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Terrorism and Associations

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The domestic manifestation of the War on Terror has produced the most difficult and sustained set of controversies regarding the limits on First Amendment protections for political speech and association since the anti-Communist crusades of the Red Scare and McCarthy eras. An examination of the types of domestic terrorism prosecutions that have become common since the September 11 attacks reveals continuing and unresolved conflicts between national security needs and traditional protections for speech and (especially) associational freedoms. Yet the courts have barely begun to acknowledge, much less address, these serious issues. In the Supreme Court’s only sustained engagement with these problems, the 2010 decision in Holder v. Humanitarian Law Project, the majority largely avoided the hard questions by simply asserting that 18 U.S.C. § 2339B, the federal statute forbidding the provision of material support to foreign terrorist organizations, does not directly burden either the freedom of speech or freedom of association. Lower courts have performed even more poorly, generally rejecting powerful speech and association claims with bare assertions that “there is no First Amendment right . . . to support terrorists.”

This article has taken as its major goal identifying and analyzing the First Amendment issues raised by the domestic War on Terror, focusing especially on the role of freedom of association in this context. Freedom of association has historically been a critical and basic First Amendment right, central to the process of democratic self-governance that the First Amendment protects. The right of association is also deeply implicated in many domestic terrorism prosecutions, since the essence of those prosecutions is an act of association, often combined with speech. Finally, the judiciary’s bare assertions that “material support” or financial contributions do not constitute association cannot be sustained given both first principles and well-developed law outside the context of terrorism. In short, in this area the courts have failed in their basic job of honestly engaging with the law.

Ultimately, however, I conclude here that there does exist a clear, textually and historically justifiable basis for limiting constitutional protections for terrorist and other violent groups. The principle derives from the textual roots of the freedom of association, which lies in the Assembly Clause of the First Amendment. The Assembly Clause, unlike the Free Speech Clause, explicitly protects only a right “peaceably to assemble,” and so excludes violent groups. This simple principle, completely missed by the courts, serves to reconcile most terrorism prosecutions with the First Amendment. It cannot, of course, resolve all issues, especially when a prosecution is based primarily on speech not association, but it does much of the work. There also remain some difficult and complicated issues of definition and implementation, on which I provide some thoughts. But the basic argument advanced here is quite simple: the freedoms of association and assembly protect only peaceable association and assembly; and terrorists are not peaceable.
INTRODUCTION

More than a decade has now passed since the attacks of September 11, 2001 fully inaugurated the Age of Terror. In the early years after the attacks, aside from the immigration sweep that followed immediately, U.S. antiterrorism policy was focused primarily on threats from abroad, including notably the wars in Afghanistan and (at least purportedly) Iraq. While those events raised some fascinating issues about the scope of executive authority and about the geographic reach of the Constitution, relatively rarely were the individual liberties provisions of the Bill of Rights directly implicated. In subsequent years, however, the federal government initiated a series of legal actions, including criminal prosecutions, directed at alleged terrorists and supporters of terrorism within the United States. These actions have in turn generated a large number of constitutional disputes regarding the consistency of these prosecutions with the Bill of Rights, especially the speech and association rights protected by the First Amendment. To date, the Supreme Court has had only one occasion to address these issues, in its 2010 decision in Holder v. Humanitarian Law Project. In Holder, the Court rejected a First Amendment challenge to 18 U.S.C. § 2339B(a)(1), the so-called “material support” statute, which bans the provision of material support to designated foreign terrorist organizations (“FTOs”). Holder, however, did very little to clarify the law regarding the interaction between First Amendment rights and antiterrorism measures; indeed, the decision if anything increased the already high levels of confusion and uncertainty.

Despite the lack of guidance from above, the lower federal courts have of course necessarily confronted and resolved many First Amendment issues in the context of terrorism prosecutions. These cases and disputes are discussed in more detail in Part II of this paper, but the bottom line is clear: the First Amendment has been irrelevant. Lower courts have not only consistently rejected First Amendment claims, they have generally dismissed them as insubstantial. A closer look at these cases demonstrates, however, that under current law the First Amendment claims in these cases, especially those brought under the freedom of association, are in fact quite weighty. Courts have avoided them only by twisting doctrine and, in some cases, accepting arguments that are grossly inconsistent with First Amendment law in other factual contexts. In short, the War on Terror has forced the courts to twist the First Amendment into a pretzel.

In this article, I aim to abate some of this confusion, and to build a sustainable framework within which First Amendment challenges to antiterrorism measures

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4 See Part II, infra.
can be evaluated. My focus is on freedom of association, though in the course of discussing association issues I necessarily have to consider some related free-speech issues as well – indeed, one of my main points is that speech and association issues are deeply entangled in these situations, and contrary to the courts must be considered together. As I suggested earlier, my conclusion is that the associational claims raised in this area are far from insubstantial; indeed, under extant doctrine many of them are probably valid. Nonetheless, I conclude that the courts have probably been correct to reject most (though by no means all) of the First Amendment challenges to antiterrorism prosecutions. The problem is that the courts are doing this for the wrong reasons, twisting doctrine to reach intellectually unsustainable conclusions. The problems with this approach – other than rule-of-law concerns – are that first, it leads courts to reject even some legitimate claims; and second, it threatens to undermine First Amendment rights in other areas. I conclude by arguing that instead of ignoring individual associational rights, or narrowing their scope in indefensible ways, courts should instead focus their attention on what kinds of associations, what kinds of groups are protected by the First Amendment, and more particularly, whether certain kinds of organizations may be categorically excluded. The building blocks of such an approach can be found in the text and history of the First Amendment itself. This article develops these ideas more fully and demonstrates that such an approach can preserve important First Amendment principles without reaching absurd results such as supporting a constitutional right to fund Al Qaeda.

In Part I of this article, I discuss the Supreme Court’s Holder decision. Part II presents a series of case studies from the domestic War on Terror, illustrating how the lower courts have, and have not, confronted the First Amendment raised by them. Part III examines the grave uncertainties these cases reveal regarding the scope and application of First Amendment rights in the context of the War on Terror. Part IV articulates a new way forward, which seeks to identify limits on the sorts of groups entitled to constitutional protection based on the language and purposes of the First Amendment. Finally, Part V examines some of the difficult boundary problems raised by any proposal to categorically restrict the scope of First Amendment protections.

I. HOLDER V. HUMANITARIAN LAW PROJECT: TERRORISM TRUMPS THE FIRST AMENDMENT

The Supreme Court’s decision in Holder v. Humantarian Law Project arose out of a constitutional challenge to 18 U.S.C. §2339B, the so-called “material support” statute which prohibits “knowingly provid[ing] material support or resources to a foreign terrorist organization.” The statute in turn defines “material support or resources” broadly, to include, inter alia, any and all property, services, training, expert advice, and personnel. A foreign terrorist organization (or “FTO”)

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6 For a more general discussion of the relationship between the speech and association rights, see Ashutosh Bhagwat, Associational Speech, 120 Yale L.J. 978 (2011).
7 See Holder, 130 S. Ct. at 2712-2713 & n.1.
8 Id. at 2713 (citing 18 U.S.C. §2339A(b)(1)).
is defined as “an organization designated as a terrorist organization” by the Secretary of State, pursuant to her authority under 8 U.S.C. §1189. The plaintiffs in the litigation were U.S. citizens and organizations who wished to provide expert training and advice to support the nonviolent activities of two designated FTOs: the Kurdistan Workers Party (“PKK”), an organization seeking the establishment of an independent Kurdish state in Turkey; and the Liberation Tigers of Tamil Eelam (“LTTE” or “Tamil Tigers”) a now-defunct organization that sought the establishment of an independent Tamil state in Sri Lanka. The plaintiffs claimed that application of the material-support to their activities violated their rights to freedom of speech and freedom of association protected by the First Amendment and that the statute was void for vagueness. The Supreme Court, in an opinion by Chief Justice Roberts, rejected all of these claims by a 6-3 vote.

The majority’s analysis proceeded in several steps. First, the Court rejected a non-constitutional claim that the statute should be interpreted to require that defendants possess an intent to further an FTO’s illegal activities, at least when the statute was applied to speech. The Court concluded that the statutory language did not support such a limiting construction. The Court then rejected the void-for-vagueness challenge. It held that the statute’s definition of “training” and “expert advice” clearly covered plaintiffs’ proposed activities, and critically, held that the statute’s definitions of “personnel” and “service” clearly excluded independent advocacy in support of an FTO, thereby providing a safe harbor so long as an individual’s activities are not directed by or coordinated with an FTO. In response to plaintiffs’ objection that this reading in turn created fatal ambiguity about the degree of coordination or direction which would cross the line into material support, the Court simply responded that plaintiffs had not alleged sufficient facts to properly raise this issue. In other words, the majority essentially ducked this as we shall see crucial question.

The majority then turned to the First Amendment. It began, building on its vagueness analysis, by emphasizing that the material-support statute was not a flat restriction on political speech, because it permitted independent advocacy in support of FTOs. However, the Court acknowledged that the statute imposed a content-based restriction on speech, and so “more rigorous scrutiny” than intermediate scrutiny was required (though the majority opinion coyly never used the phrase “strict scrutiny”). The majority then quickly concluded that the government’s objective here, to combat terrorism, is sufficiently strong (compelling?) to meet the applicable standard of review. The difficult question was one of fit, whether the statute was “necessary to further that interest.” Ultimately, the Court concluded that it was necessary. The Court pointed out that material

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10 Holder, 130 S. Ct. at 2713-2714.
11 Id. at 2714.
12 Id. at 2717-2718.
13 Id. at 2721-2722.
14 Id. at 2722.
15 Id. at 2722-2723.
16 Id. at 2724.
17 Ibid. (quoting Brief for Plaintiffs 51).
support even for an FTO’s legal activities advances terrorism because it “frees up other resources within the organization that may be put to violent ends,” and it “also importantly helps lend legitimacy to foreign terrorist groups – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks.” 18 In a similar vein, the Court argued that providing material support to FTOs “also furthers terrorism by straining the United States’ relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks.” 19 Finally, the Court granted deference to Congress and the President on the necessity of the material-support statute, given the national security and foreign relations implications of the case. 20 However, the Court closed this section of the analysis with a limiting cautionary statement: “we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.” 21

Having polished off the free speech claim, the majority then turned to freedom of association. Here, the Court was brief, almost dismissive. It rejected the claim on the simple grounds that the material-support “statute does not penalize mere association with a foreign terrorist organization,” because it does not prohibit membership in an FTO, merely the provision of material support. 22

Justice Breyer wrote a dissenting opinion, joined by Justices Ginsburg and Sotomayor. From the beginning, the tone of the dissent is dramatically different from the majority. Breyer emphasized that the plaintiffs’ activities are political and so fall within the core of the First Amendment’s protections. 23 He also repeatedly described them as implicating rights of both speech and association, rather than treating the associational claim as a poor stepchild as the majority did. 24 Indeed, Breyer emphatically rejected the majority’s conclusion that the statute was constitutional because it prohibits only speech coordinated with an FTO, pointing out that the First Amendment “after all, also protects the freedom of association” and citing cases that describe the right of freedom of assembly protected by the First Amendment as an independent and “cognate” right. 25 The dissent also pointed out that the Court’s prior precedent had clearly upheld a right to associate with groups that themselves use “unlawful means” to achieve their political goals. 26 Finally, Justice Breyer argued that the government’s primary arguments in defense of the material-support statute – that even peaceful support to FTOs is “fungible,” and that support for FTOs can “legitimize” them – are either factually questionable, or

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18 Id. at 2725.
19 Id. at 2726.
20 Id. at 2727.
21 Id. at 2730.
22 Ibid.
23 Id. at 2731-2732 (Breyer, J., dissenting).
24 Id. at 2732-2733 (Breyer, J., dissenting).
26 Id. at 2733 (Breyer, J., dissenting) (citing Scales v. United States, 367 U.S. 203, 229 (1961); NAACP, supra, at 908).
contrary to precedent. Because it found the statute, as interpreted by the
government, to violate the First Amendment, the dissent would have imposed a
limiting construction “criminalizing First-Amendment-protected pure speech and
association only when the defendant knows or intends that those activities will
assist the organization’s unlawful terrorist actions.”

Several significant questions are raised by the Holder Court’s First
Amendment analysis. First, it is striking that despite the Court’s invocation of strict
scrutiny (albeit without naming it as such), it deferred to the Congress and the
President’s factual assertions regarding the necessity of the law. Such a deferential
posture in the context of heightened scrutiny is inconsistent with most modern
law, and brings to mind such questionable decisions as Korematsu v. United
States and Dennis v. United States in which the Court sacrificed basic civil
liberties in the name of national security and deference to political/military
authorities. The sweeping deference language of the Holder majority opinion raises
the possibility that in the Age of Terror, the Court will retreat to a similar
constitutional calculus.

In other ways, however, the Holder Court took a notably more speech-
protective stance than it had to. Most significantly, by applying rigorous (strict?)
scrutiny, the Court implicitly but clearly rejected any suggestion that the speech at
issue was categorically unprotected under current First Amendment doctrine, either
as “incitement” under the modern Brandenburg test, or as speech which is “an
integral part of conduct in violation of a valid criminal statute.” The Court also, as
noted earlier, explicitly excluded independent advocacy in support of FTOs from the
reach of the material-support statute, and also raised doubts about whether the
statute could constitutionally be applied to domestic organizations, even terrorist
ones. Ultimately, then Holder is probably best read as an important, but at least for
the time being limited, holding regarding the scope of free speech in the context of
the War on Terror.

But this is precisely the problem: Holder is clearly a holding primarily about
speech, with the right of association treated merely as an after-thought. But on the
facts of the case, this is quite odd. It is true that the plaintiffs themselves to some
extent framed their case around free-speech by emphasizing the training and advice
they wanted to provide to FTOs; but central to the dispute (as the majority itself
recognized repeatedly) was the fact that the plaintiffs wish to act in coordination
with – i.e., in association with – FTOs, rather than simply advocating on their
behalf independently. In other words, it was plaintiffs’ association rather than their

27 Id. at 2735-2737 (Breyer, J., dissenting).
28 Id. at 2740 (Breyer, J., dissenting).
30 323 U.S. 214 (1944).
32 See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (the First Amendment does not “not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).
34 See Holder, 130 S. Ct. at 2732 (Breyer, J., dissenting).
speech which brought them within the scope of the material-support statute. Yet the majority’s analysis of association was, as we have seen, utterly cursory.

In many ways, this neglect of the associational right is typical of the Court’s recent performance, and has already been extensively discussed (and criticized) in the literature.\(^{35}\) The result of this neglect, however, is to create profound confusion. For example, one clear and obvious implication of the Court’s reasoning in rejecting the associational claim in *Holder* is that the right of association protects membership in an organization, but not the provision of material support. Lower courts have largely mimicked this reasoning. The difficulty is that this conclusion is entirely inconsistent with interpretations of the associational right in other contexts.\(^{36}\) In addition, as noted earlier, the Court completely avoided addressing the difficult question of what level of communication, or direction, between an individual and an FTO crosses the line into “coordination,” and so brings the individual within the scope of the material-support statute. Yet these questions lie at the heart of many First Amendment claims raised in modern terrorism prosecutions. In sum, far from clarifying the scope of First Amendment rights in the context of terrorism, *Holder* largely obfuscated or avoided the issues. As we shall now see, the net effect of *Holder* was therefore merely to add to the confusion already rampant in the lower courts.

II. TERRORISM IN THE LOWER COURTS:
THE FIRST AMENDMENT IN ABSENTIA

To understand the nature of the First Amendment problems raised by modern terrorism prosecutions, it is necessary to have some sense of the nature of those prosecutions. I therefore begin this section by laying out some recent, prominent terrorism prosecutions that raise difficult First Amendment issues. It should be noted that I focus here on prosecutions which primarily target speech or association, as opposed to individuals such as Major Nidal Malik Hasan\(^ {37}\) or Faisal Shahzad\(^ {38}\) who engaged in, or attempted to engage in, violence, and whose prosecutions of course raise no serious First Amendment concerns. Another preliminary point to note is that almost all of these prosecutions were brought pursuant to either 18 U.S.C. §2339B, the material-support statute upheld in *Holder*, or its sibling 18 U.S.C. §2339A, which prohibits the provision of material support or resources “knowing or intending that they are to be used in preparation for, or in carrying out”\(^ {39}\) (i.e., this statute prohibits material support intended to aid actual acts of terrorism, as opposed to material support to FTOs).

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\(^{36}\) *See infra* at ___.


\(^{39}\) 18 U.S.C. §2339A.
A. The Cases

Tarek Mehanna

Tarek Mehanna is a native-born U.S. citizen with a doctorate in pharmacology, who lived with his parents in the upscale suburb of Sudbury, Massachusetts. In December of 2011, Mehanna was convicted after a jury trial on multiple counts of providing material support to terrorism (as well as counts involving lying to the FBI). Mehanna’s prosecution was based primarily on his translation from Arabic, and distribution on the Internet, of Jihadi literature, including a text titled 39 Ways to Serve and Participate in Jihad and a video depicting Al Qaeda activities and propaganda involving Iraq. The prosecution also introduced evidence that Mehanna flew to Yemen in 2004 seeking to obtain weapons training at a terrorist training camp, but conceded that he did not succeed in locating the camp (Mehanna denied that he was seeking weapons training). The main thrust of the government’s case, however, was clearly the translation and distribution of Jihadi materials. Importantly, the government provided no proof that Mehanna coordinated his propaganda with any members of Al Qaeda or any other FTO. Indeed, it is quite unclear whether Mehanna had any direct contact at all with Al Qaeda members. Instead, the government’s case relied on evidence that Mehanna described himself as Al Qaeda’s “English Wing,” and on other statements Mehanna made expressing support for Osama bin Laden and Al Qaeda.

Mehanna’s attorneys unsurprisingly sought to have the material support charges against Mehanna dismissed on First Amendment grounds. The primary thrust of his argument was that the Holder decision required proof of coordination with an FTO (or in the case of Section 2339A with known terrorists), and that the overt acts for which Mehanna had been indicted constituted protected, independent advocacy. The government’s response was to deny that coordination was a required element of a Section 2339A violation, and that in any event “coordination” did not require direct contact between the defendant and an FTO – it was sufficient for a defendant to respond to an FTO’s call for assistance, and believe that he was assisting the organization. The District Court denied Mehanna’s motion to dismiss, and ultimately Mehanna was convicted by a jury and sentenced to 17½ years in prison.

41 Id. at 38.
43 Id. at 18 & n.52.
44 Id. at 23-24.
45 Id. at 18 & n. 158.
46 Pyetranker, supra note __, at 1-2.
47 Id. at 16-17.
48 Id. at 17; Abel, supra note __, at 21-22.
49 Id. at 21-22.
50 Pyetranker, supra note __, at 18.
Javed Iqbal and Laleh Elahwal

Javed Iqbal is a Pakistani national who has resided in the United States since he was a teenager. Iqbal lived on Staten Island, New York, and ran a business providing specialized satellite programming. In 2006, at the age of 42, Iqbal was arrested and charged with material support for terrorism. The gravamen of the charge was that as part of his business, Iqbal retransmitted the signal of Al Manar, a television station associated with the Lebanese Shia organization Hezbollah.\(^{51}\) Hezbollah is a complex organization which conducts charitable activities and is a political party within Lebanon, but also uses terrorism to achieve its political goals. It has been a designated FTO since 1997\(^{52}\) (though the European Union has not designated Hezbollah a terrorist group\(^{53}\)). Eventually, after his First Amendment defense was denied by the trial judge on the grounds that Iqbal was being prosecuted for conduct, not speech, Iqbal plead guilty to one count of providing material support. In pleading guilty, Iqbal confessed to receiving money for providing services to Al Manar, a fact that the court emphasized in rejecting Iqbal’s First Amendment defense.\(^{54}\) Iqbal was sentenced to 69 months in prison.\(^{55}\)

Saleh Elahwal was Iqbal’s business associate. He too eventually plead guilty to a material-support charge, and was sentenced to 17 months in prison.\(^{56}\)

The Lackawanna Six

In the spring of 2001, six Yemeni-American young men from Lackawanna, New York, a suburb of Buffalo, traveled to Afghanistan. While there, they received weapons training at an Al Qaeda training camp, and at least some of them met personally with Osama bin Laden. They then returned to the United States – all prior to the September 11 attacks later that year. In the year following the attacks, the United States government received information about the “Lackawanna Six,” which raised concerns that the group might be an Al Qaeda “sleeper cell.” Eventually, all six men plead to charges of providing material support to an FTO, based on their training in Afghanistan. At no point during the trial or investigation of the Lackawanna Six did the government present any evidence demonstrating that the group was planning to commit or intended to commit a specific act of terrorism. The prosecution of the Lackawanna Six was hailed by the government as a major


\(^{52}\) http://www.state.gov/j/ct/rls/other/des/123085.htm.


\(^{56}\) Ibid.
victory against terrorism, and was even mentioned by President George W. Bush in his State of the Union address.\footnote{For a detailed discussion of the Lackawanna Six prosecution, see Matthew Purdy and Lowell Bergman, Unclear Danger: Inside the Lackawanna Terror Case, New York Times (Oct. 12, 2003), available at http://www.nytimes.com/2003/10/12/nyregion/12LACK.html?pagewanted=1.}

\section*{The Holy Land Foundation for Relief and Development}

The Holy Land Foundation for Relief and Development was an Islamic charitable foundation that operated in the United States beginning in 1989.\footnote{See Holy Land Foundation for Relief and Development v. Ashcroft, 333 F.3d 156, 159-160 (D.C. Cir. 2003). The Foundation was originally named the “Occupied Land Fund,” and changed its name to Holy Land Foundation in 1991.} It describes itself as “the largest Muslim charity in the United States.”\footnote{Id. at 160.} In December of 2001, the Holy Land Foundation was designated as a “Specially Designated Global Terrorist” and all of its assets were frozen by the Department of the Treasury pursuant to an Executive Order issued by President Bush following the September 11, 2001 attacks. The Executive Order was in turn issued under the authority of the International Emergency Economic Powers Act passed by Congress in 1995.\footnote{50 U.S.C. §1701 et seq.} The primary basis for the Holy Land Foundation’s designation was evidence indicating that the Foundation “had financial connections to” Hamas and and had provided funding to Hamas as well as to charitable organizations and individuals linked to Hamas.\footnote{Holy Land Foundation, 333 F.3d at 161.} Hamas is of course the Palestinian group engaged in armed struggle against the Israeli occupation of the Occupied Territories. Hamas has been a designated as a Specially Designated Global Terrorist organization since 1995\footnote{http://www.state.gov/j/ct/rls/other/des/123085.htm.} (and has also been an FTO for the purposes of the material-support statute since 1997\footnote{Id. at 159.}).

The Foundation challenged its designation as a terrorist organization on a number of grounds, including a claim that “the government had violated its First Amendment rights [including freedom of association] by prohibiting it from making any humanitarian contributions by blocking its assets.”\footnote{Id. at 165.} The D.C. Circuit off-handedly rejected this claim with the statement “the law is established that there is no constitutional right to fund terrorism.”\footnote{Id. at 164.} The lower court had rejected the Foundation’s First Amendment claims on the same grounds,\footnote{Id. at 164.} noting as well that designating the Foundation and blocking its assets was permissible because these actions “do not prohibit membership in Hamas or endorsement of its views, and therefore do not implicate HLF’s associational rights.”\footnote{Id. at 161 (quoting Holy Land Foundation for Relief & Dev. v. Ashcroft, 219 F.Supp.2d 57, 81 (D.D.C. 2002)).}

Circuit’s opinion in the *Holder v. Humanitarian Law Project* litigation that eventually reached the Supreme Court.

**Islamic American Relief Agency**

The Islamic American Relief Agency was, like the Holy Land Foundation, an Islamic charity, founded in this case by a Sudanese immigrant in 1985. It too was designated as a Specially Designated Global Terrorist by the Bush Administration, in 2004. The factual basis for the Agency’s designation was a bit more complicated than with the Foundation, but in short came down to allegations that the Agency had provided funding to another entity, which was itself acknowledged to be a terrorist organization. Like the Holy Land Foundation, the Islamic American Relief Agency raised a freedom-of-association challenge to its designation. The D.C. Circuit predictably rejected this claim on the same grounds as before, citing its decision in *Holy Land Foundation* as well as the Ninth Circuit’s decision in *Humanitarian Law Project*. The court went on to reject the argument that the Supreme Court’s First-Amendment caselaw required proof of a specific intent to advance the terrorist organization’s illegal ends, concluding that this requirement was limited to instances of pure association, not funding.

**Mohamad Hammoud**

Mohamad Hammoud is a Lebanese citizen who came to the United States in 1992. While in the U.S., he became involved in various illegal activities, including cigarette smuggling. In addition, he assisted in raising money for Hezbollah (sometimes spelled Hizballah), and himself donated $3500 to that organization. On the basis of these actions, Hammoud was tried and convicted of providing material support to a terrorist organization (along with a number of other offenses).

On appeal, Hammoud argued that his material-support conviction violated his First Amendment right to freedom of association. The *en banc* Fourth Circuit rejected this view. The primary grounds for its ruling was that the material-support statute “does not prohibit mere association; it prohibits the *conduct* of providing material support to a designated FTO. Therefore, cases regarding mere association with an organization do not control.” Because it found that the statute did not directly target first-amendment protected activity, the court applied the lenient

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68 *Id.* at 164-165 (citing *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000)).
69 *Islamic American Relief Agency v. Gonzales*, 477 F.3d 728, 730-731 (D.C. Cir. 2007).
70 *Id.* at 736-737 (citing *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000)).
71 *Id.* at 737.
72 *United States v. Hammoud*, 381 F.3d 316, 325 (4th Cir. 2004) (*en banc*).
73 *Id.* at 326. Hammoud’s associates were also found to have provided “dual-use” physical equipment to Hizballah, but Hammoud declined to participate in these activities. *Ibid.*
74 *Hammoud*, 381 F.3d at 326.
75 *Id.* at 329.
O’Brien test applicable to facially neutral statutes that incidentally restrict expressive conduct, and easily upheld the statute. ⁷⁶

Jubair Ahmad

Jubair Ahmad is a young Pakistani-American (he was 24 at the time of his conviction) electrician living in Woodbridge, Virginia. When he was a teenager, before moving to the United States, Ahmad attended a training camp run by Lashkar-e-Tayyiba (“LeT”), a Pakistani militant group that conducts attacks against India because of the ongoing dispute between India and Pakistan over the state of Kashmir (LeT is believed to be behind the November, 2008 terrorist attack on Mumbai).⁷⁷ LeT has been a designated FTO since 2001.⁷⁸ In 2010, at the behest of the son of LeT’s leader, Ahmad prepared a video glorifying LeT’s activities, and calling for fighters to wage jihad. He then posted the video to YouTube. These actions were the sole basis of his conviction for providing material support to terrorism, resulting in a 12 year sentence.⁷⁹

Sami Al-Hussayen

Sami Al-Hussayen was a Saudi Arabian Ph.D student in computer science at the University of Idaho in Moscow, Idaho. He also contributed his time to run websites for a number of Islamic charities.⁸⁰ Although none of the charities were themselves FTOs, the prosecution alleged that it was possible to link, through the sites run by Al-Hussayen, to other Internet locations where users could contribute to FTOs such as Hamas (though Al-Hussayen’s own involvement with these links is disputed).⁸¹ As a consequence of these events, Al-Hussayen was arrested and charged with material support of terrorism (as well as immigration violations). After a trial, however, the jury acquitted Al-Hussayen of all the terrorism-related charges and some of the immigration charges (the jury hung on the rest). Ultimately, Al-Hussayen agreed to be deported in exchange for the remaining charges being dropped.⁸²

⁷⁶ Ibid.
⁷⁹ Karas, supra note __.
⁸¹ Contrast Williams, supra note __, at 368-371 (reciting FBI allegations that Al-Hussayen was involved in website development recruiting fighters for Jihad) with O’Hagan, supra note __ (raising doubts about Al-Hussayen’s involvement).
⁸² Williams, supra, note __ at 372-373.
Jesse Curtis Morton, AKA Younus Abdullah Muhammad

Jesse Curtis Morton, also known as Younus Abdullah Muhammad, is a 33 year old American convert to Islam. In 2007 he founded the organization Revolution Muslim, and subsequently helped run the organization’s website. He also, in collaboration with his associate Zachary Chesser, posted online exhortations to extremists, encouraging them to kill a cartoonist and the creators of the television show South Park, in both cases for insulting the Prophet Muhammad. As part of this campaign, Morton disclosed the home addresses of the South Park creators. Morton also posted to his website an issue of the magazine Inspire, which is linked to Al Qaeda, and which contained an article providing detailed instructions on how to create explosives at home (“in the kitchen of Your Mom”). In 2012 Morton plead guilty to charges brought under a federal statute prohibiting the use of the Internet to make threats, and was sentenced to 12 years in prison.83

Hossein Afshari, Roya Rahmani et al.

Between 1997 and 2001, a group of individuals including Hossein Afshari and Roya Rahmani are alleged to have solicited funds at the Los Angeles International Airport purportedly on behalf of an organization called “Committee for Human Rights.” The collected funds were then allegedly forwarded to an organization called Mujahedin-e Khalq (“MEK”). The MEK is an Iranian Marxist group which was designated as an FTO in 1997 (that designation was lifted in September of 2012).84 As a consequence, Afshari, Rahmani, and their confederates were indicted for violating the material support statute. The district court dismissed the indictment on the grounds that the procedures used to designate MEK as an FTO were unconstitutional.85 On appeal, the Ninth Circuit reinstated the indictment.86 In addition to rejecting the District Court’s analysis, the Ninth Circuit also considered, and rejected, a First Amendment claim brought by the defendants. Specifically, the court rejected the argument that the First Amendment protected the defendants’ activities by noting that “[t]hough contributions of money given to fund speech receive some First Amendment protections, it does not follow that all contributions of money are entitled to protection as though they were speech.”87 The defendants contributions were not entitled to First Amendment protections because “[i]n this context, the donation of money could properly be viewed by the government as

86 Afshari, 426 F.3d at 1159.
87 Id. at 1160 (citing McConnell v. Fed. Election Comm’n, 540 U.S. 93 (2003); Buckley v. Valeo, 424 U.S. 1 (1976)).
more like the donation of bombs and ammunition than speech.”\footnote{88} The court concluded by citing its own earlier decision in *Humanitarian Law Project* for the often-stated proposition that there is no First Amendment right to facilitate terrorism.\footnote{89}

**B. First Amendment Conundrums**

The ten prosecutions described above are of course merely a small sampling of the hundreds of terrorism-related prosecutions initiated in the United States since the September 11 attacks.\footnote{90} These particular cases were selected both because of their prominence, and because their facts illustrate nicely the complex First Amendment issues that have arisen in the course of the War on Terror (albeit, these issues have largely been ignored by the courts). In the next Part, this article will consider how First Amendment rights, especially the right of association, interact with terrorism prosecutions, and how the lower courts’ treatment of these rights comports with previously well-established First Amendment principles. We set the stage for this broader discussion by here highlighting some of the issues raised by these particular cases.

Two immediate points jump out from prosecutions described above. First, in none of these cases (as in *Holder* itself) was there any evidence that the defendants had knowledge of or actually helped plan, much less participated in, a specific act of terror. Thus, despite the sometimes punitive sentences imposed on these defendants, none of their prosecutions can be said to fall within the uncontroversial core of the government’s anti-terrorism efforts. Second, the activities that formed the primary, often exclusive basis of the described prosecutions (except the Lackawanna Six, on which more later) – running websites, posting material on the Internet, distributing television signals, creating and posting videos, and providing financial support – are activities which normally would receive strong First Amendment protections. Despite the lower courts’ dismissive treatment, then, the First Amendment issues raised by these prosecutions are serious and central to the cases, rather than frivolous and peripheral.

To begin with, these cases illustrate the grave ambiguities created by the Supreme Court’s *Holder* decision. Consider in this regard *Holder*’s conclusion that the material-support statute does not violate the First Amendment right of association because it does not bar membership, combined with the Court’s insistence that the statute does not directly regulate speech because it does not prevent independent advocacy in support of FTOs. But what does “membership” mean in this context, what exactly does the statute permit (and prohibit)? Tarek Mehanna was found guilty of providing material support despite the lack of any evidence that he had direct contact with an FTO. Sami Al-Hussayen was charged

\footnote{88} Ibid.\footnote{89} Id. at 1161 ([citing Humanitarian Law Project, 205 F.3d at 1133].\footnote{90} See National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions 9/11/01 – 3/18/10, available at http://www.fas.org/irp/agency/doi/doj032610-stats.pdf (reprinting Department of Justice statistics listing 403 terrorism-related convictions obtained by the Department between September 2001 and March 2010).
(albeit acquitted) of material-support charges based on his provision of website services to charities that were themselves not FTOs, based on possible financial links between those charities and an FTO. What then is left of “independent” advocacy, and concomitantly, what is enough to cross the line into coordination? And what exactly does it mean to say that “membership” is legal, if speech in support of an FTO, combined with any sort of “membership,” no matter how attenuated, crosses the line into material support?91

The Iqbal prosecution raises different, but also serious questions. Iqbal and Elahwal, remember, were prosecuted for retransmitting a television signal on behalf of an FTO (and in exchange for financial compensation). There can be no doubt that their actions benefitted and supported Hezbollah, of course. But that conduct also constituted speech, normally protected by the First Amendment.92 The trial judge’s reject of Iqbal’s First Amendment defense on the grounds that he was being prosecuted for “conduct” not speech (in part because he was paid to retransmit Al Manar) is difficult to reconcile with a myriad cases protecting under the First Amendment both the expenditure of money to finance speech,93 and the republication of another’s speech for compensation.94 It is true that Iqbal’s conviction can probably be defended under the Supreme Court’s strict scrutiny analysis in Holder, but those were not the grounds advanced by the court (the Iqbal prosecution predated Holder).

Several of the other prosecutions discussed above (including the Holy Land Foundation, Islamic American Relief Agency, Hammoud, and Afshari/Rahmani cases) together raise yet another issue regarding the scope of First Amendment protections in the context of terrorism prosecutions. In all of these cases, the sole legal basis for either prosecuting the defendants under the material-support statute, or designating them as a Specially Designated Global Terrorist (with the serious attendant financial consequences) was the fact that the individual or entity provided financial support to an FTO. Furthermore, in each of these cases the court rejected a First Amendment defense on the grounds that the Constitution does not protect a right to fund terrorism because funding is not protected speech or association. In this regard, the decisions seem consistent with the Supreme Court’s equally cavalier conclusion that the material support statute did not violate freedom of association because it did not ban membership, only material support. In other words, both the Supreme Court and these lower courts simply assumed that money is not association. The Hammoud court built on this idea by describing the provision of the provision of material support as “conduct” not “association.”95 The difficulty, as we shall see in the next part, is that this statement is flatly inconsistent with numerous decisions in other areas of law, raising the question of whether the right

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91 For a recent judicial discussion of these difficulties, see Hedges v. Obama, 2012 WL 3999839 at *39 (S.D.N.Y. 2012).
95 See supra, note _ and accompanying text.
of association means something different in the terrorism context than elsewhere (and if so, why).

Finally, we come to the Lackawanna Six. In some ways, this prosecution seems the most straightforward of those described above, since the actions for which the Six were prosecuted – obtaining weapons training from Al Qaeda – would not appear to be conduct conceivably protected by the First Amendment. Indeed, insofar as some of the other prosecutions (notably Ahmad and Mehanna – though the latter is a stretch given his failure to find a camp) can be tied to terrorist training, that would appear to help avoid First Amendment pitfalls. But in fact, appearances can be deceptive. The difficulty is that the material-support statute does not itself prohibit obtaining weapons training. Of course, the weapons training imparted knowledge to the defendants, but § 2339B prohibits individuals providing material support to an FTO, not vice-versa. And on the facts of the Lackawanna Six litigation, there was a notable absence of proof that the defendants’ training had benefited Al Qaeda in any way, given the defendants’ failure to plan for or take any overt acts towards acts of violence. Seen through this lens, there is a strong argument that the Lackawanna Six were successfully prosecuted for providing material-support simply because they associated with (joined?) Al Qaeda, a result in obvious tension with Holder’s saving interpretation of § 2339B as permitting simple membership.

In short, the treatment of the First Amendment in terrorism prosecutions is a mess. It is unclear what exactly the line is between protected “independent” and illegal “coordinated” advocacy in support of an FTO. It is unclear what forms of “pure” association with an FTO are protected and which cross the line into material support. And it is unclear why even speech explicitly undertaken on behalf of an FTO is unprotected, even though in other contexts such political speech is treated as lying at the core of First Amendment protections. In the next Part, I will examine these tensions in a more systematic way and place them in the context of modern First Amendment doctrine, before in the last Part seeking a path out of this thicket.

III. TERRORISM AND ASSOCIATION

This article seeks to examine the relationship between terrorism and the First Amendment. Until now, it has focused on the facts and legal issues associated with a number of terrorism prosecutions. We now turn to the First Amendment. What rights does the First Amendment protect that might be implicated by the War on Terror?

As always, it is useful to begin with the text. The First Amendment states (leaving aside the Religion Clauses) that “Congress shall make no law . . . abridging

96 There is a separate statute that does prohibit obtaining military training from a terrorist group, but it was not enacted until 2004 and so could not be invoked in the Lackawanna Six prosecution. See 18 U.S.C. § 2339D. For a complex set of reasons, although this statute was passed in 2004, as of 2009 only a single prosecution had been brought under it. See Robert M. Chesney, Terrorism, Criminal Prosecution, and the Preventive Detention Debate, 50 S. Tex. L. Rev. 669, 688-689 (2009); United States v. Maldonado, 2007 WL 7772853 (S.D. Tex. 2007) (criminal complaint). However, there are cases currently pending which charge violations of § 2339D. See United States v. Medunjanin, 2012 WL 1514766 (E.D.N.Y. May 1, 2012); United States v. Ahmed, 2012 WL 983545 (S.D.N.Y. March 22, 2012).
the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” Of these provisions, the Speech and, to a lesser extent, the Press Clauses of the First Amendment have received by far the most judicial and scholarly attention, so we will start with them. It is of course well-established that the First Amendment generally protects speech unless the speech falls within a well-established category of unprotected speech such as obscenity or defamation, and it is equally well-established that within the realm of protected speech, speech on the topic of politics or public affairs receives the highest level of protection. Finally, the Court has repeatedly emphasized that the First Amendment’s protections for political speech extend to all ideas, no matter how distasteful or in opposition to the existing social order. Under these generous standards, there can be little doubt that most speech in support of terrorism constitutes political speech, presumptively entitled to the highest level of constitutional protection, and no judge or scholar has seriously questioned this conclusion.

The First Amendment’s protections are not, however, absolute. The Court has long recognized that incitement – speech which encourages others to engage in violence – constitutes unprotected speech which may constitutionally be suppressed. The modern Court, however, has defined the category of incitement extremely narrowly. In its landmark 1969 decision in *Brandenburg v. Ohio*, the Court held that speech may be punished as incitement only if it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” In principle (though as we have seen not necessarily in practice), speech urging others to engage in acts of terrorism or violent Jihad should be punishable only if it meets the *Brandenburg* standard, a very high threshold indeed.

Incitement and *Brandenburg*, however, is not the focus of this article (though it is not irrelevant either). Nor indeed is free speech. Instead, this article focuses on another, equally significant right which has been given short shrift by the courts, the freedom of association, and textually not on the Speech and Press clauses, but rather on the Assembly clause of the First Amendment. Let us start with text. The First Amendment explicitly protects freedom of peaceable assembly as an independent, and co-equal right to freedoms of speech and the press. Moreover, as John Inazu has extensively documented, throughout most of our history until the mid-twentieth century the freedom of assembly was treated, by courts and the public alike, as an extremely significant right, central to the American experience of

97 U.S. Const., Amend. I.
101 For a brief description of the evolution of the incitement doctrine, see Ashutosh Bhagwat, Associational Speech, 120 Yale L.J. 978, 1003-1005 (2011).
103 For a detailed discussion of the undermining of the *Brandenburg* test in the War on Terror, see Thomas Healy, *Brandenburg in a Time of Terror*, 84 Notre Dame L. Rev. 655 (2009).
self-governance. During the first half of the twentieth century, in particular, the Supreme Court vigorously asserted and enforced an independent right, which it variously denoted as “assembly” and “association,” of citizens to join together in both temporary and permanent groups, for a variety of purposes including especially political ones, and also clarified that this right extended to “subversive” groups such as the Communist Party. Furthermore, cases during this period described the right of assembly as “cognate to those of free speech and free press and . . . equally fundamental.” Beginning with with the Supreme Court’s 1958 decision in NAACP v. Alabama ex rel. Patterson, however, the Court gradually abandoned the independent right of assembly/association, replacing it with a truncated, nontextual right of “expressive association” which protects only the right to associate for speech-related purposes. Indeed, John Inazu notes that the Supreme Court has not decided an Assembly clause case since 1983.

For all of the Supreme Court’s neglect, an examination of the history thus leaves no serious doubt that the First Amendment is best read to protect an independent right to form groups with fellow citizens for purposes relevant to democratic self-governance. For the purposes of my analysis, I will assume that such an independent right of assembly/association exists, and may be asserted by defendants in terrorism prosecutions (though as we will see, to say that the right exists does not mean that it is limitless). It should be noted, however, that much of the discussion that follows would not be significantly altered if the freedom of association was limited, as the modern Supreme Court seems to assume, to expressive association. This is because almost all FTOs are highly expressive in that their purpose is to advance and propagate a political and/or religious ideology, and one of the primary means they employ to do so is through propaganda/speech. This statement is true of Hezbollah, of Hamas, of the PKK, of the Tamil Tigers, of the LeT,


105 Bhagwat, supra note __, 120 Yale L.J. at 983-985 (discussing, among other cases, De Jonge v. Oregon, 299 U.S. 353 (1937), in which the right to assemble with the Communist Party was protected); David Cole, Hanging with the Wrong Crowd: Terrorists, and the Right of Association, 1999 S. Ct. Rev. 203, 216 & n.39.


108 The decline of the independent right of assembly/association and the rise of expressive association has been extensively recounted elsewhere, and here I aim only to briefly summarize the results of that scholarship. See especially Inazu, supra note __, at 61-62, 79-84, 132-135, 141-144; Bhagwat, supra note __, 120 Yale L.J. at 985-989.

109 Inazu, supra note __, at 62.

110 For a further defense of this principle, see Cole, supra note __, 1999 S. Ct. Rev. at 226-229;

111 I will henceforth describe the right as freedom of association because that is the dominant modern nomenclature. There is some historical support for the proposition that the term “assembly” contained in the constitutional text protected temporary gatherings, while the term “association” referred to more permanent groups, whose constitutional status was a bit less clear. See Jason Mazzone, Freedom’s Association, 77 Wash. L. Rev. 639, 742-743 (2002). However, as the discussion in the text indicates, throughout most of our history the public and the courts used the terms assembly and association interchangeably, and clearly presumed constitutional protection for permanent groups.

112 See infra Part IV.
and indeed of Al Qaeda itself – as illustrated by the large percentage of terrorism prosecutions that ultimately rest on speech. This is not to these organizations are exclusively or even primarily expressive – but neither obviously are the Boy Scouts, yet the Supreme Court has accorded full expressive association rights to that group.\textsuperscript{113} If as I argue the freedom of association is a stand-alone right, then a fortiori it would seem to extend to citizens seeking to associate with FTOs. And if it is limited to expressive association, nevertheless the mixed nature of FTOs is not reason enough to deny individuals the right to associate with them. If FTOs’ associational rights can be restricted, it must be on some other grounds.

Now we may return to terrorism, and its relationship to the right of association. Our starting point must be that invoking the word terrorism cannot end all analysis, any more than the word Communism should have in an earlier era. Indeed, in \textit{Holder} the Supreme Court appeared to acknowledge this point by interpreting the material-support statute to not bar simple membership in FTOs and implying that it could not do so constitutionally. In fact, however, the actual contours of the \textit{Holder} analysis, in combination with lower court decisions such as those recounted above in Part II, have left very little substance to this concession, in the process eviscerating the right of association itself. Freedom of association means that individuals may not be prosecuted for membership in FTOs. But what, in this context, does “membership” mean? It would appear that the answer is “almost nothing.” As Wadie Said and David Cole point out, the membership protected by \textit{Holder} is entirely hollow because it does not permit any acts on behalf of an FTO, since this would constitute providing “personnel” in violation of §2339B, or even the payment of membership fees to an FTO since that would constitute material support in the form of funds\textsuperscript{114} (a point also established by cases such as \textit{Holy Land Foundation} and \textit{Hammoud}).

This point is further illustrated by the prosecution of the Lackawanna Six. Recall that in this case the defendants were found guilty of providing material support to Al Qaeda on the basis of their attending an Al Qaeda training camp, where they received weapons training, and meeting with Osama bin Laden (all before the September 11, 2001 attacks)\textsuperscript{115}. Given the fact, noted earlier, that the government failed to prove any benefit that the Six provided to Al Qaeda, the implication of this case seems clear: joining an FTO, meeting with its leaders, and taking actions suggesting support for the organization’s goals alone is sufficient to violate the material-support statute. But if this alone crosses the line, what exactly is the “membership” that the \textit{Holder} Court claimed remains protected conduct? In short, whatever the Supreme Court said in \textit{Holder}, in practice the right of membership in an FTO is wholly fictitious since any individual foolish enough to invoke it is likely to be found in violation of §2339B.\textsuperscript{116}

\textsuperscript{113} See Boys Scouts v. Dale, 530 U.S. 640 (2000).
\textsuperscript{115} See supra notes \_\_ \_\_ \& accompanying text.
\textsuperscript{116} For a similar argument, see Cole, \textit{supra} note \_\_1999 S. Ct. Rev. at 247-248.
The muddle increases when one considers Tarek Mehanna's case. Mehanna's speech, with no accompanying conduct, was found to violate the material-support statute because it was sufficiently coordinated with Al Qaeda. But as noted earlier, that finding of coordination was not based on any strong evidence of ongoing dialogue between Mehanna and Al Qaeda leaders, but rather based on Mehanna's stated belief that he was acting as a "wing" of Al Qaeda. There are two puzzles here. First, Mehanna's conviction and the trial judge's rejection of his First Amendment defense reveal an extremely odd implication of Holder, when we juxtapose two separate holdings in the latter case. In analyzing the free speech claim in Holder, the Court concluded that the material-support statute was not a flat ban on political speech because it condemned only speech "to, under the direction of, or in coordination with" an FTO, not independent advocacy. But in rejecting the association claim, the Court held that membership in an FTO alone is protected conduct. Presumably, however, active membership in an FTO would be sufficient to establish coordination, especially given the finding in Mehanna of coordination despite minimal contact between Mehanna and Al Qaeda members. Put this together and under current law one may join an FTO, one may speak in favor of an FTO, but not both. This is bizarre. After all, what is the point of membership in a group one cannot speak in support of? Indeed, is it not the whole point of the Court's "expressive association" jurisprudence that speech engaged in through associations is especially favored constitutionally? More broadly, there is a strong argument to be made that, for reasons both historical and theoretical, when the political rights protected by the First Amendment such as speech and association are exercised in tandem they deserve special solicitude. It should be noted in this regard that all the original drafts of the Assembly Clause, including James Madison's original proposal to Congress, the proposals that emerged from state ratifying conventions, and the version in George Mason's Master Draft of the Bill of Rights which provided the basis for those proposals, all described a right of the people "peaceably to assemble together and consult for their common good." This right was also inevitably linked to the right to petition the legislature for a redress of grievances. In other words, the right of assembly was a right to gather together with fellow citizens, to speak together, and to speak in unison to those in power. By effectively banning all speech in the context of membership, Holder and Mehanna appear to stand these principles on their head.

A second, even more significant implication of the Mehanna case is that just as the right of association (through membership) that the Holder Court claimed was not barred by the material-support statute turns out to be wholly illusory, so too is the right of independent advocacy on behalf of an FTO. The roots of the problem lie in Holder itself. While as noted above the Holder majority held that the material

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117 Holder, 130 S. Ct. at 2722-2723.
118 This argument is laid out in detail in Bhagwat, supra, 120 Yale L.J. at 995-1002.
120 Id. at 140.
122 Ibid.; Cogan, supra note __, at 129, 140.
support statute did not bar independent advocacy, in just the previous section of the opinion the Court had refused to provide any guidance whatsoever on what forms of communication or conduct might cross the line into coordination.\textsuperscript{124} Building on this lack of clarity, in the \textit{Mehanna} case coordination, as noted above, was found based on the defendant’s actions alone, taken in response to a general plea from an FTO. This finding suggests that coordination/membership can be unilateral, which is certainly a rather unusual view of what association means. But more fundamentally, it makes the safe harbor of independent advocacy very dangerous indeed, since the supposedly protected speech itself can become proof of coordination. What confidence could any speaker have, then, that speech in favor of an FTO will not result in a successful prosecution?

Perhaps the underlying theory behind the \textit{Mehanna} court’s approach was that speech such as Mehanna’s, which actively seeks to recruit individuals to perform violent acts on behalf of Al Qaeda, crosses the line between protected “abstract advocacy” and unprotected incitement. This, however, makes a shambles of long-established principles of free-speech law. How, for example, can this approach be reconciled with Justice Holmes’s memorable phrase “every idea is an incitement,”\textsuperscript{125} the very point of which was to reject a distinction between abstract advocacy and incitement, insisting instead on proof of actual and imminent harm. More fundamentally, this attempted distinction simply cannot be reconciled with \textit{Brandenburg}, the foundational case in this area (and the direct heir to Justice Holmes’s dissent in \textit{Gitlow}), which insists the First Amendment does “not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”\textsuperscript{126} The \textit{Mehanna} prosecution does not appear to have made any effort to prove that Mehanna’s website posed a threat of inciting imminent and likely violence, after all. Instead, the government (successfully) sought to avoid \textit{Brandenburg} altogether by recasting Mehanna’s actions as “coordination” and “material support.” Such an approach could just as easily have been used to justify the now-discredited anti-Communist prosecutions of the first and second Red Scares.\textsuperscript{127} In short, the \textit{Mehanna} court’s understanding of the \textit{Holder} decision threatens to undermine a well-settled line of precedent that historically and logically lies at the heart of free-speech law.

Nor is \textit{Mehanna} the only post-9/11 terrorism prosecution in tension with \textit{Brandenburg}. Jubair Ahmad’s conviction was much like Mehanna’s in that at heart it was based on speech seeking to incite violent action, but there was no proof, or even hint, of likely and imminent violence in response to Ahmad’s speech. Admittedly, in the Ahmad prosecution the proof of coordination with an FTO was much stronger than with Mehanna, since Ahmad acted at the instigation and under the direction of an LeT leader. But the “material support” he provided to LeT consisted of nothing more than inciting speech. In effect, under the theory of prosecutions such as

\textsuperscript{124} Id. at 2722.
\textsuperscript{125} \textit{Gitlow} \textit{v. New York}, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
\textsuperscript{126} See supra note \_\_ (quoting \textit{Brandenburg} \textit{v. Ohio}, 395 U.S. 444, 447 (1969)).
Ahmad’s, the Brandenburg test applies only to purely unilateral speech, not speech in coordination with an FTO, making speech plus association a crime where neither, alone, could be prosecuted.128

Brandenburg and the law of incitement, victims though they are of the War on Terror, are not, however, the primary focus of this article;129 it is rather association. As discussed earlier, while the Supreme Court in Holder purported to preserve a right to association with FTOs through “membership,” terrorism prosecutions in the lower courts (and for that matter, Holder itself) have narrowed this right to the point of meaninglessness. But this is not the only way in which terrorism prosecutions conflict with, and so undermine, decisions protecting the right of association. Consider in this regard the Holder Court's argument that one of the reasons Congress could constitutionally ban even the provision of nonviolent material support to FTOs is that such support can “lend legitimacy” to those organizations, and so facilitate their illegal ends.130 As Justice Breyer pointed out in dissent, this justification cannot really distinguish independent from coordinated advocacy in favor of an FTO, since either form of speech can act to “legitimize” an FTO.131 More fundamentally, this reasoning also cannot be reconciled with the majority’s understanding that §2339B does not forbid membership in an FTO. After all, the choice of an individual not otherwise linked to illegal activity to join an FTO surely lends substantial “legitimacy” to the organization. Indeed, this theory of legitimation provided one of the primary motivations for the infamous prosecution of Anita Whitney during the first Red Scare for membership in the Communist Part.132 a prosecution and theory that was sharply criticized by Justice Brandeis in one of the most influential First Amendment opinions the history of the Supreme Court.133 Moreover, as Justice Breyer also points out, the Holder majority's legitimacy argument simply cannot be reconciled with other, foundational right-of-association cases which uphold the right to join the Communist Party so long as one did not intend to further its violent ends, since such membership surely conferred legitimacy.134 Once again, therefore, the judicial reasoning in terrorism cases is found to be in seemingly irreconcilable conflict with extant First Amendment jurisprudence, a conflict that courts do not even acknowledge, much less seek to reconcile.135

128 Jesse Morton’s prosecution similarly short-circuits Brandenburg, but through the different route of recharacterizing the allegedly inciting speech as a “threat.” For a discussion (and critique) of this approach, see Ashutosh Bhagwat, Details: Specific Facts and the First Amendment, 86 S. Cal. L. Rev. __ (forthcoming 2013).
129 See supra note ___ & accompanying text.
130 See supra note ___ & accompanying text (quoting Holder, 130 S. Ct. at 2725).
131 Holder, 130 S. Ct. at 2736 (Breyer, J., dissenting).
135 The Holder majority’s only effort to respond to Justice Breyer’s argument was a cryptic footnote stating (without explanation) that since §2339B does not ban “pure speech and association,” without more, reliance on the Communist Party cases is “unfounded.” Holder, 130 S. Ct. at 2723 n.4.
Finally, yet another conflict between the analysis of association rights in terrorism cases and broad First Amendment doctrine concerns the treatment of financial contributions. The starting point here is to recognize that a large fraction of the terrorism prosecutions discussed earlier, including the Holy Land Foundation, Islamic American Relief Agency, Hammoud, and Afshari et al. prosecutions were based exclusively on the contribution of money to an FTO. In response to claims that such punishment violated rights of association, the standard judicial response has been that “there is no First Amendment right nor any other constitutional right to support terrorists.” Alternatively, the Hammoud court dismissed First Amendment concerns because the material-support statute “does not prohibit mere association; it prohibits the conduct of providing material support to a designated FTO,” and similarly in Afshari the court concluded that the donations at issue here were “more like the donation of bombs and ammunition than speech.” Moreover, these statements seem to follow the Holder Court’s own reasoning in rejecting plaintiffs’ association claim on the grounds that the material-support statute does not forbid membership in an FTO, and so does not penalize “simple association or assembly,” clearly implying that the provision of material support, including financial support, is not “mere association.”

The problem is how to reconcile this reasoning with statements by the Supreme Court and lower courts in other contexts, notably campaign finance reform, that financial contributions are a form of association protected by the First Amendment. Indeed, the presumption that financial contributions are a form of protected association form the bedrock of an entire line of Supreme Court decisions, starting with the seminal decision in this area Buckley v. Valeo, that subject laws limiting financial contribution to political candidates to close First Amendment scrutiny. Why should it be that a contribution to a political candidate or political action group constitutes protected association, while a similar contribution to an FTO constitutes is entirely unprotected? The only hint of a judicial answer, raised in passing by the Hammoud court, is that the right of association is limited to expressive associations, and FTOs do not qualify. This, however, is most

136 See supra, Part II.A.
138 Hammoud, 381 F.3d at 329.
139 Afshari, 426 F.3d at 1160.
140 Holder, 130 S. Ct. at 2730.
142 424 U.S. 1, 18 (1976) (“the present Act’s contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties.”).
144 Hammoud, 381 F.3d at 328 n.3 (“Hammoud relies in part on cases holding that a donation to a political advocacy group is a proxy for speech . . . . Hizballah is not a political advocacy group, however”) (citation omitted).
unconvincing. First of all, as noted earlier, the flat assertion that FTOs are not expressive seems incomprehensible in light of the extensive political and expressive activities of most FTOs, including most especially Hezbollah (the FTO at issue in Hammoud).\(^{145}\) After all, Iqbal was prosecuted by rebroadcasting Hezbollah’s television station! More broadly, however, for reasons discussed earlier,\(^{146}\) it seems incorrect as a matter of history, text, and theory, to limit the right of assembly/association to expressive associations. Instead, the Assembly Clause of the First Amendment is best understood to protect a free-standing right to associate with organizations whose activities and expression are relevant to the political process. Under that broad definition, at first cut FTOs surely qualify for protection since they are surely political.\(^{147}\) Once the expressive/non-expressive distinction is rejected, therefore, the terrorism cases simply cannot be reconciled with the scope of freedom-of-association in other contexts.

Why does all of this matter? After all, surely the First Amendment does not prohibit the United States government from stopping its citizens from providing funds or other tangible aid to terrorist organizations, which can be used attack U.S. citizens? Indeed, is it really plausible or realistic to expect the government to take no action against acknowledged members of FTOs until an attack is “imminent” and “likely”? Probably not. The problem is that the judiciary’s current failure to acknowledge or grapple with these contradictions at all undermines the Rule of Law. This is itself a dangerous tactic in a conflict that turns so much on convincing the hearts and minds of potential adversaries. But in addition, broad judicial statements dismissing seemingly substantial First Amendment concerns as frivolous threatens to undermine First Amendment rights, including notably associational rights, in other contexts by providing language which “lies about like a loaded weapon” and can be drawn upon by future litigants and courts.\(^{148}\) Given the central role that First Amendment liberties play in the maintenance of our system of democratic government, this seems a grave risk. Better surely to tackle these problems directly, and develop a coherent framework within which to reconcile widely held instincts regarding appropriate limits on activities that aid terrorism with the words and law of the First Amendment. It is to that task that we now turn.

**IV. PEACABLE ASSOCIATION**

One clear and abiding lesson emerging from the previous discussion is that in the course of upholding the criminal prosecutions that lie at the heart of the domestic “War on Terror,” courts are systematically ignoring long-standing First Amendment principles, and in particular, are tearing apart established definitions of the rights of assembly and association. The watered down associational right that emerges from the terrorism cases, a right which theoretically permits membership in an FTO (though as we noted, even that is doubtful), but clearly precludes

\(^{145}\) See supra note ___ & accompanying text.

\(^{146}\) See supra notes ___ - ___ & accompanying text.

\(^{147}\) Though as I will discuss in more detail in the next Part, there are alternative grounds upon which exclusion of FTOs from First Amendment protections might be grounded.

combining membership with communications with an FTO, speech on behalf of an FTO, or any financial contribution to an FTO, has no relation to the robust right to freedom of association protected throughout most of our history. Even the truncated right of “expressive association” protected by the modern Court has been understood to protect a more robust form of membership than the terrorism cases acknowledge. But when one takes into account the broad, free-standing right of association, rooted in the Assembly Clause, which has been recognized throughout most of our history, the damage is even more clear. For example, there seems little doubt that such a right of association must protect a right to pool financial resources – i.e., for individuals to contribute to associations – or the right would have little meaning, since for associations to either speak or act, typically they must expend funds. The bland dismissal in the terrorism cases of a right to “support terrorists” seems irreconcilable with this fact and the history that lies behind it. At the same time, it does seem intuitively unlikely that the Constitution does protect a right to provide Al Qaeda with funds that the organization can use to purchase explosives – after all, the Constitution is not a suicide pact. Some coherent, legal principle must be found permitting reasonable steps to combat terrorism without eviscerating the Assembly Clause.

It is the contention of this paper that a solution is in fact possible. Instead of narrowing the definition of the sorts of actions that constitute association, as courts have done in terrorism cases, we should instead consider carefully what kinds of associations can claim the protections of the First Amendment. To be fair, the Supreme Court in Holder made a gesture in this direction. In setting out the limits of its reasoning in upholding the material support statute, it stated that it did “not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.” Perhaps that is the path out of this conundrum – a rule restricting the associational right to domestic groups, which would permit prosecution for association with foreign entities. After all, FTOs are by definition foreign, and so such a rule would cabin the key terrorism cases without threatening domestic liberties. Moreover, there is precedent supporting the proposition that the protections of the Bill of Rights do not extend to foreigners outside the territory of the United States, lending further support to this thesis.

Ultimately, however, the restriction the Holder majority points towards is unsatisfying. To understand why, it is useful to go back to first principles, and consider why the First Amendment protects associational freedom (or for that matter, speech, the press and petition as well). There exists an extensive body of scholarship demonstrating the close, historical links between the freedoms of the

149 See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (protecting an association’s right to maintain its members’ anonymity); Shelton v. Tucker, 364 U.S. 479 (1960) (protecting an individual’s right not to disclose associational ties); NAACP v. Button, 371 U.S. 415 (1963) (protecting an association’s right to provide legal representation to members); Randall v. Sorrell, 548 U.S. 230 (2006) (protecting an individual’s right to associate with a political candidate by providing financial contributions).
151 Holder, 130 S. Ct. at 2730.
speech, the press, assembly, and petitioning, and the practice of democratic self-governance. Indeed, the significance of the associational right in the United States and its close link to our system of democracy have been recognized by observers as long ago as de Tocqueville. The Supreme Court has similarly been quite explicit in tying the right of association to democratic politics. This is not necessarily to say that the only function of First Amendment liberties, including freedom of association, is to further self-governance; but there can be little doubt that this is their primary function.

At first cut, the close connection between association and self-governance would seem to support the Holder Court’s distinction between domestic and foreign groups. After all, democracy is about self-governance, and in this case “self” means the sovereign people of the United States, not foreigners outside of this country. FTOs such as Hamas or Al Qaeda surely have no legitimate role to play in our system of democracy. Ultimately, however, this argument goes too far. While it seems relatively clear that purely foreign organizations, whether FTOs or otherwise, have no claim to associational rights under the First Amendment, the terrorism cases do not involve that situation, they involve attempts by U.S. citizens and residents to associate with foreign groups. Perhaps in the Framing period such associations would have had limited relevance to democratic politics, but in the globalized world in which we live, a world in which the United States is the dominant international power and has an almost infinite variety of commitments and ties abroad, this position is implausible. Surely, as part of their roles as active citizen-participants in our system of government, U.S. citizens must have a protected right to associate and consult with foreign groups such as Amnesty International, Medecins Sans Frontiers, Greenpeace, Oxfam, and for that matter the Communist Internationale (in its time). To restrict the associational right to purely domestic groups would be crippling to U.S. citizens’ ability meaningfully participate in debating and influencing American policy, a result which cannot be reconciled with the purposes of the First Amendment.

The problem with the distinction between foreign and domestic groups drawn by the Holder Court, the error in its analysis, is that the Court’s reasoning is rooted in neither the text nor the purposes of the First Amendment. One suspects the reason for this is that the Court, in its modern embrace of the ahistorical right of “expressive association,” has lost track of the roots of the associational right. In particular, as discussed earlier, in the past thirty years the Court has entirely forgotten the Assembly Clause, and the fact that the freedom of association is rooted

153 See, e.g., Inazu, supra note __, 84 Tul. L. Rev. at 571-577; Mazzone, supra note __, at 647, 729-730; Abu El-Haj, supra note __, at 547, 554-555, 586-589; Bhagwat, supra note __, 120 Yale L.J. at 991-993; see also Akhil Reed Amar, The Bill of Rights 28-30 (Yale 1998) (arguing that the Assembly Clause protects a right of the sovereign People to assemble in convention, and change their government).


156 I leave aside the more difficult question of foreign citizens residing in the United States. For an argument that self-governance principles support extending the protections of the Bill of Rights to this group, see Bhagwat, supra note __, The Myth of Rights at 264-266.
directly in that constitutional text. If one does turn to the text of the Assembly Clause, however, there emerges an immediate limiting principle: the Assembly Clause does not protect all assemblies but only “the right of the people peacely to assemble.” The right was conceived as one of citizens to gather together and consult on public issues, but was never a right to riot. Furthermore, given the democracy-enhancing goals of the First Amendment, this restriction makes perfect sense since violence per se has no proper role in the democratic process (though as we shall discuss, abstract advocacy of violence may be different). Indeed, in the brief legislative history of the Assembly Clause in the First Congress, there is an express mention of the “abuse” of the right of Assembly during the 1786 Shay’s Rebellion in Massachusetts (though the speaker, Elbridge Gerry, insisted that this was no reason to withhold a right of peaceable assembly). The Supreme Court, in one of its seminal Assembly Clause decisions, described the purpose of the Assembly Clause as “to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.” Thus both the text and the historical understandings of the Assembly Clause limit its protections to peaceful gatherings.

If this restriction applies to assemblies, it must logically apply to associations (which indeed might simply be thought of as permanent assemblies). After all, the underlying purposes of the rights of temporary assembly and permanent association are the same – to enable citizen participation in governing. But that participation must be peaceful. Even the insurrectionary right of assembling in convention that Akhil Amar defends is a right of the collective people to change their government peacefully, not to engage in armed rebellion. Indeed, Tocqueville himself (and others after him) argued that one of the benefits of protecting a right of association is that it provides a social “safety valve,” preventing disaffected citizens from going underground and resorting to violence by allowing them a means to jointly engage in the democratic process. Such an understanding is entirely inconsistent with protecting a right of association with groups engaged in, or explicitly planning for, violence. The textually rooted right of association is one of peaceable association, and may properly be denied to groups outside that definition.

What this means, quite simply, is that the Constitution simply does not protect any right to assemble, or associate, with organizations whose primary activities and goals are violent. And this remains true no matter how ideological or political the group’s motivations happen to be. Al Qaeda is not a peaceable association, any more than the Mafia, and there is therefore no right to associate

157 See supra note __ (citing Inazu, supra note __, at 62).
158 U.S. Const., Amend. I (emphasis added).
159 See THE COMPLETE BILL OF RIGHTS, supra note __ at 144 (quoting speech of Elbridge Gerry).
161 See supra note __; Inazu, supra, at 166-167.
162 See Amar, supra note __, at 28-30.
Importantly, moreover, this reasoning applies fully to domestic associations, no less than foreign ones. This is an important point because terrorism is not, of course, a wholly foreign phenomenon (nor is it, obviously, an exclusively Islamic one). The material-support statute targets foreign terrorist organizations only, but its companion statute, 18 U.S.C. §2339A, is not so limited, and the broader social interest in preventing terrorism encompasses wholly domestic terrorism no less than terrorism inspired from abroad. After all, aside from the September 11 attacks, the most deadly terrorist attack on United States soil was a purely domestic event: the bombing of the Oklahoma City federal office building on April 19, 1995 by Timothy McVeigh. Because the exclusion of non-peaceable associations from First Amendment protections does not turn on the ideological character of the group, it means that no constitutional protection is due to any predominantly violent domestic organizations, whether they be right-wing militias, radical animal-rights groups, or wholly domestic Jihadi groups. Al Qaeda is merely a special case illustrating this general principle.

It is important to note that under this reasoning, what becomes unprotected is the act of associating with a violent group. The exclusion of violent groups discussed above has no application to the freedom of speech, since the Free Speech Clause does not limit its protections to “peaceable” speech. What that means is that, as Holder says, purely independent advocacy, even of terrorism, may not be punished unless the Brandenburg standard can be met. But association with violent groups may be punished regardless of whether it is accompanied by speech. Furthermore, one’s speech may be used as evidence of such association, just as speech such as admissions may be used as evidence of any other crime. Of course, speech alone, even speech supportive of an organization, cannot in itself be equated with association or the free-speech right would be eviscerated. But nor does such speech immunize otherwise unprotected association.

As the above discussion suggests, one perhaps troubling implication of restricting associational freedoms to peaceable associations is that the rights of assembly and association have in some respects a significantly narrower scope than rights of free speech and of the press. In fact, this distinction is quite consistent with extant law. While since 1969 the Brandenburg test has prohibited punishment of speech advocating violence unless it can be proven that the speech is linked to imminent and likely violence, the standard for association is much less demanding. Under the leading case addressing association and violence (the 1961 decision in United States v. Scales), membership in an organization with violent goals may be punished, consistently with the First Amendment, so long as the

\[164\] I do not consider here (because they are beyond the scope of this article) the difficult questions of proof that arise in implementing this restriction, including in particular the extent to which entities may be designated as violent through an administrative process to which the courts then defer in subsequent legal proceedings. See Hammoud, 381 F.3d at 331; Holy Land Foundation, 333 F.3d at 162-163. For a description and critique of the administrative process for designating FTOs, see Sahar Aziz, The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?, 9 Tex. J. on Civ. Libs. & Civ. Rts. 45 (2004).

\[165\] See generally United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998).

\[166\] See supra note \[164\] & accompanying text.

prosecuted individual’s membership is “active and purposive membership, purposive that is as to the organization’s criminal ends.”\textsuperscript{168} No proof of actual, imminent, or likely violence is required.\textsuperscript{169}

Moreover, there is some sense to a legal regime which is more suspicious of, and less willing to protect, groups who are directed to illegal and dangerous conduct as opposed to individuals acting on their own. Groups are powerful, and groups are dangerous. It is precisely because groups are powerful, and concomitantly, that individuals can only effectively participate in democratic governance as members of groups, that we protect the rights of assembly and association in the first place.\textsuperscript{170} But the flip side of this principle is that just as groups can be powerful, so they can also be dangerous. The occasional Unibomber notwithstanding, the reality is that individuals pose a systematically lesser threat to the public than groups, and this is especially so in the context of First Amendment liberties. A single individual calling out for violence to an undifferentiated audience rarely creates a very high risk of violence, thus making the stringent protections of the \textit{Brandenburg} test socially acceptable. But a group of individuals working together, and encouraging each other to take up arms, is quite a different matter. Such a group is more likely to form effective plans, because groups can bring together a mixture of skills. And such a group is more likely to carry them through because an individual acting alone will often suffer doubts, but in a group setting such doubts can be assuaged. This insight regarding the dangerousness of groups underlies the law of conspiracy, and provided the basis for the Supreme Court’s decision in 1927 to affirm Anita Whitney’s prosecution for criminal syndicalism, in one of the foundational cases analyzing associational and assembly rights.\textsuperscript{171}

Once it is recognized that while the First Amendment provides broad protection to violent speech, it provides no protection to violent groups, many of the terrorism cases become much easier to reconcile with constitutional requirements. Most obviously, the many prosecutions based purely on financial contributions to an FTO, including \textit{Holy Land Foundation}, \textit{Islamic American Relief Agency}, \textit{Hammoud}, and \textit{Afshari}, become trivial. After all, even if a financial contribution qualifies as an act of association, as it surely should (whatever the courts have said in this regard, at least in terrorism cases), there is simply no right to associate in any way with a violent group, making the act of association unprotected.

Similarly trivial are the prosecutions, such as those of the Lackawanna Six and brought pursuant to 18 U.S.C. § 2339D, for receiving weapons training from an FTO.\textsuperscript{172} In discussing the Lackawanna Six prosecution, I argued that one perplexing

\textsuperscript{168} \textit{Id.} at 209, 229-230.


\textsuperscript{170} See Abu El-Haj, \textit{supra} note __, 56 U.C.L.A. L. Rev. at 554-561; Bhagwat, \textit{supra}, 120 Yale L.J. at 993, 997.

\textsuperscript{171} See \textit{Whitney v. California}, 274 U.S. 357, 372 (1927) (“That . . . united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.”)

\textsuperscript{172} \textit{See supra} notes __, __ & accompanying text.
aspect of the prosecution was why the act of receiving weapons training from Al Qaeda provided any benefits to Al Qaeda, as required by the material-support statute, § 2339B. That, however, is merely a statutory argument, not a First Amendment one (though it should be noted that when the Lackawanna Six traveled to Afghanistan in 2001, § 2339D, the military-training statute, had not yet been enacted). From the perspective of the First Amendment, not only is association with an FTO not protected, but in addition only peaceable forms of association and assembly are protected. A riot instigated by a previously peaceable group is no more a protected form of assembly than is a riot instigated by the Ku Klux Klan. But of course, the act of receiving military training is by no stretch of the imagination peaceable. Indeed, it would appear to be the polar opposite. The First Amendment therefore poses no barrier to prosecutions for such activities. It should be noted, moreover, that this reasoning applies fully to domestic organizations, and indeed does not appear to be limited to violent domestic organizations. If weapons training is not a form of peaceable association or assembly when engaged in with an FTO, it is no more so with a domestic militia group, or for that matter with the Boy Scouts. There is simply no First Amendment bar to prosecuting such behavior (whether there is a Second Amendment bar is a of course another question).

Javel Iqbal’s prosecution can also probably be justified under this understanding of assembly and association rights. Iqbal, recall, was prosecuted because he was paid by an FTO, Hezbollah, to rebroadcast the organization’s television station, Al Manar.\(^\text{173}\) While Iqbal’s and his associate Elahwal’s prosecutions were rooted in speech acts, it was critical to the rejection of Iqbal’s First Amendment defense that he had been paid by Hezbollah – i.e., that the speech was not independent. That financial relationship constitutes a form of association unprotected by the First Amendment and so permissibly subject to prosecution, even if the same speech, if engaged in independently, might well have been protected under Brandenburg.

Jubair Ahmad’s prosecution follows a similar pattern. His recruiting video for the LeT would probably have constituted protected speech if produced independently, but it was not. It is true that Ahmad, unlike Iqbal, was not paid by an FTO for his work, but he did act under the direction of and for the direct benefit of a terrorist leader. That seems more than enough association to justify prosecution, even if again the speech alone is not.

Finally, a focus on peaceable associations also throws useful light on the prosecution of Sami Al-Hussayen. Al-Hussayen was of course acquitted of the key terrorism charges against him, making the First Amendment issues somewhat moot. However, what the above analysis suggests is that if it can be demonstrated that an individual is intentionally creating mechanisms, including internet links, which enable others to provide funding to an FTO, that should suffice to permit prosecution under the material-support statute, and eliminate any First Amendment defense. Just as funding is association, so too is fund raising – indeed, most of the funding cases, including Holy Land Foundation, Islamic American Relief Agency, Hammoud, and Afshari could easily be recharacterized as a fund-raising cases, but

\(^{173}\) See supra notes \_\_ - \_\_ & accompanying text.
the fact of association would surely not be affected. And if fund-raising in the direct form of collecting and forwarding money is unprotected, so surely is the act of channeling funds without taking possession oneself (so long as done knowingly). These are all essentially equivalent actions, with similar associational implications—after all, surely no one would question that creating a website to help raise funds for a protected association would itself be conduct protected by the First Amendment? When that fund-raising is for an unprotected group, however, First Amendment protections disappear.

This is not to say, of course, that recognizing the lack of protection for violent groups solves all First Amendment problems in the context of terrorism. In particular, Tarek Mehanna and Jesse Morton remain problematic. In both cases, the defendants were prosecuted for their speech without strong evidence that they were acting in association with an FTO. But under the analysis set forth above, the essence of a prosecutable crime, and the avoidance of the stringent Brandenburg standard, is association with a violent group. Absent evidence of such association, the prosecution boils down to one directed at pure, independent speech. And that is the realm of Brandenburg. There are admittedly complications in both cases that might justify the prosecutions. In the case of Mehanna, there were suggestions by the government that Mehanna might have been in contact with Al Qaeda leadership, which would create the requisite association; and Morton was convicted based on the theory that his call for action constituted a “threat” outside the protection of the First Amendment. But on the whole, the convictions of these individuals without satisfying the Brandenburg standard for incitement pose severe First Amendment problems.

V. DUAL-FUNCTION ASSOCIATIONS

There is one last issue that requires attention. Up to this point, the analysis in this article has presumed that there is a clear demarcation between unprotected “violent” associations and protected “peaceable” ones. And indeed, in many cases that line does seem quite clear. A group such as Al Qaeda, or for that matter the Mafia, is surely not a peaceable association under any definition, since its primary function and operations are violent. Nor, as noted earlier, are groups such as Al Qaeda’s religious or political motivations relevant, since the First Amendment limits its protections to peaceable assemblies, not peaceable, nonpolitical assemblies. The problem, however, is that not all groups are as easily classified as Al Qaeda, because not all groups are so single-minded. What should the constitutional status be of groups that pursue both unprotected, violent ends, and protected, nonviolent ends?

175 See Abel, supra note __, at 22-23.
176 See supra note __ & accompanying text; Virginia v. Black, 538 U.S. 343, 359 (2003). For a critique of the use of the “threat” doctrine to prosecute speech such as Morton’s and a proposed alternative solution, see Ashutosh Bhagwat, Details: Specific Facts and the First Amendment, 86 S. Cal. L. Rev. __, __ (forthcoming 2012).
177 See supra note __ & accompanying text.
The answer to this question turns out to be extremely difficult, but critical. The reason it is critical is that dual-function groups, which are characterized by a combination of violent and nonviolent goals and methods, are ubiquitous. For example, the two FTOs at issue in the *Holder* litigation, the PKK and the Tamil Tigers, both concededly “engage in political and humanitarian activities” in addition to terrorist acts.\(^{178}\) Similarly, as noted earlier, the FTO Hezbollah is an established political party in Lebanon and supports a vast array of nonviolent political and social activities alongside its violence – perhaps part of the reason why the European Union has not yet classified Hezbollah as a terrorist group. And even Hamas, the Palestinian group which is widely accepted to be a terrorist group, necessarily has substantial nonviolent activities given that since 2007 it has been in effective political control of the Gaza Strip.\(^{179}\) The question that arises is whether a constitutional right exists to associate with such dual-function groups, so long as the association itself does not touch upon the group’s violent activities. Or put differently, do a group’s nonviolent activities partially immunize it from the constitutional consequences of its violent activities?

The answer given by the *Holder* Court to this question was quite clear: “No.” The *Holder* majority emphasized that any material support given to an FTO, even material support directed at a dual-function FTO’s nonviolent activities, nonetheless can end up advancing violence because material support is fungible.\(^{180}\) And the Court specifically rejected the view that only financial support is fungible.\(^{181}\) It must be acknowledged that some of the arguments advanced by the Court to defend this position, such as that material support lends “legitimacy” to FTOs,\(^{182}\) or that material support to an FTO might strain relations between the United States and its allies,\(^{183}\) seem forced since they fail to meaningfully distinguish association with an FTO from speech supporting an FTO. Ultimately, however, there is some force to *Holder’s* basic conclusion, even if not to its reasoning. A group which systematically engages in violence, which by definition all FTOs do, is a violent group. The fact that a group is both violent and nonviolent does not mitigate that reality. And the associational right simply does not extend to violent groups. When an individual chooses to associate with a dual-function FTO such as Hezbollah, he or she is associating with that group, not some firewalled, nonviolent element of the group. Given the famous leakiness of firewalls, and the impossible complexity of ensuring that different parts of groups do not support each other (especially when the relevant group operates abroad and illegally),\(^{184}\) it seems entirely reasonable, as a constitutional matter, for the government to define the act of associating with an FTO as associating with the entire FTO, the *group*, as opposed to with parts of it. For the same reasons, the *Holder* Court appears to have been justified, both as a constitutional and statutory matter, to decline to interpret the material-support

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\(^{178}\) *Holder*, 130 S. Ct. at 2708.


\(^{180}\) *Holder*, 130 S. Ct. at 2724-2727.

\(^{181}\) Id. at 2725.

\(^{182}\) Ibid.

\(^{183}\) Id. at 2726-2727.

\(^{184}\) See id. at 2727-2729.
statute to require proof of a defendant’s intent to further the FTO’s illegal activities since regardless of one’s intent the fact of a forbidden association remains. 185

So, the First Amendment is probably best-read not to protect dual-function groups. An important clarification must, however, be emphasized here. The definition of violent, unprotected assemblies and associations includes all groups that engage in, or are actively planning, violence. It does not cover groups that merely advocate violence in abstract terms. That is the learning of the Court’s foundational associational decisions such as De Jonge v. Oregon 186 and Scales v. United States, 187 and it also underlies Brandenburg and that case’s predecessor Yates v. United States. 188 An otherwise peaceable group does not become non-peaceable simply because its members discuss the permissibility, or even advisability, of violence under certain circumstances. To hold otherwise would be to severely restrict the protections of the First Amendment, eliminating many groups outside of a narrowly defined mainstream. This was the approach taken by the Court, and by the country, during the Red Scare and McCarthy eras of the 1920s and 1950s, but it is surely one the nation has regretted, and given the broad tools available to the government to target groups that pose any sort of tangible threat of violence, it also seems quite unnecessary in the battle against terrorism. Under this approach, a domestic terrorist cell planning violence is completely unprotected no matter what the extent of its nonviolent activities. But at the same time, a group which only discusses or even abstractly condones violence is fully protected, whether it be a gun-rights organization advocating an anti-federal-government reading of the Second Amendment, a group endorsing the virtues of Jihad, or the Communist Party.

This limitation on the definition of non-peaceable associations, to groups that engage in or actively plan violence, is for the reasons noted above essential if the exception is not to swallow the general rule protecting associational freedoms. It must be acknowledged, however, that this principle will not always be easy to apply. The full question of the procedures, and strength of proof, that should be required before a group can be definitively designated an FTO is, as noted earlier, extremely complex and beyond the scope of this paper. 189 It may well be, however, that the distinction between foreign and domestic groups relied upon by the Holder Court 190 might be of use here. While as noted earlier the complete exclusion of foreign associations from the protections of the First Amendment cannot be reconciled with the Amendment’s purpose to advance democratic self-governance, there can be no doubt that associations composed exclusively or primarily of citizens are more relevant to, and more directly connected with, the democratic process than primarily foreign organizations. At the same time, it seems equally obvious that as the orientation of a group turns more violent, its relevance to democratic self-governance becomes more marginal. It may be, therefore, that with respect to

185 Id. at 2717.
186 299 U.S. 353 (1937).
188 354 U.S. 298, 318 (1957) (construing the Smith Act to forbid only “advocacy directed at promoting unlawful action,” not “abstract advocacy”).
189 See supra note __.
190 See Holder, 130 S. Ct. at 2730; supra note __ & accompanying text.
foreign groups a somewhat lower quantum of evidence may be required to strip a group of protection on the grounds that it is not peaceable, than with a domestic group. Or put perhaps more positively, it may well be that the Constitution is best read to require strong, positive proof that a domestic group has engaged in, or is actively planning to engage in violence before a Court will place it outside the bounds of freedom of association, even if a similarly situated foreign group may be denied protection more easily. Of course, even under such an approach there will be intermediate cases of groups that possess a mixed domestic and foreign membership, but those cases will be relatively rare (especially since we are concerned here only with potentially violent groups) and can probably be dealt on a case-by-case basis.

CONCLUSION

The freedoms of assembly and association protected by the First Amendment are fundamental constitutional liberties that play a critical role in our system of democratic self-governance; they therefore cannot be allowed to weaken or narrow. Terrorism poses the most significant security threat the United States has faced since the end of the Cold War, and perhaps the most significant domestic threat since World War II; the government must therefore possess the tools to effectively combat that threat. The questions this article explores are whether the courts have successfully reconciled those two statements, and more broadly whether they can be reconciled. As to the first question, it is quite clear that the courts have not identified any legal principles regarding the role of the First Amendment in the domestic War on Terror, and indeed have barely made an effort in that direction. This article has demonstrated, however, that the answer to the second question is at least a qualified yes. There does exist an understanding of the rights of assembly and association, rooted in the text and history of the First Amendment, which retains a robust set of constitutional protections within their proper scope, while permitting prosecution of dangerous groups.

Behind these debates, however, looms a much broader question. The truth of the matter is that in the thirty years following the Supreme Court’s path breaking reformulation of free-speech law in its 1969 Brandenburg decision, First Amendment liberties were vigorously protected without much controversy because that was an era of relative geopolitical stability. In the wake of the September 11 attacks, however, the United States finds itself once again facing serious foreign and domestic threats. In that atmosphere, do either the courts or the nation as a whole have the will to continue to vigorously enforce the First Amendment in the face of perceived violence or subversion? The argument presented here supports the view that we absolutely can and should retain a strong First Amendment, at least in part because the First Amendment, properly understood, does not force us into absurd choices. What legal analysis cannot answer, however, is whether we have the will to do so.