

1-2012

## Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech

Peter Margulies

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_law\\_journal](https://repository.uchastings.edu/hastings_law_journal)



Part of the [Law Commons](#)

---

### Recommended Citation

Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455 (2012).

Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol63/iss2/4](https://repository.uchastings.edu/hastings_law_journal/vol63/iss2/4)

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

# Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech

PETER MARGULIES\*

*Ever since Brandenburg v. Ohio, departures from content neutrality under the First Amendment have received strict scrutiny. However, in Holder v. Humanitarian Law Project (“HLP”), the Supreme Court decided that the perils of content regulation were less pressing than was the need to curb the human capital of groups, such as Hamas, designated as foreign terrorist organizations (“DFTOs”). As a result, the Court upheld a statute that bars “material support” of terrorist organizations, ruling that the statute bars speech coordinated with DFTOs, including training in negotiation or the use of international law. Some commentators have labeled HLP as heralding a new McCarthyism. This Article argues that critics who condemn HLP as the reincarnation of Cold War content regulation overlook the tailored quality of the decision’s hybrid scrutiny model, its roots in the Framers’ concerns about foreign influence, and its surprising parallels with constitutional justifications for professional regulation.*

*HLP is not the marked departure that critics claim. Just as professional regulation limits lawyers’ use of pretrial publicity, HLP reduced the impact of asymmetries in information that terrorist groups exploit. To constrain government, HLP’s framework of hybrid scrutiny also provides a safe harbor for the independent expression of ideas, and for scholars, journalists, human rights monitors, and attorneys.*

*Nevertheless, HLP’s critics are right that the Court’s decision is flawed. Chief Justice Roberts’s opinion invited confusion about the First Amendment status of lending “legitimacy” to violence, which could quickly drain the safe harbor that the Court created for independent advocacy. The opinion also made a studied show of deference to official sources, disdaining independent accounts of terrorist groups’ penchant for defection. Only the next case will tell if these flaws were minor missteps in a balanced decision or signs of a more severe conflict with First Amendment values.*

---

\* Professor of Law, Roger Williams University School of Law. I was co-counsel on an amicus curiae brief that asked the Supreme Court to uphold the constitutionality of the federal material-support statute, 18 U.S.C. § 2339B, and to carve out safe harbors for journalists, scholars, human rights groups, and attorneys. See Brief for Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues as Amici Curiae Supporting Petitioners, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498), 2009 WL 507069. Portions of this Article were presented at a conference sponsored by the Center on Law and Security at New York University School of Law, entitled “The Constitution and National Security: The First Amendment Under Attack,” in November 2010. I thank Bill Araiza, Renee Knake, and Larry Rosenthal for comments on a previous draft.

## TABLE OF CONTENTS

INTRODUCTION.....	457
I. INFORMATION ASYMMETRIES AND RULES OF THE ROAD IN THE REGULATION OF LAWYERS .....	464
A. THE USE AND ABUSE OF AGENCY: A PRIVATE LAW STORY .....	465
B. RECONCILING THE REGULATION OF LAWYERS WITH THE RULE OF LAW .....	466
II. A PERENNIAL CONCERN: FOREIGN AGENTS AND AMERICAN HISTORY .....	471
A. FOREIGN AGENTS AND THE FOUNDING ERA .....	471
B. POLICY AND PARANOIA: FOREIGN AGENTS IN THE TWENTIETH CENTURY .....	475
III. REGULATING THE ASSETS OF TERRORIST GROUPS: INFORMATION ASYMMETRIES AND THE CONTINUUM OF HUMAN AND FINANCIAL CAPITAL .....	479
A. DFTOs' POOR ACCOUNTING: REINFORCING VIOLENCE THROUGH PUTATIVELY NONVIOLENT ACTIVITIES.....	481
1. <i>The Statutory Framework</i> .....	482
2. <i>DFTOs, the Nexus of Violent and Nonviolent             Programs, and Intermediate Scrutiny</i> .....	484
B. TERRORIST AGENTS AND HYBRID SCRUTINY .....	485
1. <i>Curbing DFTOs' Gaming of Information             Asymmetries</i> .....	486
2. <i>Regulating Incentives to Promote Cooperation</i> .....	493
3. <i>Flaws in the Court's Hybrid Approach</i> .....	495
IV. PROVIDING SAFE HARBORS FOR CHALLENGING GOVERNMENT.....	497
A. ADDRESSING VAGUENESS BY REQUIRING AN AGENCY RELATIONSHIP .....	500
B. STRADDLING THE DOMESTIC AND INTERNATIONAL REALMS: THE CASE OF SPECIALLY DESIGNATED GLOBAL TERRORISTS....	503
C. LAWYERS AS AGENTS FOR DEMOCRACY .....	506
V. THE VIRTUES OF HYBRID SCRUTINY .....	512
A. THE UBIQUITY OF EX ANTE JUSTIFICATIONS .....	513
B. THE VIRTUES OF DEPARTING FROM DOCTRINE.....	516
CONCLUSION .....	517

## INTRODUCTION

Attempts to regulate foreign terrorist groups expose ambivalence in First Amendment jurisprudence regarding asymmetries in information. On the one hand, courts apply intermediate scrutiny in the commercial speech context, asserting that information asymmetries between seller and consumer justify regulation.<sup>1</sup> On the other hand, the specter of an information gap between government and citizen has driven heightened scrutiny of measures regulating political speech.<sup>2</sup> Interactions with foreign powers such as terrorist groups summon both concerns.

Just as U.S. corporations turn to bad accounting to present a pleasing profile to investors,<sup>3</sup> terrorist organizations with ongoing plans for attacking innocents apply a veneer of nonviolence to attract financial contributions.<sup>4</sup> Yet democracies ought to protect speech that conveys accurate information about events abroad, even if that information challenges government policy. Because of this tension, regulation of speech coordinated by terrorist groups should trigger a hybrid form of scrutiny, which the Supreme Court outlined in *Holder v. Humanitarian Law Project* (“HLP”), upholding Congress’s prohibition on material support to terrorist groups.<sup>5</sup>

*HLP* has already attracted significant scholarly debate, with some commentators arguing that the statute and the Court’s decision harken back to the oppressive content regulation of the Cold War.<sup>6</sup> Justice

---

1. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651–52 n.14 (1985) (upholding regulation requiring disclosures in lawyers’ contingency fee agreements on the grounds that a commercial speaker does not have a fundamental right “not to divulge accurate information regarding his services”). Information asymmetries are gaps in information that favor one party to the transaction. For example, cases like *Zauderer* assume that the lawyer has more information than the client about the provision of legal services. Because consumers lack the ability to share and retrieve information, the market will not squeeze out incompetent or unscrupulous practitioners. Regulation attempts to correct this market failure. Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 280 (2004) (“[I]nformation asymmetries between producers and consumers [are] widely accepted as justifying certain kinds of regulatory interventions.”).

2. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing the importance of “free trade in ideas” which government cannot monopolize).

3. Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1151 (2005) (discussing the lack of transparency in accounting of some corporations).

4. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000) (holding that Congress could prohibit financial contributions to foreign terrorist groups because such contributions may support both violent and nonviolent purposes), *cert. denied sub nom.*, *Humanitarian Law Project v. Ashcroft*, 532 U.S. 904 (2001).

5. 130 S. Ct. 2705, 2724–30 (2010). The Court reversed the Ninth Circuit’s decision in *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 933 (9th Cir. 2009).

6. Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 588–92 (2011) (criticizing the statute’s rationale and implementation); Timothy Zick, *The First Amendment in Transborder Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 995–96 (2011) [hereinafter Zick, *The First Amendment in Transborder Perspective*] (arguing that the *HLP*

Breyer fueled this argument with a dissent, joined by two of his colleagues, which criticized Chief Justice Roberts's opinion for the majority as based on speculation, not principle.<sup>7</sup> Others have suggested that the decision was a pragmatic adaptation to conflicting values.<sup>8</sup> The merits of the debate inform our understanding of free speech, terrorism, and the role of foreign affairs.

This Article views *HLP* as a hybrid form of scrutiny that limits terrorist groups' exploitation of information asymmetries, while preserving safe harbors for advocacy that challenges government policy. Chief Justice Roberts's opinion for the Court in *HLP* navigated between the opposing information gaps of First Amendment doctrine. On one side is the asymmetry between seller and consumer that dominates commercial speech cases: Sellers typically know more about the products they sell, and the government can prevent deceptive speech that exacerbates that asymmetry. The other side features the gap between government and citizen that figures so prominently in cases involving political speech: Public officials know more about the workings of government than citizens do, and protecting political speech help citizens close the gap. In addressing these asymmetries, Chief Justice Roberts distinguished speech in agency relationships with designated foreign terrorist organizations ("DFTOs"),<sup>9</sup> and the expression of ideas outside such relationships.<sup>10</sup> The former are subject to "rules of the road." These rules promote cooperation between parties and reduce asymmetries in

---

decision took "provincial" view that unduly discounted the value of transborder exchange of ideas); Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1579 (2010) (expressing concern about First Amendment consequences of the statute's enforcement); *Leading Cases*, 124 HARV. L. REV. 179, 259, 264–69 (2010) (critiquing the Court's language and reasoning). Professor David Cole of the Georgetown University Law Center, who led the legal challenge to the provision, has also been a salient scholarly critic. See David Cole, *The Roberts Court v. Free Speech*, N.Y. REV. BOOKS, Aug. 19, 2010, at 81; see also DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 60–62 (2003) [hereinafter COLE, ENEMY ALIENS] (arguing that the ban on material support to terrorist groups violates First Amendment rights); David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorism, and the Right of Association*, 1999 SUP. CT. REV. 203, 246–50. For additional criticism of the material-support statutes, see RANETA LAWSON MACK & MICHAEL J. KELLY, EQUAL JUSTICE IN THE BALANCE: AMERICA'S LEGAL RESPONSES TO THE EMERGING TERRORIST THREAT 208–10 (2004).

7. *Humanitarian Law Project*, 130 S. Ct. at 2735–36 (Breyer, J., dissenting). Justices Stevens, Scalia, Kennedy, Thomas, and Alito joined the Chief Justice's opinion, while Justices Ginsburg and Sotomayor joined Justice Breyer's dissent. *Id.* at 2712 (majority opinion).

8. See Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 71 (2011); see also William D. Araza, Citizens United, Stevens, and Humanitarian Law Project: *First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 830–31 (2011); cf. Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1010 n.150 (2011) (arguing that the Court's safe harbor for domestic groups safeguards free expression).

9. DFTOs are designated by the Secretary of State. See *infra* notes 166–68 and accompanying text.

10. *Humanitarian Law Project*, 130 S. Ct. at 2721–22.

information that undermine trust. In contrast, the expression of ideas outside such relationships receives a safe harbor.

An unexpected parallel emerges in case law on agency relationships, including those between lawyer and client. Since clients can use a lawyer to gain another's trust and then defect, courts have structured lawyer-client relationships to diminish this risk.<sup>11</sup> On occasion, this focus on agents following the rules of the road spills over from commercial to political speech: Courts require lawyers for a party in litigation to refrain from prejudicial pretrial publicity, even if the lawyer is truthful and addresses matters of public concern, because courts worry that laypersons who comprise the jury pool will not adequately discount the lawyer's remarks.<sup>12</sup> Courts also give lawyers a safe harbor by permitting public remarks by lawyers not involved in the matter.<sup>13</sup> These rules guard against both lawyer-created information asymmetries and gaps in public knowledge about the functioning of the justice system.

The uses and abuses of agency have been a particular concern in the domain of foreign affairs. Establishing rules of the road to regulate foreign agents has been a core mission since the dawn of American constitutionalism. The Framers recognized that the geographic, cultural, and political gap between American and foreign states would compound information asymmetries: American officials lacked reliable information about the designs of other nations, and other nations lacked accurate information about us.<sup>14</sup> The Foreign Gifts clause<sup>15</sup> emerged from this concern,<sup>16</sup> as did Washington's Neutrality Proclamation.<sup>17</sup> In the twentieth century, Congress passed the Foreign Agents Registration Act to require disclosure of the source of foreign political propaganda.<sup>18</sup> To limit revenue to foreign powers like Cuba whose ventures were adverse

---

11. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1336 (2010) (upholding disclosure and advice mandates that communicate adverse consequences of bankruptcy to prospective petitioners, and therefore also reassure creditors that petitioners are not abusing access to relief); cf. Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 674–85 (2011) (arguing for more robust protections for attorney speech).

12. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991); cf. W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 400 (2001) (discussing the rationale for limiting pretrial publicity).

13. See *Gentile*, 501 U.S. at 1062 (noting that the provision at issue concerned the attorney's representation of a client in a pending case).

14. Cf. H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1511–27 (1999) (discussing John Marshall's perspective on foreign affairs). For further discussion of Marshall's view, see *infra* notes 102–09 and accompanying text.

15. U.S. CONST. art I, § 9, cl. 8.

16. See *Citizens United v. FEC*, 130 S. Ct. 876, 948 n.51 (2010) (Stevens, J., dissenting).

17. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 336–41 (1993).

18. Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–621 (2010)); see *Meese v. Keene*, 481 U.S. 465, 467 (1987).

to U.S. interests, Congress and the executive branch enacted travel bans with exceptions for scholars, journalists, and human rights groups.<sup>19</sup>

However, fears about information asymmetries in the foreign arena have also impinged on the expression of ideas. This darker strand appeared early with the Alien and Sedition Acts, which criminalized speech critical of the government.<sup>20</sup> It surfaced again in repression of anarchists, in arrest and deportation of opponents to American intervention in World War I,<sup>21</sup> and in the blacklisting and loyalty investigations of the Cold War.<sup>22</sup> Such measures widen the knowledge gap between citizens and government.

Courts have reviewed these measures in terms that echo the division of commercial and political speech. Measures such as travel restrictions and disclosure requirements have elicited less demanding scrutiny.<sup>23</sup> However, starting with the Cold War, the courts have constructed a safe harbor for political opinions, initially through the canon that counsels interpreting statutes to avoid constitutional questions.<sup>24</sup>

Congress's 1996 bar on material support of groups designated by the Secretary of State as foreign terrorist organizations (DFTOs),<sup>25</sup> passed after the Oklahoma City bombing, posed a challenge to this neat division of judicial approaches. Congress acted because it saw terrorist groups such as Hamas<sup>26</sup> as quintessential defecting parties with no respect for

---

19. See *Regan v. Wald*, 468 U.S. 222, 230 n.12 (1984).

20. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 36 (2004).

21. Cf. PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 75–85 (1979) (describing wartime censorship and targeting of immigrants who were viewed as subversives).

22. See COLE, *ENEMY ALIENS*, *supra* note 6, at 129–53; ROBERT JUSTIN GOLDSTEIN, *AMERICAN BLACKLIST: THE ATTORNEY GENERAL'S LIST OF SUBVERSIVE ORGANIZATIONS 190–210* (2008) (discussing listing of domestic organizations and restrictions imposed on those who had participated in these groups). Targeting of political opponents also figured in some moves by the Bush administration. See PETER MARGULIES, *LAW'S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION* 44, 127, 131–34 (2010) (discussing the administration's efforts to target dissenters and political opponents, and the firing of federal prosecutors who refused to acquiesce in these goals).

23. See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1336 (2010) (upholding disclosure requirements); *Zemel v. Rusk*, 381 U.S. 1, 15 (1965) (upholding travel restrictions).

24. See *Kent v. Dulles*, 357 U.S. 116, 129–30 (1958) (avoiding the constitutional question by holding that Congress had not authorized singling out the illustrator Rockwell Kent for denial of a passport based on his expression of unpopular political ideas).

25. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250–53 (codified as amended at 18 U.S.C. § 2339B (2010)). Material support is defined as “any property, tangible or intangible, or service, including financial services . . . training, [and] expert advice or assistance.” 18 U.S.C. § 2339A(b)(1) (2010). For background on the Act, see Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 12–18 (2005).

26. See MATTHEW LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD* 135 (2006). Hamas, which takes its name from an acronym for Islamic Resistance Movement, was founded in 1987. The group's charter calls for destruction of the State of Israel and establishment of a religious

global rules of the road.<sup>27</sup> Like corporate officials who engage in misconduct within the U.S., DFTOs are bad accountants. Courts have repeatedly applied intermediate scrutiny to uphold the bar on financial assistance to DFTOs because DFTOs that accept contributions for a school or hospital can funnel those resources to instrumentalities of violence, or free up other resources for violent goals.<sup>28</sup>

However, DFTOs' bad accounting goes further, because DFTOs exploit *human* as well as financial capital. They use agents just as bad actors in private law do: to maximize their returns for defection from cooperative agreements. For example, DFTOs use truces as tactical devices to refurbish their weapons stocks and plan an expedient resumption of violence.<sup>29</sup> An outside negotiator for a DFTO, whatever her intent, functions like a lawyer in a financing agreement where the borrower takes the money and runs: as a reputation engineer who draws down her goodwill for the benefit of a defecting party.<sup>30</sup> Capitalizing on these asymmetries, DFTOs routinely use truces for tactical purposes and manipulate international law by mobilizing ostensibly neutral sites such as refugee camps.<sup>31</sup> Curbing this activity requires limits on a narrow band of speech: communication between an agent and a DFTO on putatively nonviolent matters such as the timing and negotiation of truces.<sup>32</sup> Regulation of this kind clearly calls for more than the intermediate scrutiny applied to curbs on financial capital. The hybrid scrutiny that the Court employed to uphold the regulation of human capital in *HLP* responded to this need.

The Court held that Congress could prohibit assisting DFTOs in negotiations and in training them in the use of international law.<sup>33</sup> The opinion stressed the pervasive information asymmetries in the realm of

---

state on land currently comprising Israel proper, the West Bank, and the Gaza Strip. Hamas seeks to supplant the more secular Palestinian Authority as the representative of the Palestinian people. To achieve these goals, it has implemented a coordinated strategy involving political activity, social welfare programs, and violence against both Israelis and moderate Palestinians. *Id.* at 8, 117.

27. *Cf.* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (“[T]errorist groups systematically conceal their [violent] activities behind charitable, social, and political fronts.” (quoting *LEVITT*, *supra* note 26, at 2–3)).

28. *See* *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000) (“[A]ll material support given to such organizations aids their unlawful goals.”), *cert. denied sub nom.*, *Humanitarian Law Project v. Ashcroft*, 532 U.S. 904 (2001); *see also* *Kilburn v. Socialist People’s Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004) (refusing to require that financial assistance be directly traceable to a terrorist act because money is fungible).

29. *Cf.* Andrew H. Kydd & Barbara F. Walter, *The Strategies of Terrorism*, 31 INT’L SECURITY 49, 72–75 (2006) (explaining incentives for violent extremists to undermine peace negotiations).

30. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 253–57 (1984) (discussing lawyers as “transaction cost engineers”).

31. *See* *Humanitarian Law Project*, 130 S. Ct. at 2729–30.

32. *Id.* at 2722–23, 2729.

33. *Id.* at 2731.

foreign affairs.<sup>34</sup> Whatever the intent of the agent who aided the DFTO, Chief Justice Roberts explained, Congress has a compelling interest in regulating this exploitation of agency relationships.<sup>35</sup> Moreover, Congress throughout its history has sent signals that trigger reciprocity with allies or neutral powers.<sup>36</sup> The material-support statute serves that purpose by limiting agency relationships with DFTOs that prey on another country's civilians.<sup>37</sup>

A hybrid model that regulates principal-agent political speech must echo the pretrial-publicity paradigm in providing safe harbors for questioning government policy. Acknowledging this imperative, Chief Justice Roberts's opinion narrowly defined speech-related material support as entailing a close degree of interaction with the DFTO, akin to an agency relationship.<sup>38</sup> Only a narrowly defined nexus leaves constitutionally adequate space for independent advocacy, journalism, scholarship, mediation, and human rights monitoring. Finally, the avoidance canon also requires protection of lawyers who assist in challenging a terrorist group's designation and who provide legal advice reasonably related to that objective.<sup>39</sup> By crafting a hybrid model that targets a limited precinct of principal-agent speech while creating safe harbors for most expressive content, the Court addressed the challenge of terrorist groups' bad accounting and preserved constitutional values.

Like any hybrid, *HLP* sacrifices doctrinal elegance for pragmatic results. The more streamlined doctrinal course would have been either to strike down the statute under strict scrutiny or to uphold the bar on agency relationships as regulating conduct rather than speech. However, each of these ostensibly smoother routes had its own perils. Striking down the statute would have permitted a DFTO to attract more financial support with facile gestures toward reform. Conversely, upholding the statute under intermediate scrutiny might have emboldened the government to enact even more aggressive measures. The Court's approach reduced the impact of information asymmetries favoring DFTOs without expanding the gap between citizen and government. In

---

34. *Id.* at 2727–28.

35. *Id.* at 2725–27.

36. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118–21 (1804) (interpreting the statute to comply with the duty under international law to respect neutrals' property).

37. *Humanitarian Law Project*, 130 S. Ct. at 2726–27 (discussing the importance of the U.S.'s signals to countries, such as Turkey, which face daunting problems with terrorist violence).

38. *Id.* at 2721–22.

39. *Cf.* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543–48 (2001) (invalidating restrictions on funding for legal challenges to welfare restrictions). This Article counters scholars who have suggested that *HLP* targets legal representation. *See, e.g.,* Knake, *supra* note 11, at 656–67 (expressing concern about *HLP*'s implications for lawyers); Margaret Tarkington, *Attorney Speech and the Right to an Impartial Adjudicator*, 30 REV. LITIG. 849, 877–78 (2011).

opting for flexibility, the Court took a page from its past practice, which often stressed solicitude for disadvantaged groups over precise placement in doctrinal pigeonholes.<sup>40</sup>

Unfortunately, the Court's flexibility turned into imprecision on three issues: (1) the deference owed to the government, (2) the public interest in curbing the "legitimacy" of DFTOs, and (3) the vagueness of the statute as applied to the plaintiffs.<sup>41</sup> First, Chief Justice Roberts's opinion seemed studied in its deference to governmental sources.<sup>42</sup> Ample independent reports cite DFTOs' chronic defections.<sup>43</sup> The Court's reluctance to cite those independent reports prompted an unnecessary expansion of deference.

In addition, the opinion needlessly roiled First Amendment doctrine by failing to clearly distinguish between functional and ideational senses of lending "legitimacy" to DFTOs. If Congress could silence *any* speaker who enhanced a DFTO's legitimacy, its power would have no stopping point, as Justice Breyer noted in dissent.<sup>44</sup> Chief Justice Roberts viewed legitimacy in a narrower functional sense, as an advantage in fundraising and recruitment yielded by an agent.<sup>45</sup> But use of the term "legitimacy" confused the issue.

Finally, the majority failed to explain clearly why the statutory term, "training," which Congress defined as the teaching of a "specific skill,"<sup>46</sup> was not vague as applied to the plaintiffs' goal of teaching DFTOs about the application of international law to the resolution of disputes. The majority could have been making a functional argument that such teaching involves concrete interactions with the DFTO about its core activities, such as ongoing violence that the group might wish to rationalize with a strained reading of international law.<sup>47</sup> However, the majority could also have been making a substantive point about the

---

40. See Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 53–60 (1996) (discussing a case-by-case approach to inequality in decisions such as *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court struck down a state constitutional provision that barred the enactment of measures remedying discrimination on the basis of sexual orientation); cf. RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 45–55 (2001) (discussing institutional concerns, such as manageable standards, that influence role of doctrine in particular cases); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 86–99 (2004) (arguing that fixating on doctrine can frustrate the larger cause of political reform).

41. Following the Court, I use the term "plaintiffs" to describe the individuals and organizations challenging § 2339B. See, e.g., *Humanitarian Law Project*, 130 S. Ct. at 2716.

42. See *id.* at 2725.

43. See Kydd & Walter, *supra* note 29, at 72–75.

44. See *Humanitarian Law Project*, 130 S. Ct. at 2736 (Breyer, J., dissenting).

45. *Id.* at 2725–27 (majority opinion) (citing the government affidavit ten times within three pages, while citing only two independent sources).

46. 18 U.S.C. § 2339A(b)(2) (2010).

47. *Humanitarian Law Project*, 130 S. Ct. at 2729. Chief Justice Roberts clearly contemplated this broader sense with reference to other activities that the statute prohibits. *Id.* at 2722 ("[T]he term 'service' [means activity] performed in coordination with, or at the direction of a [DFTO].").

relative complexity of certain topics.<sup>48</sup> In an age when the Internet offers profuse knowledge about any subject, a substantive test of complexity seems both anachronistic and difficult to apply. The Court should have recognized that effective rules of the road require attention to detail.

The Article is divided into five Parts. Part I discusses agency as a double-edged sword that can promote cooperation or facilitate defection. It then analyzes information asymmetries as a basis for regulating the legal profession, where the overlap between commercial and political speech has challenged doctrinal coherence. Part II recounts the history of American concern with the information asymmetries exploited by foreign agents, and the sometimes blurred line since the Founding Era between enacting rules of the road and chilling free expression. Part III outlines Congress's effort in § 2339B to combat information asymmetries that assist DFTOs. Because DFTOs use both financial and human capital to raise funds and boost recruitment, addressing these information asymmetries requires the regulation of agency relationships with DFTOs. Part III also addresses the flaws in the majority's handling of deference and legitimacy. Part IV focuses on the safe harbor that the Court constructed for independent advocacy. It suggests that both the logic of the Court's opinion and the avoidance of constitutional questions require a safe harbor that includes journalism, scholarship, mediation, and human rights monitoring, as well as legal representation. Finally, Part V takes a step back to discuss the virtues of the Court's hybrid approach. It argues that the *ex ante* arguments the Court adopted to justify the content regulation here have a strong pedigree in both constitutional law generally and First Amendment jurisprudence. Moreover, doctrinal tests are only one source of signaling at the Court's disposal; sometimes departing from doctrine is the most pragmatic way to accommodate conflicting values.

#### I. INFORMATION ASYMMETRIES AND RULES OF THE ROAD IN THE REGULATION OF LAWYERS

Understanding the relationship of cooperation, defection, and agency in private law facilitates understanding of Congress's efforts to bar DFTOs' exploitation of human capital. Cooperation on any level requires compliance with formal or informal norms that we can call "rules of the road." Compliance often hinges on the work of agents, who owe duties of loyalty and confidentiality to their principals.<sup>49</sup> Agents,

---

48. *Id.* at 2720–21 (asserting without explanation that teaching international law imparts "specific skill," not "general knowledge," under § 2339A(b)(2) and therefore violates the statutory bar on "training").

49. See RESTATEMENT (SECOND) OF AGENCY § 14N cmt. a (1958) ("[Agents] are fiduciaries; they owe to the principal . . . loyalty and obedience."); see also *Dubbs v. Stribling & Assocs.*, 752 N.E.2d 850, 852 (N.Y. 2001) (holding that a real estate broker as agent owes duties of loyalty and obedience to

including lawyers, can promote cooperation among parties looking to make a deal. However, agents also can help one party realize unilateral gains through defection. Either way, the human capital provided by the agent can exceed the value of financial capital.<sup>50</sup> After a brief example of the use and misuse of agents, this Part discusses how promoting compliance with rules of the road has driven the regulation of lawyers.

#### A. THE USE AND ABUSE OF AGENCY: A PRIVATE LAW STORY

Illustrating the value of agency, Ronald Gilson has referred to lawyers as “transaction cost engineers” who tailor deals to address asymmetries in information between the parties.<sup>51</sup> For example, purchasers in many sophisticated transactions rely on an opinion drafted by the seller’s counsel on the entity’s legal and financial condition.<sup>52</sup> The opinion letter leverages the lawyer’s reputation to promote cooperation and mutual trust.<sup>53</sup>

The role of the seller’s agent changes dramatically if the seller, with or without the agent’s knowledge, plans to defect from this cooperative framework to achieve a one-sided benefit. A defecting party uses the agent’s reputation, with or without the agent’s knowledge, to exploit the purchaser’s information deficit. In the opinion-letter context, for example, the seller might conceal material information from the lawyer,<sup>54</sup> or induce the lawyer to hide such data from the other party. An agent who knowingly colludes with the defecting party, or herself is deceived, does not reduce information asymmetries, but instead compounds them.

---

a seller); *Rivkin v. Century 21 Teran Realty LLC*, 887 N.E.2d 1113, 1114 (N.Y. 2008); see also N.Y. REAL PROP. LAW § 443 (2011) (prescribing a standard form that explains to the seller that the agent has “duties . . . [including] undivided loyalty, confidentiality, [and] obedience”).

50. See GARY S. BECKER, *HUMAN CAPITAL* 15 (3d ed. 1993).

51. See Gilson, *supra* note 30, at 263–67; cf. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 513 (1994) (noting incentives for lawyers, as “repeat players” in the litigation process, to cooperate, along with countervailing incentives to prolong disagreements).

52. See Gilson, *supra* note 30, at 275.

53. See *id.* at 275–76 (“Because reducing the cost of information necessary to the correct pricing of the transaction is beneficial to both buyer and seller, determination of the matters to be covered by the opinion of counsel for seller should be in large measure a cooperative, rather than a competitive, opportunity.” (footnote omitted)).

54. Legal ethics rules guard against a principal’s deception by authorizing the lawyer to disclose in certain circumstances information necessary to prevent substantial financial harm to others. See MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2011); see also David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CALIF. L. REV. 1825, 1848–49 (2004) (discussing the problem of clients who deceive lawyers regarding transactions with third parties).

## B. RECONCILING THE REGULATION OF LAWYERS WITH THE RULE OF LAW

When government seeks to regulate agents to reduce asymmetries in information, courts have tended to defer to government efforts. This deference drives the commercial speech jurisprudence,<sup>55</sup> including much of the regulation of the legal profession.<sup>56</sup> In contrast, when lawyers challenge government policies, courts worry that regulation of such advocacy will *compound* asymmetries in information between the government and the public.<sup>57</sup> Classifying such litigation as political speech, courts review government regulation more rigorously.<sup>58</sup> Some cases, however, hint at a hybrid of approaches from the commercial and political speech contexts. In these hybrid cases, courts extend the commercial speech rationale to other settings where a speaker has a special relationship that is likely to engender an information gap. Courts, however, tailor regulation, demanding a safe harbor for speakers who are free from this taint.<sup>59</sup>

In the regulation of the legal profession, regulation of deceptive speech serves two purposes. First, it addresses asymmetries in information between lawyer and client. Second, viewed *ex ante*, prohibiting deceptive speech and mandating disclosure resolve collective-action problems by signaling cooperation on rules of the road governing specialized forums. Consider *Milavetz, Gallop & Milavetz, P.A. v. United States*, in which the Supreme Court upheld the provisions

---

55. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 77 n.21 (2010) (discussing the rationale of *Zauderer* and other cases upholding First Amendment protection for lawyer advertising). On the theoretical basis for regulating marketing to reduce information asymmetries, see ALBERT O. HIRSCHMAN, *Exit, Voice, and Loyalty: Further Reflections and a Survey of Recent Contributions*, in *ESSAYS IN TRESPASSING: ECONOMICS TO POLITICS AND BEYOND* 213, 219 (1981) (noting the importance of transparency when consumers of information confront difficulties in assessing information's value or reliability).

56. See Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 584–87 (1998) (suggesting that government can limit some speech by lawyers as it regulates speech that government enables through sponsorship or employment); cf. Wendel, *supra* note 12, at 373–82 (suggesting that much regulation of lawyers stems from a concern about transparency in the marketing and functioning of the legal system, but that the conflict between a lawyer's roles as an advocate for clients and an officer of the court complicates a comprehensive theory of lawyers as First Amendment actors).

57. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001) (finding that restrictions on federally funded lawyers' challenges to welfare-reform legislation would "draw lines around [the program of legal assistance] to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider").

58. *Id.* at 543–48 (striking down a bar on funding for legal challenges to welfare restrictions); cf. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1335, 1337, 1338 n.5 (2010) (construing the Bankruptcy Code narrowly to prohibit attorney advice that a client incur pre-filing debt with the specific intent to avoid repayment, even where the parties conceded that lower scrutiny consistent with regulation of commercial speech applied, and noting that broader construction would not vindicate Congress' intent and would "seriously undermine the attorney-client relationship").

59. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (upholding "narrow and necessary limitations" on the speech of lawyers before and during trials in which they are participating).

of the Bankruptcy Code that govern the marketing and content of for-profit legal advice.<sup>60</sup> The statute requires a lawyer who assists clients in filing for bankruptcy to identify her firm as a “debt relief agency”<sup>61</sup> that helps the client obtain such relief through a bankruptcy filing.<sup>62</sup> In addition, the statute bars a lawyer from advising a client to “incur more debt in contemplation of” bankruptcy.<sup>63</sup>

In upholding the disclosure provisions, the *Milavetz* Court relied on the higher deference accorded to regulation of commercial speech, but also attributed to Congress a concern for the proper functioning of bankruptcy in the economic system. The Court cast lawyers as Gilson’s transaction cost engineers, building a floor of goodwill between debtors and creditors. The provisions at issue promoted mutual understandings on rules of the road, even though each side also has divergent interests.<sup>64</sup> The disclosure requirements provided some assurance to creditors that lawyers will not try to obtain more business by painting bankruptcy in an unduly rosy light.<sup>65</sup> Creditors concerned that lawyers are promising clients pie in the sky results could have responded with measures that disadvantaged debtors as a group. For example, creditors could have instructed their own counsel to be unduly obfuscatory in opposing individual bankruptcy petitions, viewing such tactics as a necessary substitute for the gatekeeping that a debtor’s lawyer should perform. Creditors also could have become stingier with credit to compensate for a higher risk of abuse. These unintended consequences would have ratcheted up mistrust between debtor and creditor, making each side worse off.

Similar “rules of the road” concerns drove the Court’s upholding of the provisions that limited advice on incurring debt. Advising a client to exploit a pending filing by making purely elective purchases would constitute gaming the system.<sup>66</sup> Such advice would harm the debtor by prompting an adverse ruling in bankruptcy court.<sup>67</sup> However, the Court narrowed the provision appreciably by reading it to permit advice that a

---

60. 130 S. Ct. at 1335–39.

61. 11 U.S.C. § 101(12A) (2010).

62. 11 U.S.C. § 528(a)(4) (2010).

63. 11 U.S.C. § 526(a)(4) (2010). For more on *Milavetz*, see Renee Newman Knake, *The Supreme Court’s Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499, 1508–12 (2010); see also Knake, *supra* note 11 at 648–52; Margaret Tarkington, A First Amendment Theory for Protecting Attorney Speech 5–9 (Aug. 31, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1669617>.

64. See *Milavetz*, 130 S. Ct. at 1341.

65. *Id.*

66. *Id.* at 1336 (citing *Conrad v. Pender*, 289 U.S. 472, 478 (1933)) (noting that the payment of attorney’s fees by a debtor may be scrutinized to prevent a debtor from “deal[ing] too liberally with his property,” that is, paying more than necessary for legal services to avoid having assets go to creditors).

67. *Id.* at 1337.

client incur debt “for a valid purpose,” such as a loan for living expenses.<sup>68</sup> The Court suggested that a broader interpretation of the statute would unduly interfere with the attorney-client relationship and impair bankruptcy relief.<sup>69</sup>

Asymmetries in information and the need for rules of the road prompt judicial deference, even outside the commercial speech context. In *Gentile v. State Bar of Nevada*, the Court upheld some limits on lawyers’ use of pretrial publicity, noting that lawyers’ “special access to information”<sup>70</sup> heightened the risk of prejudice to the jury pool.<sup>71</sup> The Court stressed the legal system’s rules of the road, which focus juries on “evidence and argument in open court”<sup>72</sup> and shield the fact finder from information that is privileged or prejudicial.<sup>73</sup> As “key participants in the criminal justice system,” lawyers have a central role in maintaining those rules of the road, “and the State may demand some adherence to the precepts of that system in regulating *their speech as well as their conduct.*”<sup>74</sup> Information asymmetries are less salient in a bench trial because a judge is far less susceptible to lawyer manipulation than is a jury.<sup>75</sup>

In the pretrial-publicity setting, some limits also resolve collective-action problems. Without a rule, litigation adversaries would engage in a Hobbesian war of all against all, diminishing courts’ distinctive institutional capital.<sup>76</sup> Moreover, a rule saves the advocate from an *intrapersonal* collective-action problem, which pits the lawyer today

68. *Id.* at 1336.

69. *Id.* at 1338 n.5 (“[Broader construction] would seriously undermine the attorney-client relationship.”).

70. 501 U.S. 1030, 1074 (1991).

71. *Id.* at 1075.

72. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

73. *Gentile*, 501 U.S. at 1074–76. For criticism of *Gentile* as a needless intrusion on political speech, see Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 867–71 (1998).

74. See *Gentile*, 501 U.S. at 1074 (emphasis added); cf. Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 692–94 (1997) (justifying limits on pretrial publicity as a necessary incident of regulating advocacy in court).

75. Chief Justice Rehnquist, who wrote for the Court in ruling that courts should assess pretrial publicity under a lower standard of review, regarded permitting public comments in a bench trial as sufficient to save the limit’s constitutionality, observing that “trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it.” *Gentile*, 501 U.S. at 1077 (Rehnquist, C.J., dissenting). Justice Kennedy and the four Justices who joined him in striking down the Nevada limit as void for vagueness regarded the exclusion of bench trials as necessary, but not sufficient, to save the measure. *Id.* at 1036–38 (opinion of Kennedy, J.) (conceding that some limits on pretrial publicity were appropriate, but asserting that the *voir dire* process is often adequate to guard against prejudice).

76. See *Patterson*, 205 U.S. at 462 (“The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether a private talk or public print.”); cf. Wendel, *supra* note 12, at 400 (discussing the rationale for regulating pretrial publicity).

against her future self.<sup>77</sup> In the short term, pretrial doldrums may tempt lawyers to put much of their case before the public.<sup>78</sup> In the longer term, however, detailed statements on the public record may damage the client's prospects by locking the lawyer into a strategy that does not fit changed circumstances. A lawyer who cannot deliver at trial on public statements will endure push-back from the jury at her client's expense. However, when a trial is pending, the lawyer may not sufficiently consider that risk. The rule signals to lawyers that they should steer clear of temptation.<sup>79</sup>

Yet another facet of this relational content-regulation model is the provision of a safe harbor for those outside the relationship that the law seeks to regulate. In the pretrial-publicity setting, for example, attorneys not involved in the lawsuit are free to comment on any aspect of the case.<sup>80</sup> This safe harbor has a number of purposes. First, it ensures that the public will get to hear a wide range of substantive positions, which will overlap with positions that regulated parties might articulate. The safe harbor ensures that neither the government nor a private individual or entity can keep particular positions out of the public square. The safe harbor also has a healthy *ex ante* effect on government: If the government could categorically bar all attorneys from speaking out regarding possible injustice in a criminal prosecution, it would have a greater incentive to target those who have posed a substantive challenge to government policies.<sup>81</sup> Allowing independent speech reduces the government's incentive.

---

77. An intrapersonal collective-action problem is one "in which the costs and benefits, for a particular person, of engaging in an activity change dramatically over time." Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 26 (1991); see also Daniel Read, *Intertemporal Choice*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 424, 428–29 (Derek J. Koehler & Nigel Harvey eds., 2004) (arguing that individuals tend to prefer a "smaller-sooner reward"); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443, 443–45 (1997) (arguing that people employ "commitment mechanisms" such as insurance policies or savings plans to compensate for the tendency to unduly discount the future); George Loewenstein et al., *Projection Bias in Predicting Future Utility*, 118 Q.J. ECON. 1209, 1209–12 (2003) (analyzing errors in discounting over time); cf. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 681 (2010) (arguing that undue discounting of long-term gains may prejudice attempts at unionization, which often involve short-term risk and delayed gains).

78. See Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 385–88 (2009) (discussing tactical risks of pretrial publicity). See generally Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259 (2009) (analyzing the interaction of legal and public relations strategies).

79. Cf. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 18–20 (2000) (discussing the importance of signaling in overcoming information asymmetries and promoting trust).

80. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1062 (1991).

81. See *In re Sawyer*, 360 U.S. 622, 632 (1959) ("[P]ermissible criticism [of systemic injustice] may as well be made to a lay audience as to a professional [one]."); see also *In re Snyder*, 472 U.S. 634, 647 (1985) (finding that a single incident of rudeness in a letter complaining about inadequate compensation in court-assigned criminal defense cases does not merit suspension from practice). *But*

As the importance of safe harbors demonstrates, lawyers also serve as agents in the cause of constitutionalism itself. Constitutionalism is a coordinated game premised on the polity's collective understanding that shortsighted decisions can distort abiding values.<sup>82</sup> Alexander Hamilton famously remarked that elected officials were often subject to the "effects of occasional ill humors in the society."<sup>83</sup> These effects could prompt "serious oppressions of the minor party in the community."<sup>84</sup> Under a constitutional order, majorities agree to limit some short-term choices, such as measures that could oppress minorities. In return, majorities receive protection from long-term shifts in the polity that could limit their rights. Lawyers actualize this bargain, integrating short- and long-term perspectives of parties to public law disputes, just as they do for private actors. If government seeks a short-term payoff through oppression of minorities, lawyers seek relief in the courts.<sup>85</sup> This role reduces the influence of short-term perspectives that can impel defections from the rule of law. Without lawyers performing this role, transaction costs could be far higher, as only popular upheavals<sup>86</sup> could overturn oppressive legislation. Government change would become a volatile series of "pendular swings"<sup>87</sup> rather than an exercise in

---

see Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1587–1600 (2009) (arguing that courts have impaired public discussion of the legal system through sanctions against attorneys for allegedly disrespectful extrajudicial comments); Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 363–71 (2010) (same).

82. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1830–35 (2009) (discussing premises of constitutionalism); cf. *supra* note 77 (discussing flaws in individuals' discounting of risks and benefits over time).

83. See THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84. *Id.* at 469.

85. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543–49 (2001) (striking down limits on government-funded legal representation in challenges to welfare reform); cf. Knake, *supra* note 11, at 664–72 (discussing the lawyer's role in challenging violations of constitutional rights); Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantanamo*, 44 U.C. DAVIS L. REV. 1487, 1495–1503 (2011) (same). Lawyers arguably serve a similar function within government agencies by arguing for the observance of constitutional norms. Unfortunately, the Court has declined to protect this type of lawyer speech, defining it as nonpublic and within government's ambit as an employer. See *Garcetti v. Ceballos*, 547 U.S. 410, 421–23 (2006); see also Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 451–55 (2009) (critiquing *Garcetti* as inhibiting dialog and dissent within government agencies).

86. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 136–38 (2004) (discussing the Federalists' view of the role of the judiciary); cf. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1599–1615 (2005) (reviewing KRAMER, *supra*) (assessing arguments against constitutional interpretation by people and elected officials); Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 831–42 (2011) (discussing the images and rhetoric of constitutionalism in Tea Party commentary); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1204 (explaining that in the Founding Era dispute over the Alien and Sedition Acts, "constitutional meaning was hammered out informally through political contestation").

87. See *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (striking down habeas-stripping provisions

deliberation and dialogue. Carving out a role for lawyers representing alleged victims of government overreaching thus fulfills crucial constitutional purposes.

## II. A PERENNIAL CONCERN: FOREIGN AGENTS AND AMERICAN HISTORY

Governmental efforts to limit U.S. residents' agency relationships with foreign powers have a long history, going back to the enactment of the Constitution itself. The Framers worried about asymmetries of information regarding the intentions of foreign powers and signaled America's desire for comity in the fluid domain of foreign affairs.<sup>88</sup> Our history since the Founding Era has continued to reflect this concern. However, efforts by the Framers and their successors to limit foreign influence have on occasion triggered government aggrandizement and suppression of independent advocacy. Courts since the Founding Era have used the avoidance canon to curb government overreaching.

### A. FOREIGN AGENTS AND THE FOUNDING ERA

Concern about the opacity of foreign influence drove the drafting and enactment of two constitutional provisions: the residency requirements for election to the House of Representatives and the Foreign Gifts Clause. The Framers differed only on the identity of the foreign power that posed the greatest threat. Jeffersonian Republicans cited British plots.<sup>89</sup> Federalists feared France.<sup>90</sup> Each side noted its lack of knowledge of foreign powers' intentions.<sup>91</sup>

Pushing for a residency clause that would limit the influence of foreign nationals on the legislative branch, George Mason of Virginia warned that a "rich foreign Nation, for example Great Britain, might send over her tools who might bribe their way into the Legislature for insidious purposes."<sup>92</sup> Heeding Mason's caution, the Framers required that at the time of election a member of the House of Representatives be a U.S. citizen for seven years and an "inhabitant" of the state that included his district.<sup>93</sup>

Even more concrete concerns about foreign influence impelled the enactment of the Foreign Gifts Clause.<sup>94</sup> Delegates at the constitutional

---

of the Military Commissions Act of 2006).

88. See *Citizens United v. FEC*, 130 S. Ct. 876, 948 n.51 (2010) (Stevens, J., dissenting) (quoting Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 393 n.245 (2009)).

89. See ELKINS & MCKITRICK, *supra* note 17, at 441–49 (detailing Jeffersonians' opposition to the Jay Treaty with Britain, which would have increased Britain's economic influence).

90. *Id.* at 360 (discussing Hamilton's concern about the French Revolution).

91. See *infra* notes 92–106 and accompanying text.

92. Notes of James Madison (Aug. 8, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 216 (Max Farrand ed., 1966) (recording Mason's arguments).

93. U.S. CONST. art. I, § 2, cl. 2.

94. U.S. CONST. art. I, § 9, cl. 8.

convention in Philadelphia and at state ratifying conventions feared that gratuities from foreign heads of state could sway public officials in this country. Celebrated episodes fueled this anxiety: The king of France had given a snuffbox to Arthur Lee and a diamond-studded painting to Benjamin Franklin.<sup>95</sup> Edmund Randolph, soon to become the nation's first attorney general, warned that the king's gifts had "disturbed . . . confidence" in the alliance between France and the U.S., and "diminished . . . mutual friendship, which [helped] carry us" through the Revolutionary War.<sup>96</sup> The Framers hoped that a bar on foreign gifts would both reduce corruption among American officials and signal that foreign powers should deal directly and transparently with Congress and the President.<sup>97</sup>

Hamilton defended key structural provisions of the Constitution on similar grounds. He cast the Treaty Clause as a hedge against foreign intrigue within the federal government. According to Hamilton, while "leading individuals in the Senate [could] prostitute[] their influence in that body as the mercenary instruments of foreign corruption" and bring to the floor a treaty that injured American interests, two-thirds of the Senate would not follow suit.<sup>98</sup> Hamilton also defended the electoral college as a safeguard against foreign influence, reasoning that its temporary operation and shifting membership would frustrate "the desire in foreign powers to gain an improper ascendant in our councils."<sup>99</sup>

During the Founding Era, concern about foreign influence often dovetailed with anxiety that agents of one country would entangle the new republic in conflicts abroad. President Washington's Neutrality Proclamation signaled to warring European nations that the U.S. would not become a party to their conflict.<sup>100</sup> Highly public events made such signaling necessary. In the most prominent example, Edmond Genet of France engaged in provocative acts in the course of his service as the French ambassador to the U.S. For example, Genet outfitted at least one privateer that sailed from American shores to prey on British shipping.<sup>101</sup> Even Secretary of State Thomas Jefferson, a celebrated Francophile and Anglophobe, recognized the risk presented by Genet's maneuverings.

---

95. See Teachout, *supra* note 88, at 361.

96. DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 330-31 (Richmond, Enquirer-Press 2d ed. 1805).

97. See *id.*

98. See THE FEDERALIST No. 66, at 406 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

99. See THE FEDERALIST No. 68, at 412-13 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton reasoned that permitting longer membership in a continuing body could facilitate foreign efforts at corruption. *Id.* at 413.

100. See Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling Over Presidential Power Outside the Courts*, in PRESIDENTIAL POWER STORIES 21, 44 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

101. See MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 78-80 (2007).

Fearing that American inaction in the face of Genet's provocations would persuade Britain that the U.S. had joined forces with France, Jefferson declared that for "[U.S.] citizens . . . to commit murders and depredations on the members of nations at peace with us . . . [was] as much against the law of the land, as to murder or rob [other U.S. citizens]." <sup>102</sup>

Jefferson's foe John Marshall had even more pronounced views on the need for clear signals to overcome asymmetries in information between nations. In well-known remarks to Congress made shortly before his appointment as Chief Justice, Marshall recalled Genet's intrigue as a paradigmatic danger to the new republic, which required an unequivocal response. <sup>103</sup> Marshall also recognized that foreign powers seeking an advantage in conflicts abroad would not merely try to use America as a base, but would seek to extort money from the U.S. as the price for peace. Indeed, Marshall knew about this tendency first hand. His knowledge stemmed from service on the diplomatic mission to France that culminated in the notorious XYZ Affair, in which French officials evaded negotiating about trade policy and instead demanded millions in cash as the price for avoiding war. <sup>104</sup> Summarizing the lessons of the new republic's first decade under the Constitution, Marshall warned about the ubiquity of imperfect information about rapidly changing matters abroad, noting the challenge of "understand[ing] precisely the state of the political intercourse and connexion between the United States and foreign nations." <sup>105</sup>

Importantly, Marshall warned that this asymmetry was reciprocal: foreign powers could be uncertain of the U.S.'s intentions. For Marshall, clear signaling of a commitment to comity would dispel foreign powers' mistrust. Counseling judicial deference to President Adams's decision to extradite a British subject, Thomas Nash, Marshall recommended flexibility in the application of American rights such as trial by jury to the shifting transnational sphere. <sup>106</sup>

Marshall also acknowledged asymmetries in information about foreign affairs while serving as Chief Justice. In a classic early decision, this acknowledgement spawned the avoidance canon, which narrows the scope of statutes to avoid conflicts with the overall legal landscape.

---

102. See Letter from Thomas Jefferson to Edmond C. Genet (June 17, 1793), in 9 THE WRITINGS OF THOMAS JEFFERSON, at 131, 136 (Andrew A. Lipscomb ed., 1903) (quoted in 10 ANNALS OF CONG. 599 (1800) (statement of John Marshall)).

103. See 10 ANNALS OF CONG. 598–99 (1800) (statement of John Marshall) (discussing the Genet episode); see also Powell, *supra* note 14, at 1511–27 (discussing Marshall's views).

104. See 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 255–64 (1916); see also ELKINS & MCKITRICK, *supra* note 17, at 568 (describing the French Directory's approach to dealing with both the U.S. and European governments as that of an "international bully").

105. 10 ANNALS OF CONG. 614–15 (1800).

106. *Id.* at 611.

Marshall wrote for the Court in *Murray v. The Schooner Charming Betsy*, which held that courts should interpret statutes to avoid clashes with international law.<sup>107</sup> Applying the avoidance canon, the Court narrowly interpreted a statute that limited trade with France in order to reduce the risk of entanglement in foreign conflicts.<sup>108</sup> The statutory text prohibited Americans from trading with France; the Court declined to read it as also prohibiting trade with France by subjects of neutral countries, since international law protected the rights of neutrals.<sup>109</sup> By requiring Congress to state clearly its intent to defy international law, the Court sought to ensure that Congress would deliberate carefully before enacting a statute with such a disruptive effect.

The Framers' efforts to calibrate policy with imperfect information about foreign powers had a decidedly darker side, entailing the expression of dissent. Not content with measures that limited trade with France, the Federalists passed the Sedition Act, which criminalized any criticism of policy stated with the intent to cast the government "into contempt or disrepute."<sup>110</sup> This episode illustrated that efforts to address the problem of imperfect information about foreign powers can suppress the exercise of democratic voice at home.

Concern about American agents promoting foreign designs reemerged during the War of 1812. The governor of Massachusetts publicly disclosed plans for pending military operations against the British.<sup>111</sup> New England residents smuggled livestock across the northern border, forming an integral link in the supply chain for British troops.<sup>112</sup>

---

107. 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").

108. *Id.* (ordering a navy commander to pay compensation for improperly seizing a vessel owned by a national of a neutral power); see also Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1998); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 302 (2005). See generally Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004) (arguing that courts should interpret statutes authorizing force as being consistent with international humanitarian law).

109. *Charming Betsy*, 6 U.S. at 118.

110. Ch. 74, § 2, 1 Stat. 596, 596 (1798); see ELKINS & MCKITRICK, *supra* note 17, at 592–93; STONE, *supra* note 20, at 37–38 (describing Federalists' claims that the Sedition Act was justified because of a "crowd of spies and inflammatory agents" that was "alienating the affections of our own citizens"); Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1536–51 (2004); Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUM. RTS. L. REV. 547, 566 (2007).

111. See Jan Ellen Lewis, *Defining the Nation: 1790 to 1898*, in SECURITY V. LIBERTY: CONFLICTS BETWEEN CIVIL LIBERTIES AND NATIONAL SECURITY IN AMERICAN HISTORY 117, 133 (Daniel Farber ed., 2008).

112. *Id.* Over a generation later, concern about British influence fueled movement for the annexation of Texas. See David E. Narrett, *A Choice of Destiny: Immigration Policy, Slavery, and the Annexation of Texas*, 100 SW. HIST. Q. 271, 294–95 (1997). During and immediately after the Civil

While the federal government failed to stop this collusion, the aftermath of the war saw an increase in national power and a consensus that states could not act as agents for a wartime adversary.<sup>113</sup>

#### B. POLICY AND PARANOIA: FOREIGN AGENTS IN THE TWENTIETH CENTURY

Concerns about asymmetries of information in dealings with foreign powers have continued to animate U.S. policy. Notable incidents of foreign influence ensured that the concerns received officials' attention. As in the early period, one strand of policy targeted the problem directly, while another strand targeted free expression of ideas. In recent decades, the courts have used statutory interpretation, including the canon of constitutional avoidance, to nudge policymakers toward the first option.

American involvement in World War I was spurred by the Zimmerman telegram, in which German diplomats including the ambassador to the U.S. proposed that Mexico enter into an alliance against the U.S.<sup>114</sup> During World War II, U.S. citizen Tokyo Rose, acting on directions from the Japanese government, broadcast propaganda urging American soldiers to abandon the fight.<sup>115</sup> Indeed, Tokyo Rose was the prototypical agent for a defecting party, since she constructed a benign image of the Japanese war effort that conveniently concealed wartime atrocities.<sup>116</sup> After World War II, espionage by U.S. citizens acting on behalf of the Soviet Union ensured the issue's continued currency.<sup>117</sup>

Policy responses to this issue range from neutral to repressive. Some responses to this concern have focused largely on regulating foreign principals' functional participation in the American economy or political scene.<sup>118</sup> Congress and the executive branch also have had an incidental

War, Secretary of State Seward expressed his anxiety about France's effort to install the Austrian Archduke Ferdinand Maximilian as emperor of Mexico, and what that effort might portend for French interference in American governance. See FREDERICK W. SEWARD, *SEWARD AT WASHINGTON AS SENATOR AND SECRETARY OF STATE 190* (New York, Derby & Miller 1891).

113. See Lewis, *supra* note 111, at 133.

114. See Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 *IND. L.J.* 233, 253 (2008).

115. See *Citizens United v. FEC*, 130 S. Ct. 876, 947 (2010) (Stevens, J., dissenting).

116. Cf. Michael J. Lebowitz, "Terrorist Speech": *Detained Propagandists and the Issue of Extraterritorial Application of the First Amendment*, 9 *FIRST AMEND. L. REV.* 573, 596 (2011).

117. See G. Edward White, *Alexander Vassiliev & Alger Hiss: Part II*, 13 *GREEN BAG* 2d 85, 89 (2009) (noting confirmation in Soviet files of the participation of Julius Rosenberg in an espionage plot, and tracing the Soviet service of American diplomat—and former law clerk for Justice Holmes—Alger Hiss).

118. For instance, Congress has barred foreign entities and individuals from making direct contributions to American political campaigns. 2 U.S.C. § 441e (2010). See generally Neil J. Mitchell, *Foreign Money and American Politics*, 24 *POLITY* 337 (1991) (book review). Legislation also has limited foreign ownership of media outlets. 47 U.S.C. § 310(b) (2010); see Ian M. Rose, *Barring Foreigners from Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 *COLUM. L. REV.* 1188, 1188 (1995). In addition, the Foreign Intelligence Surveillance Act permits courts to issue

effect on political speech through measures such as travel bans<sup>119</sup> and disclosure requirements.<sup>120</sup> Officials directly targeted political beliefs during World War I<sup>121</sup> and the Cold War.<sup>122</sup>

Judicial assessments of these measures have hinged on the role of asymmetries in information. If a measure targeted the expression of ideas, courts declined to grant the government power to shield its policies from public debate.<sup>123</sup> However, courts typically have upheld measures that left space for public debate and that managed asymmetries in information between the U.S. and foreign powers.

During the Cold War, courts relied on the avoidance canon to limit the scope of measures targeting ideas. In *Yates v. United States*, the Court construed the Smith Act, which prohibited membership in any organization that advocated the government's forcible overthrow,<sup>124</sup> as requiring not merely adherence to abstract Communist party doctrine, but the instigation of specific action.<sup>125</sup> The Court relied on the avoidance doctrine, denying that Congress would have casually entered the "constitutional danger zone"<sup>126</sup> demarcated by the punishment of ideas.<sup>127</sup>

warrants for surveillance of an agent of a foreign power. 50 U.S.C. §§ 1802–1803 (2010); see *United States v. Duggan*, 743 F.2d 59, 69 (2d Cir. 1984).

119. See *Regan v. Wald*, 468 U.S. 222, 244 (1984) (upholding a ban on travel to Cuba); *Zemel v. Rusk*, 381 U.S. 1, 25–26 (1965) (same).

120. See Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–621 (2010)). The Act currently requires foreign nations to disclose their sponsorship of "informational materials" produced on their behalf. *Id.* § 614.

121. See William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 389–92.

122. See *id.*; see also L.A. Powe, Jr., *The Role of the Court*, in SECURITY V. LIBERTY, *supra* note 111, at 165, 167–70 (asserting that avoidance decisions slowed momentum for Cold War restrictions); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 417–26 (2005).

123. See *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (holding that Congress had not authorized denial of a passport based on expression of unpopular political ideas).

124. See *Dennis v. United States*, 341 U.S. 494, 497 (1951) (construing the Alien Registration Act of 1940 (the Smith Act), ch. 493, § 3, 54 Stat. 670, 670–71 (codified as amended at 18 U.S.C. § 2385 (2010))).

125. See 354 U.S. 298, 318–19 (1957); *cf.* *Scales v. United States*, 367 U.S. 203, 209–10 (1961) (imposing a heightened standard requiring both "active" membership in a subversive organization and proof of specific intent to overthrow government through violence).

126. *Yates*, 354 U.S. at 319.

127. For more on the avoidance doctrine, see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring); Frickey, *supra* note 122, at 417–26 (approving of the use of the avoidance doctrine in Cold War cases); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1602–13 (2000) (discussing the rationale for avoidance). *But see* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 90–97 (expressing skepticism about the legitimacy and utility of the doctrine). *Yates* and its companion cases paved the way for the Court's landmark holding in *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969), that the government could punish speech advocating violence only when the speaker wished to provoke violence and when violence was reasonably likely to occur in the imminent future. See DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 109 (2009) (discussing the Court's incremental path to *Brandenburg*).

Justice Black, who would have gone further and struck down the statute, stressed that upholding the convictions would have compounded information asymmetries between the government and its constituents.<sup>128</sup> Justice Black made clear that vacating the convictions deterred government's exploitation of prejudice against "obnoxious or unorthodox views" to stifle public debate crucial to democracy.<sup>129</sup>

Courts take a more deferential view when statutes or executive orders prohibit travel to nations that pursue policies adverse to U.S. interests. In applying intermediate scrutiny, courts first require that travel restrictions be across the board, rather than selective efforts to retaliate against an individual's expression of her beliefs.<sup>130</sup> Once satisfied that any effect on speech is incidental, courts cite the role of tourism in generating revenue for foreign powers.<sup>131</sup> A hostile foreign power could leverage those economic benefits to subsidize courses of action that are adverse to American interests.<sup>132</sup> Courts analogize travel curbs to the trade measures undertaken since the Founding Era, holding that reducing revenue for hostile foreign powers is an important policy goal that travel bans are adequately tailored to achieve.<sup>133</sup> When a foreign regime has a track record of imprisoning Americans<sup>134</sup> and seeking to topple other foreign governments allied with the U.S.,<sup>135</sup> the political branches can cut off this revenue to provide leverage in negotiations.<sup>136</sup>

---

128. *Yates*, 354 U.S. at 339 (Black, J., dissenting).

129. *Id.* at 339. Justice Black also warned of the threat to constitutional values when "[g]uilt or innocence may turn on what Marx or Engels or someone else wrote or advocated as much as a hundred or more years ago." *Id.*

130. *See, e.g., Zemel v. Rusk*, 381 U.S. 1, 16 (1965).

131. *See, e.g., Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 12–13 (D.C. Cir. 2008) (describing tourism as a "critical and much exploited revenue source" for foreign governments).

132. *See Regan v. Wald*, 468 U.S. 222, 243 (1984) (noting Cuba's support for armed violence and terrorism and its deployment of troops abroad "in support of objectives inimical to United States foreign policy interests").

133. *See, e.g., id.* at 243; *Emergency Coal.*, 545 F.3d at 12–13; *cf. Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2101–02 (2005) (arguing that *Zemel* and later cases have extended deference to the political branches in foreign affairs, outside the realm of the regulation of ideas).

134. *Zemel*, 381 U.S. at 15.

135. *Id.* at 14.

136. *Emergency Coal.*, 545 F.3d at 12–13. The case for deference is clearest when Congress and the President act jointly. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); *cf. Patricia L. Bellia, The Story of the Steel Seizure Case*, in PRESIDENTIAL POWER STORIES, *supra* note 100, at 233, 273–75 (noting the limits of *Youngstown* in providing guidance to lower courts); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in THE CONSTITUTION IN WARTIME 173–76 (Mark Tushnet ed., 2005) (distinguishing the Court's holdings in its cases concerning the treatment of Japanese-Americans during World War II based on the difference between the powers exercised by the President and whether or not his actions were authorized by Congress). *But see* Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 316–24 (2010) (arguing that the *Youngstown* framework, because it defers to some degree to the President even

Travel restrictions reduce the impact of asymmetries in information between the U.S. and foreign nations in three ways. First, viewed *ex ante*, the mere prospect of such a loss in revenue gives foreign powers weighing hostile moves a reason to maintain moderate policies. Second, imposing such curbs assures U.S. allies, who otherwise might have reason to question the U.S.'s intentions or resolve. Third, travel curbs compensate for the naiveté of some U.S. travelers, whom a hostile foreign regime could use to extract concessions.<sup>137</sup>

Courts also have stressed information asymmetries in upholding disclosure requirements for informational material, such as films, sponsored by a foreign entity. In *Meese v. Keene*,<sup>138</sup> the Court upheld a provision of the Foreign Agents Registration Act of 1938,<sup>139</sup> which required that any agent of a foreign entity notify the Department of Justice of the distribution of "propaganda" on its principal's behalf.<sup>140</sup> Justice Stevens, writing for the majority, asserted that Congress had enacted the statute to "better enable the public to evaluate the import"

---

when Congress is silent, creates an incentive for the President to bypass Congress and clandestinely implement policies such as warrantless surveillance).

137. The *Zemel* Court noted that under the so-called "Hostage Act," 22 U.S.C. § 1732, the President had statutory authority to "use such means, not amounting to acts of war as he may think necessary and proper" to free American hostages. 381 U.S. at 15. The Court, noting that the Cuban Missile Crisis had occurred "less than two months" before the filing of the complaint in the case, deemed it reasonable that the President took prophylactic steps such as a travel ban to reduce the need to use this authority. *Id.* at 15-16. Events in another country now subject to travel restrictions demonstrated the Court's prescience. See *Dames & Moore v. Regan*, 453 U.S. 654, 675-77 (1981) (discussing the Hostage Act's relevance to presidential authority to settle claims against Iran in negotiating the end to the hostage crisis).

Parties challenging such travel curbs have argued that the information asymmetry argument cuts the other way because travel restrictions limit the ability of U.S. citizens to learn about the consequences of government policies. See, e.g., *Zemel*, 381 U.S. at 16. Courts have responded that many legitimate measures have an incidental impact on the flow of information. *Id.* at 16-17 (citing the example of rules limiting access to the White House). Moreover, travel curbs typically have included exemptions for journalists, scholars, and human rights groups who can learn about country conditions and publicize the results of their findings. See, e.g., *Emergency Coal.*, 545 F.3d at 6-7 (upholding a modification in the exemption for educational programs).

138. 481 U.S. 465, 467, 482-85 (1987).

139. Ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611-621 (2010)).

140. 22 U.S.C. § 611(j) (repealed 1995); see *Keene*, 481 U.S. at 467, 467, 482-85. For criticism of the Foreign Agents Registration Act as inconsistent with First Amendment jurisprudence, see Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 735-38 (1985); Zick, *The First Amendment in Transborder Perspective*, *supra* note 6, at 950-53 (asserting that the legislation's purpose was the inhibition of political speech). In 1995, without any judicial prodding, Congress amended the statute on functional grounds by repealing § 611(j) and replacing the term "propaganda," with the term "informational materials." Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 9, 109 Stat. 691, 699-700 (codified as amended at 22 U.S.C. §§ 611-614(a) (2010)). These reforms were suggested in order to increase compliance with the disclosure requirements by those who were reluctant to acknowledge their link to "propaganda." See Charles Lawson, Note, *Shining the "Spotlight of Pitiless Publicity" on Foreign Lobbyists? Evaluating the Impact of the Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT'L L. 1151, 1171 (1996).

of the materials.<sup>141</sup> In that sense, he noted, the requirement dovetailed with the commitment to transparency behind the Court's commercial speech jurisprudence.<sup>142</sup> Justice Stevens also used statutory interpretation, as the Court had years earlier in *Yates*, to avoid any constitutional problems with stigma imposed by the term "propaganda." He noted that parties did not have to expressly identify materials as propaganda in the form provided for disclosure,<sup>143</sup> and that Congress had defined propaganda in "broad, neutral" terms that echoed common dictionary definitions.<sup>144</sup> Rather than single out allegedly seditious material, Congress had covered *any* communication by friend or foe designed to influence or persuade.<sup>145</sup> Another definition, such as "material adverse to American interests," could have triggered vagueness concerns. But the ample flow of material under the current regime suggested that the duty to disclose had not chilled speech.<sup>146</sup>

### III. REGULATING THE ASSETS OF TERRORIST GROUPS: INFORMATION ASYMMETRIES AND THE CONTINUUM OF HUMAN AND FINANCIAL CAPITAL

Terrorist groups like Hamas,<sup>147</sup> the PKK,<sup>148</sup> and the now largely defunct LTTE<sup>149</sup> inspire the same concerns about asymmetries in

---

141. *Keene*, 481 U.S. at 480–81.

142. *Id.* at 481–82 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

143. *Id.* at 471.

144. *Id.* at 477–78 & n.10 (noting the definition of "propaganda" as "doctrines, ideas, arguments, facts, or allegations spread by deliberate effort through any medium of communication in order to further one's cause or to damage an opposing cause" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1817 (1981))).

145. See 22 U.S.C. § 611(j) (repealed 1995) ("The term 'political propaganda includes any . . . communication . . . reasonably adapted to . . . in any . . . way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States . . ."); *Block v. Meese*, 793 F.2d 1303, 1310 (D.C. Cir. 1986) (declining to construe the provision as applying only to "subversive" propaganda); *United States v. Kelly*, 51 F. Supp. 362, 363 (D.D.C. 1943) ("[The Foreign Agents Registration Act] sought to bring about disclosure of the authorship and source of [material] . . . which appeared in publications and other media . . . at the instance of, and particularly when pursuant to compensation paid by, foreign governments, or foreign factions or parties, whether friendly or unfriendly, whether violent or mild.").

146. Distributors complying with the provision had disclosed foreign sponsorship of a wide range of films, including a Canadian documentary on acid rain, a movie distributed by the Israeli consulate on the persecution of Soviet Jewry, a film distributed by the West German consulate critical of the Berlin Wall, another German-sponsored opus entitled, "Berlin Means Business and More," and a film distributed by Japan extolling free trade. See *Keene*, 481 U.S. at 483 n.17; *Block*, 793 F.2d at 1312. Justice Stevens also echoed the commercial speech jurisprudence in noting that distributors were free to insert additional material with their disclosure, thereby creating "more speech" to counteract any stigmatizing effect. *Keene*, 481 U.S. at 481 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

147. See LEVITT, *supra* note 26, at 135.

148. The PKK, also known as the Kurdistan Workers' Party, was founded in 1974. To promote an independent Kurdish state, it has engaged in a long campaign of violence against both civilians and

information about foreign powers that drove the Framers' deliberations. DFTOs use any asset available to them to promote violence, but reject the accounting principles that would make their activities transparent. This rejection of transparency is clearest in the case of cash donations to foreign terrorist groups, which all nine Justices of the Supreme Court agreed in *HLP* that Congress could prohibit.<sup>150</sup> The rejection of accounting principles is also an apt metaphor for DFTOs' exploitation of human capital, including agency ties that generate funds and fresh recruits. Like the worst-case scenario in Part I of an agent's aid to a defecting party, DFTOs use agents to exploit asymmetries in information. For Congress, combating those information asymmetries through global coordination requires a comprehensive framework, including § 2339B, which bars a wide range of "material support" to terrorist groups.<sup>151</sup>

To sustain this framework but also to guard against the government's curbing of public debate, the *HLP* Court fashioned a hybrid approach that blended intermediate and heightened scrutiny with the avoidance canon. The activities that the plaintiffs told the Supreme Court they wished to pursue involved not cash but speech, including assisting DFTOs in negotiation and training DFTOs in the use of international law and of nonviolent techniques.<sup>152</sup> Because these activities entail speech, the Court recognized that heightened scrutiny was appropriate.<sup>153</sup> However, just as in the attorney speech cases described above, a common attribute of the activities the plaintiffs sought to protect was the existence of an agency relationship. Reviewing the plaintiffs' claims required a model that bears a surprising resemblance to the approach the Court has taken in cases involving the regulation of lawyers. Even as *HLP* regulated speech related to agency, as the Court

---

military targets in Turkey. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2713 (2010); ALIZA MARCUS, *BLOOD AND BELIEF: THE PKK AND THE KURDISH FIGHT FOR INDEPENDENCE* 286–95 (2007).

149. The LTTE, commonly known as the Tamil Tigers, were a Sri Lanka group that engaged in suicide attacks and guerilla warfare, ostensibly to gain autonomy for the ethnic Tamil population. The Sri Lankan government defeated the LTTE in 2009 after a bloody campaign that regained territory controlled by the group but also cost the lives of many Tamil civilians. See Jon Lee Anderson, *Death of the Tiger: Sri Lanka's Brutal Victory over Its Tamil Insurgents*, *NEW YORKER*, Jan. 17, 2011, at 41, 47; see also Phil Williams, *Terrorist Financing and Organized Crime: Nexus, Appropriation, or Transformation?*, in *COUNTERING THE FINANCING OF TERRORISM* 126, 138–39 (Thomas J. Biersteker & Sue E. Eckert eds., 2008) (detailing the involvement of the LTTE in criminal conduct, including the heroin trade, human trafficking, gun-running, and extortion).

150. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2741 (2010) (Breyer, J., dissenting) (arguing that cash contributions are "inherently . . . likely" to facilitate violence, and therefore Congress has the power to prohibit such contributions).

151. See *supra* note 25.

152. *Humanitarian Law Project*, 130 S. Ct. at 2720–21 (majority opinion).

153. *Id.* at 2723–24.

had done in the pretrial-publicity context, the decision also built a safe harbor that can accommodate independent advocacy, scholarship, journalism, human rights monitoring, and legal representation.

Chief Justice Roberts's opinion imported some of the conventions of the intermediate scrutiny model, including a willingness to assess government justifications from an *ex ante* perspective. An *ex ante* point of view considers how a given measure shapes incentives for future conduct.<sup>154</sup> Viewed *ex ante*, barring agency relationships with DFTOs enhances the possibility of cooperation among foreign entities and between those entities, and the U.S. Courts have sometimes adopted an *ex ante* perspective to justify other limits on speech<sup>155</sup> and have also done so in decisions *expanding* speech rights<sup>156</sup> and crafting evidentiary privileges that limit disclosure in court to spur useful activity.<sup>157</sup> An *ex ante* approach also dovetails with the lawyer speech cases and with the approach that courts have traditionally taken to managing asymmetries of information in foreign affairs.

Mention of the avoidance canon is ironic because *HLP*'s principal flaw is an unnecessary display of broad deference to government fact finding. The decision's factual predicate—the systemic defection of terrorist groups—rests securely on independent accounts. The majority did not need to rely on government assertions. Moreover, the Court's deference, viewed *ex ante*, might encourage the political branches to overreach. That eventuality highlights the need for the safe harbors that the decision provides to those challenging government policy.

#### A. DFTOs' POOR ACCOUNTING: REINFORCING VIOLENCE THROUGH PUTATIVELY NONVIOLENT ACTIVITIES

Like so many other stories, this one starts with money. DFTOs work diligently to gather funds for putatively nonviolent purposes, siphon off those funds into violence, and conceal the funds' source and destination.

---

154. See, e.g., Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CALIF. L. REV. 803, 840 (1988) (noting the premise that, viewed *ex ante*, patent protections provide an incentive for greater innovation); see also Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 32 (2008) (noting the conventional account that judicial review encourages government officials to take greater care in making decisions, since officials know that judicial review will reveal any mistakes).

155. See *New York v. Ferber*, 458 U.S. 747, 759–60 (1982) (upholding more intrusive regulation of the distribution chain for child pornography as necessary to “dry up” the market).

156. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring) (“The opinion of the court conclusively demonstrates the chilling effect of the . . . libel laws on First Amendment freedoms . . .”).

157. See *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 471 (7th Cir. 1984) (discussing Federal Rule of Evidence 407, which excludes evidence of subsequent repairs to promote the “social policy of encouraging people to take, or least not discouraging them from taking, steps in furtherance of added safety” (quoting FED. R. EVID. 407 advisory committee's note)).

Prior to the Supreme Court's decision in *HLP*, courts repeatedly found that terrorist groups disdained sound accounting principles.<sup>158</sup> Courts also realized early in the lengthy history of the *HLP* litigation that because cash is fungible, support for putatively nonviolent programs "frees up resources that can be used for terrorist acts."<sup>159</sup> Because of this link, Congress found that DFTOs, like state sponsors of terrorism, "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."<sup>160</sup> A more holistic focus on DFTOs' poor accounting also highlights the link between DFTOs' financial and human capital assets.

### I. The Statutory Framework

Section 2339B, passed as part of the Antiterrorism and Effective Death Penalty Act of 1996 in the wake of the Oklahoma City bombing, reflected Congress's view that curbs on the concrete instrumentalities of violence, such as "explosives," would be futile without limits on the financial and human capital that facilitate violence.<sup>161</sup> In the Act and

---

158. See *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004) ("[T]errorist organizations can hardly be counted on to keep careful bookkeeping records."); *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (holding that proof of specific intent to aid violence is not required for a criminal conviction based on a defendant's financial contribution to Hezbollah because "terrorist organizations do not maintain open books" (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000))), *vacated*, 543 U.S. 1097 (2005), *remanded to 405 F.3d 1034* (2005). *But see* Jeroen Gunning, *Terrorism, Charities, and Diasporas: Contrasting the Fundraising Practices of Hamas and al Qaeda Among Muslims in Europe*, in *COUNTERING THE FINANCING OF TERRORISM*, *supra* note 149, at 93, 100–01 (asserting that Hamas has a "reputation for financial transparency," due to its efforts to attract charitable contributions for its humanitarian efforts, while conceding that it may resort to "money laundering and smuggling" in some of its operations).

159. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), *cert. denied sub nom.*, *Humanitarian Law Project v. Ashcroft*, 532 U.S. 904 (2001); *see also* *Khan v. Holder*, 584 F.3d 773, 777 (9th Cir. 2009) (citing *Reno*); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008); *United States v. Afshari*, 426 F.3d 1150, 1160 (9th Cir. 2005) (observing that because of fungibility, "donation of money could properly be viewed by the government as . . . like the donation of bombs and ammunition"); *Kilburn*, 376 F.3d at 1130.

160. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (codified as amended at 18 U.S.C. § 2339B (2010)). Financial assistance to terrorist groups has also become a focus of international concern. See S.C. Res. 1373, ¶ 1(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001) (requiring states to prohibit anyone within their personal or territorial jurisdiction from making any funds, resources, or financial services available to persons who commit terrorist acts or to entities controlled by them); FINANCIAL ACTION TASK FORCE, FATF IX SPECIAL RECOMMENDATIONS 2 (2008) (noting the importance of international cooperation).

161. The 1996 statute supplemented an earlier provision, 18 U.S.C. § 2339A, that prohibited acting with specific intent to cause violence to others for the purpose of influencing government policy. See Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 8–9 (2005) ("Section 2339A . . . targets aid provided for use in carrying out specific crimes; section 2339B criminalizes the provision of aid to an organization that engages in terrorist crimes."). Prosecutors continue to rely heavily on the earlier provision, particularly in conspiracy cases. See MARGULIES, *supra* note 22, at 111–15 (analyzing cases);

subsequent amendments, Congress prohibited provision of “any property, tangible or intangible, or service,” including “financial services,” “personnel,” “training,” and “expert advice or assistance.”<sup>162</sup> The statute defines “training” as the teaching of a “specific skill,”<sup>163</sup> and “expert advice or assistance” as “scientific, technical or other specialized knowledge.”<sup>164</sup> Barring all such benefits dovetails with Congress’s goal to “interrupt, or at least imperil, the flow of money” “at any point along the causal chain of terrorism.”<sup>165</sup>

Under the designation process, the Secretary of State determines there is evidence indicating that particular organizations such as Al Qaeda, Hamas, or the LTTE have a track record of violence, particularly violence against innocents.<sup>166</sup> The government then informs the organization’s representatives, who have an opportunity to review unclassified evidence and submit material rebutting the government’s assertions.<sup>167</sup> If the government determines that its evidence warrants designation of the group as a foreign terrorist organization, the group can appeal to a federal court, which will set aside a designation that is arbitrary and capricious, not based on substantial evidence, or inconsistent with procedural safeguards.<sup>168</sup>

---

Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 474–86 (2007) (same). See generally RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS: 2009 UPDATE AND RECENT DEVELOPMENTS 13–16 (2009) (analyzing recent prosecutions under §§ 2339A and 2339B); David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT’L SECURITY L. & POL’Y 1, 84–93 (2011) (providing case studies of successful outcomes in prosecutions under both subsections).

162. See 18 U.S.C. § 2339A(b)(1) (2010). After earlier litigation in *HLP*, Congress clarified certain of these definitions in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762–3764. For example, Congress stated that “personnel” included only those acting under the DFTO’s direction or control or those providing such direction and control, and did not include independent actors. See 18 U.S.C. § 2339B(h) (2010).

163. 18 U.S.C. § 2339A(b)(2). This clarification, and the clarification on “expert advice or assistance,” *infra* note 164, also originated with the Intelligence Reform and Terrorism Prevention Act of 2004. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2715 (2010).

164. 18 U.S.C. § 2339A(b)(3); see Chesney, *supra* note 25, at 12–18 (discussing the context of the statute’s enactment).

165. See S. REP. NO. 102-342 at 22 (1992) (setting out the rationale for providing civil remedies for victims of terrorism in 18 U.S.C. § 2333).

166. See 8 U.S.C. § 1189(a)(1) (2010).

167. 8 U.S.C. § 1189(a)(4)(B); see *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 613 F.3d 220, 229–30 (D.C. Cir. 2010) (discussing the process and holding that the government had violated due process by failing to give the DFTO an opportunity to view unclassified evidence prior to making a final decision denying its petition to revoke the DFTO designation).

168. 8 U.S.C. § 1189(c)(1)–(3); see *United States v. Afshari*, 426 F.3d 1150, 1160 (9th Cir. 2005) (upholding the process and barring collateral review of the designation in subsequent criminal cases); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003).

2. *DFTOs, the Nexus of Violent and Nonviolent Programs, and Intermediate Scrutiny*

Both Congress and courts ruling before the *HLP* decision recognized that a comprehensive framework is essential to combatting DFTOs' exploitation of ostensibly nonviolent programs to supply incentives for violence. For example, terrorist groups like Hamas provide special assistance to families of suicide bombers, "thus making the decision to engage in terrorism more attractive."<sup>169</sup> Schools and clerics sponsored by terrorist groups help funnel new recruits.<sup>170</sup> Public goods such as education, health services, and welfare lock in group membership because an individual who exits the group loses access to these goods.<sup>171</sup>

This functional link between nonviolent programs and violent acts reinforced courts' application of intermediate scrutiny to uphold Congress's bar on cash contributions.<sup>172</sup> A measure prevails under intermediate scrutiny if it is content neutral, furthers an important governmental objective, and is tailored to achieve that goal.<sup>173</sup> According to courts, a measure that meets these criteria imposes a merely incidental burden on free speech.<sup>174</sup> Curbing cash contributions is content neutral in

169. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), *cert. denied sub nom.*, *Humanitarian Law Project v. Ashcroft*, 532 U.S. 904 (2001); *see Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d, 685, 698 (7th Cir. 2008) ("Hamas's social welfare activities reinforce its terrorist activities . . . by providing economic assistance to the families of killed, wounded, and captured Hamas fighters . . ."); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 585 (E.D.N.Y. 2005) (holding that targeted payments to families of suicide bombers constitute "incentive" to terrorist acts); *cf. Gunning*, *supra* note 158, at 102 (acknowledging payments of \$5,000 to families of suicide bombers); Jerrold M. Post et al., *The Terrorists in Their Own Words: Interviews with 35 Incarcerated Middle Eastern Terrorists*, 15 *TERRORISM & POL. VIOLENCE* 171, 177 (2003) ("Families of terrorists who were wounded, killed, or captured enjoyed a great deal of economic aid and attention. . . . [F]amilies got a great deal of material assistance, including the construction of new homes." (quoting a jailed terrorist)).

170. *See Boim*, 549 F.3d at 698 ("Hamas's social welfare activities reinforce its terrorist activities . . . [by] providing funds for indoctrinating schoolchildren."); *see also* LEVITT, *supra* note 26, at 135 (noting links between a Hamas-affiliated cleric preaching violence and an individual inspired by the cleric to "scout[] potential sites for suicide bombings in Jerusalem"); Post et al., *supra* note 169, at 183 (reporting that fifty percent of jailed terrorists interviewed by authors cited experience at a mosque or other religious influence as "central").

171. *See Boim*, 549 F.3d at 698 (noting that Hamas's social service programs "mak[e] it more costly . . . to defect"); *see also* Eli Berman & David D. Laitin, *Religion, Terrorism, and Public Goods: Testing the Club Model*, 92 *J. PUB. ECON.* 1942, 1952, 1955 (2008); Justin Magouirk, *The Nefarious Helping Hand: Anti-Corruption Campaigns, Social Services Provision, and Terrorism*, 20 *TERRORISM & POL. VIOLENCE* 356, 358 (2008) (discussing Hamas's provision of social services).

172. *See Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1148-49 (9th Cir. 2009) (upholding broad curbs under the International Emergency Economic Powers Act); *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 12-13 (D.C. Cir. 2008) (upholding regulations on travel to Cuba as imposing a mere incidental burden on free speech); *Reno*, 205 F.3d at 1136.

173. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968) (stating the intermediate scrutiny test). *See generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 *HARV. L. REV.* 1175 (1996) (discussing the incidental burdens doctrine and offering some caveats).

174. *See O'Brien*, 391 U.S. at 377.

that potential donors remain free to praise terrorist activity and criticize the policies of both the U.S. and its allies.<sup>175</sup> The curb on financial support vindicates a core governmental interest: disrupting the operations of transnational organizations that engage in terrorist activity.<sup>176</sup> Finally, such curbs are tailored to achieving this goal: Asymmetries in information benefit foreign terrorist groups, impeding enforcement of direct prohibitions against violence abroad.<sup>177</sup> Because of the difficulty of enforcing direct prohibitions outside the U.S., curbing financial and other support is necessary to deter future violence.<sup>178</sup>

#### B. TERRORIST AGENTS AND HYBRID SCRUTINY

The distinctive challenge in *HLP* arose because the speech that the plaintiffs wished to direct at DFTOs typically prompts heightened scrutiny of government regulation. As Chief Justice Roberts recognized, under § 2339B the legal status of the plaintiffs' activity hinged on its content.<sup>179</sup> The statute barred both "training" that provided a "specific skill" and "expert advice or assistance" that furnished "specialized knowledge" to a DFTO.<sup>180</sup> By definition, such speech differs in content from speech to DFTOs that Congress permitted.<sup>181</sup> On the other hand,

---

175. See *Reno*, 205 F.3d at 1133–36. This view poses a tension with campaign finance decisions like *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which view money as the virtual equivalent of speech. The most direct way of resolving this tension is to argue that *Citizens United* is wrong and that government has a legitimate interest in regulating contributions of both money and broadcast advertising for the benefit of particular candidates. The more cautious answer is that the nexus between political speech and spending makes campaign finance an exceptional case. Protection accorded to contributions to entirely lawful political campaigns should not necessarily cover contributions to a vast spectrum of commercial and not-for-profit entities, foreign and domestic, where courts have previously upheld regulation. See Jeff Breinholt, *Resolved, or Is It? The First Amendment and Giving Money to Terrorists*, 57 AM. U. L. REV. 1273, 1280 (2008).

176. See *Reno*, 205 F.3d at 1135–36; see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 301(6), 110 Stat. 1214, 1247 (codified as amended at 18 U.S.C. § 2339B (2010)) ("[S]ome foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations . . .").

177. *Reno*, 205 F.3d at 1136.

178. *Id.* at 1135–36; cf. Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 331 (2000) ("The United States has limited ability to enforce anti-terrorist legislation against foreign organizations that are based in countries with which the United States has amicable relations, and even less ability to enforce it against organizations that are based in hostile countries.").

179. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722–24 (2010).

180. *Id.* at 2723.

181. See *id.* at 2723–24 (contrasting prohibited training with instruction that merely provides "general knowledge"); cf. Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443–44 (1996) (arguing that courts use strict scrutiny of content-based restrictions to ferret out a government motive to suppress ideas); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 191–94 (1983) (discussing the rationale for strict scrutiny of content regulation). The *HLP* plaintiffs also argued that the statute was vague as applied because it did not provide adequate guidance on

the Court reasoned, the statute did not target the expression of ideas, but only certain interactions with a particular listener.<sup>182</sup> By permitting individuals to say “anything they wish on any topic”<sup>183</sup> outside of this relation to a DFTO, including speech directed at the world in general, § 2339B regulated the relationship *with* the DFTO, rather than ideas *per se*.<sup>184</sup> The speech activity at issue therefore claimed a place midway between pure political speech, which triggers virtually absolute protection, and the regulation of relationships such as agency between individuals and organizations, which usually elicits judicial deference. The distinctive and contained site of the speech at issue in *HLP* thus required a hybrid form of scrutiny.

### *I. Curbing DFTOs’ Gaming of Information Asymmetries*

Just as in the cases on attorney-client relationships, the Court’s hybrid model in *HLP* focused on managing asymmetries in information.<sup>185</sup> The Court recognized that services to a DFTO constitute human capital, a form of material support on a continuum with cash.<sup>186</sup> Just as money for social services tightens a terrorist group’s hold on its members, providing services, training, or expert advice to the DFTO furnishes something of value that the DFTO can exploit.<sup>187</sup>

Agents are useful to DFTOs for the same reason they are useful in ordinary commercial transactions: By creating trust between parties, they reduce the transaction costs that information asymmetries create.<sup>188</sup> Lawyer-agents engineer parties’ reputations: Writing opinion letters vouching for a party’s financial health, lawyers leverage their own

distinguishing training involving a “specific skill” from instruction that merely offered general knowledge. *See Humanitarian Law Project*, 130 S. Ct. at 2720–22. The Court rejected this argument. *Id.*; *see infra* Part IV.A. (analyzing the Court’s definition and suggesting guidance for future cases).

182. *See Humanitarian Law Project*, 130 S. Ct. at 2722 (arguing that the statute barred only advocacy performed in coordination with, or at the direction of, a DFTO).

183. *Id.* at 2722–23.

184. *Id.* (rejecting the plaintiffs’ claim that the statute banned “pure political speech”). The amicus brief on which I served as co-counsel argued that this centrality of relationships, not ideas, called for intermediate instead of heightened scrutiny. Brief of Amicus Curiae Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues in Support of Petitioners at 27–28, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498), 2009 WL 5070069, at \*27–28.

185. *Humanitarian Law Project*, 130 S. Ct. at 2727 (“[N]ational security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.”).

186. *Id.* at 2725–26.

187. *Id.* at 2727 (“Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities.” (quoting Declaration of Kenneth R. McKune, U.S. Dep’t of State, Joint App. at 133, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498), 2009 WL 3877534, at \*133 [hereinafter *McKune Affidavit*])).

188. *See supra* notes 51–53 and accompanying text.

reputations to burnish the goodwill owed to their clients.<sup>189</sup> However, the mutually productive course of dealing that the reputation engineer enables depends on the parties' following through. A party who uses an agent to maximize the returns of defection from the agreement undermines not only that agreement but the prospects for future agreement, as well.

This nightmare scenario for agreements is the DFTO business model. DFTOs have a track record that speaks to a pattern of defection rather than cooperation. This pattern of defection arises from structural imperatives that deprive terrorist groups of the capacities for deliberation and reciprocity that characterize most sovereign states. Since terrorist groups must plan in secret,<sup>190</sup> they seal themselves off from moderate voices that might temper their tactics.<sup>191</sup> While states often have constituencies or institutions that can check the excesses of their leaders,<sup>192</sup> terrorist groups lack this valuable check. Terrorist groups' insularity also distorts their temporal perspective. Most terrorist groups are confident that they will ultimately achieve an epic and unconditional victory over their enemies.<sup>193</sup> Groups who define their mission in religious terms—often counter to mainstream views—perceive violence as a sacred duty.<sup>194</sup> This polarized environment equates pragmatic compromise with wholesale betrayal. The group dynamics of DFTOs therefore bid up violence.<sup>195</sup>

Moreover, terrorist groups often become prisoners of the manipulation they practice. An act of violence brings benefits no matter how an opposing government reacts: Whether officials are intimidated or overreach, terrorists can claim success. Violent acts further discredit any

189. See *supra* note 53 and accompanying text.

190. See BRUCE HOFFMAN, *INSIDE TERRORISM* 179–80 (1998).

191. *Id.* at 178; cf. Kydd & Walter, *supra* note 29, at 72–73 (discussing how terrorist groups use violence as a spoiler to discredit moderates); Andrew H. Kydd & Barbara F. Walter, *Sabotaging the Peace: The Politics of Extremist Violence*, 56 *INT'L ORG.* 263, 279–89 (2002) [hereinafter Kydd & Walter, *Sabotaging the Peace*] (same); see also Neal Kumar Katyal, *Conspiracy Theory*, 112 *YALE L.J.* 1307, 1318–23 (2003) (observing that secrecy has a polarizing effect on criminal conspiracies).

192. Judicial review, for example, tames the “undivided, uncontrolled power” that otherwise distorts governance. See *Boumediene v. Bush*, 553 U.S. 723, 742 (2008); cf. Jack Goldsmith, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 206–07 (2007) (arguing that the Bush administration's unilateralism diminished support in other branches for its policies, whereas greater consultation up front would have tempered policies and heightened support). Because terrorist groups lack the “return address” that makes nations accountable in a global order, these groups also lack the constraint furnished by international law. See Goldsmith & Levinson, *supra* note 82, at 1826–28, 1835 (discussing the role of international law).

193. See HOFFMAN, *supra* note 190, at 169 (“[T]errorists . . . live in the future . . . for that distant—yet imperceptibly close—point in time when they will assuredly triumph over their enemies and attain the ultimate realization of their political destiny.”).

194. *Id.* at 168–69.

195. Kydd & Walter, *supra* note 29, at 76–77. See generally CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* (2009) (discussing the dynamics of polarization).

moderates within terrorist ranks: If a government overreaches, extremists can say, “I told you so.”<sup>196</sup> If the government draws back, extremists can argue that substantive concessions on their part are unnecessary, since the group is already winning.<sup>197</sup> Even when a state retaliates, terrorist groups often can readily move their operatives and evade capture.<sup>198</sup> In an age of social networking across borders, terrorists’ relative freedom from a fixed location yields additional tactical advantages. This internalized “heads I win, tails you lose” syndrome casts violence as a winning strategy and blinds terrorist groups to more abiding trends that can render violence dysfunctional, even on its own terms.<sup>199</sup> While some members of terrorist groups may see past these blinders and strive for a transition from violence, the obstacles to this clarity of vision are formidable.

Like any other habitually defecting party, a DFTO needs agents to fully exploit the information asymmetries in its favor. An unvarying campaign of terrorist violence can jeopardize the DFTO’s success by spurring equally persistent governmental efforts to eradicate it.<sup>200</sup> To earn a respite from these efforts, DFTOs therefore have an incentive to occasionally promote themselves as reliable partners.<sup>201</sup> Like other chronic defectors, however, the DFTO has a problem: It can maximize the returns from defection only by persuading another party of its goodwill. A defecting party like a DFTO can solve this problem by

---

196. See Kydd & Walter, *supra* note 29, at 69–70.

197. *Id.* at 62–63; Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME & JUST. 413, 422 (2009) (discussing incentives for heightened violence in terrorist groups).

198. See Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 731 (2010) (noting terrorist groups’ advantages in evading targeting and capture); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 661 (2010) (same).

199. *Cf.* Hoffman, *supra* note 190, at 170 (noting that most terrorist groups disappear within a decade).

200. See Kydd & Walter, *supra* note 29, at 68 (discussing effective state responses to the terrorist strategy of intimidation).

201. See C. Maria Keet, *Towards a Resolution of Terrorism Using Game Theory* 16–17 (2003) (unpublished manuscript), available at [http://www.meteck.org/TERRORISM\\_WP.pdf](http://www.meteck.org/TERRORISM_WP.pdf); see also *id.* at 27 (discussing terrorist groups’ defection). Of course, governments opposing terrorism can defect as well. Regimes targeted by terrorist groups should not get a pass on their own policies. Indeed, while pushing for reform of such regimes will not eliminate terrorism, often it will encourage moderate alternatives to terrorist groups. A failure to reform may only boost terrorist groups’ pretensions to legitimacy. See Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131, 155–56 (2010) (asserting that the United Kingdom’s former policy in Northern Ireland of authorizing detention without trial led to radicalization of the Catholic community and increased violence as the IRA used the policy “as an effective recruiting tool”); *cf.* Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT’L SECURITY L. & POL’Y 437, 450–51 (2010) (arguing that international restrictions on terrorist financing, such as Security Council Resolution 1373, undermine rights because enforcement of the restrictions and respect for fundamental rights vary widely between countries).

employing agents who engender the goodwill that the DFTO's past conduct has dissipated. Two kinds of agents work best: those who approve of the group's violent aims but are skillful enough to conceal their approval, and those who do not approve of violence per se but are willing to overlook or rationalize it, through arguments that the violence is only a small part of the activity of an otherwise benign group, that the group is gradually weaning itself from violence, or that the other side is even worse. In any event, these agents compound the information asymmetries between the parties, giving the DFTO more benefits upon its defection.<sup>202</sup>

Consider the ostensibly benevolent art of negotiation, in which the *HLP* plaintiffs wished to train or assist DFTOs like the PKK.<sup>203</sup> The Court held that Congress could bar agents of the DFTO from engaging in such activity.<sup>204</sup> In his opinion, Chief Justice Roberts observed that the PKK and other DFTOs could "pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks."<sup>205</sup> Justice Breyer, in his dissent, dismissed such arguments as "general and

---

202. Because each of the levels of scienter mentioned in the text compound information asymmetries, the agent's knowledge that the group is a DFTO is sufficient to support liability. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010). The plaintiffs argued that for speech-related activities, the government should be required to show specific intent to further violence. *Id.* However, this requirement is not constitutionally necessary and also makes a poor fit with the comprehensive framework that Congress enacted. In the domestic sphere, criminalizing help to an organization would require a showing of specific intent to aid the group's illegal conduct. *See Scales v. United States*, 367 U.S. 203, 229–30 (1961). However, the government does not face the same information asymmetries in directly regulating the illegal conduct of domestic groups. *See Neuman, supra* note 178, at 331. Therefore, no public interest counsels against a higher scienter requirement for criminalizing aid to domestic organizations. *Cf. Humanitarian Law Project*, 130 S. Ct. at 2730 (disclaiming any suggestion that Congress could extend comparable prohibitions to domestic groups); Bhagwat, *supra* note 8, at 1010 n.150 (viewing this disclaimer as preserving free speech and association). Moreover, even in the domestic sphere, professional regulation does not require a showing of specific intent. In the pretrial-publicity context, for example, a lawyer who makes public comments that pose a substantial likelihood of material prejudice can be sanctioned even when she does not intend specifically to prejudice the outcome. *See Wendel, supra* note 12, at 400. The key factors here, as in the material support of DFTOs, are information asymmetries and the need for rules of the road in a specialized system.

A specific-intent requirement would also undermine Congress's comprehensive scheme. Congress expressly set the scienter level at knowledge of a DFTO's designation or record of violence. *See Humanitarian Law Project*, 130 S. Ct. at 2717 (discussing 18 U.S.C. § 2339B(a)(1) (2010)). Requiring specific intent for speech-related activities would make the statute a patchwork quilt, since the plaintiffs acknowledged that specific intent was *not* required for charges based on the provision of ammunition, communications equipment, and other tangible items. *Id.* at 2718. Requiring disparate scienter levels for violations of the same statutory section would impede enforcement and actually offer *less* guidance to parties who wished to conform their conduct.

203. *Humanitarian Law Project*, 130 S. Ct. at 2729.

204. *Id.*

205. *Id.*

speculative.”<sup>206</sup> However, independent sources amply document DFTOs’ consistent recourse to this strategy.

Journalists and scholars have noted that DFTOs such as the PKK, Hamas, and Hezbollah regularly use truces and negotiation to prepare for renewed violence. The PKK, for example, has used truces not as preludes to peace, but as expedient punctuations to violent campaigns.<sup>207</sup> Hezbollah has used the respite gained from the end of Israel’s offensive against it in Lebanon to rebuild its storehouse of offensive weapons.<sup>208</sup> In Sri Lanka, the LTTE undermined a truce by assassinating a prominent moderate official and obstructing a reservoir that provided water to thousands of farmers.<sup>209</sup>

DFTOs’ leveraging of information asymmetries encourages such manipulation. Only a DFTO knows when the organization will deem it expedient to terminate a truce and resume the targeting of civilians. That uncertainty is a tactical benefit that negotiators for a DFTO enhance, whether or not the negotiators specifically intend to facilitate terrorist acts. The First Amendment should not bar Congress from prohibiting training that merely adjusts the spigot of violence.

Similarly, while the *HLP* plaintiffs wished to train DFTOs in “the use of international law,”<sup>210</sup> evidence suggests that DFTOs already manipulate this knowledge for strategic purposes. Consider the analysis of the Gaza police force in the United Nations-sponsored Goldstone Report, which examined human rights in Israel and the occupied territories during and immediately after Israel’s military intervention in Gaza in 2008–2009.<sup>211</sup> The report, which obtained most of its information

206. *Id.* at 2739 (Breyer, J., dissenting); see also *Leading Cases*, *supra* note 6, at 265 (arguing that the *HLP* majority’s account of DFTOs’ manipulation of international law and organizations was “conclusory,” “of dubious probability,” and “insufficient to satisfy heightened scrutiny”).

207. See MARCUS, *supra* note 148, at 286–95; see also Catherine Collins, *Kurd Violence Rises in Turkey, Raising Fears of a Renewed War*, CHI. TRIB., May 18, 2005, at 6 (discussing the return to violence by groups associated with the PKK after the end of a truce); Ayla Jean Yackley, *20 Injured in Turkish Resort Bomb*, IRISH TIMES, July 11, 2005, (World) at 11 (reporting the explosion of a bomb for which the militant wing of the PKK claimed responsibility, which injured twenty people, including at least one critically, and which came after a unilateral truce declared by the PKK).

208. See Michael R. Gordon & Andrew W. Lehren, *Straining to Stop Arms Flow: U.S. Officials Frustrated in Blocking Weapons from Reaching Militants*, INT’L HERALD TRIB., Dec. 7, 2010, at 7 (noting that Hezbollah, a DFTO based in Lebanon, has an arms inventory that includes “50,000 rockets and missiles, including some 40 to 50 Fatah-110 missiles capable of reaching Tel Aviv and most of Israel, and 10 Scud-D missiles”); cf. Ian Black, *US Used Israel Intelligence to Block Arms from Iran and Syria*, GUARDIAN (London), Dec. 7, 2010, at 6 (detailing U.S. efforts to halt arms shipments to both Hamas and Hezbollah). Hezbollah, a Shiite group that precipitated an armed conflict with Israel in 2006, allegedly has also used narcotics trafficking and money laundering for strategic purposes. See Jo Becker, *Beirut Bank Seen as a Hub of Hezbollah’s Financing*, N.Y. TIMES, Dec. 14, 2011, at A1.

209. See Anderson, *supra* note 149, at 47.

210. *Humanitarian Law Project*, 130 S. Ct. at 2723–24 (majority opinion).

211. See Rep. of U.N. Fact Finding Mission on the Gaza Conflict, ¶ 34, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter Goldstone Report]; cf. Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT’L L. 279, 292–95 (2011)

from tours of Gaza supervised by Hamas, classified air strikes on Gaza police stations as disproportionate measures under the law of war, even though the report's drafters acknowledged that "a great number of the Gaza policemen were recruited among Hamas supporters or members of Palestinian armed groups."<sup>212</sup> In fact, a veteran member of Al Qassam, Hamas's military wing, stated to a journalist that "two-thirds of Hamas policemen are police by day and Al Qassam by night."<sup>213</sup> This lopsided ratio demonstrates that the Goldstone investigators were unduly credulous in accepting Hamas's claim that "the Gaza police were a civilian law-enforcement agency."<sup>214</sup> The heavy percentage of Hamas-affiliated individuals suggests that the remainder served as human shields in a sophisticated, but ultimately unsuccessful, attempt to immunize strategic targets from attack.

Information asymmetries made the Hamas wager worthwhile. While human shields violate international law,<sup>215</sup> a government force opposing the DFTO must prove the elusive proposition that a targeted site contained combatants. DFTOs can readily move personnel and mortars to frustrate this effort. In contrast, one photograph proves that an opposing government force attacked the structure's site. Viewed *ex ante*, inquests like the Goldstone Report give a DFTO two chances to succeed: A government force will either forego a legitimate target or follow through and risk global discredit.<sup>216</sup> The plaintiffs in *HLP*, whatever their intent, wished to provide training that would have aided DFTOs'

---

(critiquing the Goldstone Report).

212. See Goldstone Report, *supra* note 211, ¶ 34. Some Israeli actions during the Gaza campaign were violations of the law of war. See Isabel Kershner, *Israel Rebukes 2 in Attack on U.N. Complex*, N.Y. TIMES, Feb. 2, 2010, at A4 (discussing Israeli reprimands of senior officers who had directed the firing of artillery that hit a United Nations compound in Gaza).

213. See Kristen Chick, *In Gaza, Rise of Hamas Military Wing Complicates Reconciliation with Fatah*, CHRISTIAN SCI. MONITOR, Nov. 4, 2010, at 14; cf. *Hamas Asserts Role in Suicide Bombing*, WASH. POST., Feb. 6, 2008, at A14 (detailing assertions by Gaza officials that an Israeli attack on a police station in retaliation for a suicide bombing killed police officers and Al Qassam members).

214. See Goldstone Report, *supra* note 211, ¶ 34.

215. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 28, Aug. 12, 1949, 6 U.S.T. 3516 ("The presence of a protected person may not be used to render certain points or areas immune from military operations."); Rome Statute of the International Criminal Court, art. 8, § 2(b)(xxiii), July 17, 1998, 2187 U.N.T.S. 3 ("Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations [constitutes a war crime.]); see also Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 104 (2006) (analyzing international humanitarian law provisions); Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT'L L. REV. 445, 455 (2002) (same). Hezbollah also has used human shields. See Greg Myre, *Offering Video, Israel Answers Critics on War*, N.Y. TIMES, Dec. 5, 2006, at A1 (describing evidence of Hezbollah rocket placements in population centers).

216. See LaFree & Dugan, *supra* note 197, at 422 ("A particular terrorist group may gain utility from political instability . . . [that] results either if the government appears ineffective in curbing [terrorist] acts or if the government overreacts and appears repressive and brutal.").

exploitation of such asymmetries in information.<sup>217</sup> The U.S. has a compelling interest in thwarting DFTOs' "heads I win, tails you lose" strategy.

The manipulation of international humanitarian law that bore fruit in the Goldstone Report is hardly an isolated example. In his *HLP* opinion, Chief Justice Roberts observed that DFTOs had effectively taken over administration of refugee camps from the United Nations, exploiting the camps' protected status to prepare for additional attacks.<sup>218</sup> The PLO used a United Nations training center during the Israeli invasion of Lebanon in the 1980s.<sup>219</sup> Terrorist groups also have successfully lobbied for additions to the Geneva Convention that allow them to operate with impunity. By supplanting the traditional international humanitarian law requirements that combatants wear uniforms, observe a fixed command structure, and display arms openly,<sup>220</sup> Geneva's Additional Protocol I impedes governmental compliance with the duty to avoid harm to innocents.<sup>221</sup> In addition, new guidelines from the International Committee of the Red Cross recommend protection for individuals who provide substantial support to violence.<sup>222</sup> The guidelines,

---

217. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2729 (2010).

218. *Id.* at 2729–30 (“[T]he United Nations . . . was forced to close a Kurdish refugee camp in northern Iraq because the camp had come under the control of the PKK and the PKK had ‘failed to respect the camp’s neutral and humanitarian nature.’” (quoting McKune Affidavit, *supra* note 187, at 135–36) (internal quotation marks omitted)); cf. Rony Brauman, *Darfur: The International Criminal Court Is Wrong*, MEDECINS SANS FRONTIERES (Sept. 2010), [http://www.msf-crash.org/drive/8230-rb-2010-darfur-the-icc-is-wrong-\(uk-p4\).pdf](http://www.msf-crash.org/drive/8230-rb-2010-darfur-the-icc-is-wrong-(uk-p4).pdf) (“[Darfur refugee] camps were also—as is always the case—as a refuge for the rebel movements, which gained influence and resources.”).

219. See Jack I. Garvey, *Rethinking Refugee Aid: A Path for Middle East Peace*, 20 TEX. INT’L L.J. 247, 252 (1985) (asserting that this was an isolated occurrence, while acknowledging more generally that the availability of United Nations aid removed the incentive to temper extremist demands). The PLO, or Palestine Liberation Organization, engaged in terrorist attacks in Israel and Europe for decades; after negotiations with Israel in 1993 and the 1994 signing of a joint Declaration of Principles at the White House, its leadership assumed control of the newly created Palestinian Authority, which at that time was assigned partial responsibility for administration of the West Bank and Gaza. See Amos N. Guiora, *Negotiating Implementation of a Peace Agreement: Lessons Learned from Five Years at the Negotiating Table*, 11 CARDOZO J. CONFLICT RESOL. 411, 414 (2010).

220. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1, ¶ 4, June 8, 1977, 1125 U.N.T.S. 3 (conferring lawful combatant status on those who commit violence in the course of “fighting against colonial domination and alien occupation and against racist regimes”). For discussion of the enactment of this provision, see Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT’L L.J. 323, 344–47 (2009).

221. See Blank, *supra* note 211, at 290 (noting that if government forces believe that apparent civilians may attack them, those forces will be “more likely to view those who appear to be civilians as dangerous and respond accordingly”).

222. See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 53–54 (2009) (asserting that one who assembles an improvised explosive device (“IED”), like a civilian working at a munitions factory, does not cause direct harm and would not be considered a direct participant).

which many participating experts opposed,<sup>223</sup> would limit the ability of government forces to target a trucker knowingly transporting explosives for a terrorist group.<sup>224</sup> The prospect of such manipulation should not bar U.S. citizens or residents from participation in drafting international guidelines as independent scholars or representatives of humanitarian organizations. However, participants who act as agents for a DFTO lend terrorist organizations an unfair advantage that the Constitution does not require.<sup>225</sup>

## 2. *Regulating Incentives to Promote Cooperation*

Minimizing a DFTO's exploitation of information asymmetries also yields a renewed chance for cooperation among national and international actors. In his opinion, Chief Justice Roberts rightly identified this *ex ante* perspective as crucial, noting the importance of "international cooperation . . . for an effective response to terrorism."<sup>226</sup> The comprehensive framework enacted by Congress creates incentives for deliberation and reciprocity by both foreign organizations and the governments they oppose.<sup>227</sup> The ability to form relationships with U.S. citizens, residents, and groups is an inducement tendered to groups willing to forego the use of violence. Such groups have an opportunity to differentiate themselves from extremists and identify themselves as organizations that can reach out both to governments they oppose and to the international community.

In such a framework, pragmatic moderation can also become self-reinforcing. This happens in two sequences. First, pragmatists among officials within the government the DFTO opposes can cite the

---

223. *Id.* at 9 (advising that the International Committee's guidance does not necessarily reflect the views of all or even a majority of the experts who were consulted); *id.* at 53 n.123 (noting specific disagreement among experts regarding whether non-state actors who produce IEDs would be considered direct participants).

224. *Id.* at 53 (listing transportation of weapons and equipment as an example of indirect participation). For criticism of this approach, see Samuel Estreicher, *Privileging Asymmetric Warfare? Defender Duties Under International Law*, 11 *CHI. J. INT'L L.* 425, 431–37 (2011) (arguing that viewed *ex ante*, unduly rigid restraints on governments defending civilians from terrorist groups enhance incentives for terrorists to plan attacks and conceal themselves within civilian populations); Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 *COLUM. J. TRANSNAT'L L.* 292, 315–22 (2009) (discussing the author's experience as a participant in the International Committee of the Red Cross project, and arguing that civilians who voluntarily collude with terrorist groups in an effort to shield them can be targeted under the law of war as direct participants in hostilities, but that civilians coerced into service are entitled to protection).

225. See *infra* notes 257–67 and accompanying text (providing a narrow definition of "coordination" that provides ample room for legitimate, independent activity).

226. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010) (quoting the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(5), 110 Stat. 1214, 1247 (codified as amended at 18 U.S.C. § 2339B (2010))).

227. Cf. Kydd & Walter, *Sabotaging the Peace*, *supra* note 191, at 278–89 (arguing that terrorist groups such as Hamas use extremist violence to undermine dialogue).

organization's peaceful methods as a basis for reciprocal moves by the government. Cultivating habits of nonviolence gives moderates within the government more credibility and discredits hawks.<sup>228</sup> Second, once moderate opposition groups extract concessions through a persistent resort to peaceful methods, groups elsewhere see the virtues of such methods and follow suit.<sup>229</sup> Reciprocity of this kind builds habits of deliberation that promote peace.

In addition to providing ex ante incentives for coordination between foreign governments and dissident groups, the statute also frames rules of the road between those governments and the U.S. As John Marshall recognized more than two centuries ago, other countries may regard us with a wariness that echoes our perception of an uncertain world.<sup>230</sup> The U.S. has long cultivated alliances to protect its own national interests. Offering reciprocal protection to our allies gives them an incentive to deter groups that target the U.S.<sup>231</sup> Since the U.S. has allies in sensitive regions of the world, pursuing effective counterterrorism policy through criminal law can reduce the risk that allies will seek American military intervention to cope with terrorist violence.<sup>232</sup> Moreover, reciprocity can gain the U.S. more leverage in persuading obdurate allies to respect human rights.<sup>233</sup> In addition, an effective criminal counterterrorism policy will diminish the need for other measures that complicate the U.S.'s international standing, including detention of suspected terrorists under the laws of war and military commissions.<sup>234</sup> While ex ante arguments

---

228. This development reverses the cycle of violence described by commentators. Cf. Kydd & Walter, *supra* note 29, at 69–70 (describing a cycle in which terrorist attacks provoke government responses that radicalize moderates who previously opposed terrorist methods).

229. Cf. Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443, 1465–66 (2008) (discussing “demonstration effects” yielded by efforts to promote the rule of law in sites of mass atrocities such as Sierra Leone).

230. See 10 ANNALS OF CONG. 614–15 (1800).

231. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726–27 (2010) (discussing the importance of persuading allies such as Turkey, which has long sought to stop violence by the PKK, that the U.S. shares their concerns); see also *United States v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (analyzing the provisions of the Foreign Intelligence Surveillance Act that authorize surveillance upon a finding by a court that the target of surveillance is an agent for a foreign group seeking to “carry out raids against other nations”).

232. Cf. Michael N. Schmitt, “Change Direction” 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT’L L. 127, 131 (2008) (discussing Hezbollah’s 1983 attack on U.S. Marine barracks in Beirut, after President Reagan sent Marines as a peacekeeping force).

233. See, e.g., Peter Nicholas et al., *Unrest in Egypt: A Rebuffed U.S. Turns to Egypt’s Army in the Crisis*, L.A. TIMES, Feb. 3, 2011, at A1 (noting contacts between Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, and the Egyptian military to ensure a peaceful response to the protests that ultimately brought down the Mubarak regime).

234. See generally BENJAMIN WITTES, DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTANAMO (2010) (favoring more straightforward acknowledgment and codification of detention policy); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (discussing parallels and differences between models of adjudication); Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy*

would not suffice to justify the suppression of ideas, managing information asymmetries and developing rules of the road are ample bases here, as in the pretrial-publicity context, for regulating agency relationships.<sup>235</sup>

### 3. *Flaws in the Court's Hybrid Approach*

However, the *HLP* Court's approach to hybrid scrutiny has two significant flaws, each of which could have been avoided. The first flaw is largely linguistic: Chief Justice Roberts's language invited confusion about the First Amendment status of lending "legitimacy" to violence. The second flaw is methodological: The opinion heralded a sweeping deference to the government's assertions about the harm caused by agency relationships with DFTOs. Although neither flaw is fatal to the opinion, each caused mixed signals that distracted from the Court's pragmatic goals.

The linguistic flaw arose because Chief Justice Roberts did not adequately distinguish between functional and ideational senses of lending "legitimacy" to DFTOs. Most of the opinion used the term in a functional sense, asserting that material support "lend[s] legitimacy to foreign terrorist groups . . . that makes it easier for these groups to . . . recruit members, and to raise funds."<sup>236</sup> Chief Justice Roberts's functional argument fits the age-old logic of agency. Consider the example of an author who wants to secure a book contract. The author has a choice: She could either have an independent person post a review of her manuscript on a literary website, or she could retain an agent who would confer with her and then approach publishers with whom the agent had a prior course of dealing. Surely most, if not all, authors would choose option B, because of the benefits offered by an experienced person who can integrate the author's wishes and strengths into a marketing pitch. So it is with a DFTO, which also appreciates the benefit of a relationship with an individual whose activities the DFTO directs, controls, or coordinates. Distinguished officials, such as members of Congress, spend a great deal of their time raising money; terrorist groups pursue this purpose no less avidly.<sup>237</sup> Like political candidates, terrorist groups prefer to work with those whose activities they can control. An

---

*and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87 (2008) (arguing for the creation of a national security tribunal to promote legitimacy); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) (offering criteria and procedures for detention); Zabel & Benjamin, *supra* note 161 (analyzing the effectiveness of federal courts in handling terrorism cases).

235. Regulating relationships in this fashion requires safe harbors for protected expression, which I address in Part IV.

236. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010).

237. See WILLIAMS, *supra* note 149, at 138–39 (discussing the fundraising activities of the LTTE, including drug and human trafficking, extortion, and credit-card fraud).

agent who allows the DFTO to maximize the rewards of defection certainly fits within this rubric.

However, Chief Justice Roberts's language also could be read to suggest the ideational sense of lending legitimacy, as in the argument of *any* speaker that a DFTO was a worthy group that had been vilified or misunderstood. Justice Breyer's dissent was absolutely correct that this justification for regulation lacks a "natural stopping place."<sup>238</sup> This latter sense does not fit the logic of the decision, which exempted such independent advocacy.<sup>239</sup> However, use of the term "legitimacy" invited uncertainty about the decision's scope and consequences. Since the term played no functional role in the Court's analysis, Chief Justice Roberts easily could have eschewed its use and simply explained in practical terms how agents, whatever their intent, can help a DFTO reap rewards from defection. The opinion's use of the term was a self-inflicted wound of the kind that a court should avoid, particularly in a decision whose holding predictably will arouse controversy.

The more serious flaw is a methodological one: the opinion displays a deference to the government's claims that is both unnecessary to the decision and inconsistent with the heightened scrutiny that the Court adopts. Heightened scrutiny probes the government's rationale and the fit between that rationale and the means the government has chosen. This usually requires some independent confirmation of the government's views—otherwise the government becomes the judge of its own case. However, the opinion relies principally on a government affidavit filed over ten years before the Court's decision<sup>240</sup> and cites only three independent sources.<sup>241</sup> This is a thin predicate for limiting speech, even in the discrete form authorized by the Court's opinion. While courts vary widely in the support they provide for empirical propositions, the

---

238. *Humanitarian Law Project*, 130 S. Ct. at 2736 (Breyer, J., dissenting).

239. *Id.* at 2721 (majority opinion) (ruling that the statute "does not cover *independent* advocacy").

240. *See id.* at 2725–30 (majority opinion) (citing McKune Affidavit, *supra* note 187, at 135). McKune submitted his affidavit in 1998. While the Court takes the record as it finds it, the passage of time suggests the wisdom of citing more up-to-date sources from the vast social science literature on terrorism. *See, e.g.*, Kydd & Walter, *supra* note 29 (discussing strategies terrorists employ).

241. *Humanitarian Law Project*, 130 S. Ct. at 2725 (citing LEVITT, *supra* note 26, at 2–3); *id.* at 2726 (citing Brief for Anti-Defamation League as Amicus Curiae Supporting Respondents 19–29, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498), 2009 WL 4074856); *id.* at 2729 (citing MARCUS, *supra* note 148). This list is even more sparse than an initial impression might suggest. While amicus briefs are helpful to the Court, an amicus brief supporting the government may lack the independence or reliability of scholarly work. Similarly, while Levitt's book on Hamas is useful, Levitt had formerly served as a Treasury Department official regulating the financial dealings of DFTOs. *See* Steven Erlanger, *Militant Zeal: A Terrorism Expert Analyzes the Palestinian Group Hamas, and What Should Be Done About It*, N.Y. TIMES BOOK REV., June 25, 2006, at 10 (reviewing LEVITT, *supra* note 26). For more on deference and fact finding, see Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1404–19 (2009) (arguing for a more nuanced deference that considers both institutional competence and whether the government utilized competence in a particular case).

Court offered more support in *HLP*'s closest analog, the pretrial-publicity context.<sup>242</sup> Despite the safe harbors that *HLP* provided, the decision's studied paucity of support for the government's arguments may prompt legislation even closer to the constitutional line.

The deference heralded in the opinion is also troubling because it counters a prudential judging rule that Chief Justice Roberts had earlier practiced: the norm that a court should generally decide cases on the narrowest grounds possible.<sup>243</sup> To be sure, this prudential norm cannot govern every situation. However, by following it the Court can minimize the externalities that flow from its decisions and can stick as close to the facts of disputes as possible. That connection with the facts underlying a dispute is the courts' distinctive advantage over the more free-wheeling deliberations of the other branches. Reaching out to decide an issue truncates debate that could enrich the Court's perspective. Here, ample independent authority supported the government's view that assistance in negotiation or training in international law would heighten the information asymmetries that already favor DFTOs.<sup>244</sup> The Court's failure to mine this authority undermined the perceived legitimacy of the decision, obscuring its essential architecture as a blend of discrete regulation and capacious safe harbors. It is to that second feature of the decision that we now turn.

#### IV. PROVIDING SAFE HARBORS FOR CHALLENGING GOVERNMENT

While limits on agency relationships with DFTOs reduce asymmetries of information in foreign affairs, restrictions that sweep too broadly have an opposite but equally pernicious effect: they increase asymmetries of information at home. Sweeping restrictions limit the information available to the public and the ability to challenge government policies. *HLP* addressed these concerns through statutory interpretation that echoed the Cold War Court's use of the avoidance canon. The decision constructed a safe harbor by reading the statute narrowly to protect independent advocacy, scholarship, journalism,

---

242. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 356–62 (1966) (citing a wide spectrum of support, including newspaper editorials, University of Missouri publications, and the Warren Commission).

243. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The court will not ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’” (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885))); cf. *Nw. Austin Mun. Util. Dist. v. Holder*, 129 S. Ct. 2504, 2512–13 (2009) (holding, in an opinion by Chief Justice Roberts, that because an electoral district did not pursue a statutory option to “bail out” of the preclearance requirement of section 5 of the Voting Rights Act, the Court did not have to decide whether the pre-clearance requirement was constitutional). But see *Citizens United v. FEC*, 130 S. Ct. 876, 917–21 (2010) (Roberts, C.J., concurring) (arguing that comprehensive overruling of precedent was necessary in a campaign-finance case, since a narrow holding would not remedy the problem).

244. See *supra* notes 190–209 and accompanying text.

human rights monitoring, and legal representation. However, the Court's work was marred by conclusory treatment of the plaintiffs' vagueness claims.

Just as the Court had invoked the avoidance canon in the 1950s to temper Cold War statutes that suppressed political ideas, Chief Justice Roberts read § 2339B to allow speech-related activity that did not stem from an agency relationship with the DFTO.<sup>245</sup> After the Court's decision in *Brandenburg*, the protection of independent advocacy has been at the core of free speech. To assert her voice, each individual can stand up on an actual or virtual soapbox and proclaim her views to an attentive (or indifferent) audience. Of course, in a nation where some can afford more access to a megaphone, the individual's voice may not prevail.<sup>246</sup> But the Court's interpretation of § 2339B left unchanged an individual's right to opine on a DFTO such as Hamas, the PKK, or the LTTE: Any speaker is free to assert that each or every group was benevolent, nonviolent, or not violent enough.

However, the Court's decision left questions about speech that neither emerges from an agency relationship nor is wholly independent in the "soapbox" sense. Scholars, journalists, and human rights groups were troubled that Chief Justice Roberts declined to specify how much "coordination" with a DFTO would yield a violation of the statute.<sup>247</sup> Each of these actors may engage in some contact with a DFTO. For example, a scholar who studies a DFTO may wish to interview DFTO leaders to provide focus and detail for her account. A journalist may wish to do the same in the course of reporting on the DFTO's activities, as will a human rights group investigating abuses committed by governments and non-state actors. If any contact renders such activity "coordinated" with the DFTO under the statute, many organizations will face substantial legal exposure.<sup>248</sup>

The Court's initial response to these concerns was inauspicious. The opinion substituted conclusions for analysis in asserting that the statutory terms "training" and "expert advice" were not vague as applied. The plaintiffs had argued that these terms provided insufficient guidance

---

245. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2721–22 (2010).

246. *See Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) (rejecting the argument that a prohibition on independent political expenditures could be justified by the government's interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections").

247. *See, e.g.,* Amanda Shanor, *Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World*, 34 SUFFOLK TRANSNAT'L L. REV. 519, 533–34 (2011) (discussing concerns of journalists and other groups); Scott Atran & Robert Axelrod, *Why We Talk to Terrorists*, N.Y. TIMES, June 30, 2010, at A31 (expressing concern that *HLP* will hinder scholarship).

248. *See Zick, The First Amendment in Transborder Perspective*, *supra* note 6, at 948 (arguing that the *HLP* decision could impede "peace-building efforts" by American citizens working in Afghanistan and elsewhere).

about the legality of instructing DFTOs in the use of international law.<sup>249</sup> Chief Justice Roberts noted that the plaintiffs themselves had used these terms in their pleadings.<sup>250</sup> However, as the plaintiffs had consistently argued that the terms were vague, this observation merely highlighted the question of what the statutory language meant. In particular, the plaintiffs were concerned about discerning the dividing line between training in a “specific skill,” which the statute prohibits, and training that entails “general” instruction, which the statute permits.<sup>251</sup> Chief Justice Roberts’s only direct answer was that vagueness doctrine’s “person of ordinary intelligence” would understand that training in the use of international law “to peacefully resolve disputes” involves a “specific skill,” and thus falls within the statute’s prohibition.<sup>252</sup> However, the opinion failed to make clear whether this congruence with ordinary perception flowed from the functional effect of the interaction between teacher and student on the DFTO’s operations, or from the substantive difficulty of the subject matter.

The functional-substantive distinction was central to the question of vagueness, as it was to the First Amendment status of speech that enhanced a DFTO’s “legitimacy.”<sup>253</sup> The functional usage of “training” would prohibit much teaching that involves such interaction,<sup>254</sup> but would provide plain guidance to those affected. The substantive sense, however, lacks such clarity, because basic knowledge can be imparted on virtually any subject: witness the ubiquity of Wikipedia, which indeed has an entry on international law.<sup>255</sup> Presumably, sending a representative of a DFTO a link to Wikipedia would not trigger prosecution, but a purely substantive meaning of teaching or instruction makes that assessment a guess about prosecutors’ proclivities, not a product of legal analysis.<sup>256</sup>

---

249. *Humanitarian Law Project*, 130 S. Ct. at 2721.

250. *Id.* at 2720–21.

251. *Id.* at 2721.

252. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 114–15 (1972)).

253. *See supra* note 236 and accompanying text.

254. At oral argument, Justice Sotomayor suggested that Congress could not have intended to prohibit teaching a skill wholly unrelated to the DFTO’s activities, such as playing the harmonica. *See* Transcript of Oral Argument at 49, *Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498) [hereinafter *HLP* Argument]. Then-Solicitor General Kagan responded that the harmonica was really a red herring, since “there are not a whole lot of people going around trying to teach Al-Qaeda how to play harmonica.” *Id.* Justice Scalia hinted at the breadth of the functional concept, observing that “Mohamed Atta and his harmonica quartet might tour the country and make a lot of money.” *Id.*

255. *See International Law*, WIKIPEDIA, [http://en.wikipedia.org/wiki/International\\_law](http://en.wikipedia.org/wiki/International_law) (last visited Dec. 23, 2011).

256. The majority declined to address other examples, such as teaching geography, cited by the plaintiffs to show the vagueness of the language in § 2339B. *Humanitarian Law Project*, 130 S. Ct. at 2721. According to the majority, these examples were purely hypothetical because the plaintiffs had not indicated an interest in teaching geography. *Id.* Therefore, the majority asserted, discussion of such hypotheticals had no relevance to a preenforcement challenge, where the relevant conduct was the precise activity that the plaintiffs wished to perform, as noted in their complaint. *Id.*

#### A. ADDRESSING VAGUENESS BY REQUIRING AN AGENCY RELATIONSHIP

While Chief Justice Roberts could have offered clearer guidance on the plaintiffs' plans, his opinion read as a whole identified the functional sense as a blueprint for future decisions. The opinion signaled that "training" and the other types of human capital in § 2339B hinge on interaction between the defendant and a DFTO that approximates an agency relationship. The primary indication that courts should look for an agency relationship emerged in the discussion of the statutory term "service." For Chief Justice Roberts, service resembled agency as a relationship or course of conduct that implies direction and control by another. The opinion reinforced this view by citing the dictionary definition of service as "the performance of work commanded or paid for by another: a servant's duty: attendance on a superior" or "an act done for the benefit or at the command of another."<sup>257</sup> This definition tracks the common law definition of agency.<sup>258</sup> Chief Justice Roberts also suggested at two points in the opinion that the various prohibited forms of material support have common attributes.<sup>259</sup> Given this view, the indicia of service also should inform definitions of "training" and "expert advice."

From this perspective, training prohibited by the statute should entail some kind of interactive relationship with the group. For example, a DFTO, such as Hamas, that wished to exploit an agent's knowledge of international humanitarian law would pose specific questions about the percentage of operatives it could safely house at a supposedly "civilian" site to maintain the site's legal protection from attack. Any answer other than "zero percent" would give Hamas a tactical advantage, by encouraging it to continue using civilians as human shields for its operatives.<sup>260</sup> Whatever the trainer's intent, Congress has a legitimate interest in barring such interaction. In contrast, merely providing a group

---

257. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993)); *see also id.* at 2722 (defining "service" to include activity "performed in coordination with, or at the direction of" a DFTO).

258. *See supra* note 49. An inference from another of the statute's definitions also points to a narrow definition of service. Congress defined the term "personnel" to exclude independent advocacy. *See* 18 U.S.C. § 2339B(h) (2010) ("Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."). Anyone who provides a service could plausibly be viewed as "personnel." As Chief Justice Roberts noted, Congress's carve out of independent advocacy in defining "personnel" would not make sense if Congress viewed independent advocacy as a prohibited "service." *Humanitarian Law Project*, 130 S. Ct. at 2722.

259. *Humanitarian Law Project*, 130 S. Ct. at 2722 (asserting that "service," like "lodging," "weapons," "explosives," and "transportation," cannot be supplied "independently" of a DFTO); *see id.* at 2718 (concluding that all prohibited forms of material support should require the same level of intent).

260. *See* Blank, *supra* note 211, at 290–91.

with a widely available book, such as an international law treatise by Grotius or Vattel, would not meet the test.

In addition, under the statute training must be provided *to* a DFTO, such as the PKK or Hamas.<sup>261</sup> As Chief Justice Roberts explained, “use of the word ‘to’ indicates a connection” between the service and the DFTO.<sup>262</sup> In other words, the training cannot merely be instruction that a defendant provides to a broadly heterogeneous group, even if that group includes some members of a DFTO. To demonstrate this connection, the government should have to show that the defendant had accepted payment from the DFTO for this purpose, or offered the training at the DFTO’s request in a forum that the DFTO sponsors. This kind of DFTO-sponsored forum offers the maximum opportunity for the manipulation that Congress wished to combat.

The avoidance canon strengthens the case for narrow definitions of “training” and “expert advice.” As Chief Justice Roberts noted, Congress expressly exempted independent advocacy because it wished to steer clear of constitutional difficulties.<sup>263</sup> Any workable test, therefore, must clearly distinguish between independent advocacy and prohibited conduct. Such a test would have to require more than the mere existence of contacts with a DFTO. The government conceded in *HLP* that § 2339B did not “prevent [the plaintiffs] from becoming members of [a DFTO] or impose any sanction on them for doing so.”<sup>264</sup> However, even a symbolic species of membership, which does not include payment of membership dues, involves nominal contacts with the DFTO. A test keyed to contacts would thus clash with the statute’s membership carve out.<sup>265</sup>

If mere contacts alone cannot destroy the safe harbor of independent advocacy, courts need a distinct test to provide guidance and avoid the problem of vagueness.<sup>266</sup> The agency concept fills the gap.

---

261. *Humanitarian Law Project*, 130 S. Ct. at 2721–22 (quoting 18 U.S.C. § 2339B(a)(1)).

262. *Id.* at 2722. A simple coincidence of views, without more, between a speaker and a DFTO should not suffice to demonstrate the kind of connection required. Neither should agreement, tacit or express, on political goals. In this sense, the standard under § 2339B is more demanding, for instance, than the standard for price-fixing in antitrust law. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (holding that a violation requires “unity of purpose or a common design and understanding”); *Theatre Enters., Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 540–41 (1954) (noting that “conscious parallelism” is evidence of a violation, but is not sufficient in and of itself).

263. *Humanitarian Law Project*, 130 S. Ct. at 2723.

264. *Id.* (first alteration in original) (internal quotation marks omitted).

265. This conclusion dovetails with the Cold War avoidance cases. In *Rowoldt v. Perfetto*, for example, the Court required that when the government seeks to deport a noncitizen, it must show a “meaningful association” with the Communist Party. 355 U.S. 115, 120 (1957). The Court pointedly declined to find such a link, even where the petitioner had joined the Party and briefly had run a business that the Party sponsored. *Id.* at 117–18.

266. The vagueness doctrine requires that the statute set a boundary between lawful and unlawful conduct that is discernible by a “person of ordinary intelligence.” *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

It informs the test with a centuries-long pedigree in common law and, through its link to “service,” an anchor in Chief Justice Roberts’s opinion.<sup>267</sup>

These narrow definitions of “training” and “service” also deal with a concern, raised by critics of the *HLP* decision, that prosecutors could now target journalistic decisions, such as a newspaper’s decision to publish an op-ed piece by a Hamas leader purporting to announce a cease-fire.<sup>268</sup> Under the narrow definition posited above, categorizing this journalistic decision as “material support” would be problematic. Starting with the law’s protection for independent advocacy illustrates the point. Under the statute, an individual with a copy of the Hamas leader’s speech could stand on a soapbox in the public square and praise the speech profusely. In contrast, the newspaper’s publication of the piece would carry no such express or implicit endorsement, since newspapers routinely print op-ed pieces representing a wide spectrum of opinion. If the soapbox speaker’s advocacy is independent, the newspaper’s activity is even more so. Moreover, the newspaper clearly is not providing a service “to” Hamas.<sup>269</sup> Instead, the newspaper is providing a service to its *readers* in spurring public debate, as it does with the rest of its editorial content. This role also rebuts any claim that the newspaper specifically intends to aid Hamas. While publication of the op-ed may provide some benefit to Hamas by enabling it to reach an audience that would otherwise not consider its views, this benefit is purely incidental to the newspaper’s goal of spurring public debate.<sup>270</sup>

Similarly, individuals would be free to offer a course on international humanitarian law open to students who met neutral requirements, such as age, educational prerequisites, or ability to pay.

267. See *United States v. Farhane*, 643 F.3d 127, 143–144 (2d Cir. 2011) (holding that the statute was not vague as applied to a physician who offered to serve as an “on-call doctor” for Al Qaeda). Even before *HLP*, courts had found that the term “service” was “by and large, a word of common understanding and one that could not be used for selective or subjective enforcement.” See *Humanitarian Law Project v. U.S. Dep’t of Treasury*, 463 F. Supp. 2d 1049, 1063 (C.D. Cal. 2006), *aff’d*, 578 F.3d 1133 (9th Cir. 2009); see also *Al Haramain Islamic Found. v. United States (Al Haramain I)*, No. 07-1155, 2009 U.S. Dist. LEXIS 103373, at \*50–52 (D. Ore. Nov. 5, 2009) (finding no vagueness in 31 C.F.R. § 594.406(b), which bars unauthorized provision of “legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services”). Courts and agencies have also readily distinguished between coordinated and uncoordinated activities in the campaign finance arena. See *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (*per curiam*) (upholding limits on campaign spending coordinated with a candidate, as opposed to independent spending). The Court may have erred as a substantive matter in holding that the First Amendment bars limits on independent spending; the point here is that a corpus of case law makes this distinction.

268. See, e.g., Cole, *The Roberts Court vs. Free Speech*, *supra* note 6, at 80.

269. *Humanitarian Law Project*, 130 S. Ct. at 2721–22.

270. See Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1546 (2008) (noting the importance of transparency in government and the media’s role in promoting that objective).

Enrolled students could include students who happened to be members of a DFTO. Such a course of study would not violate § 2339B, so long as the provider did not restrict enrollment, recruitment, or publicity to members of the group. The *HLP* plaintiffs could also participate in a conference cosponsored by both a DFTO and moderate groups. Here, too, the more inclusive nature of the audience would rebut a charge that the plaintiffs were providing aid “to” a DFTO. Organizations, such as the Carter Center, that mediate disputes between governments and non-state actors would also comply with the law. Mediation might entail private sessions with a DFTO as part of an initial push to persuade the DFTO of the value of mediation, or as a technique during mediation to identify areas of contention and common ground. Mediation involves mutual commitments by the DFTO and the government it opposes and confers no special advantage on the DFTO. For this reason, activity reasonably related to mediation efforts would not constitute assistance “to a foreign terrorist organization.”<sup>271</sup> Indeed, by encouraging such cross-over events, § 2339B echoes Justice Stevens’s praise of disclosure requirements in *Meese v. Keene* as promoting “more speech.”<sup>272</sup>

#### B. STRADDLING THE DOMESTIC AND INTERNATIONAL REALMS: THE CASE OF SPECIALLY DESIGNATED GLOBAL TERRORISTS

A narrow interpretation of material support also clarifies an area in which domestic and international realms overlap: the regulation of specially designated global terrorists (“SDGTs”).<sup>273</sup> SDGTs are individuals or entities present in this country that the government believes have helped funnel money to DFTOs.<sup>274</sup> As a result, the government blocks the SDGT’s transfer and receipt of assets and services.<sup>275</sup> As a threshold matter, an individual or entity that wishes to assist the SDGT must specify in its preenforcement challenge the conduct it wishes to perform.<sup>276</sup> As a substantive matter, however,

271. See Peter Margulies, *Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid*, 34 SUFFOLK TRANSNAT’L L. REV. 539, 556 (2011).

272. See 481 U.S. 465, 481 (1986). A clear and capacious safe harbor also serves policy goals, by reassuring communities whose cooperation is crucial for effective counterterrorism. Cf. Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 896–97 (2011) (arguing that the use of religious affiliation as an index of terrorist proclivity is problematic on constitutional and policy grounds); Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOCIETY REV. 365, 372 (2010) (discussing the positive effects of a perception of legitimacy on cooperation with law enforcement). See generally Lawrence Rosenthal, *The Law Professor as Counterterrorist Tactician*, 89 TEX. L. REV. 113, 120–21 (2011).

273. See 31 C.F.R. § 594.310 (2011) (citing Exec. Order No. 13,224, § 1(d)(i), 3 C.F.R. 786 (2002)) (defining “SDGT”).

274. See 31 C.F.R. § 594.201–206 (2011).

275. See 31 C.F.R. § 594.409 (barring “donation of . . . services” to SDGTs).

276. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722 (2010).

because the government has greater control over the SDGT's funding, the fungibility of services is less important than in the international realm.<sup>277</sup>

In one recent post-*HLP* decision, *Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury*, the Ninth Circuit gave the plaintiffs too much leeway on the threshold issue, and as a substantive matter interpreted a federal regulation too broadly, resulting in a finding that the regulation was unconstitutional.<sup>278</sup> In *Al Haramain*, the court held that regulations prohibiting material support of SDGTs were unconstitutional as applied to a group that asserted at oral argument that it wished to conduct joint press conferences with Al-Haramain to protest its designation.<sup>279</sup> Al-Haramain (“AHIF”) had been placed on the list because it had used resources to finance rebels in Chechnya,<sup>280</sup> had carried on its board of directors two individuals who had been found to have assisted terrorist groups with financial contributions,<sup>281</sup> and had been affiliated with a Saudi organization that had also contributed financial support to terrorist groups.<sup>282</sup> Two issues relevant to *HLP* were present in *Al Haramain*: (1) whether the plaintiffs alleged their planned coordination with AHIF with sufficient specificity to support a preenforcement challenge, and (2) whether the court was right to hold that the regulations barring material support to a SDGT were unconstitutional as applied. I examine each in turn.

The *Al Haramain* court failed to provide sufficient guidance on the threshold issue of the specificity required of plaintiffs in a preenforcement challenge. In *HLP*, the Supreme Court emphasized that plaintiffs in a preenforcement challenge must specifically articulate the nature and scope of their proposed coordination with a designated entity.<sup>283</sup> This “specific articulation”<sup>284</sup> by plaintiffs is a proxy for the factual predicate that would be available in an appeal from a criminal conviction.<sup>285</sup> It therefore helps courts avoid issuing advisory opinions in

---

277. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury (Al Haramain II)*, No. 10-35032, 2011 U.S. App. LEXIS 19498, at \*87-88 (9th Cir. Sept. 23, 2011).

278. *Id.* at \*95-96.

279. *Id.* at \*85.

280. *Id.* at \*10-11.

281. *Id.* at \*21-28 (affirming the district court's finding that substantial evidence supported the designation); see also *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury (Al Haramain I)*, No. 07-1155, 2009 U.S. Dist. LEXIS 103373, at \*12 (D. Ore. Nov. 5, 2009) (noting the actions of director Soliman Al-Buthe, who in March 2000 personally delivered \$150,000 in traveler's checks and a cashier's check from Al Haramain to its Saudi parent under circumstances that supported an inference that he intended to provide financial support for terrorist activities in Chechnya).

282. *Al Haramain II*, 2011 U.S. App. LEXIS 19498, at \*14-15.

283. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722 (2010).

284. *Id.*

285. *Id.* (citing *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)); cf. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1410 n.332 (2010) (discussing the

the preenforcement context.<sup>286</sup> The Supreme Court held that some of the *HLP* plaintiffs' claims, including their plan to "offer their services to advocate on behalf of the rights of the Kurdish people,"<sup>287</sup> did not provide the requisite specificity.<sup>288</sup>

The *Al Haramain* court misapplied the Supreme Court's standard in holding that the plaintiffs in that case had met the "specific articulation" test. In their complaint, the plaintiffs had claimed that they wished "to speak out . . . in support of AHIF's designation challenge and . . . work on AHIF's behalf and for its benefit, by speaking to the press, holding demonstrations, and contacting the government."<sup>289</sup> This description of generalized advocacy offered no more precision than the *HLP* plaintiffs' plan to speak for "the Kurdish people."<sup>290</sup> Yet the *Al Haramain* court wrongly viewed it as meeting the Supreme Court's rigorous requirements.<sup>291</sup> The *Al Haramain* plaintiffs also averred in their appellate brief that they wished to "organiz[e] public education activities in conjunction with" AHIF.<sup>292</sup> Here, too, however, the plaintiffs failed to provide the requisite specificity. Their plans could have entailed collaboration on the selection of topics and speakers for public events or could have entailed more elaborate coordination, such as reimbursing vendors selected by AHIF. The latter activity would have circumvented the Treasury Department order blocking AHIF's spending. The broad description in the brief gave no clue about the scope of the coordination contemplated. It therefore exacerbated the advisory nature of preenforcement challenges in precisely the fashion that the Supreme Court sought to avoid.<sup>293</sup> At oral argument, plaintiffs' counsel stated that one of his clients wished to coordinate media outreach, including a press conference, with AHIF.<sup>294</sup> This claim was more specific. However, responses at oral argument are too casual and contingent to fend off the dangers of advisory opinions to which the Supreme Court alluded in *HLP*.<sup>295</sup>

---

temptation for a party to engage in strategic behavior in a preenforcement challenge to administrative rules where the factual record is sparse).

286. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (holding that a dispute about regulations is typically not ripe for adjudication until the regulation has been applied "to the claimant's situation in a fashion that harms or threatens to harm him").

287. *Humanitarian Law Project*, 130 S. Ct. at 2722.

288. *Id.* at 2729.

289. See Complaint at 24, *Al Haramain I*, 2009 U.S. Dist. LEXIS 103373 (No. 07-1155).

290. See *Humanitarian Law Project*, 130 S. Ct. at 2722.

291. See *Al Haramain II*, 2011 U.S. App. LEXIS 19498, at \*84.

292. *Id.* at \*84-85 (alteration in original).

293. See *Humanitarian Law Project*, 130 S. Ct. at 2722.

294. *Al Haramain II*, 2011 U.S. App. LEXIS 19498, at \*85.

295. The Ninth Circuit panel also noted that the government had not asserted that the plaintiffs had been insufficiently precise. *Id.* However, this is not entirely accurate. The government did refer to this point at the oral argument. See Oral Argument at 54:00-56:00, *Al Haramain II*, U.S. App. LEXIS

Moving beyond the threshold point of clarity in a preenforcement challenge, the Ninth Circuit correctly viewed the First Amendment as protecting incidental contact with a SDGT that is reasonably related to an independent expression of opinion.<sup>296</sup> Consider the modest contact mentioned above, involving the selection of topics and speakers for a conference on Islam or cosponsorship of a press conference criticizing the SDGT's designation.<sup>297</sup> Conveying information to the public about Islam is political and religious speech, which the government cannot curb.<sup>298</sup> In the foreign setting, where the U.S. government cannot control a party's assets, a conference might turn into a fundraising opportunity for a terrorist group. In the domestic context, in contrast, once the government has issued a blocking order for a SDGT, such opportunities evaporate.<sup>299</sup> Any goodwill accrued by the SDGT would be useful only in prompting reconsideration of the SDGT's designation—a goal protected by the First Amendment.

Nevertheless, the panel was precipitous in striking down federal regulations that bar provision of material support to a SDGT. Because any benefit to the SDGT would be incidental to the expression of independent political opinion, the court should have invoked the avoidance canon and viewed the religious or press conference examples as not entailing aid “to” the SDGT within the meaning of the regulations.<sup>300</sup> The regulations' reference to “material . . . support . . . to” a SDGT<sup>301</sup> left abundant room for this narrow reading, which would have obviated the extreme step of invalidating the rules.

### C. LAWYERS AS AGENTS FOR DEMOCRACY

This still leaves the question of whether the bar on “expert advice” in § 2339B applies to *legal* advice. Two noted scholars have argued that the language and logic of *HLP* suggests an affirmative answer to this question.<sup>302</sup> This result, however, would clash with lawyers' crucial role as

---

19498 (No. 10-35032), available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000007126](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000007126). In any case, the issuance of advisory opinions is a jurisdictional flaw, which the court may identify on its own, without the prompting of a party. See *Gen. Ins. Co. of Am. v. Clark Mall Corp.*, 644 F.3d 375, 379 (7th Cir. 2011).

296. See *Al Haramain II*, 2011 U.S. App. LEXIS 19498, at \*91.

297. *Id.* at \*91–93.

298. See *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969); Stone, *supra* note 181, at 191–94.

299. See *Al Haramain II*, 2011 U.S. App. LEXIS 19498, at \*91–93.

300. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2721 (2010) (defining “service” as “work commanded or paid for by another”).

301. See Exec. Order No. 13224, § 1(d)(i), 3 C.F.R. 786 (2002).

302. See Knake, *supra* note 11, at 656–57 (noting the likely “chilling effect” of the Court's holding in *HLP* on lawyers' advice to DFTOs); Tarkington, *supra* note 63, at 41 (“The [*HLP*] Court . . . forbids [attorneys] from speaking *as attorneys* to assist others by providing legal advice or access to international human rights law.”).

intermediaries between the government and the people.<sup>303</sup> Prohibiting legal advice would conflict with the avoidance canon, the Court's precedents on lawyers, and Chief Justice Roberts's previously expressed views on fairness in adjudication.<sup>304</sup> Moreover, the special role of lawyers as officers of the court would minimize asymmetries in information favoring terrorist groups. In light of these factors, the best reading of both *HLP* and § 2339B would allow a lawyer challenging the terrorist designation of a group to provide advice reasonably related to the representation, including advice that, if offered by a nonlawyer, could be barred.

The language of the opinion does supply a basis for concern about the status of legal advice to DFTOs. Chief Justice Roberts asserted that § 2339B bars communication of “advice derived from ‘specialized knowledge’—for example, training on the use of international law.”<sup>305</sup> Looking at this language in isolation might elicit the conclusion that the statute bars legal advice of this nature. However, context tells a different tale.

Given the statute's text, the plaintiffs' limited claims, and *HLP*'s narrow view of preenforcement challenges, it seems unlikely that Chief Justice Roberts believed that his opinion addressed the provision of specifically legal advice. As noted above, the Court held that in preenforcement challenges it would consider only the precise activity that the plaintiffs sought to perform.<sup>306</sup> The *HLP* plaintiffs did not ask the Supreme Court to rule that they had the right to provide expressly *legal* advice or to engage in legal representation in agencies or courts.<sup>307</sup> Nor

---

303. See *supra* note 85 and accompanying text; see also Rakesh K. Anand, *The Role of the Lawyer in the American Democracy*, 77 *FORDHAM L. REV.* 1611, 1625 (2009).

304. See *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (“[T]he ability to grant interim relief is . . . ‘an historic procedure for preserving rights during the pendency of an appeal . . .’” (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 15 (1942))).

305. *Humanitarian Law Project*, 130 S. Ct. at 2723–24.

306. *Id.* at 2722 (holding that a preenforcement challenge requires more than “speculation” about the precise nature of the plaintiffs' proposed activities).

307. While the plaintiffs had sought below to provide “legal expertise” in negotiations between the LTTE and the Sri Lankan government, they informed the Court that this claim was moot in light of the LTTE's military defeat. *Id.* at 2716–17. The plaintiffs did not seek to represent any DFTO in a legal challenge to its terrorist designation. Nor did they seek a license to provide legal representation and advice pursuant to 31 C.F.R. § 597.505, like the license recently sought and obtained by lawyers for the ACLU to bring a lawsuit seeking an injunction against the targeting of Anwar al-Awlaki, an American citizen and Muslim cleric living in Yemen and accused of having ties to al Qaeda. See *Lawyers Win Right to Aid U.S. Target*, *N.Y. TIMES*, Aug. 5, 2010, at A13. The ACLU obtained the license after al-Awlaki was declared an SDGT. *Id.* The Court denied the injunction on the grounds that the plaintiff, al-Awlaki's father, lacked standing, and that the matter presented a political question. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 35, 52 (D.D.C. 2010). Al-Awlaki was killed in a missile attack by CIA-operated drones in September 2011. See Mark Mazzetti et al., *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, *N.Y. TIMES*, Oct. 1, 2011, at A1.

does the statute expressly bar legal advice, although it does prohibit a range of other activities.<sup>308</sup>

In pondering the future of legal representation of DFTOs, the avoidance canon is central. Courts have repeatedly held that legal representation serves core First Amendment and due process values, acting as a safeguard against arbitrary government action.<sup>309</sup> Such safeguards are vital in the designation of foreign terrorist organizations, which imposes substantial consequences on individuals working with the organization. Designation as a foreign terrorist group will deprive an organization of the ability to raise money or engage in most agency relationships in the U.S. Because courts have declined to review designations collaterally in cases under § 2339B,<sup>310</sup> individuals who raise money or, on the theory embraced by the *HLP* Court, engage in speech-related activity as agents of the DFTO face criminal prosecution. Designation therefore triggers substantial liberty interests. Congress provided for judicial review to ensure that a designation was based on substantial evidence. Lawyers for an organization challenging a designation vindicate that right with their expertise and judgment.

While serving in this capacity, lawyers also act as agents of constitutionalism itself,<sup>311</sup> preserving government from the long-term harm that stems from habits of arbitrariness and haste. As the Court held in *Legal Services Corp. v. Velazquez*, excluding lawyers would effectively “insulate the Government’s laws from judicial inquiry.”<sup>312</sup> Presumably, the Court would apply the avoidance canon to reject an interpretation with such drastic consequences.<sup>313</sup>

---

308. See 18 U.S.C. §§ 2339A, 2339B (2010) (barring training and expert advice and assistance, but not expressly prohibiting legal representation).

309. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543–48 (2001); cf. *In re Primus*, 436 U.S. 412, 428 (1978) (protecting ACLU lawyers’ communications with prospective clients regarding constitutional litigation, and noting that, for the ACLU, “litigation is not a technique of resolving private differences”; it is ‘a form of political expression’ and ‘political association’” (citing *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963))). See generally Knake, *supra* note 11 (discussing the First Amendment basis for legal representation); Sabbeth, *supra* note 85 (same); Tarkington, *supra* note 63 (same).

310. See *United States v. Afshari*, 426 F.3d 1150, 1155 (9th Cir. 2005).

311. See *supra* notes 82–87 and accompanying text (discussing the lawyer’s role in democracy).

312. See 531 U.S. at 545–46. Congress could require lawyers to obtain a license to advise and represent DFTOs, as is required to represent SDGTs. See 31 C.F.R. § 597.505 (2011). To meet First Amendment requirements, however, such a license would have to be content neutral and available on a provisional basis upon the lawyer’s request, at least in cases seeking preliminary relief. See *Al-Aulaqi*, 727 F. Supp. 2d at 1 (denying a request for an injunction against an alleged targeted killing effort). This would render a licensing requirement for legal representation in a designation challenge closer to the requirement of a notice of appearance that every tribunal imposes on lawyers, and to the foreign-agent registration requirements that the Court has already upheld. See *Meese v. Keene*, 481 U.S. 465, 469–70 (1987); see also *supra* notes 138–46 and accompanying text (discussing *Keene*).

313. *But see* Tarkington, *supra* note 63, at 52–53 (arguing that *HLP* does apply to legal advice and representation). A portion of Justice Breyer’s dissent argued that because the plaintiffs also wished to speak before Congress, the majority opinion limited domestic speech. See *Holder v. Humanitarian*

Chief Justice Roberts's sympathy with this view emerged in his opinion in *Nken v. Holder*, which held that statutory limits on a court's ability to grant a stay of deportation pending adjudication on the merits require a clear statement from Congress.<sup>314</sup> Congress had imposed severe conditions on injunctions regarding deportation.<sup>315</sup> The government argued that a stay was merely one type of injunction and therefore was covered by the restrictions.<sup>316</sup> Chief Justice Roberts disagreed, noting that a stay of deportation, unlike an injunction, did not require any interference with the functioning of the executive branch.<sup>317</sup> A stay merely gave courts the time necessary to make an orderly and accurate decision.<sup>318</sup> Modifying this element of courts' inherent power would require a clear statement from Congress.<sup>319</sup> Since courts also have the power to appoint a legal representative for a party to ensure the fairness and accuracy of adjudication,<sup>320</sup> a statute that could be read to prohibit exercise of this authority would similarly prompt invocation of a clear statement rule.

Even supposing that the Court would read § 2339B as not applying to legal representation of a DFTO challenging its designation, related

---

Law Project, 130 S. Ct. 2705, 2732 (2010) (Breyer, J., dissenting). However, the majority declined to reach the issue of whether § 2339B could constitutionally limit advocacy or the provision of information to Congress. *See id.* at 2722 (majority opinion) (holding only that the plaintiffs had not provided a sufficiently concrete description of advocacy before Congress to prevail in a preenforcement challenge). On Congress's wide latitude in seeking information, see *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (reaffirming the broad discretion of Congress in investigations), and compare Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915, 951–59 (arguing that members of Congress on intelligence committees have a constitutional right to advice from staff lawyers, even though legislation limits access to sensitive information to members themselves). Justice Breyer did note the government's insistence that filing an amicus brief would constitute material support. *Humanitarian Law Project*, 130 S. Ct. at 2736 (Breyer, J., dissenting). *But see infra* notes 321–28 and accompanying text (arguing that the Court's reasoning would protect the submission of amicus briefs). The Court has on at least one occasion held that a claimant's interest in receipt of government benefits is a property interest that does not require the same solicitude for the attorney's role as in cases involving liberty interests. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 332–33 (1985) (upholding limits on attorney's fees in veteran's benefit cases, while acknowledging that such limits might not be appropriate in a case involving welfare benefits necessary for subsistence). However, the liberty interests at stake in designation cases are of far greater magnitude. Moreover, the statute at issue in *Walters* only limited legal fees; it did not bar pro bono legal representation or restrict the lawyer's substantive arguments.

314. 129 S. Ct. 1749, 1759–60 (2009).

315. *See* 8 U.S.C. § 1252(f)(2) (2010) (“[N]o court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.”).

316. *Nken*, 129 S. Ct. at 1756.

317. *Id.* at 1757–59.

318. *See id.* at 1757 (“The choice for a reviewing court should not be between justice on the fly or participation in what may be an ‘idle ceremony.’” (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942))).

319. *Id.* at 1757–60.

320. *See In re Snyder*, 472 U.S. 634, 647 (1985).

issues prompt further questions. One question addressed at the *HLP* argument but reserved in the Court's decision was the filing of an amicus brief on behalf of a DFTO. The other is the scope of advice that a lawyer could provide in the course of representing a DFTO challenging its designation.

The amicus-brief issue first received notice at the Ninth Circuit, when the government argued that filing an amicus brief in support of a DFTO would constitute material support.<sup>321</sup> While the Ninth Circuit viewed such a prohibition as constitutionally infirm,<sup>322</sup> then-Solicitor General Kagan reiterated the government's view during the Supreme Court argument.<sup>323</sup> Chief Justice Roberts's opinion did not resolve the issue. The Chief Justice noted that the plaintiffs had not indicated their intention to file an amicus brief, making analysis premature in the context of a preenforcement challenge.<sup>324</sup> However, Chief Justice Roberts did not quarrel with the Ninth Circuit's view that filing an amicus brief for a DFTO could constitute "protected advocacy."<sup>325</sup>

Amicus briefs also fare well in the balancing of information asymmetries. An amicus brief does not merely help the group submitting the brief; it helps the court as well. A well-written amicus brief provides insights that the court might not obtain from the parties to the case. A DFTO such as the Iranian group MEK, which has on occasion enjoyed the protection of the U.S. government,<sup>326</sup> could offer a useful perspective to a court reviewing the government's designation of another organization. In contrast, no information asymmetries favoring DFTOs flow from permitting amicus briefs. Amicus briefs address questions of law, decided by courts. As in the pretrial publicity setting, courts are able to cull the wheat from the chaff. Submission of an amicus brief therefore entails the same minimal risk of deception or manipulation as public comments before a bench trial.<sup>327</sup> A court can deny permission to a group

---

321. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 930 (9th Cir. 2009).

322. *Id.*

323. *HLP* Argument, *supra* note 254, at 47–51 (arguing that the statute would bar a DFTO from "hir[ing] a lawyer to write an amicus brief on its behalf" but that a lawyer could independently submit an amicus brief that happened to coincide with the DFTO's views); *see also id.* at 51 (acknowledging constitutional claims regarding the right to counsel in certain criminal, habeas, and civil cases, and suggesting that the statute should be read to preserve such rights).

324. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010).

325. *Id.* (quoting *Mukasey*, 552 F.3d at 930).

326. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 225 (D.C. Cir. 2010) (noting, in the course of requiring a more precise explanation from the Secretary of State of evidence supporting the designation and an opportunity for the DFTO to rebut this evidence, an Iranian dissident DFTO's claims that it had cooperated with U.S. authorities in Iraq); *cf.* Tim Arango, *Iranian Exile Group Poses Vexing Issue for U.S. in Iraq*, N.Y. TIMES, July 23, 2011, at A5 (discussing U.S. efforts to persuade members of a group to leave a camp in Iraq after a raid by the Iraqi Army killed dozens of camp residents).

327. *See supra* note 75 and accompanying text.

whose proposed brief is tendentious and uninformative. Courts have long possessed this power, as well as the power to solicit amicus briefs from those, including the executive branch, with an interest in a matter.<sup>328</sup> As in *Nken*, restricting this option in the court's repertoire should require a clear statement from Congress.

Since asymmetries in information pose no obstacle, the main question is what constitutional values are served by an amicus brief. Because an amicus brief does not involve a party whose liberty or property are directly at stake, an amicus brief has a weaker link to procedural values than the stay that the *Nken* Court preserved. However, if a DFTO includes U.S. citizens who would risk prosecution if a court upheld the government's action, the DFTO's amicus vindicates those citizens' right to speak and therefore serves First Amendment values that a court should respect.

The question of advice is even more complicated. We have already seen that an agent of a DFTO who enhances the group's reputation for caring about the law could help net more cash contributions. However, limiting the advice furnished by an attorney assisting the DFTO in a challenge to its designation would have adverse consequences for both due process and the First Amendment. An attorney might find it difficult to represent a DFTO in a challenge to its designation without offering advice on related issues. For example, suppose leaders of a DFTO suggested that to make the best case for a challenge, they would forsake violence. The DFTOs' leaders then asked the lawyer to advise them on whether this shift would affect the posture of international organizations such as the United Nations or the legal duties of the government the DFTO opposed. Just as the legal-services lawyers in *Velazquez* could only do their job if they could "present all the reasonable and well-grounded arguments necessary for proper resolution of the case,"<sup>329</sup> a lawyer for a DFTO would have to provide this advice to meet her duty of competence under the American Bar Association's rules.<sup>330</sup> However, reading § 2339B to prohibit such advice would expose the lawyer to prosecution. Intimidated by the prospect of prosecution for providing advice in the course of legal representation, attorneys might fear representing DFTOs in challenges to their designations. The logic of *Velazquez* would make this result problematic under the First Amendment. Since drawing the line between permissible and impermissible representation would be virtually impossible, the statute also would be unconstitutionally vague as applied. To resolve these

---

328. See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1354 (2010) (describing the Court's invitations to the Solicitor General to provide the U.S.'s view on whether the Court should grant certiorari).

329. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545–46 (2001).

330. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

problems, a court should read the statute as allowing advice reasonably related to a designation challenge.

One objection to this dispensation for lawyers might be that it renders the statute underinclusive because information on the law provided by laypersons can serve the same beneficial purposes. However, these arguments ignore the compelling state interests served by the lawyer-layperson distinction. As “key participants in the . . . justice system,”<sup>331</sup> professionals accept obligations, including candor toward the tribunal,<sup>332</sup> competence,<sup>333</sup> and the duty to refrain from counseling a client to engage in illegal conduct.<sup>334</sup> The inclusion of such duties in the canons of legal ethics inspires a higher level of trust for lawyers. For example, a lawyer could not advise a DFTO that civilians were appropriate targets because they were somehow complicit in government repression. Such a dismissal of the many legal protections for civilians in domestic and international law would not constitute competent legal advice. Similarly, suppose a DFTO leader asked about the percentage of operatives it could install at a supposedly “civilian” site without compromising the site’s civilian status. Since harboring any operatives at the site would constitute use of civilians as human shields, a lawyer would have to answer “zero percent.” Finally, like the measures that the Court upheld in *Milavetz* and in *Meese v. Keene*, allowing lawyers to enter into agency relationships with DFTOs combats information asymmetries.<sup>335</sup> A layperson can conceal her agent status and thus appear independent. In contrast, a lawyer who assists a DFTO in challenging its designation must disclose her role by filing a notice of appearance with the court, as would any other attorney. By listening to a lawyer who has disclosed her role, the public can more accurately gauge the lawyer’s reliability and discount her claims.<sup>336</sup> While such disclosure does not eliminate asymmetries in information, it helps narrow these gaps and therefore enhances public debate.

## V. THE VIRTUES OF HYBRID SCRUTINY

Adding capacious safe harbors to the rules of the road does not shoehorn *HLP* into the usual doctrinal rubric. *HLP* stands out in modern First Amendment case law; it reaches a different result that is more

---

331. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991).

332. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2011).

333. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

334. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2011).

335. See *supra* notes 60–69 and accompanying text (discussing *Milavetz*); *supra* notes 138–46 (discussing *Keene*); cf. *Citizens United v. FEC*, 130 S. Ct. 876, 915–16 (2010) (upholding the requirement that independent political advertisements disclose funding sources because “the public has an interest in knowing who is speaking about a candidate shortly before an election”).

336. See MODEL RULES OF PROF'L CONDUCT R. 4.3 (2011) (requiring lawyers to make “reasonable efforts” to inform third parties that the lawyer does not represent their interests).

receptive to a limited form of content regulation and cites justifications that are less concrete. However, the decision is not the outlier that critics claim. It draws from clear strands in the case law as well as methods that span disparate doctrines.

#### A. THE UBIQUITY OF EX ANTE JUSTIFICATIONS

One feature of *HLP* is its adoption of an ex ante perspective to justify content regulation. For example, the Court found that curbing agency relationships with DFTOs will promote international cooperation against terrorism.<sup>337</sup> Justice Breyer, in dissent, suggested that this brand of argument was unduly speculative.<sup>338</sup> However, viewed against the backdrop of constitutional law in general and First Amendment cases in particular, ex ante arguments have a solid pedigree.

An ex ante perspective poses David Hume's question: "What must become of the world, if such practices prevail? How could society subsist under such disorders?"<sup>339</sup> While Hume's central concern in this passage was the ruin that would follow from abolition of private property,<sup>340</sup> courts across the landscape of constitutional law fashion rulings that frame incentives for compliance with legal norms and reduce negative externalities.<sup>341</sup> Separation of powers cases, for example, turn on factors that will curb overreaching by each of the three branches while ensuring a "workable government."<sup>342</sup> As John Marshall noted in his speech to Congress, proper framing of these incentives, particularly in the complex domain of foreign affairs, sometimes requires that the judiciary stay its hand.<sup>343</sup> Incentivizing reciprocity among sovereign states also undergirds

---

337. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010); *supra* notes 226–35 and accompanying text.

338. *Humanitarian Law Project*, 130 S. Ct. at 2738.

339. See DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS, 26–27 (Tom L. Beauchamp ed., 1998). For a more recent account, see Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123 (2003).

340. See HUME, *supra* note 339, at 96 (noting that the ability to own property "promotes public utility and . . . civil society"). Preserving the system of property rights from hasty legislative impulses was a central concern of the Framers, as well. See THE FEDERALIST NO. 78, *supra* note 83, at 470.

341. Justice Breyer's perspective often takes a pragmatist turn, which does not square with his skepticism in *HLP* about the continuum of financial and human capital for terrorist groups. Justice Breyer has alluded to an analogous continuum in the past, discussing the Court's institutional capital. See *Bush v. Gore*, 531 U.S. 98, 157–58 (2000) (Breyer, J., dissenting) (describing the "public's confidence" in the Supreme Court as a "treasure" that the Court must safeguard if it is to act effectively in the future); see also STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005) (discussing the importance of considering the social and political consequences of decisions).

342. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

343. See 10 ANNALS OF CONG. 611 (1800) (statement of John Marshall) (warning against intrusive judicial scrutiny of extradition requests); cf. *Munaf v. Geren*, 553 U.S. 674, 702 (2008) (declining to enjoin the transfer to Iraqi authorities of an American citizen accused of committing crimes in Iraq).

deference to Congress in areas such as immigration.<sup>344</sup> Moreover, the political-question doctrine encourages parties to resolve differences about foreign policy through public debate, free of the specter of hasty judicial intervention.<sup>345</sup> In addition, courts have curbed damages actions against officials in national security matters to temper hindsight bias that might chill official decisionmaking.<sup>346</sup> Evidentiary privileges, some of which have constitutional implications, also turn on an assumption that defeating truth in the courtroom will yield socially beneficial conduct elsewhere.<sup>347</sup>

Ex ante concerns are no stranger to First Amendment jurisprudence. To give the political branches a chance to frame rules of the road internationally, courts permit the government to bar the entry of a foreign national whose public remarks will complicate foreign relations.<sup>348</sup>

---

absent proof that American officials knew that the individual would be subjected to torture, on the grounds that the “second guess[ing]” of executive determinations by the judiciary would “undermine the Government’s ability to speak with one voice in this area”).

344. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 587–88 (1952) (noting that international law has traditionally viewed a sovereign state’s power to expel foreign nationals as a necessary element of its ability to obtain concessions from other states regarding treatment of its citizens abroad). Acceptance of this general proposition does not require an absolute deference to the political branches on immigration matters. Procedural and substantive safeguards, for example, should still be required under either the Constitution or legislation that implements the U.S.’s international obligations under the Refugee Convention and the Convention Against Torture. See, e.g., *Negusie v. Holder*, 129 S. Ct. 1159, 1162 (2009) (overruling an agency determination that precedent barred refugee status for an alien who alleged he had been coerced into persecuting others).

345. See *Baker v. Carr*, 369 U.S. 186, 211–13 (1962) (“[M]any such questions uniquely demand single-voiced statement of the Government’s views. Yet it is error to suppose that every case . . . which touches foreign relations lies beyond judicial cognizance.”); cf. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267–68, 329–32 (2002) (discussing the application of the political-question doctrine in foreign affairs and arguing for greater reliance on it).

346. See *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (holding that former Attorney General John Ashcroft is entitled to qualified immunity for alleged actions at issue in a lawsuit for unlawful detention under the federal material-witness statute); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942–43 (2009) (precluding a lawsuit against senior officials by aliens detained and deported after the September 11 attacks); *Arar v. Ashcroft*, 585 F.3d 559, 580 (2d Cir. 2009) (en banc) (precluding a lawsuit by an alleged survivor of extraordinary rendition). For more on these types of lawsuits, see Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195 (2010) (arguing that courts should avoid categorical preclusion or intervention, and instead consider whether damage action would further development of effective alternatives to overreaching); see also George D. Brown, *Accountability, Liability, and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 234–37 (2011) (discussing tort suits against officials as legitimate vehicles for accountability, but cautioning about negative externalities of such litigation).

347. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1533–35 (1999).

348. See *Kleindienst v. Mandel*, 408 U.S. 753, 765–70 (1972) (permitting a bar to entry based on a “facially legitimate and bona fide” reason). However, when the government provides an express reason, such as the assertion that a foreign national provided material support to a DFTO, it should confront the applicant with this reason and permit him to offer evidence in rebuttal before denying a visa request. See *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 132–33 (2d Cir. 2009).

To manage information asymmetries, courts have required disclosure of foreign governments' sponsorship of movies and other material.<sup>349</sup> Courts also have enforced bars on disclosure of national security information by present and former government employees, in part because such curbs, viewed *ex ante*, encourage the government to share information among officials who must decide and execute policy.<sup>350</sup> In the domestic realm, the Supreme Court has permitted regulation of the distribution chain of child pornography because it determined that such measures were necessary to curb incentives for the production of child pornography.<sup>351</sup> Courts distinguish between political opinion and speech acts that further criminal conspiracies, in order to diminish incentives for illegal conduct.<sup>352</sup> *Ex ante* rationales also play a dual role in the doctrine supporting curbs on pretrial publicity.<sup>353</sup> Such limits encourage advocates to frame their arguments to fit the judicial forum.<sup>354</sup> In addition, limits on pretrial publicity protect privileged information, which often arises from socially beneficial conduct that privileges seek to encourage.<sup>355</sup>

This modest list of examples demonstrates that *HLP*'s reliance on *ex ante* arguments does not marginalize the Court's analysis. On the contrary, the *ex ante* turn is a familiar trope in precedent on both foreign affairs and the First Amendment. Few bastions of doctrine would remain intact if the Court abruptly disclaimed reliance on such reasoning.

---

349. *See Meese v. Keene*, 481 U.S. 465, 480–85 (1987); *see also supra* notes 138–46 (discussing *Keene*).

350. *See Haig v. Agee*, 453 U.S. 280, 289 (1981).

351. *See New York v. Ferber*, 458 U.S. 747, 759–60 (1982). *But see United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010) (declining to extend this rationale to depictions of animal cruelty); *see also Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (holding that picketers carrying antigay placards in a public place near a military funeral could not be sued in tort because their communication regarded a matter of public concern).

352. *See United States v. Rahman*, 189 F.3d 88, 114–15 (2d Cir. 1999) (holding that the First Amendment did not prohibit prosecution of the so-called “blind sheik,” when the defendant had recommended targeting military installations to individuals whom he knew had access to explosives and who had sought his advice regarding possible targets). For scholarly discussion of the difference between protected and unprotected speech, see KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 57–65 (1989) (discussing the doctrinal distinction between political speech and speech in furtherance of a conspiracy); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1801–02 (2004) (noting that criminal solicitation is unprotected); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1217 (2005) (suggesting a test for distinguishing between protected and unprotected speech assisting crime).

353. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054–56 (1991).

354. *See supra* notes 77–79 and accompanying text.

355. *See Posner, supra* note 347, at 1530–33. The *ex ante* perspective also figures in “definitional balancing” that determines what types of communication receive First Amendment protection. *See Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192–93 (1970) (arguing that the importance of encouraging creativity through protection of intellectual property helps justify copyright's limits on speech).

However, *ex ante* arguments are not trumps for every occasion. As with the pretrial-publicity context, *HLP*'s *ex ante* perspective supports discrete limits on speech only in particular relationships. In this context, information asymmetries and the need for rules of the road require such limits. *Ex ante* rationales do not justify comprehensive limits on the expression of ideas.

#### B. THE VIRTUES OF DEPARTING FROM DOCTRINE

Within *HLP*'s parameters, the Court's holding appropriately trades off doctrinal elegance for pragmatic results. Doctrinal tests are not carved in stone. The Court constructs them to send signals to a spectrum of audiences, including government officials, citizens, and foreign powers.<sup>356</sup> Sometimes, fine-tuning those signals requires flexibility.

In the situation that the Court addressed in *HLP*, linking a modest retreat on substantive scrutiny with safe harbors that protect democratic values wins out over rigid adherence to doctrinal commands.<sup>357</sup> For the Court, the statute's inclusion of a safe harbor for independent advocacy served a vital signaling function. By permitting a substantial range of expression and disclaiming any effort to curb ideas, Congress displayed an awareness of "its own responsibility to consider how its actions may implicate constitutional concerns."<sup>358</sup> If one views strict scrutiny as a proxy for concern about the government's intent,<sup>359</sup> Congress's signaling of its capacity for deliberation justified a more relaxed hybrid approach.

Legislatures and agencies fashion rules like this all the time, by linking clear norms with the authority to grant waivers.<sup>360</sup> Only a mechanical view of judicial decisionmaking would deny that courts engage in that calculus.<sup>361</sup> Courts have always done this in constitutional

---

356. See FALLON, *supra* note 40, at 38 (discussing the implementation of constitutional norms and values that help shape the formulation of legal standards); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 30–50 (2004) (discussing the formulation of prophylactic rules, such as *Miranda*, that help prevent violations of constitutional rights); Chesney, *supra* note 241, at 1392–1402 (discussing factors that influence the framing of doctrine); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 436–42 (2007) (noting the influence of instrumental and institutional factors on the construction of doctrinal tests).

357. See Araiza, *supra* note 8, at 834–35 (arguing that *HLP* is a pragmatic accommodation of competing values); cf. Pildes, *supra* note 40 (discussing virtues of doctrinal flexibility).

358. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010).

359. Cf. FALLON, *supra* note 40, at 81–82 (noting that the Court may view the likelihood of reasonable disagreement—as opposed to studied ignorance or animus—as a basis for judicial deference).

360. Indeed, this authority is part of Congress's comprehensive scheme for addressing terrorist organizations and other hostile foreign powers. See 31 C.F.R. § 501.801(c) (2011) (authorizing the granting of licenses to nongovernmental organizations supplying aid "for the purpose of relieving human suffering").

361. See Araiza, *supra* note 8, at 834–35 (arguing that *HLP* is a pragmatic solution to a doctrinal clash); Rosenthal, *supra* note 8, at 59 (discussing the inevitability of balancing in First Amendment doctrine); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (warning against "the rigidity dictated by doctrinaire textualism" in separation of powers cases).

law, although they sometimes disguise their handiwork as a function of the law of remedies rather than as a substantive adjustment.<sup>362</sup> Indeed, without freedom to adjust doctrinal tests, the courts often would be powerless not just to vindicate legitimate governmental interests but also to protect vulnerable communities that do not fit neatly into doctrinal pigeonholes.<sup>363</sup> This is too high a price to maintain doctrinal purity.

#### CONCLUSION

Analyzing the interaction of counterterrorism measures with the First Amendment, as the attorney example illustrates, turns on the scope of asymmetries in information and the corresponding need for rules of the road. When a measure allows government to better manage asymmetries between the U.S. and foreign powers, courts usually will act as the Supreme Court did in *HLP*. However, courts will be less deferential if the government seems intent on stifling public debate, independent inquiry, and legal challenges. Courts have issued decisions along these pragmatic lines instead of paying homage at doctrine's altar.

To see why an absolutist approach to First Amendment doctrine would be a mistake, we should consider a familiar example from private law: two parties looking to make a deal. An agent, such as a lawyer, can facilitate an agreement, managing the asymmetries in information that impede an agreement. However, in a nightmare of private bargaining, the lawyer may intentionally or inadvertently assist her client in defecting, compounding asymmetries of information and skewing incentives for cooperation in the future.

The regulation of lawyers illustrates how courts cope pragmatically with an agency relationship. A decision like *Milavetz* casts courts as

---

362. See Goldsmith & Levinson, *supra* note 82, at 1810–16 (noting the interaction between substantive doctrine, remedies, and political crosscurrents); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999) (arguing that over time courts will define rights such as the right to nondiscriminatory public education or freedom from cruel and unusual punishment to promote manageable remedial regimes); cf. FALLON, *supra* note 40, at 49–50 (noting the importance of manageability in shaping doctrine).

363. For example, the quasi-suspect status of gender under the Equal Protection Clause began as a pragmatic response to inadequacies in existing doctrine. See *Craig v. Boren*, 429 U.S. 190, 197–98 (1976); Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 41–43 (1972); see also *Romer v. Evans*, 517 U.S. 620, 631–36 (1996) (applying the usually deferential rational basis review to invalidate a state constitutional provision that barred relief for victims of discrimination based on sexual orientation); *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (striking down a state bar to public education for undocumented noncitizen children as entrenching on an “area of special constitutional sensitivity,” while acknowledging that states could impose restrictions on undocumented noncitizens in other contexts, and holding that education is not a fundamental right); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (applying rational basis review to strike down a provision apparently directed at excluding “hippie communes” from a food-stamp program); cf. Sunstein, *supra* note 40 (discussing the need to depart from doctrine when values conflict).

managing information asymmetries between lawyer and client through disclosure mandates, while also upholding regulation that defuses collective-action problems by enforcing rules of the road. Ethics regulation of pretrial publicity extends this approach beyond the realm of commercial speech. Regulation protects the specialized forum of the judicial system, which channels deliberation through a web of evidentiary privileges and other constraints. Ethics regulation also provides a safe harbor for lawyers who keep the state honest by challenging government policies.

Since the dawn of debate about the Constitution, worry about information asymmetries between American officials and foreign powers has affected governing institutions. Provisions of the Constitution such as the Foreign Gifts Clause owe their inclusion to such anxieties. The Founding Era also saw a bifurcation of such concerns into two strands. One was a paranoid strand that, as in the Sedition Act, targeted the expression of ideas, and the other was a more functional strand addressing asymmetries in information about the aims of foreign powers. Since the 1950s, courts have used interpretive devices like the avoidance canon to thwart the regulation of ideas while upholding tailored measures that promote moderation and clear signals from foreign powers.

Global terrorism has made it both more difficult and more imperative to separate the paranoid and functional strands. Terrorist groups exploit asymmetries in information as a means of doing business. DFTOs use the goodwill they earn from nonviolent activities to fund violence and to cement support for future attacks. Congress passed the material-support statute to manage the asymmetries in information on which DFTOs trade. To accomplish this goal, the statute prohibits agency relationships with DFTOs, even though regulating those relationships in some manner also limits the content of speech. The statute meets the test of heightened scrutiny, which can rely both on ex ante rationales and on insights about DFTOs' history of using both peace negotiations and international law for strategic purposes.

However, passing muster under heightened scrutiny also requires safe harbors for independent advocates, human rights monitors, and attorneys. Protecting the work of such groups requires a test akin to agency. Legal representation receives special solicitude because of the lawyer's key role as an intermediary between the state and private parties.

There is an inescapable hybridity to this approach, as there is to the regulation of lawyers. First Amendment absolutists will reject *HLP*'s pragmatic accommodations of this story. Indeed, *HLP* could still turn out to be a mistake, if the ominous undertones of the Court's discussion of "legitimacy" herald a trimming of the *Brandenburg* test, or if the

decision's studied deference spurs governmental overreaching. However, the Court's insistence on safe harbors should neutralize progovernment information asymmetries and preserve the core virtues of public debate. That is a worthwhile venture for any constitutional vision.

\*\*\*