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### PRESERVING POLITICAL SPEECH FROM OURSELVES AND OTHERS

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A central concern in First Amendment jurisprudence is the proper scope of government authority to regulate speech on matters of national political concern.<sup>1</sup> Such speech supposedly secures heightened protection via a “strict scrutiny” test long glossed as “fatal in fact.”<sup>2</sup> Strict scrutiny is thought to demand that measures be “narrowly tailored” to address a “compelling government interest.”<sup>3</sup> Recent scholarship, however, has demonstrated that strict scrutiny is internally variegated. Under its rubric, courts employ different methodologies<sup>4</sup> and varying degrees of stringency.<sup>5</sup> Courts also subtly alter the verbal formulation of scrutiny even within the political speech domain.

This Essay is a case study of how the heightened judicial scrutiny of political speech regulation can vary even between cases decided by a single tribunal—the Roberts Court. Two lines of jurisprudence from that tribunal implicate political speech. First, the Court has invalidated several state and federal campaign finance laws.<sup>6</sup> Second, it has upheld a federal statute

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1. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (“The Free Speech Clause exists principally to protect discourse on public matters . . .”).

2. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 8 (1972).

3. *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)); accord *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“To satisfy strict scrutiny, the State must demonstrate that [the] legislation is narrowly tailored to achieve a compelling interest.”).

4. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1301–11 (2007) (arguing strict scrutiny might be characterized as categorical rule, weighted balancing test, or heuristic to identify measures animated by unconstitutional ends).

5. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *Vand. L. Rev.* 793, 796–97 (2006) (finding, based on survey of cases, about one in three laws survive strict scrutiny challenges, but survival rate varies according to right at issue).

6. See *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) (invalidating matching subsidy element in Arizona’s public financing system); *Citizens United v.*

criminalizing “material support” to designated foreign terrorist organizations (“FTOs”).<sup>7</sup> These lines of precedent are more alike, I will argue, than first appearances suggest. Both can be colorably read to involve state efforts to regulate the national political marketplace. Both also implicate a compelling government interest in preserving democracy, albeit from distinct internal and external threats. Yet doctrinal propinquity yields no convergence in outcomes. In the Roberts Court, the government prevails when defending democracy against external threats but loses against internal corruption.

My aim here is to examine the common doctrinal matrix of First Amendment scrutiny of political speech regulation to explain how such divergent results can emerge from a unified analytic framework (rather than, say, to explore how exogenous political or social forces might be used to explain the doctrine). A secondary goal is to illustrate how post-9/11 national security concerns find expression inside familiar and seemingly durable doctrinal frameworks. I begin in Part I by briefly sketching the two lines of cases. Part II examines how and why the severity of the Court’s scrutiny modulates across the two contexts. Part III then demonstrates that even when the Court applies the same formal decision rule across cases, that rule can have divergent downstream effects. I conclude on a note of skepticism about the possible justifications for observed intradoctrinal variances.

## I.

Initially, the Supreme Court sorted campaign finance laws into (permissible) regulation of contributions to candidates or parties on the one hand, and (impermissible) regulation of independent expenditures on the other.<sup>8</sup> The Court explained that “[r]estraints on expenditures generally curb more expressive associational activity than limits on contributions do” while “limits on contributions are more clearly justified by a link to political corruption.”<sup>9</sup> Yet a moment’s reflection suggests that the line between spending oneself and giving money to a candidate is hardly self-evident in practice: What if instead of donating money to candidates, I contact them to see what kind of advertising they need and proceed accordingly? Acknowledging this fuzzy edge, the Court draws a “functional, not a formal, line” between truly independent expenditures and expenditures with a

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FEC, 130 S. Ct. 876, 913 (2010) (invalidating federal bar on corporate and union expenditures on election-related speech close to date of polling); *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008) (invalidating so-called millionaire’s amendment in federal campaign finance law); *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2663–66 (2007) (accepting as-applied challenge to bar on corporate speech close to elections).

7. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730–31 (2010) (rejecting as-applied challenge to applications of 18 U.S.C. § 2339B (2006), one of several material support provisions).

8. *Buckley v. Valeo*, 424 U.S. 1, 51 (1974) (per curiam) (invalidating independent expenditure limitation provision of Federal Election Campaign Act of 1971); see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386–88 (2000) (noting contribution limits “would more readily clear the hurdles before them”); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259–60 (1986) (“We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.”).

9. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440–41 (2001).

candidate's "approval (or wink or nod)."<sup>10</sup> The latter count as contributions. Hence, the truly important doctrinal distinction—the de facto boundary between highly protected speech and vulnerability to campaign finance regulation—is between *independent* and *coordinated speech*.

On both sides of the independent/coordinated divide, the Roberts Court has innovated in a deregulatory direction. Early in the new Chief's tenure, the Court invalidated Vermont limits on individual contributions to political candidates as beneath "some lower bound" of constitutionality.<sup>11</sup> On the independent expenditure side of the line, *Citizens United v. FEC* struck down a federal bar upon the use of corporate funds for electioneering communications.<sup>12</sup> And in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court invalidated an Arizona public financing scheme in which a privately funded candidate's decision to exceed a stated expenditure ceiling triggered increased funding for candidates supported by the public purse.<sup>13</sup> To many commentators who favor campaign finance reform, these decisions seemed to sound a death knell for the comprehensive regulation of money in politics. After *Citizens United*, some argued, independent entities such as political action committees and 527 organizations<sup>14</sup> would become vehicles for unlimited spending, fostering a surfeit of what some perceive to be undesirable bonds of obligation between office holders and a limited pool of unaccountable interest groups.<sup>15</sup>

Importantly, a careful and exacting form of scrutiny applies, albeit in different ways, on each side of the independent/coordinated divide. On the one hand, the Court reviews independent expenditure restrictions under a truly *strict* scrutiny standard.<sup>16</sup> For example, *Citizens United* catalogued the absence of evidence that corporate expenditures were being exchanged for legislative

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10. *Id.* at 442–43. The FEC takes the position that "extensive consultations with the campaign staff of certain candidates regarding the distribution of its voter guides and other materials" can turn "otherwise permissible campaign-related materials into illegal in-kind campaign contributions." *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 48–49 (D.D.C. 1999). "Coordination" is defined by regulation. 11 C.F.R. § 109.21(a) (2011).

11. *Randall v. Sorrell*, 548 U.S. 230, 246–62 (2006) (invalidating limitations on individual political contributions to candidates of between \$200 and \$400).

12. 130 S. Ct. 876, 911 (2010) (invalidating 2 U.S.C. § 441b (2006)).

13. 131 S. Ct. 2806, 2813–16 (2011). This is not entirely accurate. Independent third-party expenditures on behalf of a privately funded candidate also triggered the match. *Id.*

14. Tax-exempt entities formed under 26 U.S.C. § 527 (2006) for the purpose of political lobbying.

15. See Michael S. Kang, *The End of Campaign Finance Reform as We Know It*, 98 Va. L. Rev. (forthcoming 2012) (manuscript at 36–38), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1829474](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1829474) (on file with the *Columbia Law Review*) (arguing "[w]ith the opportunities for unlimited independent expenditures by outside groups, we are likely to see political actors re-focusing away from grass-roots mobilization . . . back to a focus on a relatively small group of ultra-wealthy donors"). But see Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 142 (2010) ("*Citizens United* is a distraction of limited consequence."); Justin Levitt, *Confronting the Impact of Citizens United*, 29 Yale L. & Pol'y Rev. 217, 220–22 (2011) ("*Citizens United* invalidated the federal ban on corporations' ability to advocate expressly for or against political candidates, but it did not portend the complete collapse of other campaign finance regulation.").

16. *Citizens United*, 130 S. Ct. at 898.

votes.<sup>17</sup> Acknowledging the Court’s “due deference” to Congress’s conclusion that a compelling interest exists, Justice Kennedy’s opinion nevertheless emphasized that the Court would ensure that “Congress . . . not choose an unconstitutional remedy.”<sup>18</sup> He underscored the absence of harmful corruption in twenty-six states without corporate expenditure restrictions as evidence of narrow tailoring’s absence.<sup>19</sup>

By contrast, coordinated expenditure regulations that impose a “significant interference” on speech rights must only be “closely drawn” to match a “sufficiently important interest.”<sup>20</sup> This is a looser formulation than the scrutiny applied to expenditure controls, although one that still demands close means-ends tailoring. Even on the contribution side of the line, the Court has not suggested it is applying anything less than careful scrutiny given the political speech interests at stake, although it certainly tends to uphold most regulation of campaign-related giving.<sup>21</sup>

In contrast to the campaign finance jurisprudence, the ledger of Roberts Court cases involving restrictions on speech justified on national security grounds has exactly one entry. In the 2010 case *Holder v. Humanitarian Law Project (HLP)*, the Court turned aside as-applied First Amendment challenges to one of several statutes criminalizing “material support” for terrorism.<sup>22</sup> The material support statute plays a significant role in many criminal prosecutions involving terrorism.<sup>23</sup> The challenged statute, 18 U.S.C. § 2339B, is keyed to a list of foreign groups designated by the Secretary of State as FTOs.<sup>24</sup> Lending FTOs any one of a diverse list of “support or resources” is prohibited.<sup>25</sup> As the facts of *HLP* show, material support reaches (but is not limited to) First Amendment-protected speech. For instance, the *HLP* plaintiffs were U.S.-based not-for-profits wishing to train members of designated FTOs (specifically, the Kurdish Workers Party (PKK) and the Liberation Tamil Tigers of Eelam (LTTE)) on humanitarian and international law, on political advocacy techniques, and about the petitioning of international bodies.<sup>26</sup>

The Court, having turned aside the *HLP* plaintiffs’ statutory interpretation and vagueness arguments, rejected an as-applied free speech challenge to

17. *Id.* at 910–11. Arguably, the Court’s contextual analysis is vulnerable on the facts, for instance, in its treatment of corporate democracy. *Id.* at 911.

18. *Id.*

19. *Id.* at 908–09.

20. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387–88 (2000) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

21. See Winkler, *supra* note 5, at 847–48 (noting zero percent survival rate of expenditure limits in federal appellate courts).

22. 130 S. Ct. 2705, 2730 (2010).

23. Ctr. for Law & Sec., N.Y. Univ. Sch. of Law, Terrorist Trial Report Card, September 11, 2001–September 11, 2010, at 13 fig. 14 (2011), available at [http://www.lawandsecurity.org/Portals/0/documents/01\\_TTRC2010Final1.pdf](http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf) (on file with the *Columbia Law Review*) (showing use of material support in high-profile prosecutions).

24. 8 U.S.C. § 1189 (2006) (authorizing Secretary of State, in consultation with Attorney General and Secretary of the Treasury, to designate foreign group as “foreign terrorist organization”).

25. 18 U.S.C. § 2339A(a) (2006); see also 18 U.S.C. § 2339A(b)(1) (listing forms of material support).

26. *HLP*, 130 S. Ct. at 2716.

§ 2339B.<sup>27</sup> Chief Justice Robert’s majority opinion does not explicitly set forth the strict scrutiny standard or employ the precise terminology of “narrow tailoring.” But the Court opened its analysis by rejecting the Solicitor General’s submission that intermediate scrutiny applied on the ground that “§ 2339B regulates speech on the basis of its content.”<sup>28</sup> The Court conspicuously did not cite cases reviewing conduct regulations with only an incidental effect on speech,<sup>29</sup> which it might have invoked to resolve the case expeditiously in the government’s favor. Subsequently, lower courts have concluded that “[t]he Court held that strict scrutiny applied because, at least on the facts of that case, the statute regulated speech because of its content.”<sup>30</sup> For the purpose of this paper, I accept this characterization, bracketing the question of how an incidental-effects analysis would *arguendo* apply.<sup>31</sup>

At the threshold, Chief Justice Roberts dealt summarily with the compelling interest question. He explained that “the Government’s interest in combating terrorism is an urgent objective of the highest order.”<sup>32</sup> He identified no other compelling government interest. In lieu of a narrow tailoring analysis, the Court focused upon one of the implicit premises of the blanket ban on supporting FTOs: that “any contribution to such an organization facilitates [violence].”<sup>33</sup> This premise, the Court suggested, underpinned Congress’s decision to treat even nonviolent support, including the *HLP*

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27. *Id.* at 2716–17, 2730 (noting not all applications of material support statute were before Court).

28. *Id.* at 2723–24 & n.5 (“If plaintiffs’ speech to those groups imparts a ‘specific skill’ or communicates advice derived from ‘specialized knowledge’ . . . then it is barred. . . . On the other hand, plaintiffs’ speech is not barred if it imparts only general or unspecialized knowledge.”). One might object that § 2339B is most accurately described as drawing distinctions based on the intended audience of speech, and not on the content of the speech itself. That formulation collapses back into the question whether the government is entitled to distinguish between speech based on judgments about different potential audiences.

29. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 367 (1968) (reviewing and upholding application of federal statute making it illegal to burn a selective service registration card).

30. *Al-Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, No. 10-35032, 2011 WL 4424934, at \*26 (9th Cir. Sept. 23, 2011).

31. In my view, the Court was correct not to employ the *O’Brien* incidental effects framework. Briefly, my reasons for this judgments turn on the simple fact that “material support” has been defined by Congress to include a long list of activities. See 18 U.S.C. § 2339A(b)(1) (2006) (defining “material support” as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , and transportation, except medicine or religious materials”). Many of these activities are clearly not speech. Others, such as “advice” and “training,” clearly are. And it is at least plausible to think Congress included those elements with an aim of eliminating domestic speech supportive of the viewpoint of FTOs. To apply the incidental effects analysis would, in effect, reward Congress for bundling speech and nonspeech prohibitions together, thereby reducing the judicial scrutiny of legislative efforts at speech suppression. The Court may rightly have perceived that application of *O’Brien* would have created an undesirable incentive for Congress to bundle together speech and nonspeech rules in the future.

32. *HLP*, 130 S. Ct. at 2724.

33. *Id.* at 2724–25 (emphasis omitted) (citing Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (codified as amended as note to 18 U.S.C. § 2339B)).

plaintiffs' speech, as criminal. The Court identified three reasons why "Congress was justified" in that view.<sup>34</sup> First, it posited that "[m]oney is fungible," and terrorist organizations lack organizational firewalls to prevent resource diversions.<sup>35</sup> On this point, the Court invoked a 1997 incident involving the PKK and quoted from a 2006 monograph about the Palestinian group Hamas to support the proposition that FTOs used social and charitable activities to hide illegal activity and to generate recruits for violence.<sup>36</sup> The Court also hypothesized that the *HLP* plaintiffs' speech might allow the PKK to employ international organizations "to threaten, manipulate and disrupt" political processes.<sup>37</sup>

Second, the Court found that the proscribed forms of material support "hel[p] lend legitimacy" to FTOs.<sup>38</sup> The Court did not define "legitimacy," or respond to Justice Breyer's observation that many other forms of protected activity might lend an FTO legitimacy (rendering that justification at the very least underinclusive and poorly tailored).<sup>39</sup> Third, the Court stated that material support also "strain[s] the United States' relationships with its allies," who perceive "no" possibility of "legitimate" FTO activity.<sup>40</sup>

Based on these inferences, the Court concluded that the material support provision could lawfully be applied to any "speech under the direction of, or *in coordination* with foreign groups."<sup>41</sup> Relevant here, this holding inscribes the same boundary to protected speech as the campaign finance jurisprudence—the line between independent and coordinated social action.<sup>42</sup>

In the plotting of this doctrinal line, a general claim about comparative institutional competence was as pivotal for the Court as any of the specific justifications offered for § 2339B. The Court emphasized that the material support bar rested "on informed judgment rather than concrete evidence" in a domain in which "Congress and the Executive are uniquely positioned to make principled distinctions."<sup>43</sup> An extended portion of the opinion then developed grounds for "deference" not merely to Congress's judgment, but also to the Executive's conclusions about "evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to

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34. Id. at 2725.

35. Id. at 2725–26.

36. Id. (citing Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* 2–3 (2006)).

37. Id. at 2729. Again, the Court relied on a secondary academic source, rather than specific record evidence. Id. (citing Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* 286–95 (2007)).

38. Id. at 2725.

39. Id. at 2736–37 (Breyer, J., dissenting); cf. id. at 2726 (majority opinion) (asserting coordinated/independent speech line is "a natural stopping place" but not saying why).

40. Id. at 2726–27 (majority opinion).

41. Id. at 2723 (emphasis added).

42. Recall that, in the campaign finance context, unprotected "contributions" speech includes coordinated expenditures. See *supra* notes 8–10 and accompanying text. The most important doctrinal distinction in campaign finance law is thus between independent and coordinated speech.

43. *HLP*, 130 S. Ct. at 2728.

assess.”<sup>44</sup>

Does *HLP* influence how the national political market operates? On the one hand, the Court assumed that the speech at issue fell within the core of First Amendment protection, hinting at some significant stake. Nevertheless, some commentators have suggested the opinion has only small practical significance because it does not reach domestic organizations.<sup>45</sup> Even casual observation demonstrates, however, that foreign affairs matters occupy a meaningful tranche of the national political debate initiated by domestic actors. Many local and national interest groups are deeply committed to influencing U.S. policy on foreign affairs matters implicated by FTO designations, from Ireland and Spain to the Middle East and South Asia.<sup>46</sup> The material support ban does not stop such advocacy, but it does distort it. That law criminalizes interaction with foreign entities and thereby influences what domestic interest groups can know or do. It thus excises from the public sphere some set of speech. Consider, for example, the designation of Iranian organizations, including the Mujahedin-e Khaleq (MEK), that oppose the Ahmadinejad regime.<sup>47</sup> All else being equal, a private supporter of the MEK has ample reason to lobby Washington: The MEK has substantial congressional support, if not quite sufficient to shrug off FTO designation.<sup>48</sup> But that supporter has asymmetrical incentives over the choice of domestic lobbying tools. After *HLP*, it cannot consult—and perhaps cannot even meet—the MEK. Nor can it engage in domestic lobbying based on information thereby acquired. In this way, the material support ban subtly changes the content and structure of the national political marketplace by channeling the acquisition of information, networking investments, and lobbying strategies. The magnitude of this effect, of course, is hard to determine, although the scope of the Secretary of State’s discretionary designation power and the breadth of resulting prohibitions imply a large regulatory footprint. Yet such uncertainty does not obviate First Amendment questions. It may not be clear how the regulation of political campaign contributions and expenditures affects the speech marketplace, but still the Court limits legislative action in the name of the First Amendment. So long as foreign affairs are interwoven in national political affairs,<sup>49</sup> moreover, the distortive effect of the material support law is likely to persist.

The independent/coordinated line also leaves other traditionally protected

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44. *Id.* at 2727. For another instance of strict scrutiny applied in a way that seems in retrospect quite deferential, see generally *Korematsu v. United States*, 323 U.S. 214 (1944).

45. See, e.g., Ashutosh Bhagwat, *Associational Speech*, 120 *Yale L.J.* 978, 1010 n.150 (2011) (suggesting Court’s decision, limited to foreign organizations, affords greater protection to domestic organizations).

46. See U.S. Dep’t of State, *Foreign Terrorist Organizations* (Sept. 15, 2011), <http://www.state.gov/g/ct/rls/other/des/123085.htm> (on file with the *Columbia Law Review*) (listing organizations designated as FTOs).

47. See *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 613 F.3d 220, 224–25 & n.2 (D.C. Cir. 2010) (describing history of MEK’s designations).

48. See Scott Shane, *Across Party Lines, Lobbying for Iranian Exiles on Terrorist List*, *Nov. 27, 2011*, at A1.

49. Cf. Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 *B.C. L. Rev.* 941, 947–48 (2011) (criticizing conception of First Amendment exemplified in recent Supreme Court jurisprudence as “provincial”).

speech in legal peril. In oral argument before the Court in *HLP*, for example, then-Solicitor General Elena Kagan explained that the government believed that § 2339B extended to lawyers who prepared amicus briefs on behalf of an FTO.<sup>50</sup> The Court's independent/coordinated distinction thus leaves counsel wishing to represent FTOs facing uncertainty about their exposure to criminal liability.

In sum, the Roberts Court's close scrutiny of two kinds of political speech restrictions yields divergent results. Both strands are organized around the same boundary line between *coordinated* and *independent* speech. The balance of this Essay considers the Court's methodology, the mechanics of strict scrutiny, and the downstream consequences of doctrinal choices for democratic probity and national security.

## II.

The most obvious discontinuity between the campaign finance and material support cases is their divergent approaches to the factual predicates for the different laws at issue.<sup>51</sup> Canonical accounts of strict scrutiny emphasize the close attention courts are supposed to pay to the factual indicia of narrow tailoring,<sup>52</sup> and contrast it with the looser search for "substantial evidence" that typifies intermediate tiers of scrutiny.<sup>53</sup> An even larger gap separates the Court's approaches to evidentiary questions in *Citizens United* and *HLP*. While the *Citizens United* Court pointed to a specific absence of evidence that the asserted government interest was furthered by the corporate expenditure ban,<sup>54</sup> the *HLP* judgment used a light touch in examining the government's justifications.<sup>55</sup> This Part explores the justifications for that divide.

To begin, there is an obvious doctrinal explanation. As noted above, there

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50. Transcript of Oral Argument at 47, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89) ("[T]o the extent that a lawyer drafts an amicus brief for the PKK or for the LTTE . . . then that indeed would be prohibited."). But see *Am. Airways Charter, Inc. v. Regan*, 746 F.2d 865, 872 (D.C. Cir. 1984) (Ginsburg, J.) (holding government did not have power to determine whether lawyer could form an attorney-client relationship with Cuban government, which was subject to sanctions). Current regulations issued by the Treasury department under another federal designation statute create safe harbors for lawyers providing legal services directly to designated entities. See 29 C.F.R. § 403.9 (2011) (exempting attorney-client communications from disclosure rules).

51. Procedural form is an important entailment of the First Amendment in application. Cf. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984) (requiring appellate courts hearing speech cases to conduct independent review of facts); *Speiser v. Randall*, 357 U.S. 513, 520 (1958) (noting "procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law").

52. See, e.g., *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative funding cannot limit judicial inquiry when First Amendment rights are at stake.").

53. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 208 (1997); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (holding in intermediate scrutiny cases "courts must accord substantial deference to the predictive judgments of Congress").

54. *Citizens United v. FEC*, 130 S. Ct. 876, 910–11 (2010).

55. See *HLP*, 130 S. Ct. at 2739 (Breyer, J., dissenting) (noting absence of "evidence that Congress has made [an informed] judgment regarding the specific activities at issue in these cases").



are divergent standards of strictness in the review of regulations of independent and coordinated speech.<sup>56</sup> *HLP* plainly falls into the latter camp. A first cut at explaining the Court's different approaches in *Citizens United* and *HLP* would thus likely stress the different doctrinal treatment of independent and coordinated speech.

But this doctrinal explanation does not do sufficient work. This can be seen most clearly by focusing closely on the *HLP* case. Even read as an exercise in determining whether the material support law was “‘closely drawn’” to match a “‘sufficiently important interest,’”<sup>57</sup> the majority opinion in *HLP* falls far short. Chief Justice Roberts endorsed Congress's conclusion that material support for nonviolent activities “‘frees up other resources within the organization that may be put to violent ends.’”<sup>58</sup> Without asking specifically whether the plaintiffs' proposed speech acts in *HLP* could be a substitute for the support of LTTE or PKK's terrorist activity,<sup>59</sup> the Court focused primarily on the fungibility of cash transfers (not at issue in the case) for Hamas (also not implicated in the case).<sup>60</sup> The Court further assumed what was true of Hamas was necessarily true of other FTOs. But the category of FTOs is not a natural kind. It is an output from discretionary executive branch policy choice. Nothing in the statute requires the State Department to bestow FTO status only when an organization fails to preserve appropriate internal firewalls. What is true of one FTO's internal structure and operation might therefore not be true of others. At best, the Court showed the statute's justification was plausible, not that it was closely drawn.<sup>61</sup>

Moreover, 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.<sup>62</sup> Chief Justice Roberts thus explained that an absolute ban on material support to the PKK was warranted because of the risk that Turkey “‘would react sharply’” to private American support for the Kurdish separatist movement.<sup>63</sup> As Justice Breyer noted, it seems odd to treat “‘the fact that other nations may like us less’” as a pass to restricting First Amendment speech.<sup>64</sup> At a minimum, this dispute illustrates the *HLP* Court's surprisingly cavalier attitude toward the

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56. See *supra* text accompanying notes 16–21 (describing different standards of review).

57. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

58. *HLP*, 130 S. Ct. at 2725.

59. The Court speculated that the PKK “‘could . . . pursue peaceful negotiations as a means of buying time to recover from short-term setbacks.’” *Id.* at 2729. Whether or not this is an accurate reading of the historical record, it is a prediction that relies on a piling of inference upon inference to reach the conclusion that the *HLP* plaintiffs' actions could facilitate violence. Nor is it clear how this conclusion applies to the teaching of international law.

60. *Id.* at 2726–25.

61. The Court's oblique citations to past behavior of the PKK and LTTE, see *id.* at 2726, only partly remedy this gap.

62. Compare *id.* at 2724 (describing government interest in fighting terror as an “‘objective of the highest order’”), with *id.* at 2726 (describing importance of “‘cooperative efforts between nations to prevent terrorist attacks’”).

63. *Id.* at 2726–27.

64. *Id.* at 2739 (Breyer, J., dissenting).

government's proclivity for shuffling between putative compelling interests. It also reflects a surprising inattention to the comparative strength of state interests that range from preventing terrorist attacks in the United States to maintaining good relations with states around the Indian Ocean.

In light of these features of the *HLP* decision, it cannot be said that the Court's light touch in that case is solely explained by the more relaxed judicial approach to coordinated speech. Even accounting for that relaxation of scrutiny, the *HLP* Court's version of strict scrutiny is strikingly forgiving. Indeed, it is barely recognizable as First Amendment scrutiny at all given the Court's express acceptance of loosely defined and evolving governmental goals on the one hand, and predictions instead of facts on the other.

Other explanations for the deference gap in *HLP* also founder. The looser review used in *HLP* might be defended, for example, by pointing out that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."<sup>65</sup> But both campaign finance laws and material support provisions respond to problems with long historical pedigrees. It is not clear one is more familiar or credible than the other.

Alternatively, the Court's dialing down of factual scrutiny in *HLP* might be explained as a reflection of the large expected cost of terrorism and the relatively small expected cost of corruption induced by electoral spending in a democratic system.<sup>66</sup> Stated otherwise, the high stakes of terrorism lead to greater judicial deference. But this too is not clearly true. It is at least arguable that the magnitude of terrorism's total social cost for the United States is less than is generally believed (particularly where the LTTE and PKK rather than, say, al Qaeda, are concerned).<sup>67</sup> And it is also not clear why what one scholar has called "the anti-corruption principle," which has a long and robust pedigree in American history, should be given such short shrift.<sup>68</sup> Stated otherwise, public tolerance for the violent actions of FTOs with a purely foreign reach might in fact be much greater than zero (think of the IRA), whereas our constitutional tradition might be glossed to suggest that tolerance for distortions in political representation from the democratic ideal should be

65. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000).

66. Even though, as I just observed, the logic of *HLP* turns as much on foreign policy concerns that are legitimately subject to domestic democratic contestation as it does on security from terrorism.

67. There is a tendency to see all terrorist attacks as akin to 9/11. But serious terrorism incidents comprise a small fraction of the universe of actual terrorism. Since 1978, only 118 incidents of terrorism worldwide have killed more than 100 people. This is only 0.12% percent of the 98,000 terrorist events in that period. Nat'l Consortium for the Study & Responses to Terrorism, [http://www.start.umd.edu/gtd/](http://www.start.umd.edu/gtd/search/Results.aspx?start_yearonly=1978&end_yearonly=2010&start_year=&start_month=&start_day=&end_year=&end_month=&end_day=&asmSelect0=&asmSelect1=&dt2=all&success=yes&casualties_type=f&casualties_max=101) (on file with the *Columbia Law Review*) (last visited Oct. 27, 2011).

68. See generally Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev.* 341, 342 (2009) ("The Constitution carries within it an anti-corruption principle, much like the separation-of-powers principle, or federalism. It is a freestanding principle embedded in the Constitution's structure, and should be given independent weight . . .").

minimal. If the Court's divergent approaches to factual scrutiny do indeed rest on some implicit hierarchy of the interests furthered respectively by campaign finance and material support laws, then it is at the very least incumbent on the Justices to explain how they have prioritized different policy goals, and to defend that judgment explicitly. The Roberts Court has offered no such explanation.

Finally, the difference in the Court's approach might be justified on comparative institutional competence grounds.<sup>69</sup> In *HLP*, Chief Justice Roberts invoked the "sensitive and weighty" nature of national security questions, and the presumption that the political branches are skilled at assessing "evolving threats in an area where information can be difficult to obtain."<sup>70</sup> By contrast, Roberts Court campaign finance cases are haunted by a pervasive "mistrust of governmental power"<sup>71</sup> and by a specific suspicion that regulation is motivated by incumbency protection.<sup>72</sup> This asymmetrical economy of suspicion, however, rests on unconvincing foundations. As an initial matter, both national security and campaign financing involve government lock-up power. Whatever expertise the executive might have, this fact alone should raise libertarian red flags given the possibility of both good and bad actors at the helm of the state. More to the point, the *HLP* Court's analysis of the welfare consequences of terrorism is lopsided. The Court accounts for the pros of political control of security matters but ignores the long history of constitutional rights violations premised on perceived foreign threats.<sup>73</sup> It also takes no account of incumbent politicians' potent incentives to manipulate security concerns for partisan gain. In other words, the Court engages in cost-benefit analysis without costs.

Nor is it clear that the actual degree of government expertise makes the risk of error in national security matters any smaller than in other policy domains. To the contrary, recent accounts of post-9/11 policy underscore institutional blundering, myopia, and catastrophic miscalculation through the past decade.<sup>74</sup> The Court, on the other hand, overstates the case for suspicion of campaign finance regulation. In *Arizona Free Enterprise*, for example, it effectively applied a presumption of skepticism predicated on a fear of *legislators'* incumbency-protection motives to measures adopted by *popular referendum*, where legislators' self-dealing motives play no role.<sup>75</sup> A logic of comparative institutional advantage, in short, cannot reconcile the differences

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69. See, e.g., *HLP*, 130 S. Ct. at 2727–29 (discussing judicial deference toward executive decisions concerning national security and foreign affairs).

70. *Id.* at 2727.

71. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

72. See, e.g., *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 637, 644 n.9 (1996) (Thomas, J., dissenting) (“[H]istory demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents . . .”).

73. See generally Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (2004) (recounting history).

74. See, e.g., Peter L. Bergen, *The Longest War: The Enduring Conflict Between America and al-Qaeda* 120 (2011) (characterizing “President Bush’s extralegal approach to the war on terrorism” as “unnecessary and counterproductive”).

75. Cf. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2845 (Kagan, J., dissenting) (emphasizing democratic credentials of public financing system invalidated in that case).

between the two lines of cases.

To summarize, the Roberts Court's scrutiny of political speech regulation encompasses starkly distinct kinds of factual inquiry. Although recent studies of heightened scrutiny have identified some of that variance,<sup>76</sup> they have not explored its normative justifications. Attention to the divergent approaches to First Amendment scrutiny of political speech regulation in the Roberts Court suggests that the variance observed in that domain is at best undertheorized and at worst unjustified.

### III.

If the Roberts Court's deployments of First Amendment scrutiny have a plural and inconstant character, they are also characterized by important doctrinal commonalities. Recall that in Part I, I emphasized parallels between the doctrinal structure in the campaign finance and national security cases, in particular the doctrinal line between *coordinated* and *independent* action. The division between more and less protected speech in both domains, that is, is drawn at the border between coordinated speech and independent speech, making it easier for government to penalize speech in association with others than to punish discrete and independent speech.<sup>77</sup> But does this doctrinal equality cash out as equal protection for different sorts of speakers? Formal symmetry of doctrinal protection, I suggest here, hides differential downstream effects on speakers' options and the government's regulatory options. What in the campaign finance context weakens government and empowers speakers has the opposite effect in the national security context, where it shifts authority from private to public hands.

In the campaign finance context, it has long been argued that drawing a line between permissible regulation of coordinated political action and a protected zone of sheltered independent initiative has a perverse "hydraulic" effect.<sup>78</sup> In other words, commentators have argued that campaign funding stops flowing via actors such as candidates and parties, and instead courses through less transparent "political action committees (PACs), the 527s, and all the rest."<sup>79</sup> Extending that argument, one critique of *Citizens United* suggests that the decision's "removal of longstanding restriction on independent expenditures is causing money rapidly to return to the least regulated, least restricted pathways."<sup>80</sup> Drawing a line between contributions and expenditures in the campaign finance context thus saps government's ability to regulate comprehensively in a way that responds to possible circumvention.<sup>81</sup>

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76. See Winkler, *supra* note 5, at 829, 845 (presenting data).

77. Cf. Bhagwat, *supra* note 45, at 1006 (arguing that historical First Amendment protection is explained by greater solicitude for "speech in the context of public assemblies or political organizations").

78. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *Tex. L. Rev.* 1705, 1708 (1999) (defining hydraulic account of campaign finance).

79. Issacharoff, *supra* note 15, at 120.

80. Kang, *supra* note 15, at 3.

81. This brackets the question whether disclosure is an effective substitute for direct regulation.

The coordinated/independent campaign finance speech line also means that private actors still have substitutes for prohibited speech acts.<sup>82</sup> To be sure, an independent expenditure may not have the specific expressive content of a contribution to a party or candidate. But a person or corporation barred from making a contribution, whether their motives are good or bad, has a ready substitute in the form of independent expenditures. Wishing to aid a candidate or party, a well-motivated speaker will frequently be able to identify campaign messages that benefit the favored entity even absent coordination. An ill-motivated (and sufficiently wealthy) speaker seeking to create a relationship of dependency or privileged access can also use expenditures to that end, albeit with each dollar being perhaps marginally less effective than a dollar of contribution.<sup>83</sup>

The effects of the coordinated speech/independent expenditure line on the speech at issue in *HLP* are almost at the opposite pole from those observed in the campaign finance context. Use of coordination to demarcate bounds to protected speech *expands* the authority of the government because the range of possible substitutions for either well-intentioned or ill-intentioned actors is small. Recall that the *HLP* plaintiffs sought to teach and advise designated groups about international law and political advocacy.<sup>84</sup> It is hard to see how the *HLP* plaintiffs could substitute these necessarily coordinated actions with independent speech. It would be too quick to say they could simply write books or blog on the topic. (By that logic, law professors should pack up shop today and leave students to *Gilberts* and *Emanuel*s.<sup>85</sup>) Pedagogy conducted in person, like speech accomplished in unison with like-minded others, has a value that likely outpaces its close competitors. At the same time, ill-intentioned actors, who wish to aid an FTO's terrorism by subventing its nonviolent activities, also have no plausible substitute. The full spectrum of acts they wish to engage in is prohibited by the material support law. Potential speakers in the national security domain, unlike political actors laboring under the current campaign finance dispensation, cannot plausibly substitute out of the regulated domain of speech for either good or bad reasons. Use of coordination to limn the edges of protected speech in the security context therefore expands the outer fringe of the government's regulatory authority and, as a result, predictably reduces the aggregate volume of both good and bad private speech—precisely the opposite of what is observed in the campaign finance context.

In passing, it bears notice that the narrowing gyre of constitutional protection instigated by *HLP* can also be discerned in its effect on the rule against “guilt by association.” That protection took doctrinal form as a

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82. In other areas of First Amendment jurisprudence, the availability of “ample alternative channels for communication” is part of the formal doctrinal framework. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 535 (1980) (describing doctrinal framework for time, place, and manner restrictions).

83. For an example of a campaign contribution being viewed as having a corrupting effect, see *Caperton v. A.T. Massey Coal Co. Inc.*, 129 S. Ct. 2252 (2009).

84. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2716 (2010).

85. Perhaps they should. This too might be socially desirable in a way I am too biased to perceive.

prohibition on the criminalization of membership absent evidence of a specific intent to further an organization's illegal aims.<sup>86</sup> The *HLP* Court made short work of the specific intent rule. It argued, a bit tautologically, that § 2339B “does not criminalize mere membership,” but rather only material support.<sup>87</sup> After *HLP*, the rule against guilt by association thus only reaches “mere” membership. If a member teaches another member about international law or political advocacy, if they coordinate advocacy to ensure consistency, or if they offer a penny in dues, constitutional protection peels away. By revealing the “guilt by association” rule to be only penurious shelter against state penalties, the *HLP* Court clarified how small the domain of protected political speech is when a trace of political subversion is in play.<sup>88</sup>

In sum, formal homology of doctrinal protection in the campaign finance and national security domains hides functional dissonance. For practical purposes, a coordination boundary renders the state's reach on campaign finance matters significantly *underinclusive* in relation to the state's putative goals. By contrast, the identical doctrinal rule applied to national security matters yields a governmental grasp that is *overinclusive* in relation to the state's notional goals in that domain. By adopting a coordination boundary to protected speech, campaign finance cases assume no regulatory overbreadth is acceptable, while national security cases take overbreadth to be self-evidently acceptable.

### CONCLUSION

An analysis of the Roberts Court's political speech cases first and foremost finds a striking divergence between the Court's magnanimous gestures of broad deference to elected actors in the national security domain and its beady-eyed skepticism in the campaign finance context. That stark contrast cannot be explained on doctrinal or comparative institutional competence grounds alone. Rather, it reflects an implicit normative judgment about policy priorities related to political speech that is only half-aired for public inspection. The Court's consistent use of a coordination/independent speech line also has subtly divergent effects in different domains. The net consequence of the Court's sometimes consistent/sometimes inconsistent approach to political speech is a soft pressure in favor of speakers and forms of speech of which the Court approves. Far from acting as an umpire in these speech cases,<sup>89</sup> therefore, the Court appears to be in the business of pursuing a

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86. *Scales v. United States*, 367 U.S. 203, 228–30 (1961) (discussing constitutional limitations on criminalizing association).

87. *HLP*, 130 S. Ct. at 2718.

88. Accord David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 Sup. Ct. Rev. 203, 233 (“[A]ssociation would be an empty formality without the conduct that brings people together—meeting, raising funds, engaging in volunteer work, and the like—and therefore to limit the right of association to the formal act of joining a group would eviscerate the right.”).

89. See, e.g., Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the United States: Hearing before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.) (“[M]y job [is] to call balls and strikes, and not to pitch or bat.”).

singularly normative vision of the democratic order packaged with an implicit hierarchy of more or less legitimate speakers, all of whom are notionally sheltered by the First Amendment. By building these judgments into a hermetic doctrinal framework, the Justices can exercise influence in oblique and indirect ways. Their normative judgments need never be fully articulated or defended, but cloaked in concealing robes of constitutional diction. Whatever one thinks the appropriate role of courts in a constitutional democracy should be, it is hard to discern how this could be the best way to delineate a constitutionally protected domain for political speech.

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