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FIRST AMENDMENT FREEDOM OF SPEECH AND RELIGION—OCTOBER 2009 TERM

Burt Neuborne^{*} and *Michael C. Dorf*^{**}

I. INTRODUCTION

PROFESSOR NEUBORNE: The First Amendment cases before the Supreme Court were, quite possibly, this Term's most important decisions. The cases to be discussed cover campaign financing,¹ support to foreign terrorist groups,² religious symbols on public property,³ and conflicts between equality and freedom of association.⁴

II. CORPORATE-FUNDED CAMPAIGN SPEECH

It is safe to say that *Citizens United v. Federal Election Commission*⁵ changed the Term dramatically. It was a seismic case and a case of potentially enormous practical importance for our democratic

^{*} This is an edited version of an oral presentation given at the Practising Law Institute's Twelfth Annual Supreme Court Review in New York, New York on August 3, 2010. While I am grateful to the editors for adding citations and cleaning up my more egregious oral embarrassments, and while the edited version accurately reflects my substantive views, it should not be cited as my work or confused with my voice.

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¹ See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010) (holding that corporations have a right to make independent expenditures on free speech grounds).

² See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010) (discussing the federal crime of "provid[ing] material support or resources to a foreign terrorist organization" (quoting 18 U.S.C.A. § 2339B(a)(1) (West 2010))).

³ See *Salazar v. Buono*, 130 S. Ct. 1803, 1812 (2010) (discussing a claim that a cross located on federal land violates the Establishment Clause).

⁴ See *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2978 (2010) (discussing whether a public law school's requirement that student groups accept all applicants impaired the Christian Legal Society's "First Amendment rights to free speech, expressive association, and free exercise of religion").

⁵ 130 S. Ct. 876.

system.

The precise question presented was whether a video made by a nonprofit ideological corporation—an hour-long critical documentary on Hillary Clinton—was an “electioneering communication,” falling under the provisions of the McCain-Feingold law banning corporate-funded electioneering communications from being broadcast on the electronic media just before a federal election.⁶ There are three blackout periods—just before the convention, just before the general election, and just before a primary election.⁷ The blackout period at issue in *Citizens United* was thirty days before a partisan primary—in this case, a Democratic presidential primary in which Hillary Clinton was a candidate.⁸

The Federal Election Commission (“FEC”) argued in the Supreme Court that since the video was a corporate-funded electioneering communication, it could not be disseminated on cable TV, even as a voluntary download, during the thirty day period prior to the Democratic primary.⁹ The FEC did not bring suit against Citizens United.¹⁰ Rather, Citizens United sued the FEC.¹¹ Citizens United, claiming to be frightened that *Hillary: The Movie* would be treated by the FEC as covered by McCain-Feingold as the “‘functional equivalent of express advocacy,’” which would result in “subjecting [Citizens United] to civil and criminal penalties,”¹² sought declaratory and injunctive relief to protect the group from prosecution.¹³ The FEC took the bait, insisted that the video fell within McCain-Feingold, and litigated an extremely weak case on the worst possible facts. It was good lawyering by Citizens United. General Custer was advising the

⁶ *Id.* at 888 (citing 2 U.S.C.A. § 441b(b)(2) (West 2010)).

⁷ *See id.* at 887; *see also* Bipartisan Campaign Reform Act of 2002, 2 U.S.C.A. § 434(f)(3) (West 2010) (“‘[E]lectioneering communication’ means any broadcast, cable, or satellite communication which . . . is made within [sixty] days before a general, special, or runoff election for the office sought by the candidate; or [thirty] days before a primary or preference election, or a convention or caucus of a political party.”).

⁸ *Citizens United*, 130 S. Ct. at 888 (discussing Citizens United’s intention “to make *Hillary* available through video-on-demand within [thirty] days of the 2008 primary elections”).

⁹ *Id.* at 888, 891.

¹⁰ *See id.* at 888 (noting that it was Citizens United which initiated litigation by seeking “declaratory and injunctive relief against the FEC”).

¹¹ *Id.*

¹² *Id.* at 888-89 (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 206 (2003), *overruled by Citizens United*, 130 S. Ct. 876).

¹³ *See Citizens United*, 130 S. Ct. at 888.

FEC.

Citizens United initially took a very narrow litigation position, arguing: first, that the video was a documentary, not a covered “electioneering communication” and second, that the documentary did not fall within the blackout period because the video was unlikely to be downloaded by more than 50,000 people eligible to vote in the Democratic primary.¹⁴ Finally, Citizens United argued that if the documentary did fall within the statute, it was protected by the First Amendment, as applied,¹⁵ but avoided arguing that the statute was facially unconstitutional, taking the advice of the lower court judges that such arguments do not typically succeed in the Supreme Court.¹⁶

A. What the Court Decided

The first time this case was heard by the Supreme Court, the Solicitor General’s office blundered, conceding during questioning that Congress had the power to order a book partially funded by a corporation off the shelves thirty days before an election.¹⁷ The Solicitor General argued that Congress could “ban corporate expenditures for almost all forms of communication stemming from a corporation,” including books.¹⁸ The gasps from the audience and from the Justices were audible. The response may have been honest, but it was wrong. The Solicitor General should have argued that Congress lacks the power to ban communications that require affirmative cooperation by a willing hearer.

Several days later, the Court scheduled a re-argument on whether the statute was constitutional on its face.¹⁹ In a five-to-four decision, the Court ruled that the blackout of corporate-funded electioneering communications thirty days before an election was facially

¹⁴ *Id.* at 888-89, 890 (reasoning that (1) *Hillary* merely examines certain historical events, thus classifying it as a documentary and (2) “each separate transmission . . . will be seen by just one household—not 50,000 or more persons”).

¹⁵ *Id.* at 893 (“Citizens United . . . asserted . . . that the FEC . . . violated its First Amendment right to free speech.”).

¹⁶ *See id.* at 931-32 (Stevens, J., concurring in part and dissenting in part).

¹⁷ *See id.* at 904 (majority opinion).

¹⁸ *Citizens United*, 130 S. Ct. at 904 (“The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books.”).

¹⁹ *See Citizens United v. Fed. Election Comm’n*, 129 S. Ct. 2893, 2893 (2009).

unconstitutional because corporations have a First Amendment right to spend unlimited funds on independent expenditures, as opposed to contributions, designed to affect the outcome of an election.²⁰ Independent expenditures by corporations, the Court held, are fully protected by the First Amendment.²¹

The practical implications stemming from the Court's decision are profound. For example, prior to the decision, Exxon operated a political action committee ("PAC").²² Individuals connected to the corporation—such as eligible employees and retiree shareholders—made voluntary contributions to the Exxon PAC.²³ The Exxon PAC would then make independent expenditures or contributions to candidates.²⁴ The Exxon PAC, in the last major campaign cycle, contributed \$721,998 to federal candidates.²⁵ It raised the money from voluntary participants within the Exxon community, in order to engage in these types of political activities.²⁶ Exxon's treasury funds during the same period amounted to approximately \$80 billion.²⁷ In terms of the potential effect of *Citizens United*, we have now moved from a position where Exxon was able to tap over \$700,000 that had been voluntarily collected from members of the Exxon community for use in politics, to a vastly larger amount in its treasury account generated by sales and items utterly unconnected to politics.²⁸ The full weight of that treasury is now theoretically available for indepen-

²⁰ *Citizens United*, 130 S. Ct. at 913 ("The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.").

²¹ *See id.* (expressing that there is "no basis for allowing the Government to limit corporate independent expenditures").

²² *See Political Contributions and Lobbying*, EXXONMOBIL, http://www.exxonmobil.com/Corporate/about_operations_political_data.aspx (last visited Sept. 29, 2010).

²³ *See id.*

²⁴ *See id.*

²⁵ *ExxonMobil: 2008 PAC Summary Data*, OPENSECRETS (July 13, 2009), <http://www.opensecrets.org/pacs/lookup2.php?strID=C00121368&cycle=2008>. Eleven percent of expenditures were contributed to Democratic candidates, while eighty-nine percent were given to Republican candidates. *Id.*

²⁶ *See Political Contributions and Lobbying*, *supra* note 22.

²⁷ EXXONMOBIL, 2008 SUMMARY ANNUAL REPORT 38 (2009), available at http://www.exxonmobil.com/Corporate/Files/news_pub_sar_2008.pdf.

²⁸ *See Citizens United*, 130 S. Ct. at 887 (explaining that PACs were separate funds specifically created because § 441b(b)(2) barred corporations from using their money from their general treasuries to fund such communications). Since the statute has been struck down as unconstitutional, corporations are no longer barred from using their general treasuries to fund electioneering communications. *Id.* at 913.

dent political expenditures.

There is, however, an important empirical question: How much corporate support or opposition for a particular political candidate will actually result? Many argue that corporations will avoid participating in electoral politics because they fear significant consumer and shareholder reactions. While the amounts that will actually be spent by corporations are still very much in question, what is known is that the treasuries of large corporations are now available for independent expenditure in ways that are clearly, indeed concededly, designed to influence the outcome of an election.²⁹ A vast pool of money has now been unlocked that can be used for campaign spending.

Justice Kennedy, who wrote the majority opinion, is one of the most dedicated First Amendment voices ever to serve on the Supreme Court.³⁰ He is a remarkably consistent defender and deep believer in the notion of free speech,³¹ and the right of hearers to make decisions based upon a free flow of information.³²

Justice Kennedy does not start his opinion with a freestanding analysis of whether corporations have First Amendment rights. Rather, he begins by noting that the Court is deeply suspicious of rules that treat similarly situated speakers differently.³³ He notes that there

²⁹ See, e.g., David D. Kirkpatrick, *Lobbies' New Power: Cross Us, and Our Cash Will Bury You*, N.Y. TIMES, Jan. 22, 2010, at A1 (criticizing that "[t]he Supreme Court has handed a new weapon to lobbyists. . . . [A] lobbyist can now tell any elected official that my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election.").

³⁰ See Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2002*, UCLA LAW, <http://www.law.ucla.edu/volokh/howvoted.htm> (last visited Oct. 1, 2010) (showing that Justice Kennedy had the highest percentage of decisions taking the speech-protective position of all the justices between 1994-2002: "Kennedy 74.5%; Thomas 61.1%; Souter 61.0%; Stevens 55.7%; Ginsburg 53.6%; Scalia 49.6%; O'Connor 44.7%; Rehnquist 41.8%; Breyer 39.7%").

³¹ Justice Kennedy has long taken a strong stance on protecting political speech under the First Amendment, even when it results in a decision he does not like. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) (joining the decision holding that burning of the American Flag is protected political speech).

³² See, e.g., *Citizens United*, 130 S. Ct. at 898 (stating that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it").

³³ *Citizens United*, 130 S. Ct. at 898-99. The Court stated:

By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speak-

are two different categories of speakers before the Court—natural persons and corporations—which are being treated differently.³⁴ Justice Kennedy then questions why corporate speakers should be treated differently than natural speakers.³⁵ He posits three possible reasons for this difference in treatment.³⁶

B. Three Arguments to Justify Section 203 of the Bipartisan Campaign Reform Act

i. *The Equality Rationale*

First, Justice Kennedy considers the argument that limiting corporate electioneering is justified to prevent a rich speaker from overwhelming speakers with less money.³⁷ As a society, we do not want to have a situation where one speaker is so powerful that he or she overwhelms a less powerful speaker's ability to exercise political influence.³⁸ Under this rationale, banning corporate electioneering is justified to equalize political influence.³⁹ Justice Kennedy rejects the equalization rationale, following the holding in *Buckley v. Valeo*⁴⁰ that strong voices may not be silenced in an effort to increase the relative strength of weak ones, and holding that "[t]he First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion.'"⁴¹ Contrary precedent in *Austin* was

er's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.

Id. at 899.

³⁴ See *id.* at 898-901.

³⁵ See *id.*

³⁶ See *id.* at 903 (noting that the government abandoned their reliance on the anti-distortion rationale and instead argued the compelling interests of anti-corruption and shareholder-protection).

³⁷ See *Citizens United*, 130 S. Ct. at 905.

³⁸ *Id.* at 904 (stating that the anti-distortion rationale's purpose has been described as "prevent[ing] corporations from obtaining 'an unfair advantage in the political marketplace' by using 'resources amassed in the economic marketplace' " (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990))).

³⁹ *Id.* (stating that the antidistortion rationale has also been described as "an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections' " (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976))).

⁴⁰ 424 U.S. 1.

⁴¹ *Citizens United*, 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 49).

overruled.⁴²

ii. *The Anti-Corruption Rationale*

Second, Justice Kennedy considers the anti-corruption rationale as applied to large independent expenditures by corporations.⁴³ Such a rationale had already been accepted in the context of campaign contributions.⁴⁴ It is the reason why the Court will not permit corporations to make direct financial contributions.⁴⁵ In *Buckley*, however, the Court had rejected the applicability of the anti-corruption rationale to independent expenditures because, by definition, the person spending the money—the speaker—and the politician never meet, rendering it impossible to engage in quid pro quo corruption.⁴⁶ Justice Kennedy ruled that since the Court had already rejected the anti-corruption rationale for independent expenditures in *Buckley*, stare decisis prevented its reconsideration in the context of corporate independent expenditures.⁴⁷

iii. *The Shareholder-Protection Rationale*

The third rationale—corporate self-governance—was the rationale that then Solicitor General Elena Kagan, on behalf of the government, used in her argument.⁴⁸ This theory relies on the fact that management's money is not being used. Rather, it is the shareholders' money, which should not be used for politics without the shareholders' permission, since it may interfere with the shareholders' political rights.⁴⁹ Justice Kennedy was sympathetic to the argument, but ruled that less drastic means existed to assure shareholder consent.⁵⁰ Before completely eliminating the corporation's right to speak, the Court had to determine whether there was a narrower way

⁴² *Id.* at 913.

⁴³ *See id.* at 908-11.

⁴⁴ *Id.* at 908.

⁴⁵ *Id.*

⁴⁶ *Citizens United*, 130 S. Ct. at 910 ("The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.").

⁴⁷ *See id.* at 908.

⁴⁸ *Id.* at 911.

⁴⁹ *Id.*

⁵⁰ *See id.*

to accomplish this task.⁵¹

Justice Kennedy considered all three rationales together and found that there was no real basis for discriminating against corporate speech.⁵² Accordingly, he overruled two cases—*Austin v. Michigan Chamber of Commerce*,⁵³ decided in 1990, and *McConnell v. Federal Election Commission*,⁵⁴ decided in 2003—that had upheld limits on corporate speech. Since, Justice Kennedy reasoned the cases' intellectual premises had been eroded, the Court was justified in overruling them.⁵⁵

There is an irony in Justice Kennedy's treatment of stare decisis. Commitment to stare decisis was Justice Kennedy's justification for refusing to consider the equality rationale or the anti-corruption rationale, since each had been rejected in *Buckley*, a 1976 case.⁵⁶ However, Justice Kennedy ignored stare decisis when addressing *Austin* and *McConnell*, more recent cases that had accepted the equality and anti-corruption rationales.⁵⁷

Corporations can speak freely, held Justice Kennedy, because they disseminate information of value to listeners, even when the "information" threatens to swamp competitors and generates a fear of undue influence.⁵⁸

C. The Likely Impact of *Citizens United*

Citizens United gives a green light to corporations and unions to use their treasury funds for political purposes, as long as there is no coordination with the candidate.⁵⁹ One hundred years ago, there was a similar issue before the Supreme Court. The Justices had to decide

⁵¹ See *Citizens United*, 130 S. Ct. at 911. In its evaluation, the Court noted that the statute was both underinclusive and overinclusive. *Id.*

⁵² See *id.* at 903-11.

⁵³ 494 U.S. 652.

⁵⁴ 540 U.S. 93.

⁵⁵ *Citizens United*, 130 S. Ct. at 913.

⁵⁶ See *id.* at 904, 908, 913.

⁵⁷ See *id.* at 913.

⁵⁸ *Id.* at 912 ("Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.").

⁵⁹ See *id.* at 910-11.

whether corporations enjoy self-incrimination rights under the Fifth Amendment.⁶⁰ The Justices agreed that individuals who worked in the corporation had self-incrimination rights, but the question remained whether the corporation itself had self-incrimination rights.⁶¹ The early twentieth century Supreme Court ruled that corporations do not have self-incrimination rights because they are not human—they are an artificial creation of law.⁶² There exists no spark of the divine and no conscience—there is no dignitary interest to protect.⁶³ Corporations, ruled the Court, are nothing more than a device to assemble and manage capital to achieve a specific economic purpose. Accordingly, they do not have self-incrimination rights.⁶⁴ This is still the law, with Justice Kennedy's enthusiastic concurrence.

What happened over the last one hundred years that allows somebody as extraordinarily principled as Justice Kennedy to begin anthropomorphizing corporations—to think of corporations as entities that have the same rights as human beings? When Justice Kennedy begins his opinion, he begs the question by assuming that there are two similarly situated speakers being treated differently.⁶⁵

The threshold question is whether a corporation constitutes a similarly-situated speaker under the First Amendment in the first place.⁶⁶ A corporation is a First Amendment speaker only if you anthropomorphize it as a human agent that speaks.⁶⁷ If things keep

⁶⁰ See *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906).

⁶¹ See *id.*

⁶² See *id.* The Court stated:

[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. . . . While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

Id.

⁶³ See *id.*

⁶⁴ See *Hale*, 201 U.S. at 75.

⁶⁵ *Citizens United*, 130 S. Ct. at 895-97.

⁶⁶ See *id.* at 899-900 (analyzing the First Amendment as applied to corporations).

⁶⁷ *Id.* at 900 ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to 'the discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to

going this way, soon corporations will be able to legally adopt people. If you are lucky, one day you will be able to marry a corporation. Until then, you will have to be content with being screwed by them.

There were a number of narrower ways to decide this case. Justice Stevens, concurring in part and dissenting in part, listed the narrower ways.⁶⁸ One presented the question of whether the speech fell within the statute at all.⁶⁹ Was this an electioneering communication?⁷⁰ Was it likely to reach 50,000 people?⁷¹ The second was the question of *de minimis*, which got lost in all of the discussions.⁷² The amount of corporate money that was used to fund Citizens United's documentary was less than one percent of the total production cost.⁷³ It was a trace amount of corporate money used for the communication.⁷⁴ Several courts of appeal have held that there is a *de minimis* exception to the statute.⁷⁵ These courts have stated that if there is only a trace amount of corporate money, the statute is not implicated.⁷⁶

foster." (quoting *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 75 U.S. 1, 8 (1986) (internal quotation marks omitted))).

⁶⁸ See *id.* at 937-38 (Stevens, J., concurring in part and dissenting in part) (discussing three of the narrower grounds that were bypassed by the majority: (1) a ruling that a feature-length film distributed via video-on-demand does not qualify as an "electioneering communication" under the statute; (2) the expansion of the *Massachusetts Citizens for Life* exemption to cover nonprofit organizations that accept only *de minimis* contributions from corporations operating for-profit; and (3) by declining to adopt the notion that all types of speakers must be treated the same, "the Court could have easily limited the breadth of its constitutional holding").

⁶⁹ *Id.* at 937.

⁷⁰ *Citizens United*, 130 S. Ct. at 937 (Stevens, J., concurring in part and dissenting in part) ("The sponsors of BCRA acknowledge that the FEC's implementing regulations do not clearly apply to video-on-demand transmissions.").

⁷¹ See 11 C.F.R. § 100.29(b)(3)(ii) (2010) (stating that public distribution of election material for a candidate running for President or Vice President will be within the definition of "electioneering communication" when it "[c]an be received by 50,000 or more persons in a [s]tate where a primary election . . . is being held within [thirty] days[,] or" within thirty days between the beginning and end of a national nominating convention).

⁷² *Citizens United*, 130 S. Ct. at 937 (Stevens, J., concurring in part and dissenting in part).

⁷³ Brief for Appellant at 41, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 61467 at *41.

⁷⁴ See *id.*

⁷⁵ *Citizens United*, 130 S. Ct. at 937 (Stevens, J., concurring in part and dissenting in part).

⁷⁶ See, e.g., *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1148-49 (10th Cir. 2007) (holding that if corporate contributions make up a minimal part of an organization's income, it may still fall within the exception); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999) (receiving up to a "modest percentage [8%] of revenue" from corporations still enables the organization to fall within the exception); Fed.

The Court ignored the *de minimis* exception, declined to consider whether the documentary was likely to reach 50,000 people and whether it was an electioneering communication, and ignored the as-applied First Amendment issue of applying the statute to grass roots ideological groups with only trace corporate funding.⁷⁷

Since municipal employee unions are very large engines for campaign spending, union funds may balance corporate expenditures, although, the potential for union spending is dwarfed by the potential for corporate spending. The real empirical question is how many corporations are going to engage in politics? Many corporate executives do not want to fragment the market in this way. Thus, the disclosure statute is important. The disclosure statute would have been a vehicle to create a brake on corporate spending. Once disclosure breaks down, as it did, money can be laundered through a variety of ways, making it very difficult to track the money back to the original corporate source.

PROFESSOR DORF: Although I do not agree with the ruling in *Citizens United*, I would like to add a word in defense of the proposition that the First Amendment can be sensibly interpreted to give at least some protection to the rights of corporate speakers. The best available argument does not depend on the assumption that corporations are, in all respects, just like natural persons. Rather, one can argue that corporate speech should be presumptively protected in order to protect the constitutional right of natural persons to receive information.

For example, *Lamont v. Postmaster General*⁷⁸ involved the ability of a United States citizen to receive information from foreign sources, even though non-citizens outside the country may have no cognizable First Amendment rights.⁷⁹ The government sought to ban the receipt of foreign-sourced material that it labeled “communist po-

Election Comm’n v. Survival Educ. Fund, 65 F.3d 285, 293 (2d Cir. 1995) (holding that a group receiving less than 1% funding from corporations was still able to fall within the exception); Day v. Holahan, 34 F.3d 1356, 1364-65 (8th Cir. 1994) (finding the key issue to be the amount of corporate funding and holding that a group that has not received significant contributions from for-profit corporations can fall within the exception as long as the contributions received remains substantially the same).

⁷⁷ See *Citizens United*, 130 S. Ct. at 892.

⁷⁸ 381 U.S. 301 (1965).

⁷⁹ See *id.* at 302.

litical propaganda.”⁸⁰ The Supreme Court upheld the right of United States citizens to receive information from outside the United States, notwithstanding the fact that no person or entity had a right to *send* the information.⁸¹ The core idea is that if a law infringes upon the ability of American citizens to receive information, then it infringes upon what the First Amendment protects, namely “the freedom of speech,” not the freedom of particular speakers.⁸²

III. SUPPORT TO FOREIGN TERRORIST GROUPS

PROFESSOR NEUBORNE: The other key case argued in the 2009 Term was *Holder v. Humanitarian Law Project*.⁸³ If *Citizens United* is arguably the most intensive protection of the First Amendment in the country’s history, then *Holder* is a continuation of what one may call the “nylon curtain.”⁸⁴ During the Cold War, the United States correctly excoriated the Soviet Union for maintaining an Iron Curtain and a Berlin Wall designed to wall its citizens off from the outside world.⁸⁵ For many years, the United States has operated a “nylon curtain”—nothing like the Iron Curtain—but nevertheless, inconsistent with the tenets of a free society.⁸⁶ Most obviously, the Cuban embargo blocks Americans from buying books from Cuba because, allegedly, the purchase of the books will provide foreign exchange to Cuba.⁸⁷ Similarly, travel to Cuba and a few other verboten

⁸⁰ See *id.*

⁸¹ See *id.* at 305, 307.

⁸² *Citizens United*, 130 S. Ct. at 898 (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”).

⁸³ 130 S. Ct. 2705.

⁸⁴ 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, 720-21 (1985) (describing the “nylon curtain” as a “network of regulations and statutes that . . . [is intended] to keep foreign ideas out” using the national border as an “information barrier,” proving to be a “discernible impediment to the free flow of ideas”).

⁸⁵ See Ronald Reagan, President of the United States, Address in West Berlin: Remarks at the Brandenburg Gate (June 12, 1987), available at http://www.ronaldreagan.com/sp_11.html.

⁸⁶ See Neuborne & Shapiro, *supra* note 84, at 720.

⁸⁷ See Cuban Assets Control Regulations, 31 C.F.R. § 515.201 (2010) (prohibiting exportation and transfer of funds to Cuba).

places are still off limits to Americans.⁸⁸

Holder is in the same tradition. It is a case that forbids an American from providing material support to a group on the foreign terrorist list.⁸⁹ There are about thirty groups listed, from around the world, which have been found to engage in terrorist activities.⁹⁰ Among those listed are a Kurdish group, the Partiya Karkeran Kurdistan, and the Liberation Tigers of Tamil Eelam.⁹¹ Several individuals and organizations wanted to inform the groups of peaceful ways to deal with their grievances, such as filing complaints with the United Nations.⁹² They wanted to show the groups that there were international law approaches that would make it unnecessary to resort to violence.⁹³ The government took the position that these contacts constituted the grant of material support to a terrorist group,⁹⁴ even though they were well-intentioned and wholly verbal, since such training might strengthen terrorist groups by making them appear more respectable.

The Supreme Court ruled in a six-to-three decision that the material support statute, which makes it a crime for an American citizen to contribute in any way to a foreign terrorist group, was constitutional as applied to the plaintiffs.⁹⁵ All agree that contributing money to such groups—even if the reason behind the contribution is to support a worthy, non-violent cause—can be forbidden because money is fungible.⁹⁶ Teaching somebody how to file a complaint in

⁸⁸ *Id.* § 515.560(a) (2010) (allowing specific categories of travel by citizens subject to jurisdiction in the United States to Cuba authorized only by general license or on “a case-by-case basis by a specific license for travel”).

⁸⁹ 130 S. Ct. at 2730-31 (holding that prohibiting the plaintiffs’ material support of foreign terrorist groups does not violate their freedom of speech under the First Amendment).

⁹⁰ See Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997).

⁹¹ *Id.*

⁹² *Holder*, 130 S. Ct. at 2716.

⁹³ See *id.*

⁹⁴ See *id.* at 2713-14.

⁹⁵ *Id.* at 2712. The statute states in pertinent part:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined . . . or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C.A. § 2339B(a)(1) (West 2010).

⁹⁶ See *Holder*, 130 S. Ct. at 2725-26 (stating that terrorist organizations may not keep separate funds for violent and peaceful activity and therefore money given to the organization for peaceful purposes can be used by the terrorist organization to finance weapons).

the International Human Rights Court is, however, not fungible.⁹⁷ Yet the Court held that if one cooperates with a terrorist group by providing that kind of assistance, such activity is to be considered criminal.⁹⁸ While “[i]ndependent advocacy that might be viewed as promoting the [terrorist] group’s legitimacy is not covered” by the statute,⁹⁹ any kind of interaction with the group will risk a criminal penalty.¹⁰⁰ Justice Stevens and Justice Kennedy joined the majority opinion.¹⁰¹

IV. RELIGIOUS SYMBOLS ON PUBLIC PROPERTY

*Salazar v. Buono*¹⁰² was the only Establishment Clause case heard last year by the Court. This case involved a Latin cross in the Mojave National Preserve (“Preserve”) located in California.¹⁰³ The Veterans of Foreign Wars had erected the cross in the Preserve to honor World War I veterans.¹⁰⁴ The cross was quite large and was visible from a roadway nearly one hundred feet away.¹⁰⁵ The cross also immediately became a gathering place for Easter mass.¹⁰⁶ The suit was brought by Frank Buono, a retired employee of the National

⁹⁷ *Id.* at 2735 (Breyer, J., dissenting) (“There is no *obvious* way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, towards terrorist ends.”).

⁹⁸ *Id.* at 2728 (majority opinion).

⁹⁹ *Id.* at 2726.

¹⁰⁰ *See id.* at 2728-29. The Court elaborated:

Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups’ nonviolent ends.

Holder, 130 S. Ct. at 2728-29.

¹⁰¹ *See id.* at 2712.

¹⁰² 130 S. Ct. 1803.

¹⁰³ *Id.* at 1811.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1812.

¹⁰⁶ *Id.*

Park Service who frequently visited the Preserve.¹⁰⁷ He claimed that the sight of a religious symbol on federal lands was offensive and therefore violated the Establishment Clause.¹⁰⁸

The case went through two phases.¹⁰⁹ In the first litigation, the Ninth Circuit upheld the district court's determination that the presence of the cross on the public land violated the Establishment Clause.¹¹⁰ The Ninth Circuit also upheld the district court's issuance of an injunction that forbade the government from displaying the cross, which led to the cross being covered with a tarp, and subsequently, a plywood box.¹¹¹ The Ninth Circuit opinion was not appealed, and became *res judicata* on the merits.¹¹² Next, Congress enacted a statute that transferred the land on which the cross stood to the Veterans of Foreign Wars, in exchange for the government receiving land from Henry Sandoz and his spouse.¹¹³ After the transfer, the cross would stand on private land.¹¹⁴ The Ninth Circuit decision invalidated the transfer, treating it as a ploy to avoid its original holding.¹¹⁵ The Supreme Court remanded the case for additional consideration of Congress's motives in providing for the land transfer.¹¹⁶ Since the merits were blocked by *res judicata*, the Supreme Court stated that it could not consider the merits.¹¹⁷

Salazar, which had a tremendous amount of press, decided very little. It did highlight an unfortunate trend in recent Establishment Clause jurisprudence—pretending that religious symbols are really secular in nature. Justice Kennedy's opinion states that Latin crosses are not necessarily religious, and that such crosses can have

¹⁰⁷ *Salazar*, 130 S. Ct. at 1812.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 1812-14.

¹¹⁰ *See id.* at 1812-13.

¹¹¹ *Id.*

¹¹² *See Salazar*, 130 S. Ct. at 1813.

¹¹³ *See id.* at 1811-12.

¹¹⁴ *Id.* *See also* Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a)-(b), 117 Stat. 1054 (2003). According to the statute, the property transferred to the Veterans of Foreign Wars must have been maintained "as a memorial commemorating United States participation in World War I and honoring the American veterans of that war," or else it would revert back to the United States. *Id.* § 8121(e).

¹¹⁵ *See Salazar*, 130 S. Ct. at 1817-18.

¹¹⁶ *Id.* at 1820-21.

¹¹⁷ *Id.* at 1815 (noting that the Government could not ask the Court to consider the district court's reason for granting the initial injunction or the injunction's propriety).

several meanings.¹¹⁸ Justice Scalia made a similar point at oral argument in a very aggressive manner when he argued that the cross was “erected as a war memorial” and that it “is the most common symbol of . . . the resting place of the dead.”¹¹⁹ In response, the lawyer for the challengers—a young ACLU lawyer from California—said: “Justice Scalia, . . . [t]he cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.”¹²⁰ The comment infuriated Justice Scalia, who responded: “I don’t think you can leap from that to the conclusion that the only war dead that [the] cross honors are the Christian war dead. I think that’s an outrageous conclusion.”¹²¹ The audience was taken aback by the vehemence of Justice Scalia’s comments.¹²² One attorney present at the argument noted the insensitivity of the comment.¹²³ If disputes about religious imagery can trigger that kind of anger and irrational behavior in a Supreme Court Justice who should know better, imagine what it can do in the real world when government becomes entangled in religious disputes.

V. CONFLICT BETWEEN EQUALITY AND FREEDOM OF ASSOCIATION

PROFESSOR DORF: A case that involved a conflict between equality and freedom of association was *Christian Legal Society v. Martinez*,¹²⁴ which came out of the University of California’s Hastings College of the Law, in San Francisco.¹²⁵ Hastings has a Registered Student Organization (“RSO”) program under which eligible

¹¹⁸ *Id.* at 1820. Justice Kennedy stated that the “[p]lacement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.” *Id.* at 1816-17.

¹¹⁹ Transcript of Oral Argument at 38-39, *Salazar*, 130 S. Ct. 1803 (No. 08-472).

¹²⁰ *Id.* at 39.

¹²¹ *Id.*

¹²² See Tony Mauro, *At High Court, Cross Words Over Mojave Memorial*, LAW.COM (Oct. 8, 2009), <http://www.law.com/jsp/article.jsp?id=1202434373566> (stating that at the culmination of the exchange between Justice Scalia and the attorney for the ACLU, “[y]ou could audibly hear people breathing in”).

¹²³ See *id.*

¹²⁴ 130 S. Ct. 2971.

¹²⁵ *Id.* at 2978.

student groups receive funding from the school and a preferred status, enabling them to use the school's e-mail system to send out messages to the entire student body and to receive first dibs on available classroom space to host speakers and meetings.¹²⁶ To qualify as a RSO, a student organization must abide by a policy that forbids discrimination on various grounds, including, as proved relevant in this case, religion and sexual orientation.¹²⁷ The law school interpreted its nondiscrimination policy to require that each RSO accept all-comers, meaning that RSOs have to accept as members any students who want to join.¹²⁸

The Christian Legal Society is a national umbrella organization for fundamentalist Christian student organizations on law school campuses.¹²⁹ The local chapters tend to be small student organizations, and in order to be affiliated with the national organization, the student organizations must adopt by-laws that promote the national organization's tenets.¹³⁰ One of the tenets is that members must adhere to a statement of faith.¹³¹ The statement of faith has various religious elements, including traditional sexual morality, which is interpreted as requiring, among other things, that one cannot be "unrepentantly" gay.¹³² The Christian Legal Society applied for RSO status at Hastings.¹³³ After reviewing the Christian Legal Society's constitution, Hastings determined that the organization's by-laws were inconsistent with the all-comers policy and the nondiscrimination policy.¹³⁴ As a result, the Christian Legal Society sued Hastings, but lost in the lower federal courts.¹³⁵

As a threshold matter in the Supreme Court, the Christian Legal Society argued that the nondiscrimination policy should be read as written—prohibiting discrimination—rather than as "a requirement that all [RSOs] accept all[-]comers."¹³⁶ However, the parties had sti-

¹²⁶ *See id.* at 2979.

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ *See Martinez*, 130 S. Ct. at 2980.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Martinez*, 130 S. Ct. at 2980.

¹³⁵ *Id.* at 2981.

¹³⁶ *Id.* at 2982.

pulated at the district court level that the all-comers policy applied to RSOs.¹³⁷

The Christian Legal Society further argued that the application of the all-comers policy disproportionately affected groups of faith.¹³⁸ The Supreme Court majority rejected this argument “because ‘[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.’”¹³⁹

That left the Justices with the task of sorting the dispute into one of two different lines of cases.¹⁴⁰ One could think of *Christian Legal Society* as a funding case, in particular, what is known as a “public forum” case.¹⁴¹ If a government entity decides to fund organizations or provide access to certain sorts of government property not counting as a “public forum,” it may attach conditions to the funding or property use so long as the conditions are viewpoint-neutral and reasonable.¹⁴² Under this line of cases, it seemed clear that the Christian Legal Society would not prevail. In effect, Hastings was arguing that it was not singling out the Christian Legal Society but neutrally applying its all-comers rule to every RSO. The Hastings bicycle club, the Hastings wine tasting club, and even the Hastings branch of the Ku Klux Klan—if such an organization existed—must accept all students to qualify for RSO status.¹⁴³ This was a neutral policy, Hastings said, because it applied to all groups and applied to the *conduct* of discrimination rather than applying based on viewpoint. Moreover, Hastings argued (and the Court agreed), the all-comers policy was reasonable as a means of ensuring that there was open

¹³⁷ See *id.*

¹³⁸ *Id.* at 2994 (stating that the Christian Legal Society argued that the policy “systematically and predictably burden[ed] most heavily those groups whose viewpoints [we]re out of favor with the campus mainstream”).

¹³⁹ *Martinez*, 130 S. Ct. at 2994 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹⁴⁰ See *id.* at 2984 (noting that the Christian Legal Society supported its argument that the all comers policy violated its First Amendment rights by relying on “two lines of decisions”).

¹⁴¹ See *id.* (stating that “in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech”).

¹⁴² See *id.*

¹⁴³ *Id.* at 2993 (stating that “Hastings’ all-comers requirement draws no distinction between groups based on their message or perspective”).

access to RSOs so that “leadership, educational, and social opportunities . . . [we]re available to all students.”¹⁴⁴

The hard question in *Christian Legal Society* was whether to treat the case as presenting issues of government funding or as implicating a second line of cases—those involving freedom of expressive association. These cases hold that even a neutral nondiscrimination policy—such as the one that New Jersey applied to all places of public accommodation, including the Boy Scouts (per a broad reading of state law)—may unconstitutionally infringe on an organization’s right to expressive association.¹⁴⁵ Another case involved an Irish-American group that wanted to exclude a sub-group from marching under an openly gay banner as part of its St. Patrick’s Day Parade.¹⁴⁶ The Irish-American group was held to have constitutional right to exclude the sub-group, even though the City of Boston was applying a general nondiscrimination policy in seeking to condition a parade permit on nondiscrimination.¹⁴⁷

Thus, if the Court had viewed *Christian Legal Society* as a freedom of association case, Christian Legal Society would have received a constitutional exemption from the Hastings all-comers policy.¹⁴⁸ But a majority instead viewed it as a funding case and denied an exemption.¹⁴⁹ That approach was apparently inconsistent with *Hurley*, the case involving the St. Patrick’s Day Parade. So how did the majority reconcile the cases? The key for the majority was the nature of the forum, although the opinion relegates the crucial move to a footnote.¹⁵⁰ *Hurley* involved access to the streets, which are a “public forum”¹⁵¹ in which government restrictions on expression are subject to the most exacting judicial scrutiny. In a public forum,

¹⁴⁴ *Martinez*, 130 S. Ct. at 2989.

¹⁴⁵ *Id.* at 2984-85. See also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (holding that “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints”).

¹⁴⁶ See *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 561 (1995).

¹⁴⁷ *Id.* at 580-81.

¹⁴⁸ The Christian Legal Society would have received an exemption if the forced inclusion of certain individuals affected the group’s ability to advocate its viewpoint. See *Dale*, 530 U.S. at 648.

¹⁴⁹ See *Martinez*, 130 S. Ct. at 2995.

¹⁵⁰ See *id.* at 2986 n.14.

¹⁵¹ See *Hurley*, 530 U.S. at 579.

government regulation must not only be viewpoint-neutral; people have an affirmative right of access to the government property.¹⁵² By contrast, the RSO program was a limited forum of the government's own creation, and so the government—here Hastings, a public law school—was held to a less strict standard.¹⁵³ For example, if the government establishes a public theater for community productions for the works of Shakespeare, it cannot censor a production of Shakespeare's *Henry VI, Part 3* on the ground that it presents an anti-war (or any other) message, for that would be viewpoint discrimination. But if one wants to present plays by Christopher Marlowe or Arthur Miller, the government may constitutionally insist on reserving the theater for its designated purpose.

Understanding the *Christian Legal Society* case as part of the Court's designated forum doctrine reconciles it with broader First Amendment jurisprudence. However, that does not necessarily mean that the all-comers policy is sensible. Although I wrote a brief in the case on behalf of the Association of American Law Schools in support of Hastings, I do have doubts about the wisdom (as distinguished from the constitutionality) of the all-comers policy. If you tell the Republican students that they have to admit Democrats, they may cease to be the Republican students (and vice-versa). What should Hastings do about the Law Review? Does it have to take all-comers? Here, as elsewhere, to say that a policy is constitutional is not to say that it is perfect or even, on balance, wise.

VI. CONCLUSION

The First Amendment was at issue in some of the Supreme Court's most significant cases of the October 2009 Term. Collectively, these cases may have a considerable impact on many aspects of American life, from the way political campaigns are financed to battling the War on Terror and the ability of organizations at publicly-funded institutions to control their membership while continuing to receive funding. The repercussions of these cases will surely be felt

¹⁵² See *id.* (“Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says.”).

¹⁵³ *Martinez*, 130 S. Ct. at 2984 n.11 (providing a list of various public forums such as public streets, parks, and government property not designated as a public forum, but opened up for that purpose).

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for years to come.

