function of its domestic or foreign origin. The Burger Court never overruled these Warren Court precedents—but it declined to expand on them. By way of contrast, however, the Rehnquist and Roberts Courts have declined to apply the First Amendment at full strength to transborder speech activities—and arguably have resiled from the Warren Court precedents that protected transnational information flows from government censorship. If the Supreme Court's efforts to prohibit the government from distorting the political marketplace of ideas reflect a meaningful and serious jurisprudential commitment—rather than a merely rhetorical one—a significant course correction is both needed and long overdue. In sum, a free and open marketplace of political ideas requires that transborder speech not constitute a poor relation of its healthier, more robust domestic first cousin.

#### INTRODUCTION: TRANSBORDER SPEECH, DEMOCRATIC SELF-GOVERNMENT, AND THE GLOBALIZED MARKETPLACE OF POLITICAL IDEAS

This Article considers an important, but largely overlooked and underappreciated, subset of First Amendment activity: transborder speech. Transborder speech involves the exercise of freedom of speech, assembly, association, press and petition across national borders; it relates to the global information flows of people, ideas, knowledge, and argument. Simply put, in the age of the internet, the marketplace of ideas does not respect national boundaries.<sup>3</sup> Even though transborder speech constitutes an increasingly important aspect of expressive freedom, it enjoys considerably less protection than purely domestic speech activity.<sup>4</sup>

If the value of information and ideas is not a function of its source, as the Supreme Court explained with great force in *Citizens United v. Federal Election Commission*,<sup>5</sup> then it necessarily follows, as a matter of constitutional logic, that the *locus* of speech activity should be equally irrelevant to ascertaining the value of particular speech to the marketplace of ideas—or to the process of democratic self-government.<sup>6</sup> Professor Timothy Zick argues that we “ought to treat American citizens’ rights to engage in speech, assembly,

3 See Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1544 (2010) (observing that “we live in a world characterized by extraordinary advances in communications technology, widespread global travel, increasing cross-border commerce, and frequent transnational involvements” and “[i]nformation flows at great speed, and in remarkable quantity, across our national borders”).

4 See TIMOTHY ZICK, *THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES* 66–68, 199–227 (2014).

5 *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”).

6 *But cf.* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–39 (2010) (upholding a federal statute that, as applied, banned any contact with proscribed organizations abroad on the theory that such contact inevitably constituted “material support” of them and despite any evidence that the actual speech and associational activity at issue advanced unlawful aims or objectives and notwithstanding Congress’s failure to narrowly tailor the proscription in any way, shape, or form).

petition, and press as fully portable.”<sup>7</sup> Nevertheless, as Professors Burt Neuborne and Steven R. Shapiro observed in 1985, “[r]ecent case law hardly encourages optimism about the prospects for close judicial scrutiny of impediments to the flow of information and ideas across the national border.”<sup>8</sup> Moreover, from the vantage point of the Reagan era, “the trend probably points in the opposite direction.”<sup>9</sup> Subsequent judicial developments have entirely borne out this baleful prediction.

As this Article will explain in some detail, transborder speech has never enjoyed a strong claim on the First Amendment. Moreover, despite its merely modest protection under the Warren Court, the protection of transborder speech has declined, rather than increased, over time. Even as the Rehnquist and Roberts Courts have radically expanded the protection afforded to domestic speech activity,<sup>10</sup> transborder speech has remained something of a First Amendment orphan.

The Warren Court pioneered the constitutional protection of transborder speech, affording such speech tentative, modest protection.<sup>11</sup> The

7 Zick, *supra* note 4, at 215.

8 Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America’s National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 765 (1985).

9 *Id.*

10 See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012) (plurality opinion) (holding intentionally false speech about military honors to be protected under the First Amendment); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011) (holding that the First Amendment protects the distribution of violent video games to minors); *Snyder v. Phelps*, 562 U.S. 443 (2011) (holding outrageous and offensive protest at a deceased U.S. marine’s funeral service and burial to be protected speech about a matter of public concern); *United States v. Stevens*, 559 U.S. 460 (2010) (holding that the First Amendment protects graphic depictions of animal cruelty); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (holding intentionally outrageous and offensive parody of a public figure constitutes protected speech absent the inclusion of a false statement of fact made with malice aforethought).

11 See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (invalidating on First Amendment grounds a federal statute that required postal service customers to request, in writing, delivery of “communist political propaganda” in order to receive materials from abroad that Post Office employees deemed to constitute such material and holding that “[t]he regime of this Act is at war with the ‘uninhibited, robust, and wide-open’ debate and discussion that are contemplated by the First Amendment” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))); *Aptheker v. Sec’y of State*, 378 U.S. 500, 505, 514, 517 (1964) (holding unconstitutional, on Fifth Amendment due process grounds, revocation of a U.S. citizen’s passport because of membership in a Communist Party-affiliated organization and observing that foreign travel “is a constitutional liberty closely related to rights of free speech and association”); *Dayton v. Dulles*, 357 U.S. 144, 150 (1958) (holding that denial of a passport because of membership in a Communist-affiliated domestic organization would be unconstitutional and declining to find statutory authority for such action); *Kent v. Dulles*, 357 U.S. 116, 125, 129–30 (1958) (holding that Congress did not convey authority to deny passports to U.S. citizens “because of their beliefs or associations” and noting that such authority, if granted, would raise “important constitutional questions”). The Warren Court did not, however, always or invariably vindicate transborder speech claims. See *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965) (upholding the U.S. government’s ban

Burger Court halted the further extension of First Amendment protection for transborder speech activity, but did not overrule the relevant Warren Court precedents.<sup>12</sup> The Rehnquist and Roberts Courts, on the other hand, effectively have resiled from the modest protection afforded to transborder speech under the Warren Court.<sup>13</sup>

In the age of the internet, national boundaries should not impede the free flow of information and ideas. Yet, as Neuborne and Shapiro observe, “America’s border has been permitted to evolve into a discernible impediment to the free flow of ideas.”<sup>14</sup> The fact that speech crosses a border should not affect its status under the First Amendment. No necessary relationship exists between the geographic origin of speech or a speaker and its potential utility to the project of democratic self-government.<sup>15</sup>

Professor Zick, one of the few contemporary legal scholars to consider the application of the First Amendment to transborder speech in a compre-

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on travel to Cuba and holding that the policy constituted merely “an inhibition of action” rather than “speech” and observing that “[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow”). Nevertheless, the passport cases and the foreign mail case, *Lamont*, afforded transborder speech non-trivial First Amendment protection.

12 See *Haig v. Agee*, 453 U.S. 280, 306–09 (1981) (assuming that the First Amendment protects a U.S. citizen’s interest in speaking in foreign venues to foreign audiences, but holding that Agee’s prior unlawful leaking of CIA classified material justified the federal government’s decision to revoke Agee’s passport); *Kleindienst v. Mandel*, 408 U.S. 753, 762–70 (1972) (recognizing that U.S. citizens have a cognizable First Amendment interest in interacting, in person, with a foreign journalist who advocated Marxist ideologies, but sustaining the federal government’s refusal to issue a visa for Mandel to travel to the United States because the decision rested on “a facially legitimate and bona fide reason” ostensibly unrelated to Mandel’s politics or ideology).

13 See *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 422 (2013) (holding that U.S. citizens and corporations that communicate electronically with persons in other countries lacked standing to challenge the federal government’s mass surveillance program under the Foreign Intelligence Surveillance Act); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (upholding application of criminal sanctions against “material support” of terrorist organizations based on the Humanitarian Law Project’s efforts to teach peaceful and nonviolent conflict resolution techniques to members of the Partiya Karkeren Kurdistan); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 n.10, 490–91 (1999) (rejecting a First Amendment objection to deportation proceedings that were allegedly initiated because of the government’s antipathy toward the deportees’ First Amendment activities); *Meese v. Keene*, 481 U.S. 465, 480–85 (1987) (upholding, against a First Amendment compelled speech objection, a federal law that required the labeling of three Canadian films “political propaganda” distributed by “foreign principals and their agents”).

14 Neuborne & Shapiro, *supra* note 8, at 721.

15 See MEIKLEJOHN, *supra* note 1, at xiii–xiv, 24–27, 91 (arguing that voters need all relevant information in order to hold government accountable through the electoral process and arguing that foreign speakers and ideas are no less potentially relevant to the process of democratic deliberation than domestic speakers and ideas). Professor Meiklejohn posited that “[t]o be afraid of ideas, any idea, is to be unfit for self-government.” *Id.* at 27.

hensive and sustained fashion,<sup>16</sup> argues that “U.S. citizens ought to enjoy protection for free speech, press, assembly, and petition rights without regard to frontiers or borders.”<sup>17</sup> Yet, in the United States and elsewhere, governments routinely use the accident of geography as a basis for regulating—or even proscribing entirely—speech activity that would enjoy robust constitutional protection but for its transborder characteristic. In the contemporary United States, federal laws and regulations use control over the border to suppress speech activity that the national government deems inimical to its diplomatic, military, and national security interests.<sup>18</sup> For the most part, and for reasons that the Supreme Court has never fully explained or justified, crossing the nation’s borders provides a sound basis for disregarding the First Amendment’s strictures.<sup>19</sup>

To provide one concrete example of the problem, consider that the ability of foreign speakers to enter the United States—and the ability of U.S. citizens to travel abroad in order to inform themselves about issues of central importance to matters of public concern in the United States—are subject to pervasive regulation and control. Moreover, these controls can be used, and are used, to engage in viewpoint- and content-based censorship of speech.<sup>20</sup>

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16 The paucity of writing on the status of transborder speech is startling. As Professor Zick observes, “[s]cholars, courts, and government officials have considered the First Amendment’s domestic domain in exhaustive detail,” but “far less attention has been paid to the manner in which First Amendment liberties intersect with and relate to international borders.” ZICK, *supra* note 4, at 1. In fact, only a handful of articles have been written that address the question of how to map the First Amendment onto speech and speakers that originate outside the United States. Professors Zick and Neuborne have authored the most comprehensive works on the subject. See generally Neuborne & Shapiro, *supra* note 8; Zick, *supra* note 3. Other works that discuss transborder speech include David Cole, Essay, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL’Y REV. 147 (2012); Aziz Z. Huq, Essay, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16 (2012); Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271 (2008); Robert D. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 WM. & MARY L. REV. 863 (1985); John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988); Steven R. Shapiro, Commentary, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987). Remarkably, these works comprise the existing scholarly oeuvre. The failure of the U.S. legal academy to address issues associated with government efforts to regulate or proscribe transborder speech is telling; the subject is sufficiently foreign (so to speak) to contemporary concerns about expressive freedom that the body of literature addressing it pales in comparison to the ink spilled analyzing the First Amendment protection afforded to low value speech, such as advertising, child pornography, and obscenity.

17 ZICK, *supra* note 4, at 212.

18 See *infra* Part III.

19 See *infra* notes 271–76 and accompanying text.

20 See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) (“Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the

*Holder v. Humanitarian Law Project* sustained a flat ban on any contact with foreign organizations listed on a State Department terrorist group watch list.<sup>21</sup> The Humanitarian Law Project (HLP) sought to teach peaceful dispute resolution techniques, and principles of international law, to Kurdish rebels (members of the Partiya Karkeran Kurdistan (PKK)).<sup>22</sup> The Supreme Court sustained the federal government's *criminal* ban on this entirely peaceful, nonviolent, speech and associational activity.<sup>23</sup> Chief Justice John Roberts explained that "in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective [national security] consistent with the limitations of the First and Fifth Amendments."<sup>24</sup>

*Humanitarian Law Project* raises very troubling questions about the rigor with which the First Amendment will be applied in circumstances where U.S. citizens seek to exercise First Amendment freedoms outside the United States.<sup>25</sup> As Professor David Cole has observed, "[f]or the first time in its history, the Court upheld the criminalization of speech advocating only non-violent, lawful ends on the ground that such speech might unintentionally assist a third party in criminal wrongdoing."<sup>26</sup> In an increasingly globalized marketplace of ideas, we need to ensure that First Amendment rights do not end at the water's edge. Simply put, the locus of expressive activity should not prefigure the government's ability to engage in censorship, yet good evidence exists that this is not really the case under current First Amendment law and doctrine.<sup>27</sup>

This Article also considers the problems presented by national security-based surveillance programs aimed at preventing crime. Many of these programs, such as those created under the Foreign Intelligence Surveillance

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supporters meant to promote only the groups' nonviolent ends."); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) ("We hold that when the Executive exercises this power [to control the entrance of foreign nationals into the United States] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."); *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965) ("There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. . . . The right to speak and publish does not carry with it the unrestrained right to gather information."). *But cf. id.* at 24 (Douglas, J., dissenting) ("The ability to understand this pluralistic world, filled with clashing ideologies, is a prerequisite of citizenship if we and the other peoples of the world are to avoid the nuclear holocaust.").

21 *Humanitarian Law Project*, 561 U.S. at 39.

22 *Id.* at 10–11, 14.

23 *See id.* at 33–40.

24 *Id.* at 40.

25 *See Cole, supra* note 16, at 148–50; *see also infra* notes 264–76 and accompanying text (discussing and critiquing *Humanitarian Law Project* and its unusually weak application of strict judicial scrutiny).

26 *Cole, supra* note 16, at 149.

27 *See ZICK, supra* note 4, at 61–76, 126–31, 156, 215, 303.



Act,<sup>28</sup> use the transborder nature of communications as a basis for engaging in surveillance of electronic communications without any individualized showing that a particular person's electronic communications might relate in some way to unlawful activities.<sup>29</sup>

Pervasive forms of surveillance have a predictable and significant chilling effect; simply put, surveillance programs based on big data present serious threats to vibrancy of the marketplace of ideas.<sup>30</sup> As Professor Neil Richards observes, “[s]hadowy regimes of surveillance corrode the constitutional commitment to intellectual freedom that lies at the heart of most theories of political freedom in a democracy.”<sup>31</sup> Nevertheless, the federal courts have been very reticent to apply First Amendment values to these national security programs that use the accident of crossing a national border as a basis for justifying comprehensive data collection—particularly in the face of a widely held perception that the risk of terroristic attacks is both real and growing.<sup>32</sup>

National security efforts, such as the PRISM program<sup>33</sup> and other similar activities sanctioned by section 215 of the Patriot Act,<sup>34</sup> present some very serious risks to the exercise of expressive freedoms. A surveillance state may be many things, but it is not likely to be a successful democracy. Surveillance produces a significant chilling effect that impedes democratic discourse—something that the Court of Justice of the European Union noted in its landmark *Digital Rights Ireland* decision.<sup>35</sup> Surveillance can and does func-

28 50 U.S.C. §§ 1801–1885c (2012).

29 See *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418–22 (2013). For a discussion of how the federal government conducts dragnet surveillance of U.S. citizens' transborder communications (without obtaining a warrant), see James Purce, Comment, *Push It to the (Constitutional) Limit: Strengthening the National Security Agency's Section 702 Surveillance Program*, 70 ADMIN. L. REV. 745 (2018).

30 See Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1945–47, 1950–52 (2013).

31 *Id.* at 1951.

32 See generally Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115.

33 See Timothy B. Lee, *Here's Everything We Know About PRISM to Date*, WASH. POST: WONKBLOG (June 12, 2013), [https://www.washingtonpost.com/news/wonk/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/?utm\\_term=.161c000cbfe5](https://www.washingtonpost.com/news/wonk/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/?utm_term=.161c000cbfe5).

34 50 U.S.C. §§ 1861–1863 (2012).

35 *Joined Cases C-293/12 & C-594/12, Dig. Rights Ir. Ltd. v. Minister for Commc'ns, Marine, and Nat. Res.*, 2014 E.C.R. 238, ¶¶ 28, 69–73, <http://curia.europa.eu/juris/document/document.jsf?text=0&docid=150642&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=41538> (invalidating EU Directive 2006/24, which required the collection and storage of literally *all* electronic communications, because of the lack of adequate procedural and administrative safeguards, and observing that “retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by that directive and, consequently, on their exercise of freedom of expression”).

tion as a powerful tool for social control; programs like PRISM seriously burden the exercise of expressive freedom by inciting self-censorship.<sup>36</sup>

Despite the risks to democratic self-government that mass surveillance programs present, the Roberts Court has refused to even consider the constitutional status of such programs on the merits, finding that U.S. citizens who generally engage in telecommunications activities with people and institutions located abroad lacked Article III standing to challenge the constitutionality of these mass surveillance programs because there was no present injury.<sup>37</sup> Because the federal government does not officially acknowledge even the existence of some of these programs, much less provide a database of persons whose electronic communications have been recorded and stored, it is not possible for a would-be plaintiff to establish that her communications have been surveilled. In the absence of discovery, it is quite impossible for a would-be plaintiff seeking judicial review of these programs to prove that Big Brother has been watching and listening to her communications.

Yet, in *Clapper v. Amnesty International USA*, the Supreme Court held that the inability to assert with something approaching certainty the fact of government surveillance means that a would-be plaintiff lacks a concrete and particularized injury in fact sufficient to establish constitutional standing.<sup>38</sup> In consequence, mass surveillance programs that target transborder communications operate free and clear of judicial review. The First Amendment obviously cannot constrain the government's spying on its citizens if the federal courts refuse to apply it.

The fact that many of these mass surveillance programs rely on the transborder nature of communications as a basis for government surveillance is telling. Clearly, the political branches of the federal government have figured out that the federal courts are unlikely to apply the First Amendment at full strength to speech activity that takes place, even in part, outside the United States.<sup>39</sup> Because the Supreme Court has signaled that a junior var-

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36 See Richards, *supra* note 30, at 1948 (observing that “surveillance inclines us to the mainstream and the boring” and “menaces our society’s foundational commitments to intellectual diversity and eccentric individuality”). Professor Richards persuasively posits that “[i]f we care about the development of eccentric individuality and freedom of thought as First Amendment values, then we should be especially wary of surveillance of activities through which those aspects of the self are constructed.” *Id.* at 1950.

37 See *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401–02, 422 (2013) (“We hold that respondents lack Article III standing because they cannot demonstrate that the future injury they purportedly fear is certainly impending and because they cannot manufacture standing by incurring costs in anticipation of nonimminent harm.”).

38 See *id.* at 418–22.

39 See generally KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 83–90, 209–10 (2009) (discussing the “plenary power” doctrine, which gives Congress very broad authority to regulate persons and territory outside the boundaries of the fifty states and, with respect to the First Amendment, observing that “[o]nly a few cases have ever considered the extraterritorial reach of the First Amendment” and noting that “American judges have tended to deny its extraterritorial reach”). Professor Zick points out, however, that “[s]ince the mid-1950s, the territo-

sity version of the First Amendment applies to transborder speech, the accident of geography can be used as a basis for censoring speech that Congress and the President dislike. However, if content- and viewpoint-based speech regulations are antithetical to the freedom of speech required for democracy to function,<sup>40</sup> the fact that speech has a transborder element should not serve as a constitutionally sufficient basis for denying it the full protection of the First Amendment.<sup>41</sup>

It has not always been thus. The idea that transborder speech has at best a very weak claim on the First Amendment is of relatively recent vintage and reflects a break with precedents of the Warren Court. To be sure, the Warren Court did not vigorously move to protect transborder speech activity.<sup>42</sup> During the Warren Court years, however, the Justices issued opinions that invoked the First Amendment to limit government efforts to censor speech and associational activities with transborder characteristics that the political branches not only disliked, but feared.<sup>43</sup> These decisions were tentative and halting—but they nevertheless brought First Amendment values to bear to protect transborder First Amendment activity.

The Burger Court, by way of contrast, failed to expand on these precedents. When presented with opportunities to build on the work of its predecessor, the Burger Court declined to extend Warren Court precedents and, instead, distinguished them away.<sup>44</sup> When doing so, however, the Burger Court reiterated that government border regulations that burdened access to information and ideas triggered the protection of the First Amendment.<sup>45</sup> Thus, the Burger Court ratified prior holdings that applied the First Amendment to transborder speech, but proceeded to uphold government regulations that burdened or precluded transborder speech and association activities. It did so by finding that the government was regulating conduct, rather than speech, and that the nonspeech justification for regulating conduct was consistent with the First Amendment.<sup>46</sup>

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rial domain of constitutional liberties, including those set forth in the Bill of Rights, has steadily expanded with respect to both citizens and aliens.” Zick, *supra* note 3, at 1593.

40 See MEIRLEJOHN, *supra* note 1, at 24–27.

41 See Shapiro, *supra* note 16, at 942 (“The Bill of Rights, after all, was adopted to limit the exercise of sovereign powers that are inconsistent with transcendent national values.”).

42 See *infra* Part I.

43 See, e.g., *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305–07 (1965) (invalidating a statute that significantly burdened the receipt of “communist political propaganda” mailed from outside the United States because the law constituted “an unconstitutional abridgment of the addressee’s First Amendment rights”).

44 See *infra* notes 133–94 and accompanying text.

45 See, e.g., *Haig v. Agee*, 453 U.S. 280, 308 (1981) (assuming “that First Amendment protections reach beyond our national boundaries” but holding that “Agee’s First Amendment claim has no foundation”).

46 See *id.* at 309 (“To the extent the revocation of his passport operates to inhibit [the owner of the passport], ‘it is an inhibition of *action*,’ rather than of speech.” (quoting *Zemel v. Rusk*, 381 U.S. 1, 16 (1965))).

During the Rehnquist and Roberts Court eras, however, the Supreme Court has moved to flatly deny First Amendment protection to transborder speech activity.<sup>47</sup> For example, the Supreme Court has upheld regulations aimed at chilling the distribution of motion pictures produced abroad<sup>48</sup> and also sustained a federal law that criminalized any contact made abroad with proscribed foreign organizations.<sup>49</sup> In reaching these conclusions, the Justices have either declined to find the First Amendment implicated at all (*Meese v. Keene*<sup>50</sup>) or applied a watered-down version of the First Amendment that bears little relationship to its more rigorous, domestic first cousin (*Holder v. Humanitarian Law Project*<sup>51</sup>).

Accordingly, and as this Article will demonstrate, it is not possible to gainsay that the protection afforded transborder speech has decreased, rather than increased, over time in the United States. The federal government has successfully invoked imperatives associated with diplomatic, military, and national security concerns to justify content- and viewpoint-based speech regulations that burden or completely prohibit First Amendment activity based on the locus of the speech activity being outside the United States.

As this Article will explain in greater detail, a perplexing asymmetry exists in the contemporary Supreme Court's approach to transborder speech and corporate speech. The Roberts Court has been remarkably protective of corporate speech activity, positing that the value of information to an audience is not a function of the identity of the speaker or the speaker's motive for speaking.<sup>52</sup> Thus, a corporation may claim the full protection of the First Amendment when it speaks out on a matter of public concern or about a candidate for public office.<sup>53</sup> It is puzzling why speaker identity and motive are irrelevant to the protected status of corporate speech about a matter of public concern but afforded central and controlling weight in the context of transborder speech.<sup>54</sup>

This Article proceeds in four main parts. Part I considers the Warren Court's tentative efforts to map the First Amendment on to transborder speech activity. Even though these efforts were halting and limited, they represented a major theoretical and doctrinal innovation. Prior to the Warren

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47 See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36–40 (2010).

48 See, e.g., *Meese v. Keene*, 481 U.S. 465 (1987).

49 *Humanitarian Law Project*, 561 U.S. at 39–40.

50 See *infra* notes 199–227 and accompanying text.

51 See *infra* notes 260–82 and accompanying text.

52 See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 339–41 (2010).

53 See *id.* at 342 (“The Court has recognized that First Amendment protection extends to corporations.”); see also *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 n.14, 784 (1978) (holding that the First Amendment protects corporate speech and noting the existence of “many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies”). In *Bellotti*, the Supreme Court held that speech does not lose its First Amendment protection “simply because its source is a corporation.” *Id.* at 784.

54 See *infra* Part IV.

Court, the Supreme Court had not suggested, much less held, that the First Amendment had extraterritorial effect.<sup>55</sup> Part II takes up the more cautious approach of the Burger Court, which declined to build on the jurisprudential foundations established by its predecessor. To be sure, the Burger Court acknowledged that the First Amendment applied to transborder speech but was inclined to credit the federal government's claims that foreign relations, military affairs, and national security interests justified the imposition of significant limits on transborder speech activity.

Part III discusses the diminution of transborder speech protection under the Rehnquist and Roberts Courts. The most recent cases involving transborder speech either find no serious First Amendment interest or, worse still, sustain transborder speech restrictions under a form of "strict scrutiny lite". Drawing on the iconic work of Alexander Meiklejohn, Part IV presents a sustained argument in favor of affording transborder speech activities full and robust First Amendment protection. The Article then provides a brief overview and conclusion.

#### I. THE WARREN COURT AND TRANSBORDER SPEECH: TENTATIVE RECOGNITION AND MODEST, BUT INCONSISTENT, FIRST AMENDMENT PROTECTION

The Warren Court recognized constitutional protection for international travel, both as a liberty interest under the Fifth Amendment's Due Process Clause and as an aspect of the First Amendment. Travel provides opportunities that advance important First Amendment interests, including association, access to news and information, and education. Thus, denial of a passport, which has the effect of precluding international travel, implicates the First Amendment.<sup>56</sup> The Warren Court also held that the right to receive news and information from abroad, including foreign political material, falls within the scope of the First Amendment's protection.<sup>57</sup>

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55 *But cf.* *Reid v. Covert*, 354 U.S. 1, 10–14 (1957) (holding that the Bill of Rights protects U.S. citizens located abroad and overruling *In Re Ross*, 140 U.S. 453 (1891), a decision that held the contrary). Justice Hugo Black explained that unacceptable consequences would necessarily flow from holding the Bill of Rights inapplicable to U.S. citizens when they are outside the United States:

The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes.

*Id.* at 14.

56 As a matter of historical record, foreign travel did not require a passport. See Kahn, *supra* note 16, at 316 ("For most of American history, travel abroad was as unencumbered as travel at home. Passports were optional.").

57 See, e.g., *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

In *Kent v. Dulles*,<sup>58</sup> the Warren Court first recognized the right to travel abroad. Writing for the five–four majority, Justice William O. Douglas observed that “[t]he right to travel is part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”<sup>59</sup> Rockwell Kent sought to attend a “World Council of Peace” conference in England.<sup>60</sup> The State Department’s Passport Office denied Kent’s application for a passport because of an alleged association with the Communist Party.<sup>61</sup> Kent sued, arguing that the denial of a passport based on his political beliefs and associations violated the Constitution; Kent lost in both the district court and before the U.S. Court of Appeals for the District of Columbia.<sup>62</sup>

The Supreme Court granted review and reversed. Rather than reaching the broader constitutional questions,<sup>63</sup> the majority instead held that Congress did not authorize the State Department to refuse to issue passports based on a U.S. citizen’s political beliefs.<sup>64</sup> Justice Douglas explained that it would be mistaken to infer a power “to curtail in [the Secretary of State’s] discretion the free movement of citizens in order to satisfy himself about their beliefs or associations.”<sup>65</sup> Thus, the majority held that the relevant statutory provisions did “not delegate to the Secretary the kind of authority exercised here.”<sup>66</sup>

Strictly speaking, *Kent* does not directly hold that a constitutional right to travel internationally exists; instead, it relies on a saving construction to avoid reaching the larger constitutional question.<sup>67</sup> Even so, Justice Douglas’s opinion strongly intimates that an express authorization to deny a passport based solely on ideological beliefs or political associations would fail to pass constitutional muster.<sup>68</sup> He explained that “we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect.”<sup>69</sup> By way of contrast, the dissenting Justices would have permitted the State Department to deny a passport when the applicant “is

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58 357 U.S. 116 (1958).

59 *Id.* at 125.

60 *Id.* at 117.

61 *See id.* at 117–19.

62 *Id.* at 119–20.

63 *Id.* at 129 (noting that “we do not reach the question of constitutionality”).

64 *Id.* at 130.

65 *Id.*

66 *Id.* at 129.

67 Denial of a passport obviously raises serious constitutional questions and reflects efforts to control domestic politics as much as efforts to protect foreign relations and national security concerns. *See* Louis L. Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFF. 17, 18 (1956) (“Nearly every passport denial has been a decision to keep the citizen here within the high walled fortress where he can be isolated, neutralized, kept, let us say, to his accustomed and observable routines of malefaction. It has been simply one facet of our tactic of domestic security, and only incidentally a matter of foreign policy.”).

68 *Kent*, 357 U.S. at 130.

69 *Id.*

going abroad with the purpose of engaging in activities that would advance the Communist cause,<sup>70</sup> an approach that would have denied meaningful protection to any and all transborder speech activities disapproved of by the State Department.

The Supreme Court's next major transborder speech case also involved passports—more specifically, the revocation of passports based on the holders' support of communist or socialist ideologies and organizations that advocated for such causes. In *Aptheker v. Secretary of State*,<sup>71</sup> the Supreme Court reaffirmed and extended its earlier ruling in *Kent*.<sup>72</sup> The State Department invoked authority under the Subversive Activities Control Act of 1950 (the "Act").<sup>73</sup> The law prohibited the issuance or use of a passport by "any member" of a Communist organization.<sup>74</sup> On October 20, 1961, the federal government listed the Communist Party of the United States under the Act.<sup>75</sup> Following this listing, the State Department notified Herbert Aptheker, as well as Elizabeth Gurley Flynn, "that their passports were revoked."<sup>76</sup>

Following the passport revocation, Aptheker and Flynn sought judicial review of the State Department's order on constitutional grounds; among other constitutional claims, they argued that the order violated both due process and First Amendment rights.<sup>77</sup> A three-judge district court ruled in favor of the State Department and against Aptheker and Flynn.<sup>78</sup> The Supreme Court granted review and reversed, holding that the Act "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment."<sup>79</sup>

Justice Arthur Goldberg, writing for the six–three majority, found the provision authorizing the passport revocations "unconstitutional on its face" because it "swe[pt] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."<sup>80</sup> He explained that "[t]he prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity [that] Congress sought to proscribe."<sup>81</sup> Because there was no requirement that the State

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70 *Dayton v. Dulles*, 357 U.S. 144, 154 (1958) (Clark, J., dissenting); *see also Kent*, 357 U.S. at 131, 143 (Clark, J., dissenting) (objecting to the majority's conclusion "that the Secretary has not been authorized to deny a passport to a Communist whose travel abroad would be inimical to our national security" and arguing that the State Department possessed statutory authority "to deny petitioners' applications for passports").

71 378 U.S. 500 (1964).

72 *See id.* at 505.

73 Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 987 (codified as amended in scattered sections of 50 U.S.C.); *Aptheker*, 378 U.S. at 501–02.

74 *Aptheker*, 378 U.S. at 501–02.

75 *Id.* at 502.

76 *Id.*

77 *Id.* at 503–04, 504 n.4.

78 *Id.* at 504–05.

79 *Id.* at 505.

80 *Id.* at 514.

81 *Id.*

Department assess a citizen's actual level of involvement with the Communist Party on an individualized basis, the statute was not drawn with sufficient narrow tailoring.<sup>82</sup>

The Supreme Court reached this conclusion even though Aptheker was a leader of the Communist Party and the editor of *Political Affairs*, an official publication of the Communist Party of the United States, and Flynn served as Chair of the Communist Party of the United States.<sup>83</sup> Aptheker sought to visit Europe for "study," "recreation," and "to observe social, political and economic conditions abroad, and thereafter to write, publish, teach and lecture in this country about his observations."<sup>84</sup> In addition, he sought to "attend meetings of learned societies and to fulfill invitations to lecture abroad."<sup>85</sup> Flynn offered similar reasons for her desire to travel outside the United States.<sup>86</sup>

Aptheker's reasons for traveling abroad clearly and directly implicated core First Amendment values; his proposed activities all involve the exercise of the freedom of speech, assembly, and association. Accordingly, it should not be surprising that, in addition to the due process rationale, Justice Goldberg also recognized the First Amendment implications of revoking a passport in order to prevent the exercise of protected expressive freedoms: "[S]ince freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants in this case should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel."<sup>87</sup> Justice Goldberg's opinion clearly recognizes that citizens seek to go abroad in order to exercise First Amendment freedoms and that this activity enjoys some measure of constitutional protection.

Justice Douglas, in his concurring opinion, drew the link even more directly. He argued that "[f]reedom of movement is kin to the right of assembly and to the right of association."<sup>88</sup> In his view, "[t]hese rights may not be abridged."<sup>89</sup> Douglas posited that "[w]e cannot exercise and enjoy citizenship in world perspective without the right to travel abroad."<sup>90</sup>

The Warren Court's most sweeping transborder speech decision, *Lamont v. Postmaster General*,<sup>91</sup> invalidated a federal statute that required written registration with the federal government in order to receive "communist political

82 *Id.*

83 *Id.* at 515.

84 *Id.* at 511 n.10.

85 *Id.*

86 *Id.* (reporting that Flynn sought to travel for, among other things, "study" and "to observe social, political and economic conditions abroad, and thereafter to write, publish, teach and lecture in this country about her observations").

87 *Id.* at 517.

88 *Id.* at 520 (Douglas, J., concurring).

89 *Id.*

90 *Id.* at 521.

91 381 U.S. 301 (1965).



propaganda.”<sup>92</sup> The statute provided that foreign material mailed to the United States, and determined by the Postal Service to constitute “communist political propaganda,” would not be delivered to the recipient, but instead “detained by the Postmaster General upon its arrival for delivery in the United States.”<sup>93</sup> The recipient would be notified of its availability and, in order to receive the material, would have to notify the Post Office that the material is “desired by the addressee.”<sup>94</sup>

Obviously, Congress intended this statute to have a predictable and profound chilling effect on the willingness of U.S. residents to receive materials from abroad that the Postal Service deemed to constitute communist political propaganda. Moreover, in order to receive such material, the postal customer had to be willing to create a permanent record, in the form of a reply card, informing the Postal Service in writing of her desire to obtain such material.<sup>95</sup>

The Supreme Court invalidated the statute as facially unconstitutional.<sup>96</sup> Writing for a unanimous Supreme Court, Justice Douglas explained that “the Act as construed and applied is unconstitutional because it requires an official act (*viz.*, returning the reply card) as a limitation on the unfettered exercise of the addressee’s First Amendment rights.”<sup>97</sup> Requiring a recipient to request delivery of otherwise lawful books and periodicals “is almost certain to have a deterrent effect, especially as respects those who have sensitive positions.”<sup>98</sup> For example, many government employees, including school teachers, “might think they would invite disaster if they read what the Federal Government says contains the seeds of treason.”<sup>99</sup> Moreover, “any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as ‘communist political propaganda.’”<sup>100</sup>

Concurring in the judgment, Justice William Brennan, joined by Justice Goldberg, observed that “[t]hese might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders.”<sup>101</sup> However, *Lamont* did not involve free speech claims by foreign governments; instead “the addressees assert First Amendment claims in their own right.”<sup>102</sup> In Justice Brennan’s view, “the right to receive publications” constitutes an important, indeed “fundamental” right, and “[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not

92 *Id.* at 302 (quoting Postal Service and Federal Employees Salary Act of 1962, Pub. L. No. 87-793, § 305(a), 76 Stat. 832, 840 (repealed 2012)).

93 *Id.*

94 *Id.*

95 *Id.* at 303.

96 *Id.* at 307.

97 *Id.* at 305.

98 *Id.* at 307.

99 *Id.*

100 *Id.* (quoting Postal Service and Federal Employees Salary Act of 1962, Pub. L. No. 87-793, § 305(a), 76 Stat. 832, 840 (repealed 2012)).

101 *Id.* at 307 (Brennan, J., concurring).

102 *Id.* at 308.

free to receive and consider them.”<sup>103</sup> In other words, “[i]t would be a barren marketplace of ideas that had only sellers and no buyers.”<sup>104</sup>

Unlike the passport decisions—*Aptheker*, *Kent*, and *Dayton*, which all featured a badly divided Supreme Court—*Lamont* was a unanimous decision.<sup>105</sup> Not a single member of the Supreme Court dissented from the ruling. Perhaps this was so because, as Justice Douglas observed, the regulatory scheme before the Court was “at war with the ‘uninhibited, robust, and wide-open’ debate and discussion that are contemplated by the First Amendment.”<sup>106</sup> Or, as Justice Brennan stated the point, “inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government.”<sup>107</sup>

It is quite clear that foreign governments seeking to disseminate propaganda have no protected constitutional interest in using the U.S. mail service to accomplish this objective. Thus, *Lamont* does not suggest, much less hold, that Russia’s efforts to influence the 2016 presidential election in the United States have any purchase on the First Amendment whatsoever.<sup>108</sup> But, even if foreign governments lack any protected speech rights, or right to access the U.S. marketplace of ideas, U.S. citizens have a right to receive and consider what foreign governments have to say.<sup>109</sup>

103 *Id.*

104 *Id.*

105 *See id.* at 307 (majority opinion).

106 *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

107 *Id.* at 309 (Brennan, J., concurring).

108 *See* Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html> (“Russian agents intending to sow discord among American citizens disseminated inflammatory posts that reached 126 million users on Facebook, published more than 131,000 messages on Twitter and uploaded over 1,000 videos to Google’s YouTube service . . . .”); Greg Miller et al., *Obama’s Secret Struggle to Punish Russia for Putin’s Election Assault*, WASH. POST (June 23, 2017), <https://www.washingtonpost.com/graphics/2017/world/national-security/obama-putin-election-hacking/> (reporting the Russian President Vladimir Putin issued “specific instructions” aimed at achieving “[an] audacious objective[ ],” namely to “defeat or at least damage the Democratic nominee, Hillary Clinton, and help elect her opponent, Donald Trump”). It bears noting that the advertising buys undertaken by the Russian government on Facebook, Google, and Twitter constituted a minute portion of the total paid political advertising related to the 2016 presidential election—perhaps \$100,000 in total on Facebook and about \$60,000 in Russian-related ad buys on Google (with only around \$5000 in purchases by the Russian Internet Research Agency). *See* Isaac & Wakabayashi, *supra*. Russian-related political communications also comprised a “minuscule amount” of the total political communications related to the 2016 presidential election circulating on Facebook, Google, and Twitter. *See id.*

109 *See* MEIKLEJOHN, *supra* note 1, at 91 (arguing that, under the First Amendment, “such books as Hitler’s *Mein Kampf*, or Lenin’s *The State and Revolution*, or the *Communist Manifesto* of Engels and Marx, may be freely printed, freely sold, freely distributed, freely read, freely discussed, freely believed, freely disbelieved, throughout the United States” not to safeguard “the financial interests of a publisher, or a distributor, or even of a writer” but

As Meiklejohn so forcefully explained, the foreign source of ideas and inspiration is irrelevant to their potential relevance to the ongoing project of democratic self-government. For democratic self-government to work, “the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them.”<sup>110</sup> Thus, *Lamont* protects the right of U.S. citizens to receive communist political propaganda through the mail because a power to censor ideas, through the expedient of censorial postal regulations, is a power to control political thought—and such a power simply cannot be reconciled with a meaningful commitment to the process of democratic self-government.<sup>111</sup>

The accident of the materials at issue in *Lamont* originating with a foreign government, and from outside the United States, could have been used as a basis for denying them any meaningful First Amendment protection. Under the plenary power doctrine,<sup>112</sup> the federal government has nearly unfettered discretion to control who may enter the United States and who may seek lawful resident status or naturalization as citizens.<sup>113</sup> It would not require much of a jurisprudential stretch to extend the plenary power doc-

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rather because intense ongoing examination of our government is essential to its proper functioning).

110 *Id.*

111 See *Cohen v. California*, 403 U.S. 15, 24–26 (1971) (invalidating Cohen’s conviction for disturbing the peace based on his public display of a jacket emblazoned with the word “fuck” and explaining that “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process” and that permitting such regulation of speech as offensive conduct would encourage governments to “seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views”); Ronald J. Krotoszynski, Jr., *Cohen v. California: “Inconsequential” Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1254 (1996) (“By distinguishing the question of full and free public debate from the particular content of the message (or the nature of the messenger), Justice Harlan vindicated the individual citizen’s right to hold and share political views within the marketplace of ideas, and to communicate those ideas in unconventional—or even patently offensive—ways.”).

112 See RAUSTIALA, *supra* note 39, at 83–87. It bears noting, however, that the plenary power doctrine does not imply the constitutional authority to violate the constitutional rights of lawfully present aliens. See *id.* at 55 (“The result is a system that permits largely unfettered discretion in the process of admitting or expelling aliens, but requires fair treatment while the aliens are within the United States.”).

113 See *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123–24 (1967) (“It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (positing that “[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government” and observing that the principle that “the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (holding that Congress’s powers over immigration and the national border “are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”).

trine to use the nation's border as a basis for excluding foreign material—in this instance, communist political propaganda—from the United States. Yet, *Lamont* does not feature even a single vote for this outcome; censoring what U.S. citizens may read lies beyond the legitimate scope of the federal government's powers (even when control over the nation's borders is implicated in the speech activity).

Unfortunately, the Warren Court was not consistent in affording serious First Amendment protection to transborder First Amendment activities. In *Zemel v. Rusk*,<sup>114</sup> the Warren Court refused to credit a First Amendment claim that a U.S. citizen has a right to travel to Cuba.<sup>115</sup> *Zemel* constitutes an important exception to the Warren Court's generally protective approach to transborder speech claims.

In 1962, Louis Zemel sought a visa permitting him to “travel to Cuba as a tourist.”<sup>116</sup> The State Department denied the visa application.<sup>117</sup> In October 1962, Zemel renewed his request notwithstanding the State Department's denial of his initial request.<sup>118</sup> Zemel elaborated on his reasons for seeking to travel to Cuba, explaining that he wanted to learn about the current state of affairs on the island in person so as to make himself “a better informed citizen.”<sup>119</sup> The State Department again denied the visa application.<sup>120</sup> Zemel responded to this second denial by filing suit in federal district court, asserting that the visa denial burdened his First Amendment rights.<sup>121</sup> A three-judge district court dismissed his claim and entered summary judgment for the State Department.<sup>122</sup> Zemel appealed to the Supreme Court.

The Supreme Court affirmed the trial court's order.<sup>123</sup> The State Department had statutory authority to deny Zemel's visa application; moreover, doing so did not violate the First Amendment.<sup>124</sup> Chief Justice Earl Warren, writing for a six-three majority, explained that “we cannot accept the contention of appellant that it is a First Amendment right which is involved.”<sup>125</sup> He characterized the visa denial as merely a regulation of “action” rather than “speech,” observing that “[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of

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114 381 U.S. 1 (1965).

115 *Id.* at 16.

116 *Id.* at 3.

117 *Id.* at 3–4.

118 *Id.* at 4.

119 *Id.* at 4.

120 *Id.*

121 *Id.* at 4, 16.

122 *Id.* at 4–5.

123 *Id.* at 20.

124 *Id.* at 13, 16.

125 *Id.* at 16.

decreased data flow.”<sup>126</sup> Accordingly, “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.”<sup>127</sup>

Justice Douglas dissented vigorously, positing that “[t]he ability to understand this pluralistic world, filled with clashing ideologies, is a prerequisite of citizenship if we and the other peoples of the world are to avoid the nuclear holocaust.”<sup>128</sup> He characterized *Kent* as a freedom of speech decision, arguing that it “reflected a judgment as to the peripheral rights of the citizen under the First Amendment.”<sup>129</sup> Travel to other nations, for the purpose of seeking information about foreign peoples and cultures, and the opportunity to learn from such experiences, “gives meaning and substance to freedom of expression and freedom of the press.”<sup>130</sup> In light of these free speech values, “[r]estrictions on the right to travel . . . should be so particularized that a First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion.”<sup>131</sup>

In sum, the Warren Court applied the First Amendment to protect transborder speech but did so in contexts where the locus of the First Amendment activity being protected was domestic. The State Department attempted to deny passports not based on concerns about what the citizen would do abroad, but instead based on purely domestic political activity—namely, membership and participation in the Communist Party. So too, *Lamont* protected the right of persons in the United States to receive foreign materials—not the right of U.S. citizens to go abroad for the purpose of disseminating speech. Even though *Lamont*, *Aptheker*, and *Kent* implicated transborder expressive activity, the First Amendment claims at issue in all three decisions involved government actions that placed burdens on domestic speech and associational activity as well.

## II. THE BURGER COURT AND TRANSBORDER SPEECH: RETRENCHMENT AND GRUDGING ACKNOWLEDGMENT OF THE FIRST AMENDMENT’S APPLICATION TO TRANSBORDER SPEECH

The Burger Court declined to extend the Warren Court’s transborder speech precedents and instead distinguished them away to sustain government burdens on transborder speech—specifically foreign speakers entering the United States<sup>132</sup> and U.S. citizens traveling abroad to speak.<sup>133</sup> The Burger Court’s transborder speech precedents acknowledge that the First Amendment applies to such speech—but nevertheless find that the federal government had acted constitutionally and for reasons wholly unrelated to

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126 *Id.* at 16–17.

127 *Id.* at 17. It bears noting that “[g]overnment restrictions on travel abroad have a long and unfortunate history in this country.” Neuborne & Shapiro, *supra* note 8, at 733.

128 *Zemel*, 381 U.S. at 24 (Douglas, J., dissenting).

129 *Id.*

130 *Id.*

131 *Id.* at 26.

132 *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

133 *Haig v. Agee*, 453 U.S. 280 (1981).

suppression of speech based on content or viewpoint (a dubious conclusion based on the facts at bar).

In *Kleindienst v. Mandel*, the Supreme Court sustained the Nixon administration's decision to refuse Ernest E. Mandel an entry visa.<sup>134</sup> Mandel, a Belgian journalist, served as the editor of a socialist publication, *La Gauche* ("The Left"); he was also an accomplished Marx-Engels scholar and had published works on communist political theory.<sup>135</sup> In September 1969, Mandel applied for a visa for entry into the United States in order to attend an academic meeting at Stanford University, in Palo Alto, California.<sup>136</sup> Famed economist John Kenneth Galbraith was to serve as the keynote speaker at this conference.<sup>137</sup> Mandel was to speak on a panel discussion following Galbraith's address.<sup>138</sup> After Mandel's invitation to speak at Stanford University became publicly known, Mandel received additional speaking invitations, including invitations from "Princeton, Amherst, Columbia, and Vassar."<sup>139</sup>

The U.S. Consulate in Brussels rejected Mandel's visa application in October 1969.<sup>140</sup> The State Department, in a formal letter denying the visa application, claimed that Mandel had violated the terms of his 1968 visa by "engag[ing] in activities beyond the stated purposes" and that his extended activities "represented a flagrant abuse of the opportunities afforded him to express his views in this country."<sup>141</sup> Thus, Mandel was denied lawful entry to the United States and was unable to speak in person to the various audiences that wished to hear his views.<sup>142</sup>

Mandel, joined by a number of U.S. citizens, all university professors who wished to hear and interact with Mandel in person, brought suit in March 1970 to challenge the visa denial.<sup>143</sup> A three-judge district court found the relevant immigration statutes invalid as applied to Mandel on these facts and ordered the State Department to provide him with an entry visa.<sup>144</sup> The ruling rested not on Mandel's right to enter the United States

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134 *Kleindienst*, 408 U.S. at 756–60, 770.

135 *Id.* at 756.

136 *See id.* at 756–57.

137 *Id.* at 757.

138 *Id.*

139 *Id.* at 757.

140 *Id.* at 756–57.

141 *Id.* at 758–59.

142 *Id.* at 759. The relevant statutory provisions actually created a shared responsibility for a waiver from a federal law that barred the admission of persons advocating communist ideologies. *See* 8 U.S.C. § 1182 (2012). The relevant language authorizes a waiver of the ban against issuing an entry visa to any alien who advocates, writes, or publishes "the economic, international, and government doctrines of [w]orld communism" on the recommendation of the State Department, and with the concurrence of the Attorney General. *Id.* § 1182(a)(28)(D). In Mandel's case, the State Department actually recommended that a waiver be approved for the visit, but the Department of Justice refused to approve this recommendation. *Kleindienst*, 408 U.S. at 759.

143 *Mandel v. Mitchell*, 325 F. Supp. 620, 622 (E.D.N.Y. 1971), *rev'd sub nom. Kleindienst*, 408 U.S. 753.

144 *Id.* at 634.

for the purpose of public speaking, but rather on the interest of U.S. citizens in hearing and interacting with him.<sup>145</sup> Judge John F. Dooling, Jr., writing for the majority, explained that “[t]he nature of the First Amendment rights as a retained attribute of the sovereignty of the people is reflected in the emphasis that recent adjudications particularly have given to the ‘the right to hear.’”<sup>146</sup>

Justice Harry Blackmun, writing for the *Kleindienst* majority, did not contest the lower court’s conclusion that the First Amendment protected audience autonomy, including the right to hear and receive ideas from non-U.S. sources and speakers.<sup>147</sup> Moreover, this right to receive information has particular salience in the context of “our schools and universities.”<sup>148</sup> Justice Blackmun considered and squarely rejected the government’s argument that U.S. citizens could access Mandel’s ideas and opinions through means other than in-person real-time communication.<sup>149</sup> Direct personal communication involves “particular qualities inherent in sustained, face-to-face debate, discussion and questioning.”<sup>150</sup> Thus, the “existence of other alternatives” did not “extinguish[ ] altogether any constitutional interest on the part of appellees in this particular form of access.”<sup>151</sup> Thus, as one commentator has observed, *Mandel* “recognizes that a policy of ideological exclusions has important constitutional consequences for American citizens and therefore is subject to constitutional scrutiny.”<sup>152</sup>

On the other hand, under the plenary power doctrine, Congress possesses very broad discretion to admit or exclude noncitizens from entering the United States. Congress has “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”<sup>153</sup> Moreover, “the formulation of these policies is entrusted exclusively to Congress,” a principle that “has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”<sup>154</sup> Accordingly, in light of this vast discretion, Mandel’s supporters did not claim that the First Amendment precluded Congress from barring issuance of a visa to Mandel, but rather that the existence of a waiver procedure meant that the executive branch could not exer-

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145 *Id.* at 630–34.

146 *Id.* at 630.

147 *Kleindienst*, 408 U.S. at 762–63.

148 *Id.* at 763.

149 *See id.* at 765.

150 *Id.*

151 *Id.*

152 Shapiro, *supra* note 16, at 942 n.75; *see also* Zick, *supra* note 3, at 1553 (“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.”).

153 *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967).

154 *Galvan v. Press*, 347 U.S. 522, 531 (1954).

cise its discretionary authority in a way that reflected viewpoint discrimination.<sup>155</sup>

The Supreme Court ultimately dodged the question of whether the State Department could bar Mandel based on his political and ideological beliefs, depriving a U.S. audience of the right to interact with him in person, because the government proffered a “facially legitimate and bona fide” alternative basis for Mandel’s exclusion.<sup>156</sup> The State Department denied the waiver “because [it] concluded that previous abuses by Mandel made it inappropriate to grant a waiver again.”<sup>157</sup> Thus, when the executive branch uses discretionary authority to exclude an alien “on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication” with a visa applicant.<sup>158</sup> In the absence of a facially legitimate and bona fide reason unrelated to the suppression of information and ideas, a meritorious First Amendment claim *might* exist.<sup>159</sup>

Justice Douglas vigorously dissented, arguing that the government applied an “ideological test”<sup>160</sup> to deny Mandel a visa and that “[t]hought control is not within the competence of any branch of government.”<sup>161</sup> In his view, persons living in the United States “may need exposure to the ideas of people of many faiths and many creeds to further their education,” and, accordingly, the federal courts should have narrowly construed the State Department’s statutory authority to deny a visa based on antipathy toward a speaker’s likely message.<sup>162</sup>

Justice Thurgood Marshall also dissented, characterizing the stated reason for denying Mandel a waiver as completely pretextual: “There is *no* basis in the present record for concluding . . . ‘flagrant abuse’—or even willful or knowing departure—from visa restrictions.”<sup>163</sup> The State Department, in point of fact, had found that these restrictions were not communicated to Mandel, so that he could not fairly be charged with violating conditions that

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155 See *Kleindienst*, 408 U.S. at 767 (“They argue that the Executive’s implementation of this congressional mandate through [the] decision whether to grant a waiver in each individual case must be limited by the First Amendment rights of persons like appellees.”).

156 *Id.* at 769.

157 *Id.*

158 *Id.* at 770.

159 *Id.* (“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.”).

160 *Id.* at 770 (Douglas, J., dissenting).

161 *Id.* at 772.

162 *Id.*

163 *Id.* at 778 (Marshall, J., dissenting); *cf.* Shapiro, *supra* note 16, at 944–45 (“Every sovereign nation has the right to control its borders. But in a nation premised on the notion that sovereignty flows from the popular will and that the popular will is determined by political debate, ideological exclusions cannot be justified.”).



he did not know existed in the first place.<sup>164</sup> Justice Marshall seems to have the better of this argument.

Marshall posited that the government's real reason for denying Mandel's visa application was its "desire to keep certain ideas out of circulation in this country," and "[t]his is hardly a compelling governmental interest."<sup>165</sup> He wryly observed that "[n]othing is served—least of all our standing in the international community—by Mandel's exclusion."<sup>166</sup> Mandel's exclusion constituted a departure "from the basic traditions of our country, its fearless acceptance of free discussion."<sup>167</sup>

*Mandel* thus reaffirmed the holding of *Lamont* and acknowledged that the First Amendment protects the interest of a U.S. audience in receiving ideas and information from abroad. At the same time, however, it credited what appeared to be an entirely pretextual reason offered to support denial of entry to a world-famous Marx scholar and journalist. Justice Blackmun, and the *Mandel* majority, clearly placed a thumb on the scale in order to find that the real reason for Mandel's exclusion was his failure to comply with limitations on his speaking engagements when he was in the United States in 1968.

*Mandel* leaves the law more or less as it existed after *Lamont*: the geographic locus of ideas and information does not prefigure its protected status under the First Amendment. Audience autonomy, not the plenary power doctrine, should control with respect to the right of U.S. citizens to read and hear news, ideas, and points of view. However, provided that the federal government does not facially target speech qua speech for regulation, it may use powers related to its plenary power over the borders to take actions that burden or preclude U.S. would-be audiences from reading, hearing, or seeing foreign speakers.

In other words, even as the *Mandel* Court invoked *Lamont* and reaffirmed its central holding, it adopted the *Zemel* Court's approach to assessing the consistency of federal government action regarding control over the nation's borders. The visa denial was not about *speech*—it was merely about *conduct* (or "action," to use the precise language from *Zemel*).<sup>168</sup> To be sure, and as Professor Zick has observed, "U.S. restrictions on the cross-border movement of citizens have long affected cross-border political, intellectual, academic, social, artistic, and religious exchanges."<sup>169</sup> Although *Mandel* acknowledges the importance of transborder interactions between U.S. citi-

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164 See *Kleindienst*, 407 U.S. at 778 (Marshall, J., dissenting).

165 *Id.* at 784.

166 *Id.* at 785.

167 *Id.*; see Neuborne & Shapiro, *supra* note 8, at 767 ("Once the focus is shifted from the foreign speaker, who has no first amendment rights, to the American audience, which possesses full first amendment rights, the issue of judicial capacity in national border cases involving content-based censorship largely disappears."); Shapiro, *supra* note 16, at 945 ("The suppression of speech is surely not the answer in a constitutional democracy.").

168 *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965).

169 ZICK, *supra* note 4, at 30.

zens and the wider world and holds that the First Amendment affords significant protection to such interactions, the credulousness with which the majority accepted a clearly pretextual basis for denying Mandel a visa grossly disserved core First Amendment values and the process of democratic deliberation.

The Burger Court adopted a largely identical approach in *Haig v. Agee*,<sup>170</sup> holding that the First Amendment protected a right to travel abroad, but finding that the government's decision to revoke Philip Agee's passport was unrelated to concerns about the content or viewpoint of his speech but instead related solely to Agee's conduct, namely, unlawful disclosure of national security information.<sup>171</sup> Agee had worked for the Central Intelligence Agency (CIA) from 1957 to 1968 and had personal knowledge of "covert intelligence gathering in foreign countries."<sup>172</sup> In the 1970s, Agee embarked on a public campaign to "out" secret CIA operatives, as well as to release classified intelligence information to facilitate holding the Agency publicly accountable for its actions.<sup>173</sup>

In December 1979, the State Department revoked Agee's passport based on the Department's conclusion that his "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."<sup>174</sup> Agee brought suit in federal district court and prevailed;<sup>175</sup> the court of appeals affirmed this decision.<sup>176</sup> The lower federal courts found that Congress had not authorized the regulation used to revoke Agee's passport. The U.S. Court of Appeals for the District of Columbia acknowledged that Agee's actions "may be considered by some to border on treason,"<sup>177</sup> but nevertheless concluded that the State Department had exceeded its lawful statutory authority because the court was "bound by the law as we find it."<sup>178</sup> The Supreme Court granted review and reversed.<sup>179</sup>

*Agee* clearly presented serious First Amendment issues—at the heart of Agee's program was an effort to disclose covert CIA operations in foreign countries, activity that certainly involved public officials and matters of public concern.<sup>180</sup> It might seem startling to posit that the unlawful disclosure of

170 453 U.S. 280 (1981).

171 *Id.* at 304–06.

172 *Id.* at 283.

173 *Id.* at 283–85.

174 *Id.* at 286 (quoting 22 C.F.R. § 51.70(b) (1980)).

175 *Agee v. Vance*, 483 F. Supp. 729, 732 (D.D.C. 1980), *aff'd sub nom. Agee v. Muskie*, 629 F.2d 80 (D.C. Cir. 1980), *rev'd sub nom. Haig*, 453 U.S. 280.

176 *Muskie*, 629 F.2d at 87.

177 *Id.*

178 *Id.* at 87.

179 *Haig*, 453 U.S. at 310.

180 *Cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964); *see also* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 626–46 (1990) (discussing in some detail the concept of a matter of public concern and how discourse about matters of public concern helps to facilitate the project of democratic deliberation).

classified intelligence information constitutes speech about a matter of public concern, but as Professor Robert Post has explained, “[f]rom the perspective of the logic of democratic self-governance, any restriction of the domain of public discourse must necessarily constitute a forcible truncation of possible lines of democratic development.”<sup>181</sup> This does not mean, of course, that public discourse may never be truncated to advance important government interests, but it does mean that the concept’s “periphery will remain both ideological and vague, subject to an endless negotiation between democracy and community life.”<sup>182</sup>

Then-Justice, and later Chief Justice, William Rehnquist found that the State Department had established a clear policy of revoking passports to prevent a “substantial likelihood of serious damage to the national security or foreign policy of the United States.”<sup>183</sup> He also emphasized that the gravamen of the administrative action was “conduct” rather than speech—the State Department’s policy existed to prevent “conduct likely to cause serious damage to our national security or foreign policy.”<sup>184</sup> *Kent* was not apposite because the policy of denying U.S. passports to members of the Communist Party had not been consistently enforced and also because “[t]he *Kent* Court had no occasion to consider whether the Executive had the power to revoke the passport of an individual whose *conduct* is damaging the national security and foreign policy of the United States.”<sup>185</sup> Justice Rehnquist emphasized that “*Kent* involved denials of passports solely on the basis of political beliefs entitled to First Amendment protection.”<sup>186</sup>

Accordingly, on the facts presented, “Agee’s First Amendment claim ha[d] no foundation,” even assuming “that First Amendment protections reach beyond our national boundaries.”<sup>187</sup> Agee’s disclosures certainly constituted speech, but they were also conduct—conduct aimed at “obstructing intelligence operations and the recruiting of intelligence personnel,” goals and objectives “clearly not protected by the Constitution.”<sup>188</sup> Justice Rehnquist emphasized that “[t]he mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law.”<sup>189</sup> Moreover, even after revocation of his passport, “Agee is as free to criticize the United States Government as he was when he held a passport—always subject, of course, to express limits on certain rights by virtue of his [employment] contract with the Government.”<sup>190</sup> Justice Rehnquist also

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181 Post, *supra* note 180, at 683.

182 *Id.* at 684.

183 *Haig*, 453 U.S. at 302–03.

184 *Id.* at 303.

185 *Id.* at 303–04.

186 *Id.* at 304.

187 *Id.* at 308.

188 *Id.* at 309.

189 *Id.* *But cf.* Kamenshine, *supra* note 16, at 894 (“Permission to travel [should] not be denied for the purpose of punishing the traveler for his political views or attempting to skew scientific or political debate.”).

190 *Haig*, 453 U.S. at 309.

found no evidence of either “subterfuge to punish criticism of the Government” or “any basis for a claim of discriminatory enforcement.”<sup>191</sup>

Justices Brennan and Marshall dissented, not on the point of whether passport revocation could occur on the facts presented, but rather on whether Congress had, in point of fact, authorized the State Department to adopt the regulation used to effect the revocation of Agee’s passport.<sup>192</sup> Moreover, the federal government had not established that Congress had implicitly sanctioned the policy reflected in the regulations.<sup>193</sup> The dissent, then, was about Congress’s responsibility for clearly authorizing the policy, and not whether such a policy, if plainly authorized, would violate the First Amendment.<sup>194</sup>

Whatever the shortcomings of *Agee*, the majority takes pains to acknowledge the Warren Court’s precedents holding that the First Amendment protects the right to travel abroad for the purpose of engaging in expressive activities. *Agee*, like *Mandel*, does not resile from the Warren Court’s holdings that extend First Amendment protection to transborder speech. To be sure, both cases are more broadly deferential to the federal government’s use of control over visas and passports than the relevant Warren Court decisions—yet neither case suggests that First Amendment rights stop at the water’s edge.

It would be quite fair to say that the Burger Court declined to build on the Warren Court’s transborder speech precedents—but it would be off the mark to say that the Burger Court overruled or ignored them. One can perceive, however, a clear and discernable shift toward a posture of greater judi-

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191 *Id.* at 309 n.61.

192 *Id.* at 312–13 (Brennan, J., dissenting) (arguing that Congress must clearly authorize a power to revoke a citizen’s passport and observing that “there is no dispute here that the Passport Act of 1926 does not *expressly* authorize the Secretary to revoke Agee’s passport”).

193 *See id.* at 314–15.

194 Justice Brennan did object to the deferential standard of review that the majority applied to the First Amendment questions raised by the State Department’s revocation of Agee’s passport based on his past speech. In his view, “the Court’s responsibility must be to balance that infringement against the asserted governmental interests to determine whether the revocation contravenes the First Amendment.” *Id.* at 320 n.10. This might have been a more intellectually honest approach; the majority essentially engages in such a balancing exercise but finds the federal government’s interests in foreign affairs and national security overbear Agee’s interest in exercising his First Amendment rights abroad. Justice Brennan’s proposed approach essentially constitutes a call for proportionality analysis. Proportionality analysis involves a reviewing court acknowledging that a fundamental right, in this case, expressive freedoms safeguarded by the First Amendment, has been burdened, but nevertheless gives the government an opportunity to demonstrate that the burden is justified because it relates to a pressing and substantial government objective, directly advances that objective, and is otherwise narrowly tailored to minimize the adverse effects on the constitutional right at issue. *See R. v. Oakes*, [1986] 1 S.C.R. 103, 112 (Can.); *see also* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (David Dyzenhaus & Adam Tomkins eds., Doron Kalir trans., 2012); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

cial deference toward the political branches with respect to efforts to regulate speech activity abroad that has the potential for undermining U.S. foreign policy or national security objectives. This trend grew and accelerated under the Rehnquist and Roberts Courts.

### III. RETROGRESSION: THE REHNQUIST AND ROBERTS COURTS' FAILURE TO AFFORD MEANINGFUL PROTECTION TO TRANSBORDER SPEECH ACTIVITY

The Rehnquist and Roberts Courts have plainly permitted the federal government to restrict the exercise of First Amendment rights based on the transborder character of expressive activities. For example, the Rehnquist Court declined to follow *Lamont* and permitted the federal government to discourage the dissemination within the United States of films funded in part by foreign governments.<sup>195</sup> In addition, it applied the plenary power doctrine to permit targeted deportations that allegedly reflected the federal government's hostility to the deportees' political associations and activities in the United States.<sup>196</sup> Both decisions represent clear, clean breaks with the analytical approach and precedents of the Warren and Burger Courts.

The Roberts Court continued the Rehnquist Court's de facto policy of declining to afford transborder speech significant First Amendment protection. It refused to reach the merits of a challenge to a federal government spying program that targeted all domestic communications with persons or institutions located outside the United States.<sup>197</sup> Even more depressing, the Roberts Court sustained a content-based ban on speech abroad with members of proscribed terrorist organizations—on pain of criminal indictment and imprisonment for lending “material support” to such organizations.<sup>198</sup> In fact, *Humanitarian Law Project* rests on premises fundamentally inconsistent with *Aptheker*, *Kent*, and even *Agee*. For the first time, the Supreme Court held that the federal government may treat otherwise peaceful, nonviolent speech abroad about a matter of public concern as a crime, despite any direct connection between the transborder speech activity and unlawful activities—whether in the United States or abroad.

The Supreme Court's retrenchment project commenced in *Meese v. Keene*, a case that involved coerced speech aimed at discouraging the circulation of films and periodicals produced with foreign government funding.<sup>199</sup> The Foreign Agents Registration Act of 1938 (FARA) requires persons who distribute within the United States films and periodicals funded by foreign governments to register as “agents of foreign principals.”<sup>200</sup> Barry Keene, a California state senator, wished to arrange for public showings of three films

195 *Meese v. Keene*, 481 U.S. 465, 480–82 (1987).

196 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 487–92 (1999).

197 *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401–02 (2013).

198 *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–40 (2010).

199 *Keene*, 481 U.S. at 467–68.

200 22 U.S.C. §§ 611–621 (1982).

produced with support from the National Film Board of Canada; two of the films addressed the adverse environmental effects of acid rain and the third was about the potential catastrophic environmental effects of nuclear war.<sup>201</sup>

The FARA required the films to be registered with the Department of Justice and labeled as foreign “political propaganda” distributed at the behest of a “foreign principal.”<sup>202</sup> The law required “such political propaganda” to be “conspicuously marked at its beginning with, or prefaced or accompanied by, a true and accurate statement” describing the material’s source.<sup>203</sup> The statute also required the exhibitor to provide a formal statement to the recipients of the materials that identifies “such agent of a foreign principal and such political propaganda and its sources.”<sup>204</sup> The FARA defined “political propaganda” quite broadly to encompass “any oral, visual, graphic, written, pictorial, or other communication or expression by any person.”<sup>205</sup> Thus, as in *Lamont*, a person seeking to obtain information from abroad had to register with the federal government and, in addition, to distribute a mandatory disclosure form when exhibiting the material to the public.<sup>206</sup>

The district court found that the FARA’s registration and mandatory disclosure requirements had a profound chilling effect, coerced speech, and hence violated the First Amendment.<sup>207</sup> U.S. District Judge Raul A. Ramirez found that branding expressive materials as “political propaganda” was clearly pejorative and that Congress adopted the measure in order to discourage the dissemination of materials subject to the registration and disclosure requirements.<sup>208</sup> In consequence, the court held “that the use of the phrase ‘political propaganda’ in the Foreign Agents Registration Act abridges plaintiff’s freedom of speech within the meaning of the First Amendment.”<sup>209</sup> The Supreme Court granted direct review of the district court’s judgment and reversed.<sup>210</sup>

Writing for the *Keene* majority, Justice John Paul Stevens characterized the FARA’s mandatory registration and disclosure requirements as wholly unobjectionable and fully consistent with the First Amendment.<sup>211</sup> He flatly rejected the district court’s conclusion that the term “political propaganda” has an obvious and profound pejorative connotation.<sup>212</sup> Accordingly, its

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201 The films included *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid from Heaven*. *Keene*, 481 U.S. at 468 n.3.

202 See *id.* at 470–71 (quoting 22 U.S.C. § 611(j)).

203 22 U.S.C. § 614(b).

204 *Id.*

205 *Id.* § 611(j).

206 *Keene*, 481 U.S. at 470–71.

207 *Keene v. Meese*, 619 F. Supp. 1111 (E.D. Cal. 1985), *rev’d*, 481 U.S. 465 (1987).

208 *Id.* at 1124–26.

209 *Id.* at 1126.

210 See *Keene*, 481 U.S. at 469.

211 *Id.* at 480–81.

212 *Id.* at 483.

compelled use to describe motion pictures, books, or magazines distributed in the United States “places no burden on protected expression.”<sup>213</sup>

Of course, *Lamont* holds that the federal government’s labeling materials from abroad as “communist political propaganda,” and requiring would-be recipients in the United States to register with the government to receive such materials, have an obvious and profound chilling effect—indeed, these requirements could easily prove ruinous to those wishing to receive the information.<sup>214</sup> Why the operator of a movie theater would not fear serious adverse consequences flowing from being identified as the purveyor of “political propaganda” being distributed by the “agents of foreign principals” is far from obvious.<sup>215</sup> Justice Stevens blithely asserts that “Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.”<sup>216</sup> This approach is fundamentally inconsistent with the Warren Court’s serious concerns about the chilling effects of having to register with the federal government to receive otherwise lawful material from abroad.

It is certainly true that “Congress did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit.”<sup>217</sup> Of course, these exact arguments could have been made in *Lamont*—but they were not. Justice Stevens posits that “[b]y compelling some disclosure of information and permitting more, the Act’s approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.”<sup>218</sup> However, were the materials at issue of purely domestic origin, coerced speech requiring the distributor to affix a pejorative label—for example, requiring materials distributed by a public employees labor union to be described as “political propaganda distributed at the behest of labor union agitators”—would be unthinkable. The Supreme Court would reflexively invalidate coerced speech that requires a speaker to denigrate her own speech in a way conceded to be an effort to undermine its persuasive force.<sup>219</sup>

Justice Stevens argued that the cure for the coerced speech problem was not invalidation of the statute imposing the pejorative “foreign propaganda” label, but rather to clarify “during, or after the film, or in wholly separate context—that Canada’s interest in the consequences of nuclear war and acid rain does not necessarily undermine the integrity or the persuasiveness of its

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213 *Id.* at 480.

214 *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965).

215 *Keene*, 481 U.S. at 469–70.

216 *Id.* at 480.

217 *Id.*

218 *Id.* at 481.

219 *See, e.g., Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372–75 (2018) (invalidating as unconstitutional coerced speech a California law that imposed mandatory disclosure requirements regarding the scope of reproductive health services actually offered by crisis pregnancy centers).

advocacy.”<sup>220</sup> Thus, the remedy for coerced speech is more effectively coerced speech—the irony runs very deep.<sup>221</sup>

Moreover, the federal government had to shoulder no serious burden of justification at all in *Keene*—a result that seems quite remarkable. Again, the Supreme Court, in the context of domestic speech, has protected anonymous speech and invalidated efforts to force political speakers to admit publicly authorship of particular political messages.<sup>222</sup> In fact, Justice Stevens wrote the majority opinion *invalidating* Ohio’s proscription against anonymous campaign advocacy.<sup>223</sup> In the context of purely domestic political speech related to an election or ballot measure, the more-speech-is-better rationale went out the window because “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.”<sup>224</sup> Moreover, “[a]nonymity is a shield from the tyranny of the majority.”<sup>225</sup>

It bears noting that not a single reference to *Meese v. Keene* appears in Justice Stevens’s majority opinion in *McIntyre*. Nor is there any suggestion that mandatory information disclosures enhance and secure First Amendment values in the domestic electoral context—rather they constitute a very clear violation of the First Amendment. The only distinction between *Keene* and *McIntyre* involves the geographic source of the expression; domestic speech cannot be subjected to mandatory disclosure requirements, whereas speech that originates abroad, that was funded in whole or in part by a foreign government, may be subjected to mandatory, pejorative labeling requirements.

To be sure, *Keene* was not a unanimous decision. In a powerful and persuasive dissent, Justice Blackmun argued that “[b]y ignoring the practical effect of the Act’s classification scheme, the Court unfortunately permits Congress to accomplish by indirect means what it could not impose directly—a restriction of appellee’s political speech.”<sup>226</sup> The FARA clearly burdens speech because it “inhibits dissemination of classified films.”<sup>227</sup> It will dissuade exhibitors from showing the films and “taints the message of a classified film by lessening its credence with viewers.”<sup>228</sup>

The Rehnquist Court extended its deference to Congress and the President in cases involving transborder speech in *Reno v. American-Arab Anti-Discrimination Committee*.<sup>229</sup> The majority opinion, written by Justice Antonin

220 *Keene*, 481 U.S. at 481.

221 *Cf. Becerra*, 138 S. Ct. at 2372–75 (holding that coerced speech about controversial issues is always unconstitutional, even if such coerced speech does not impede the ability of a speaker to add an additional, alternative, message of her choosing).

222 *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 354–57 (1995).

223 *Id.* at 356.

224 *Id.* at 357.

225 *Id.*

226 *Keene*, 481 U.S. at 491 (Blackmun, J., dissenting).

227 *Id.*

228 *Id.* at 492.

229 525 U.S. 471 (1999).



Scalia, dismissed as irrelevant a claim that the federal government targeted deportation proceedings against the plaintiffs “because of their affiliation with a politically unpopular group,” namely the “Popular Front for the Liberation of Palestine (PFLP), a group that the Government characterize[d] as an international terrorist and communist organization.”<sup>230</sup>

The initial deportation proceedings facially targeted the proposed deportees on “advocacy-of-communism charges,” but the federal government dropped this claim in favor of speech-neutral legal justifications for the deportation proceedings.<sup>231</sup> At a press conference, however, the Immigration and Naturalization Service’s (INS) regional counsel stated that although “the charges had been changed for tactical reasons,” that “the INS was still seeking respondents’ deportation because of their affiliation with the PFLP.”<sup>232</sup> Despite the ideological motivation for the deportations, the Supreme Court held that the proceedings were not subject to judicial review.<sup>233</sup>

The potential chilling effect of targeted deportations based on political activities was irrelevant to deciding whether the deportees’ selective enforcement claims were judicially cognizable.<sup>234</sup> The majority effectively deprived aliens seeking to contest deportation the ability to press selective enforcement claims before the federal courts.<sup>235</sup> This was so because judicial review of such claims, even if laced with First Amendment arguments, would require “not merely the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques.”<sup>236</sup>

As with *Zemel*, *Mandel*, and *Agee*, federal court misgivings about disrupting foreign policy and national security matters clearly motivated the Supreme Court’s decision to defer to the political branches:

The Executive should not have to disclose its “real” reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country’s nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.<sup>237</sup>

This presumption against judicial review could perhaps be overcome in “outrageous” circumstances, but “[w]hether or not there be such exceptions, the general rule certainly applies here.”<sup>238</sup> Accordingly, “[w]hen an alien’s continuing presence in this country is in violation of the immigration laws,

230 *Id.* at 472–73.

231 *See id.* at 473–74.

232 *Id.* at 474.

233 *Id.* at 492.

234 *See id.* at 488 & n.10.

235 *Id.* at 488 n.10 (“Our holding generally deprives deportable aliens of the defense of selective prosecution.”).

236 *Id.* at 490–91.

237 *Id.* at 491.

238 *Id.*

the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.”<sup>239</sup>

Consistent with this posture of deference, the Roberts Court also has used decision avoidance techniques to avoid reaching the merits in important transborder speech cases. *Clapper v. Amnesty International USA*<sup>240</sup> provides an illustrative example of this phenomenon.

Under section 702 of the Foreign Intelligence Surveillance Act (FISA), the federal government may conduct regular surveillance of persons who do not reside in the United States.<sup>241</sup> Such surveillance is contingent on the approval of the FISA court. In *Clapper*, a group of U.S. persons who engage in regular electronic communications with non-U.S. residents sued in federal district court, seeking an order declaring section 702 unconstitutional.<sup>242</sup>

The entire predicate for surveillance under section 702 is communications activity that crosses the nation’s borders. Amendments that Congress enacted in 2008 authorize the conduct “of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad.”<sup>243</sup> Under current law, surveillance undertaken under section 702 does not require any showing of probable cause or targeting of the federal government’s surveillance activity. Use of the data, however, is subject to substantive and procedural protections.<sup>244</sup>

If the federal government engaged in this sort of ongoing, dragnet surveillance with respect to entirely domestic electronic communications, the federal courts would easily find that the surveillance activity constitutes a violation of the Fourth Amendment. The chilling effect of such surveillance also would trigger serious First Amendment concerns. Accordingly, the plaintiffs’ complaint alleged that the section 702 surveillance program violated the Fourth Amendment, the First Amendment, and separation of powers principles.<sup>245</sup>

The *Clapper* Court declined to reach the merits of the plaintiffs’ claims; instead, the majority held that the plaintiffs lacked Article III standing to challenge the “foreign” surveillance program.<sup>246</sup> Justice Samuel Alito, writing for the *Clapper* majority, explained that the plaintiffs’ “theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be ‘certainly impending.’”<sup>247</sup> This was so because “it

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239 *Id.* at 491–92. Justice Ginsburg concurred in the judgment, reasoning that “[i]t suffices to inquire whether the First Amendment necessitates *immediate* judicial consideration of their selective enforcement plea. I conclude that it does not.” *Id.* at 492 (Ginsburg, J., concurring in part and concurring in the judgment).

240 568 U.S. 398 (2013).

241 50 U.S.C. § 1881a (2012).

242 *Clapper*, 568 U.S. at 401.

243 *Id.* at 404.

244 *See id.* at 404–05.

245 *Id.* at 407.

246 *Id.* at 402.

247 *Id.* at 401 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

is speculative whether the Government will imminently target communications to which respondents are parties.”<sup>248</sup> Nor was “incurring costs in anticipation of non-imminent harm” sufficient to establish a constitutionally cognizable injury because self-imposed costs could easily be used to defeat the Article III standing requirement of injury in fact by permitting would-be plaintiffs to essentially manufacture standing through entirely voluntary expenditures.<sup>249</sup>

To be sure, *Clapper* was a five–four decision. Justice Stephen Breyer, writing for the minority, would have held that standing existed because “there is a high probability that the Government will intercept at least some electronic communication to which at least some of the plaintiffs are parties.”<sup>250</sup> Thus, “[t]he majority is wrong when it describes the harm threatened the plaintiffs as ‘speculative.’”<sup>251</sup>

Standing analysis should not turn on whether a constitutional harm involves transborder speech activity or wholly domestic communications. Yet, one has to wonder if the *Clapper* majority was less concerned with judicial review of the section 702 program because it targeted communications that involve at least one foreign party. If, as the preceding cases suggest, the Bill of Rights applies more weakly outside the nation’s borders, it would be reasonable to use discretionary merits-avoidance doctrines, like standing<sup>252</sup> or the political question doctrine,<sup>253</sup> to avoid reaching the merits of the NSA’s mass surveillance of international electronic communications. It would have been more intellectually defensible to reach this conclusion through an analysis of the merits—in other words, one could find that at least some of the plaintiffs had standing to challenge the section 702 surveillance program, but nevertheless deny relief on the merits—and on the theory that constitutional rights apply either weakly or not at all when speech activity takes place, even in part, outside the nation’s territory.

Indeed, in the final major transborder speech case of the Roberts Court era, the Supreme Court essentially took this step because avoiding the merits on standing or political question grounds was not a viable option. In *Holder v. Humanitarian Law Project*,<sup>254</sup> the Supreme Court essentially applied a weak, tepid version of strict scrutiny to a content-based criminal restriction of the freedom of speech and association out of concern that more demanding judicial scrutiny would interfere with important foreign affairs and national security objectives. To be sure, as Professor Zick observes, “[c]ourts seem to treat any utterance or association that happens to intersect with territorial borders as activity that touches on foreign affairs and implicates national

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248 *Id.* at 411.

249 *See id.* at 415–18, 422.

250 *Id.* at 431 (Breyer, J., dissenting).

251 *Id.*

252 *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992).

253 *See Baker v. Carr*, 369 U.S. 186, 210–17 (1962).

254 561 U.S. 1 (2010).

security.”<sup>255</sup> Even so, however, *Humanitarian Law Project’s* abject deference to the political branches—at the cost of proscribing core expressive activity that would be vigorously protected under the First Amendment at home—makes the decision rather remarkable.<sup>256</sup>

*Humanitarian Law Project* involved a First Amendment challenge to a federal statute that criminalized “knowingly provid[ing] material support or resources to a foreign terrorist organization.”<sup>257</sup> Humanitarian Law Project (HLP) sought to teach peaceful dispute resolution techniques to the Partiya Karkeran Kurdistan (PKK); the federal government listed the PKK as a “foreign terrorist organization,” and, accordingly, providing the PKK with “material support” constituted a crime.<sup>258</sup> HLP argued that, as applied to their associational activities with the PKK, which involved instruction in peaceful dispute resolution techniques, section 2339B violated the First Amendment.<sup>259</sup>

The Supreme Court rejected HLP’s First Amendment claims.<sup>260</sup> The statute was not impermissibly vague in proscribing “material support” because “a person of ordinary intelligence” would understand the statute’s scope of application.<sup>261</sup> The majority also rejected HLP’s more general free speech claims, holding that because “[p]roviding foreign terrorist groups with material support in any form” has the effect of furthering terrorism,<sup>262</sup> the federal government had “adequately substantiated [its] determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups’ nonviolent ends.”<sup>263</sup> Chief Justice Roberts, writing for the majority, observed that “[a]t bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization.”<sup>264</sup>

255 Zick, *supra* note 4, at 73.

256 *Id.* at 184 (“*Humanitarian Law Project* is a troubling precedent.”). More specifically, Zick argues that *Humanitarian Law Project* is “in conflict with traditional First Amendment justifications, which emphasize a commitment to protecting peaceful political speech in the interest of self-governance and the search for truth.” *Id.*

257 *Humanitarian Law Project*, 561 U.S. at 8 (quoting 18 U.S.C. § 2339B(a)(1) (2006)).

258 *Id.* at 7–9.

259 *Id.* at 8.

260 *Id.*

261 *Id.* at 24–25.

262 *Id.* at 32.

263 *Id.* at 36.

264 *Id.* *But cf.* Kahn, *supra* note 16, at 333–34 (“Official disapproval of the traveler or his noncriminal purposes in traveling does not entitle the state to restrict the citizen as a ‘potential match[ ]’ in the ‘international tinderbox.’” (quoting *Briehl v. Dulles*, 248 F.2d 561, 273 (D.C. Cir. 1957), *rev’d on other grounds sub nom. Kent v. Dulles*, 357 U.S. 116 (1958))). Professor Kahn argues that “[s]o long as the citizen’s actions are not treasonous,

The sweep and scope of the decision is astonishing. In the 1950s and 1960s, the Supreme Court invalidated state and federal laws that made mere membership in the Communist Party or affiliated organizations a criminal act; the Warren Court held that criminalizing material support of domestic communist organizations was incompatible with the freedoms of speech, assembly, and association safeguarded by the First Amendment.<sup>265</sup> Even if membership in a local branch of the Soviet Communist Party might lend legitimacy and credibility to the local organization's foreign parent, the federal government could not proscribe domestic communist organizations or criminalize mere membership in them. By way of contrast, however, *Humanitarian Law Project* holds that the slightest *possibility* of lending "legitimacy" to organizations like the PKK constitutes a harm that the federal government may legislate to prevent—using the criminal law as its means of censoring speech.

Indeed, Chief Justice Roberts asserts that *any* kind of association and coordinated activity by U.S. citizens with members of foreign terrorist organizations abroad "helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to

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immediately dangerous, or contrary to some contractual obligation made to the state, a citizen's travel is none of the state's business." *Id.* at 335. Professor Aziz Huq posits that "although the Court framed its analysis around the compelling interest in 'combating terrorism' directed toward the United States, much of what followed in fact turned on the distinct, foreign-affairs related government interest in maintaining cordial relations with countries such as Turkey and Sri Lanka." Huq, *supra* note 16, at 24.

265 See *United States v. Robel*, 389 U.S. 258 (1967); *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Yates v. United States*, 354 U.S. 298 (1957), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978); see also Cole, *supra* note 16, at 172 ("[T]he Communist Party cases might have been decided differently had Congress imposed restrictions on association with the *Soviet* rather than the *American* Communist Party."). For relevant discussions of the Red Scare prosecutions of individual citizens for mere membership in or association with the Communist Party in the United States—and the Supreme Court's emphatic rejection of such prosecutions—see WALTER GELLHORN, *AMERICAN RIGHTS: THE CONSTITUTION IN ACTION* 82–83 (1960) and Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 66–97 (1991). Indeed, Professor Marc Rohr observes that "[a]fter the *Scales* and *SACB* [Subversive Activities Control Board] decisions of 1961, every first amendment challenge to 'loyalty' laws that reached the Supreme Court in the 1960's was successful," meaning that even serious advocacy of a proletariat-led revolution could not be the subject of criminal charges. Rohr, *supra*, at 91; see *Brandenburg v. Ohio*, 395 U.S. 444, 447 & n.2 (1969) (per curiam) (holding that the government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" and characterizing prior cases, such as *Yates*, as having adopted and applied this approach). After the Warren Court's landmark 1969 decision in *Brandenburg*, in the absence of convincing evidence that a particular call to action will produce imminent unlawful conduct, advocating violent revolution enjoys full First Amendment protection. *Id.* at 447–48; see Rohr, *supra*, at 97–100 (discussing *Brandenburg* and its effective rejection of criminal prosecutions for advocacy of a violent Communist revolution absent an imminent risk that calls to action would actually precipitate unlawful acts).

raise funds—all of which facilitate more terrorist attacks.”<sup>266</sup> Professor David Cole rightly objects that Roberts “engaged in only the most deferential review, and upheld the law in the absence of any argument, much less evidentiary showing, that prohibiting plaintiffs’ speech was necessary or narrowly tailored to further a compelling interest.”<sup>267</sup> Moreover, “the Court’s scrutiny was . . . neither strict nor fatal, nor even demanding” but rather represented “only the most deferential review.”<sup>268</sup>

Despite the Chief Justice’s claims to the contrary, this kind of “parade of horrors” reasoning would apply with no less force to mere membership in local affiliates of foreign organizations (such as the Communist Party of the Soviet Union) on the theory that *any* domestic support of local affiliates lends the foreign parent organization “legitimacy.” Accordingly, the distinction must rest on the transborder character of the First Amendment activity—and not on the nature of the activity itself. This has the odd effect of making the government’s power to censor speech a function of its location—rather than its potential social cost.

To be sure, *Humanitarian Law Project* does not overturn the Warren Court’s precedents that afforded transborder speech First Amendment protection. Instead, the majority opinion distinguishes them away because the locus of the First Amendment activities protected by the Warren Court’s precedents were largely domestic in character.<sup>269</sup> Chief Justice Roberts emphasizes that “[w]e . . . do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.”<sup>270</sup> Moreover, lower federal courts have relied on this caveat to reject the federal government’s efforts to criminalize membership in domestic affiliates of foreign organizations deemed to have terroristic objectives.<sup>271</sup>

*Humanitarian Law Project* essentially creates an exception to the First Amendment for speech activity that takes place outside the United States.<sup>272</sup>

266 *Humanitarian Law Project*, 561 U.S. at 30.

267 Cole, *supra* note 16, at 148.

268 *Id.* (internal quotation marks omitted).

269 *Humanitarian Law Project*, 561 U.S. at 39.

270 *Id.*

271 See, e.g., *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of the Treasury*, 660 F.3d 1019, 1051–54 (9th Cir. 2011) (validating First Amendment claim because “[t]he entities in *HLP* were wholly foreign, whereas AHIF-Oregon is, at least in some respects, a domestic organization” and “content-based prohibitions on speech violate the First Amendment” when such speech relates to “a domestic branch of an international organization”), *amended and superseded on denial of reh’g en banc* by 686 F.3d 965 (9th Cir. 2012). As Professor Huq has observed, “some commentators have suggested the opinion [in *Humanitarian Law Project*] has only small practical significance because it does not reach domestic organizations.” Huq, *supra* note 16, at 22. However, this effort to renormalize *Humanitarian Law Project* ignores the importance of transborder speech to the process of democratic self-government. See *supra* notes 91–113 and accompanying text.

272 See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1010 n.150 (2011); see also ZICK, *supra* note 4, at 187 (noting that the Supreme Court in *Humanitarian Law Project* “posits a foreign-domestic distinction with respect to First Amendment freedoms that suggests full constitutional protection applies only to intraterritorial communications and

It does so to avoid the prospect of the federal judiciary applying the First Amendment in ways that would potentially interfere with foreign affairs and national security objectives that Congress and the President seek to secure. For example, U.S. foreign relations policy could be adversely affected by transborder speech because it “strain[s] the United States’ relationships with its allies and undermin[es] cooperative efforts between nations to prevent terrorist attacks.”<sup>273</sup> Moreover, the political branches are “entitled to deference” when assessing the potential adverse effects of speech activity abroad because of the “sensitive and weighty interests of national security and foreign affairs.”<sup>274</sup>

Even though Congress imposed a content-based restriction on speech, via the criminal law, and did nothing to narrowly tailor its regulation to directly target only unlawful activity, would-be speakers must lose their ability to exercise First Amendment rights abroad because the judgment of the political branches regarding the requisite balance to be struck “is entitled to significant weight.”<sup>275</sup> Despite purporting to apply strict scrutiny to section 2339B, the majority applied something much closer to rationality review; neither Congress nor the President labored under any obligation to prove the factual predicates that supported a flat ban on speech activity and free association with proscribed organizations abroad. By way of contrast, the legislative record supporting the Bipartisan Campaign Finance Reform Act of 2002 spanned over 100,000 pages—but failed to incite much, if any, judicial deference.<sup>276</sup>

*Humanitarian Law Project* completes the turn that began under the Burger Court in cases like *Mandel* and *Agee*. In order to avoid interfering with foreign policy and national security objectives, the federal courts will apply a “junior varsity” version of the First Amendment to speech activity that takes place outside the physical borders of the United States. The potential social cost of speech activity is not usually a basis for censoring speech inside the nation’s borders—but it constitutes a compelling interest outside of them. This approach is mistaken—at least if the value of speech to the project of

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associations”); Cole, *supra* note 16, at 164 (“There is certainly reason to believe that the analysis in *Humanitarian Law Project* is not generally applicable.”).

273 *Humanitarian Law Project*, 561 U.S. at 32.

274 *Id.* at 33–34. On the other hand, there is good cause for concern that the political branches’ claimed foreign affairs and national security justifications for regulating or banning transborder speech activity could be merely pretextual. See Shapiro, *supra* note 16, at 941 (“But when the nature of that foreign policy interest is explored, it becomes clear that the government’s concrete worry is that a particular speech, pejoratively labeled as ‘propaganda’ or ‘disinformation,’ will cause a public reaction in the United States that will complicate implementation of the administration’s foreign policy objectives.”).

275 *Humanitarian Law Project*, 561 U.S. at 36. *But cf.* Cole, *supra* note 16, at 149 (“For the first time in its history, the Court upheld the criminalization of speech advocating only nonviolent, lawful ends on the ground that such speech might unintentionally assist a third party in criminal wrongdoing.”).

276 *Citizens United v. FEC*, 558 U.S. 310, 412 (2010) (Stevens, J., concurring in part and dissenting in part) (“The total record [Congress] compiled was 100,000 pages long.”).

democratic self-government bears no necessary relationship to a speaker's identity or motive for speaking.<sup>277</sup>

IV. MAPPING THE FIRST AMENDMENT ONTO TRANSBORDER SPEECH: THE RELEVANCE OF MEIKLEJOHN'S DEMOCRATIC SELF-GOVERNMENT THEORY OF FREEDOM OF EXPRESSION

The value of speech has nothing to do with its foreign or domestic locus. The logic of *Citizens United* and the Meiklejohn democratic self-government theory of the First Amendment requires that the federal courts afford speech meaningful First Amendment protection regardless of its transborder nature. Using the nation's borders as a basis for censoring speech is antithetical to everything that the First Amendment ostensibly stands for—and, accordingly, cannot be accepted as a persuasive interpretation of its meaning, scope, and import.

If the central insight of *Citizens United* holds true—the identity of the speaker and the speaker's motivations for entering the marketplace of ideas are irrelevant to the potential value of speech to its audience—the failure to protect cross-border speech cannot be justified in normative, policy, or doctrinal terms.<sup>278</sup> Simply put, either the government may regulate speech based on the identity and motive of a speaker or it may not. Either *Citizens United* or *Humanitarian Law Project* was wrongly decided, for these decisions rest on fundamentally incompatible premises about the central meaning of the First Amendment. In short, if we truly believe that speech related to democratic self-government requires vigorous and vigilant protection against a censorial federal government, then we should embrace the constitutional logic of *Citizens United* and reject *Humanitarian Law Project's* embarrassingly halting, weak, and grossly underprotective vision of the freedom of speech for the citizens of a democratic polity.

The facts of the case are straightforward. As part of the Bipartisan Campaign Reform Act of 2002, a comprehensive campaign finance reform package, Congress enacted a statutory provision that prohibited corporations and

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<sup>277</sup> See *id.* at 339–41 (majority opinion).

<sup>278</sup> Of course, in the real world, the source of news or information obviously plays an important role in its credibility. A reliable news source, such as the *New York Times* or *Wall Street Journal*, which observes standards of journalistic ethics and relies on maintaining its journalistic credibility to secure its market position, should be deemed a more reliable and trustworthy source of news and information than a *Wikipedia* entry or an *Infowars* post. In this sense, then, the identity of a speaker is crucially important to a reader or listener. See Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 983–90 (2005) (noting that the identity of a speaker often prefigures the credibility of information to an audience and documenting the problematic practice of the government deploying so-called “sock puppet” identities to obfuscate the government's authorship of messages in order to enhance the credibility of them with the general public); Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 935–38 (2010) (noting that a speaker's identity can often prefigure the credibility of the speech to an audience and noting that government sometimes attempts to hide its identity in order to enhance the credibility of its speech).



labor unions alike from engaging in “electioneering communication,”<sup>279</sup> which the statute defined as “any broadcast, cable, or satellite communication” that refers to “a clearly identified candidate for Federal office” and made thirty days before a primary election or sixty days prior to a general election.<sup>280</sup> Fearing that the Federal Election Commission would find that broadcast of *Hillary: The Movie*, a film highly critical of Hillary Rodham Clinton, would constitute an “electioneering communication” falling within section 441b’s proscription against such speech by corporations and labor unions, Citizens United, the movie’s producer, sought a preliminary injunction holding section 441b unconstitutional as applied to the film.<sup>281</sup> The district court denied the injunction and the court of appeals affirmed the district court’s judgment.<sup>282</sup>

The Supreme Court granted review and reversed. In doing so, it overruled a 2003 precedent that had specifically upheld section 441b against a First Amendment challenge<sup>283</sup> and also a 1990 decision that had sustained limits on corporate political speech because such speech could have a distortionary effect on the political process.<sup>284</sup> After overruling these precedents, the *Citizens United* majority proceeded to hold that section 441b violated the First Amendment because the statute’s “purpose and effect are to silence entities whose voices the Government deems to be suspect.”<sup>285</sup>

Justice Anthony Kennedy posited that “[t]he First Amendment protects speech and speaker, and the ideas that flow from each.”<sup>286</sup> He emphasized that the government may not intervene in information markets in order to handpick free speech winners and losers: “The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”<sup>287</sup> This rule reflects the fact that the value of information and ideas does not necessarily correlate with either the speaker’s identity or motive for speaking. Moreover, *Citizens United* embraces a theory of audience autonomy that permits readers, listeners, and viewers to assess for themselves the reliability and value of speech; the decision squarely rejects government paternalism as a basis for imposing speech regulations in the political marketplace of ideas.<sup>288</sup> In consequence,

279 2 U.S.C. § 441b (2012).

280 *Id.* § 434(f)(3)A).

281 *Citizens United*, 558 U.S. at 319–21.

282 *Id.* at 322.

283 *McConnell v. FEC*, 540 U.S. 93, 203–09 (2003), *overruled by Citizens United*, 558 U.S. 310.

284 *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658–60 (1990), *overruled by Citizens United*, 558 U.S. 310.

285 *Citizens United*, 558 U.S. at 339.

286 *Id.* at 341.

287 *Id.* at 340–41.

288 *See id.* at 339–41. *But cf.* TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 121–24 (2012) (arguing that government paternalism can protect consumers from false and misleading speech, that unregulated speech markets merely constitute “paternalism of a different stripe, tough love—hard paternalism rather

the government may not use a speaker's identity or motive for speaking as a basis for imposing silence.<sup>289</sup> As Justice Kennedy stated the point, "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."<sup>290</sup>

If these premises are correct—namely that the value of information and ideas is simply not a function of a speaker's identity or motive for speaking and paternalistic government interventions in the political marketplace of ideas are inherently and unacceptably distortionary—then it should also be the case that a speaker's *geographic location* is equally irrelevant to the potential value of speech to the political marketplace of ideas and to the dangers of paternalistic government censorship of core political speech. After all, if "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes,"<sup>291</sup> the location of information otherwise potentially relevant to the process of democratic self-government should be irrelevant to its protected status under the First Amendment.

Given that "no basis [exists] for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers,"<sup>292</sup> the contemporary Supreme Court's failure to provide meaningful protection to transborder speech activity is difficult, if not impossible, to reconcile with core First Amendment values. A theory of the First Amendment premised, at least in part, on a paradigm of audience (voter) autonomy would seem to require that transborder speech be no less protected than speech that happens to take place within the metes and bounds of the United States.

If, as the *Citizens United* majority argued, "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it,"<sup>293</sup> speech that originates outside the nation's borders should be no less protected than speech that originates within those borders. So too, if citizens may engage in free speech, free association, and assembly in order to advance the process of democratic self-government at home, then U.S. citi-

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than soft, protective paternalism," and that government interventions in speech markets to weed out false and misleading information do not "in any way interfere[ ] with listeners' interests").

289 See *Citizens United*, 558 U.S. at 340.

290 *Id.* at 339. Moreover, it bears noting that in today's marketplace of ideas, "[i]nformation flows at great speed, and in remarkable quantity, across our national borders." Zick, *supra* note 3, at 1544. These global information flows are plainly relevant to the process of democratic deliberation necessary to democratic self-government. See MEIKLEJOHN, *supra* note 1, at 25–27. As Professor Meiklejohn argues, under the First Amendment, "[t]he freedom of ideas shall not be abridged," *id.* at 27, and the local or foreign source of an idea is entirely irrelevant to its potential value to the electorate. See *id.* at xiii–xiv, 90–91.

291 *Citizens United*, 558 U.S. at 341.

292 *Id.*

293 *Id.* at 339.

zens should be no less free to engage in such activities abroad.<sup>294</sup> Speech relevant to democratic self-government must enjoy the First Amendment's most robust protection. Simply put, if "political speech must prevail against laws that would suppress it, whether by design or inadvertence,"<sup>295</sup> then the geographic locus of the political speech should not be the controlling factor in First Amendment analysis.

Under the logic of *Humanitarian Law Project*, however, the protection of political expression depends critically on its domestic or transborder character. This outcome simply cannot be reconciled with Justice Kennedy's soaring poetics to the centrality of free and wide-open speech to the maintenance of democratic self-government and his Cassandra-esque warnings about the danger of permitting government to banish disfavored speakers from the political marketplace of ideas.<sup>296</sup> Moreover, *Humanitarian Law Project's* reasoning and outcome also cannot be reconciled with a theory of freedom of expression that justifies protecting speech because of its integral relationship to the process of democratic self-government.

Professor Meiklejohn, arguably the most prominent proponent of the democratic self-government theory of the First Amendment, argued strongly that U.S. citizens must have access to speakers and ideas regardless of their domestic or foreign origin. He inveighed Attorney General Tom C. Clark's adoption of regulations that "restrict[ed] the freedom of speech of temporary foreign visitors to our shores" and "declare[d] that certain classes of visitors are forbidden, except by special permission, to engage in public discussion of public policy while they are among us."<sup>297</sup> Meiklejohn, outraged, asked "Why may we not hear what these men from other countries, other systems of government, have to say?"<sup>298</sup> He condemned efforts to protect voters from speakers and ideas "too 'dangerous' for us to hear."<sup>299</sup> To accept the exclusion of speech, speakers, and ideas based on their foreign origin "would seem to be an admission that we are intellectually and morally unfit to play our part in what Justice Holmes has called the 'experiment' of self-government."<sup>300</sup>

Meiklejohn states the point in forceful, yet highly persuasive, terms. The First Amendment protects the distribution of books like Adolf Hitler's *Mein Kampf*, Vladimir Lenin's *The State and Revolution*, and Friedrich Engels and

294 See MEIKLEJOHN, *supra* note 1, at xiii–xiv, 88–91.

295 *Citizens United*, 558 U.S. at 340.

296 In fact, the *Citizens United* majority declined to decide whether the federal government would have a compelling interest in banning speech by "foreign individuals or associations." *Id.* at 362 (observing that "[s]ection 441b is not limited to corporations or associations that were created in foreign countries or funded predominantly by foreign shareholders" and accordingly "would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process").

297 MEIKLEJOHN, *supra* note 1, at xiii.

298 *Id.*

299 *Id.*

300 *Id.* at xiv.

Karl Marx's *Communist Manifesto* not because of "the financial interests of a publisher, or a distributor, or even of a writer."<sup>301</sup> Instead, "[w]e are saying that the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them."<sup>302</sup> In sum, "[t]he unabridged freedom of public discussion is the rock on which our government stands."<sup>303</sup>

Meiklejohn could not have been more clear, or emphatic, in his rejection of using the transborder nature of speech or speakers as a basis for restricting, much less banning, access by U.S. citizens to people, information, ideas, and ideologies. To threaten American citizens with criminal prosecution for interacting abroad with foreign political organizations (such as the PKK)<sup>304</sup> or attempting to visit Cuba in order to assess the efficacy of the U.S. policy of embargo and isolation,<sup>305</sup> is to undermine, if not betray, the process of wide-open public discussion of public affairs that Meiklejohn believes to be crucial to maintaining the ability of citizens to hold the institutions of government accountable through the electoral process.<sup>306</sup> As he explained, "[w]hen a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator."<sup>307</sup> Instead, "[t]he voters must have it, all of them."<sup>308</sup> If we accept Meiklejohn's arguments, then U.S. citizens must be free to interact with both foreign speakers and ideas—at home, in the United States, but also abroad.<sup>309</sup>

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301 *Id.* at 91.

302 *Id.*; see ZICK, *supra* note 4, at 20 ("Whether we like it or not, we occupy a world where cultures and legal systems are intertwined."); Cole, *supra* note 16, at 170 ("The First Amendment should protect our right to read *The Guardian* (UK), as it does our right to read the *New York Times*, and our right to post blogs on sites immediately accessible in a distant foreign land, as it does our right to hand out a leaflet on a [domestic] neighborhood street corner.").

303 MEIKLEJOHN, *supra* note 1, at 91.

304 See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–39 (2010).

305 See *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965).

306 See Kahn, *supra* note 16, at 348 ("To prevent a citizen from leaving the United States because that travel is asserted to be contrary to the country's foreign policy interests is to engage in a form of countrywide house arrest on grounds that sound uncomfortably close to preventive detention on the basis of future dangerousness (which itself has been held to require strict scrutiny)."); Kamenshine, *supra* note 16, at 894 (arguing that the federal courts should "afford foreign travel by United States citizens a significant degree of first amendment protection").

307 MEIKLEJOHN, *supra* note 1, at 88.

308 *Id.*

309 To be sure, Professor Meiklejohn's specific examples all involve the domestic consumption of foreign books and interactions with foreign, noncitizen speakers, within the United States. See *id.* at 88–91. However, the logic of his position would necessarily have to encompass the ability to go abroad to gather the information necessary to cast a well-informed vote. See *id.* at 25–26, 88–89. *But cf. Zemel*, 381 U.S. at 16–17 (rejecting a First Amendment–based right to travel to Cuba to learn firsthand about conditions there under Fidel Castro because "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow").

So too, trying to discourage U.S. voters from considering ideas and arguments from abroad by labeling films “political propaganda” being distributed by “foreign principals and their agents”<sup>310</sup> seems fundamentally inconsistent with a theory of freedom of speech that protects expression from paternalistic government efforts to control, or even merely to tilt, the marketplace of political ideas. Just as banning a celebrated foreign Marx scholar from visiting the United States in order to lecture and speak to and with audiences comprised of U.S. citizens eager to hear and interact with him<sup>311</sup> transgresses our core constitutional commitment to maintaining a public debate that is “uninhibited, robust, and wide-open.”<sup>312</sup> This is so because, as Professor Cole posits, “[c]ommunication across borders furthers many of the values said to be served by the First Amendment.”<sup>313</sup>

Meiklejohn emphasizes, in a well-functioning democracy, that:

The voters . . . must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. . . . When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.<sup>314</sup>

Moreover, “[t]o be afraid of ideas, any idea, is to be unfit for self-government.”<sup>315</sup>

*Citizens United*, whatever one’s views of the desirability of limits on corporate or union speech favoring or opposing candidates for federal elective office, reflects and incorporates these insights—government simply lacks the constitutional competence to adopt paternalistic regulations that seek to protect voters from bad ideas propagated by self-interested speakers. Audience autonomy constitutes the trump card; the public can judge for itself the merit, or lack thereof, in any particular instance of political speech. By way of contrast, however, *Humanitarian Law Project* permits the government to proscribe First Amendment activity because it *might* impede or burden the achievement of the federal government’s foreign relations or national security objectives. Under this unfortunate precedent, the federal government may suppress, through the criminal law, transborder speech that it deems too

310 See *Meese v. Keene*, 481 U.S. 465, 480–85 (1987).

311 See *Kleindienst v. Mandel*, 408 U.S. 753, 762–70 (1972). *But cf.* *Cole*, *supra* note 16, at 170 (“Exchange with foreign voices informs citizens about world affairs, and thereby furthers self-government.”).

312 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

313 *Cole*, *supra* note 16, at 170.

314 MEIKLEJOHN, *supra* note 1, at 25–26; see ZICK, *supra* note 4, at 212 (“U.S. citizens ought to enjoy protection for free speech, press, assembly, and petition rights without regard to frontiers or borders . . . . Treating expressive rights as portable will facilitate citizens’ participation in global conversation and commingling.”); *Cole*, *supra* note 16, at 169 (“[C]ommunication and association with foreign organizations is, and should be, protected by the First Amendment.”).

315 MEIKLEJOHN, *supra* note 1, at 27.

dangerous to tolerate—because it might lend “legitimacy” to foreign organizations that it opposes.<sup>316</sup> However, a free people in a democratic polity should be entitled to use free speech and their votes to set or amend government policy—rather than the other way around (i.e., government policies controlling the scope of permissible democratic discourse).

The normative position that animates *Citizens United* rests in a fundamental tension with the theoretical basis of *Humanitarian Law Project*: it is simply not plausible to posit that government interventions in speech markets are distortionary—except when they are not. *Citizens United* posits that the First Amendment constitutes a kind of structural check on government, literally “[p]remised on mistrust of governmental power.”<sup>317</sup> If one presumes that government attempts to regulate or control the political marketplace of ideas are inherently distortionary, it would make sense to subject such efforts to beady-eyed judicial scrutiny.

On the other hand, *Humanitarian Law Project* vests government with tremendous power to regulate even core political speech—to criminalize it, in fact—if the speech *might* present an obstacle to the federal government’s foreign policy or national security objectives.<sup>318</sup> The risk of government abusing its power to censor speech, and thereby distorting the mechanisms of democratic accountability,<sup>319</sup> exists regardless of the domestic or foreign locus of speech. One cannot coherently take both sides on the fundamental question of whether, as a general matter, government interventions in speech markets *enhance* or *degrade* the marketplace of ideas. Nevertheless, the constitutional logic of *Humanitarian Law Project* would support the kinds of domestic speech regulations that the *Citizens United* majority so forcefully rejected as fundamentally incompatible with the central meaning and purpose of the First Amendment.

In sum, the threat that an organization and its ideas present to the public health, safety, and welfare simply does not correlate with the organization’s domestic or foreign nature. If “[t]he primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life,”<sup>320</sup> then the federal courts cannot permit the transborder nature of speech to prefigure its protected, or unprotected, status under the First Amendment.<sup>321</sup> A thorough and mean-

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316 Cf. Neuborne & Shapiro, *supra* note 8, at 744 (“Democratic principles are reinforced, not diminished, by judicial review that prevents a transient majority from tampering with the flow of information necessary to assure its continued political accountability.”).

317 *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

318 *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–39 (2010). It bears noting that the Supreme Court issued both decisions during the same term.

319 See *Citizens United*, 558 U.S. at 339 (positing that free speech constitutes “an essential mechanism of democracy” because it serves as “the means to hold officials accountable to the people”).

320 MEIKLEJOHN, *supra* note 1, at 88–89.

321 See Kamenshine, *supra* note 16, at 876 (“The business of government does not include using its regulatory power to shape a political viewpoint.”); Neuborne & Shapiro,

ingful commitment to democratic self-government, and the process of deliberation that facilitates it, requires that “no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from [the citizenry].”<sup>322</sup> Yet the Supreme Court, from the Burger Court era to the present, has failed to respect and advance these principles when transborder speech is at issue. We can and should expect more civic courage from our nation’s highest constitutional court.<sup>323</sup> Moreover, a theory of the First Amendment resting on the dual jurisprudential pillars of speaker autonomy and distrust of government censorship requires a full measure of constitutional protection for transborder speech.

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*supra* note 8, at 748 (“Given the danger to a free society created by widespread censorship at the national border, reviewing courts should insist upon proof, not merely that speech *might* damage our foreign policy or even our national security, but that it is reasonably likely to do so.”). Kamenshine concludes that “[r]egulation controlling speech directly related to issues of public policy demands strict review.” Kamenshine, *supra* note 16, at 878. On the other hand, however, Neuborne and Shapiro think judicial vigilance is unlikely to occur in transborder speech cases because “[i]n national border cases . . . the nature of the asserted governmental interest often involves assessments of fact and policy beyond the institutional competence of the judiciary, making judges extremely wary of estimating the importance of an asserted government justification.” Neuborne & Shapiro, *supra* note 8, at 747. Because of this reticence to interfere with foreign relations and national security efforts, federal judges feel “bound to defer to any justification that [is] not facially invalid.” *Id.* To be sure, the potential social costs of transborder speech could be quite high—but those costs do not seem to affect the willingness of the federal courts to protect *domestic* speech activity that could easily produce very serious adverse effects abroad—such as the infamous fundamentalist Florida preacher Terry Jones—who conducts public Koran burnings. See Kevin Sieff, *Florida Pastor Terry Jones’s Koran Burning Has Far-Reaching Effect*, WASH. POST (Apr. 2, 2011), [https://www.washingtonpost.com/local/education/florida-pastor-terry-jones-koran-burning-has-far-reaching-effect/2011/04/02/AFpiFoQC\\_story.html?utm\\_term=.7258dd23273c](https://www.washingtonpost.com/local/education/florida-pastor-terry-jones-koran-burning-has-far-reaching-effect/2011/04/02/AFpiFoQC_story.html?utm_term=.7258dd23273c); see also Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 386–91, 397–99 (2017) (providing an excellent historical and doctrinal overview of free speech “national security exceptionalism” and positing that national security concerns, including concerns about terrorism, “are . . . somewhat inflated”). Professor Chen argues that “the legal system ought to be skeptical about calls to relax the free speech protections surrounding unlawful advocacy” and cautions against “a tendency to overreact to what are perceived as new types of national security threats.” *Id.* at 399.

322 MEIKLEJOHN, *supra* note 1, at 89.

323 See Neuborne & Shapiro, *supra* note 8, at 748 (“[A] genuine threat to national security must arise before the national border can be used to impede the free flow of ideas.”). See generally Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988) (positing that, consistent with the arguments set forth in Justice Louis Brandeis’s iconic concurring opinion in *Whitney*, the process of democratic deliberation necessarily requires that society tolerate speech that could impose serious social costs). As Professor Zick has argued, “[e]xtension of First Amendment protections to U.S. citizens located abroad would seem to be supported by text, theory, and precedent.” Zick, *supra* note 3, at 1593. Moreover, “[t]he First Amendment’s text does not suggest any geographic limitation.” *Id.*

## CONCLUSION

The Warren Court pioneered First Amendment protection for transborder speech. The Burger Court failed to expand on the limited scope of protection that the Warren Court conveyed on transborder speech—but declined to expressly overrule the Warren Court’s precedents. By way of contrast, however, the Rehnquist and Roberts Courts moved both existing doctrine and practice toward a more general posture of abject judicial deference to Congress and the President when the political branches seek to regulate, or even proscribe, transborder speech activity that takes place abroad.

As Professor Zick observes “the First Amendment has a critically important transborder dimension.”<sup>324</sup> First Amendment theory and doctrine can and must take account of transborder speech as a potentially important part of the larger process of democratic deliberation. To be sure, the federal courts’ consistent failure to protect transborder speech vigorously and vigilantly suggests that securing change may take time and involve incremental, rather than wholesale, improvements. Even if this is so, however, Neuborne and Shapiro are surely correct to posit that “the assumption that present judicial attitudes are immutable, or that they even reflect a coherent legal theory, is mistaken.”<sup>325</sup>

The case for change is not difficult to make: It is impossible to reconcile the core First Amendment reasoning of *Citizens United* with that of *Humanitarian Law Project*. *Citizens United* constitutes an extended argument that the value and relevance of speech to the project of democratic self-governance does not depend on a speaker’s identity or motive for speaking. The decision also reflects deep skepticism about government efforts to censor or even to shape the political marketplace of ideas by banishing disfavored speakers. Yet *Humanitarian Law Project* reflects precisely the opposite attitude—a position of reflexive trust in government—and rests on the assumption that a speaker’s identity and motive for speaking (at least in the transborder context) may serve as a basis for sustaining government regulations that nakedly censor even core political speech. If the Supreme Court actually meant what it said with such force in *Citizens United* about the First Amendment being premised on a profound mistrust of government interventions in speech markets,<sup>326</sup> then the federal courts can and should apply the First Amendment more reliably and robustly to transborder speech.

In conclusion, First Amendment activity should not go unprotected simply because it happens to possess a transborder element. Current First Amendment theory and doctrine fails—quite badly—to respect the idea that the First Amendment protects a public debate that will be “uninhibited,

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324 ZICK, *supra* note 4, at 7.

325 Neuborne & Shapiro, *supra* note 8, at 765.

326 *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.” (citation omitted)).



robust, and wide-open.”<sup>327</sup> If the Supreme Court’s efforts to prohibit the government from distorting the political marketplace of ideas reflect a meaningful and deep-seated jurisprudential commitment—rather than a merely rhetorical one—a serious course correction is both needed and long overdue.

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327 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

