

PANEL DISCUSSION ON RECENT U.S. SUPREME COURT  
FREE SPEECH DECISIONS & THE IMPLICATIONS OF THESE  
CASES FOR AMERICAN SOCIETY

*Alan B. Morrison\**  
*Susan N. Herman\*\**  
*Robert M. O'Neil\*\*\**  
*Ronald K.L. Collins\*\*\*\**  
*Robert D. Richards\*\*\*\*\**  
*Adam Liptak\*\*\*\*\**

MR. BENJAMIN POMERANCE: Good afternoon, everyone. Welcome back to those of you who are returning from the morning session, returning from lunch. And welcome for the first time to those of you who are joining us for the first time today. We are very glad and very proud to have such a good turnout for an excellent afternoon discussion about free speech issues past and present.

Before we begin the afternoon discussion, it is my pleasure to turn the work of giving the introductions over to someone who is new to our Albany Law School community, but someone who has already established a very positive reputation with the Law Review and with the entire student body. We are thrilled to have her here today: Albany Law School's Dean and President, Penelope Andrews.

*(Applause)*

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## INTRODUCTION OF THE PANELISTS

DEAN & PRESIDENT PENELOPE ANDREWS: Good afternoon. I want to start by thanking the people who made this possible, and who certainly contributed to making this the success it has been thus far. I want to start obviously by thanking Benjamin, who has done just an amazing job, as we have seen and heard this morning. Thank you.

And Mary D'Agostino, who is the editor-in-chief—who is back there. And then the people from Technical Services. And all the other people in this building who worked behind the scenes to make this possible.

I came here two-and-a-half months ago. And this morning when I was listening to the debate, I thought about one of the things that people tell you and that we experience as we grow older. It is that we lose the “wow factor”; that we become cynical; we’ve seen it all; and so on. So this morning I thought no, I have not lost the “wow factor.” I was so impressed by the debate, and this is thanks to the students.

The second thing I want to say is that I am constantly amazed at the wonderful group of students that we have at Albany Law School. I don’t have children of my own, so I don’t know what parental love may feel like, but I think it is something that is unfiltered and completely unconditional love. That’s what I felt this morning. Our students are just wonderful, and today’s event is a reflection of that. And of course I also want to thank the faculty, who have some part, especially when students come to the second and third year, in becoming what they are.

I was going to spend this time talking about growing up in South Africa and the lack of freedom of speech and the First Amendment. But no, I thought—for another time.

This is one of the values of American society that can be exported. It’s one of the good things about the United States. In many societies we still struggle with this idea of really giving a voice to people, a real voice, a genuine voice, and not living in fear of government.

So it is my great joy to introduce the speakers. We could talk about them all afternoon. You have the abbreviated bios in the pamphlets and brochures that were handed out, and you can also go on the Web and Google them. Many of them get five million hits at a time. So there is a lot about them.

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So let me start by introducing Ronald Collins, who is the Harold S. Shefelman Scholar at the University of Washington School of Law and a Fellow at the Washington, D.C. office of the First Amendment Center.

He writes and lectures on freedom of expression, and developed the First Amendment Center's online Supreme Court Library.

He has served as a law clerk to Justice Hans Linde on the Oregon Supreme Court, and thereafter was a judicial fellow under Chief Justice Warren Burger of the U.S. Supreme Court.

He has taught constitutional law and commercial law at Temple Law School and George Washington Law School. And he has published some fifty articles, as well as a book on the trials of Lenny Bruce.

This is what I found out about Professor Collins when I trolled the Web: that in 1967, before he entered college, Professor Collins appeared on *The Dating Game*, which ran on ABC television. And he was the bachelor chosen.

*(Applause)*

His wife's not here, so I can say it.

*(Laughter)*

Susan Herman, a friend, was elected president of the American Civil Liberties Union in October 2008, and after having served on the ACLU National Board of Directors for twenty years, was a member of the Executive Committee for sixteen years, and was General Counsel for ten years. And she holds the chair of Centennial Professor of Law at Brooklyn Law School, where she currently teaches courses in constitutional law and criminal procedure, and seminars on law and literature, and terrorism and civil liberties.

Her recent books include *Taking Liberties: The War on Terror and the Erosion of American Democracy*, and *Terrorism, Government and Law: National Authority and Local Autonomy in the War on Terror*. She was editor and co-author of the latter work with one of our professors, Professor Paul Finkelman. Professor Herman has appeared on PBS, C-Span, NBC, MSNBC, and a series of appearances on the Today Show and Today in New York, and she has participated in Supreme Court litigation.

Before entering teaching, Professor Herman was *pro se* law clerk for the United States Court of Appeals for the Second Circuit, and associate director of Prisoner's Legal Services of New York.

I'm also pleased to say that I was the person who took Professor Herman to her first trip to South Africa in 2005, when I organized a conference there on law and rights, and she came along. So that, I didn't have to get off the Web. Welcome.

Robert O'Neil was the former director of the Thomas Jefferson Center for the Protection of Free Expression, and an authority on the First Amendment. He teaches constitutional law, free speech and the press, and church and state at the University of Virginia.

Professor O'Neil was the University of Virginia's sixth president, a position he held from 1985 to 1990. Other posts include provost of the University of Cincinnati, vice president of Indiana University, and president of the statewide University of Wisconsin system.

After law school he clerked for U.S. Supreme Court Justice William Brennan, Jr. He is currently Director of the Ford Foundation's Difficult Dialogues Program, and Chair of the American Association of University Professors Special Committee on Academic Freedom and National Security in Times of Crisis.

With such an august bio, I didn't think it appropriate to go and do a Google search on him.

Robert Richards is the founding co-Director of the Pennsylvania Center for the First Amendment at Penn State. He has worked as a news writer, anchor, reporter, and talk show host for stations in the Northeast, and for NBC News in New York City.

Professor Richards is the co-author of the 2003 book *Mass Communications Law in Pennsylvania*, and is also the author of *Freedom's Voice: The Perilous Present and Uncertain Future of the First Amendment*. At Penn State, he has served as the head of the Journalism Department and Associate Dean of the College of Communications, where he created and currently directs the Pennsylvania Center for the First Amendment. He teaches undergraduate and graduate courses in mass communications law, the first amendment, and news media ethics.

But most importantly, he's a wine maker and a certified specialist of wine, and has passed the first level examination of the prestigious Court of Master Sommeliers. So he knows how to make good wine.

MR, RICHARDS: In case this law thing doesn't work out for me.

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*(Laughter)*

DEAN ANDREWS: And our moderator—our very esteemed moderator—Mr. Adam Liptak, who is the Supreme Court correspondent for the *New York Times*. He joined the *Times* staff in 2002, and began covering the Supreme Court in the fall of 2008.

Mr. Liptak is a lawyer, and has written a legal column, “Sidebar,” since 2007. His series on ways in which the United States legal system differs from those of other developed nations, “American Exception,” was a finalist for the 2009 Pulitzer Prize.

He worked for four years at Cahill Gordon & Reindel as a litigation associate specializing in First Amendment matters. In 1992, he returned to the *Times* Legal Department for ten years. And during that time he has taught media law at the Columbia University School of Journalism, UCLA Law School, and Yale Law School. I’ve been trying to persuade him to come to Albany Law School for a few days and teach a course here.

Mr. Liptak first joined the *Times* after graduation from Yale University with a degree in English.

For those of you who follow him on Twitter, you will see that this summer he told a former colleague how he missed the old days as a copy boy, when they had one deadline a day rather than the four they have now. He doesn’t mention in his tweet, as is mentioned in his bio, that the good old days for him included clerical work and fetching coffee.

This week he tweeted a humorous Homer Simpson clip. Homer, who begrudgingly votes for a president, complains, “Why do we have to choose our leaders? Isn’t that what we have the Supreme Court for?”

*(Laughter)*

And then we have Mr. Morrison. Professor Alan Morrison was introduced this morning. He is the Lerner Family Associate Dean for Public Interest and Public Service at George Washington Law School. He is doing double-duty for us, as he was on this morning as well.

He creates pro bono opportunities for students, brings public interest programs to the law school, encourages students to seek careers in the non-profit sectors, and finds ways to fund their legal education to make it possible for them to pursue careers outside of traditional law firms.

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For most of his career, Dean Morrison worked for the Public Citizen Litigation Group, which he co-founded with Ralph Nader in 1972 and directed for over twenty-five years.

He has argued twenty cases in the U.S. Supreme Court. A graduate of Yale University and Harvard Law School, he served as a commissioned officer in the U.S. Navy.

And the apple doesn't fall far from the tree. His daughter Nina is a leading attorney at the Innocence Project.

Welcome to all our speakers.

*(Applause)*

#### PANEL DISCUSSION

MR. ADAM LIPTAK: Thank you very much, Penny.

Well, we demonstrated, if nothing else, that you have a really cool Dean, if she follows people's Twitter feeds. And, you know, I make no apologies. Homer Simpson is one of the leading legal philosophers.

So we're going to have a discussion, in the spirit of the First Amendment, and continuing on that really great discussion this morning, and I'm going to thank Benjamin once again for pulling together this really distinguished panel. We're going to come at the question of how protective of the First Amendment is the Roberts' Court from various perspectives. And I see my job mostly as to stay out of the way, be a traffic cop—in First Amendment terms, set time, place, and manner restrictions—but I also want to encourage as much interaction as we can on these questions, because it's possible to come at them from all sorts of perspectives, and I want to let the panelists test a little bit whether the perspective makes sense in a larger context.

So to that end, I'm going to invite them already, even before we have a series of short presentations from each of them, to feel free to jump in, and not wait for an invitation from me. And then toward the end, we'll make sure to have some questions from you.

So to set the table a little bit on this question about the Roberts' Court seven terms in and the First Amendment, what can be said about it—and Ron Collins has written, as you've already heard, a really good foreword that drills down into some of these issues.

The popular conception, I think, is that you may not like the results, but, boy, this Court cares about the First Amendment.

It's willing to place First Amendment values ahead of other

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values, to ensure that corporations can speak as much as they like,<sup>1</sup> and in a series of what I dismissively call goofy cases, involving funeral protests,<sup>1</sup> and animal cruelty,<sup>2</sup> and violent video games,<sup>3</sup> and lying about military medals,<sup>4</sup> it both sends a strong free speech message in the particular case and also tells the public generally, you know, if we protect this speech, there must be all kinds of speech we have to protect, and I think there are lawsuits that are not filed.

I think there's a kind of didactic function in finding an odd fact pattern, making a bold decision in that, and sending the general message that here in the United States, maybe not so much elsewhere in the world, we really believe in protecting even hateful speech.

So that's the way lawyers might think about it. Look at the leading cases. Draw some conclusions from those cases.

But I also want to talk for a minute about another discipline that lawyers don't like very much, and that's political science. Political scientists also spend a lot of time looking at the Court.

They code the cases, they count up votes, and they come to a very different conclusion about whether the Roberts' Court is a free speech protective Court.

There are always questions about exactly which one counts as a First Amendment case, but by one fairly good account, both from Monica Youn at the Brennan Center and then Lee Epstein at USC Law School, they count up twenty-nine free speech decisions through 2011, and found that the Roberts' Court ruled in favor of the free speech claim ten times, which is to say only 34½ percent of the time.<sup>5</sup>

That's a smaller percentage than any of the three preceding Courts, than the Rehnquist, Burger, or Warren Courts. The difference between the Burger and Rehnquist Courts was not tremendous. The difference between the Warren Court was huge,

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<sup>1</sup> See *infra* notes 2–5.

<sup>1</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

<sup>2</sup> See *United States v. Stevens*, 130 S. Ct. 1577 (2010).

<sup>3</sup> See *Brown v. Ent. Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>4</sup> See *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>5</sup> Monica Youn, *The Roberts Court's Free Speech Double Standard*, ACS BLOG (Nov. 29, 2011), <http://www.acslaw.org/acsblog/all/monica-youn>; Lee Epstein & Jeffery A. Segal, *A (Brief) Report on the Roberts Court and Free Speech*, 6, Dec. 22, 2011, available at <http://epstein.usc.edu/research/RobertsFreeSpeech.pdf>; see also Adam Liptak, *Study Challenges Supreme Court's Image as Defender of Free Speech*, N.Y. TIMES, Jan. 8, 2012, at A25.

and statistically significant.<sup>6</sup>

So counted up that way, we don't have a free speech-protective Court, and I'll be interested to see what some of the reactions to that mode of analysis is.

Another thing that political scientists find is that you can't really talk about the Court as such. The individual Justices, Lee Epstein writes, are free-speech opportunists. If the free speech value goes in the same direction as the ideological result they want to achieve, they embrace the free speech value. But if not, then not.<sup>7</sup>

And that seems to be the case over quite some period of time now. I think there's probably truth in that.

You see that occasionally where the three liberal Justices dissent in a case involving material support for terrorism, which Susan will talk about, and those same three Justices, and now in a case involving commercial speech, dissent, and in the two cases, the free speech value points in the opposite direction, so that does seem to support the view that ideology may trump speech protectiveness.

This last term, you know, you can count them up.

You have the *Alvarez* case about lying about military medals, surely a victory for free speech.<sup>8</sup>

The *Fox* case, where the Court had the opportunity to do something really bold about regulating broadcast television in an era where all of the rationales for regulating broadcast television differently have fallen away, they ducked that question.<sup>9</sup>

There's a question about union speech, which you can argue backwards or forwards.<sup>10</sup>

There's a question about a protestor at a Vice President Cheney rally, which, if you call it a free speech case, it went against the speech interest.<sup>11</sup>

And there was a copyright case, which you don't ordinarily think

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<sup>6</sup> See Epstein & Segal, *supra* note 5, at 7.

<sup>7</sup> *Id.* at 3–7.

<sup>8</sup> 132 S. Ct. 2537 (2012). For two points of view on this case, see Jeffery C. Barnum, *Encouraging Congress to Encourage Speech: Reflections on U.S. v. Alvarez*, 76 ALB. L. REV. 527 (2013), and Rodney Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499 (2013).

<sup>9</sup> *FCC v. Fox Television Stations, Inc.* 132 S. Ct. 2307 (2012). For a detailed discussion of this case and proposed solutions for the FCC looking forward, see Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 ALB. L. REV. 631 (2013).

<sup>10</sup> *Knox v. Serv. Emp. Int'l Union, Local 1000* 132 S. Ct. 2277 (2012).

<sup>11</sup> *Reichle v. Howards*, 132 S. Ct. 2088 (2012).

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of as a free speech case, but it is, in which the Court—astoundingly, to my mind—says the public domain is not a category of constitutional significance.<sup>12</sup>

So you have evidence all over the map.

And Erwin Chemerinsky, the Dean of the Law School at UC Irvine, feels very strongly that the Roberts' Court has a dismal record of protecting free speech in cases involving challenges to institutional authority of the government when it is regulating speech of its employees, its students, its prisoners, or when it's claiming national security justifications, and he makes the point that even of those ten cases, the pro-speech cases I mentioned before, six of the ten involved campaign finance laws.<sup>13</sup>

We can talk in more detail about particular cases and particular Justices, and I'm not sure the political science way of thinking about things is the only valuable way of thinking about it, but I submit that it is a valuable way of thinking about it.

And with that, let me turn to Ron, who has given an overview of the leading cases that might lead you toward a different conclusion.

MR. COLLINS: Thank you, Adam, and thank you for that kind introduction.

A couple of things about the Roberts' Court:

I want to be descriptive, rather than normative, so I come to describe them, not to praise or condemn them. And just another thing, in the old days, you could tell a card-carrying liberal—that is, they were for the First Amendment, right?

Well, as this morning's discussion, I'm sure, opened many minds, the question is: do you have to forfeit your claims as a liberal if the First Amendment claim comes out as it did in *Citizens United*?

So sometimes when we do the tallies and say, well, the Roberts' Court only ruled in favor of the First Amendment in ten percent of the cases, or whatever the number is, and it may seem small, you might just ask yourself if you're a liberal or conservative, how important are those labels when it comes to the questions that are important to you.

I just want to make a couple of observations about the Court.

In some respects, as I'll mention in a moment, they have brought either absolutism, or near absolutism of something akin to the old

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<sup>12</sup> *Golan v. Holder*, 132 S. Ct. 873 (2012).

<sup>13</sup> See Erwin Chemerinsky, Issac Marks Memorial Lecture: Not A Free Speech Court (March 8, 2011), in 53 ARIZ. L. REV. 723 (2011).

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Hugo Black absolutism, back into vogue. There are just certain types of speech that are virtually impossible for the government to regulate.

On the other hand, they've been a disaster when it comes to government employee's speech, a disaster, in my view, in terms of the First Amendment. They've been a disaster when it comes to student speech. They've been a disaster when it comes to prisoners' speech.

I don't believe—and Adam and others, you may want to check, I don't—and my colleagues: I don't believe a prisoners' speech case or free exercise case has ever prevailed in the Supreme Court, and I could be wrong there, but certainly not in this Court.

MS. SUSAN HERMAN: 1974.

MR. COLLINS: Yes, and—

MS. HERMAN: When that was done.

MR. COLLINS: Yes. It's been—if it has been, it's been a while. And then their anti-terrorism material support case,<sup>14</sup> I mean, those are all—anybody who values the First Amendment, at least in my view—those are very bad cases.

So lest you get the wrong impression from what I'm about to say, I think those are some really significant cases, particularly the material support for so-called terrorist groups.

I mean, I think that case cuts to the core of the First Amendment, it takes us back, you know, to the whole debates of 1919 in the *Schenck* case,<sup>15</sup> and in the *Frohwerk* case,<sup>16</sup> and in the *Abrams* case.<sup>17</sup> All of those cases, and so there are some really bad signs on the horizon.

Having said that, there is something that is developing in this Court, and just a couple, is what I call exceptional liberty, or near-

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<sup>14</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

<sup>15</sup> *Schenck v. United States*, 249 U.S. 47 (1919) (holding that the First Amendment did not protect a citizen who mailed flyers advocating peaceful protest against the draft system to draftees in the U.S. military).

<sup>16</sup> *Frohwerk v. United States*, 249 U.S. 204 (1919) (upholding a journalist's conviction under the Espionage Act for criticizing American involvement in World War I on the grounds that such criticism constituted "willful obstruction" of the American recruiting efforts).

<sup>17</sup> *Abrams v. United States*, 250 U.S. 616 (1919) (declining to give First Amendment protection to wartime speech advocating the overthrow of the American government and strikes in American munitions factories).

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absolute protection.

The Court has taken a 1942 precedent, *Chaplinsky v. New Hampshire*,<sup>18</sup> which has, for decades, been seen as a case that was used by conservatives, to diminish the free speech realm; to give it a very cabined area in which to exist.

And *Chaplinsky* had said, among other things, that there are certain historical exceptions, and it listed five. And it said, you know, if speech falls into one of those categories, it's categorically unprotected. And they also said, in effect, that if speech doesn't have socially redeeming value, you know, if it doesn't advance some higher goal, if you will, then that speech isn't protected.

Those two aspects of *Chaplinsky* had been used for decades, to shut down free speech claims time and again and again. Well, what's happened with the Roberts' Courts, rather interestingly, is they've completely turned that around. They've taken the *Chaplinsky* case and turned it into something protective.

So they've said, you know, unless it falls into these five categories, or sometimes they say three categories, or sometimes they say eight categories, all right, but unless it falls into specifically one of those categories, and we define them very narrowly they say, in some cases, then the speech—at least when content discrimination is involved, then the speech is absolutely protected.

So they've taken a rule that heretofore was used to shut down speech, as a way of protecting speech, certain kinds of speech, particularly where there's content discrimination. And as to the other tenet of *Chaplinsky*, the tenet that spoke about socially redeeming value and what have you, they pooh-poohed that altogether.

And so, they've had the cases, like the case involving the Stolen Valor Act, or the case involving violent video games, or the case involving crush films of animals, or the military protest case; they've used those cases, some call them goofy cases, clearly whether or not "Fuck the Draft", wearing that on the back of your coat in a courthouse, is a goofy case, it may be, but it became an important First Amendment case.<sup>19</sup>

But in this line of cases, they have created a very high wall of First Amendment protection.

And so something-- I mean-- to those of us who are concerned about things like content discrimination and what have you, these

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<sup>18</sup> 315 U.S. 568 (1942).

<sup>19</sup> See *Cohen v. California*, 403 U.S. 15 (1971).

are very important precedents. How far they will be extended remains to be seen.

Just one other observation—I want to be sensitive to the time.

The person who's pretty much ruling the roost here is Chief Justice John Roberts. He's written more majority opinions than anybody else, nine.<sup>20</sup> Kennedy isn't even close to him with five.<sup>21</sup> This is during the Roberts' Court era, of course.

As a practical matter, the women on the Court, they're not voices when it comes to the First Amendment, meaning expression and freedom of speech and press. They've only written two opinions; both were majority, one by Ginsburg, one by Sotomayor. They involved the cases where the vote was either unanimous or near-unanimous, and they involved situations where the First Amendment claim was denied.

It's rather amazing that if you take up the total of all the opinions—majority, concurring, dissenting, concurring in part, dissenting in part—that all the women, of the three women who have written, it comes to a total of nine.<sup>22</sup>

Justice Roberts, Kennedy, Scalia, Thomas, have all written far more individually than all of the women put together.

So it's kind of an interesting observation ... that when we talk about this Court, we're basically talking about, you know, men who rule the roost in terms of the cases that are before the Court.

Let me just take a breath there and let—

MR. LIPTAK: So on that last point, I think there is an explanation that may be content neutral.

The Chief Justice gets to assign the majority decision when he's in the majority. He loves these cases, and he assigns—he doesn't typically assign cases to himself in other areas of the law any more so than the average would suggest. But in this area of the law, he assigns cases to himself twice as often.

Second, in general, everyone thinks First Amendment cases are fun and sexy, so the more senior Justices might grab them, and the two most junior Justices on the Court are women, so that may explain a little bit of the--

MR. COLLINS: Just one point, if I may--

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<sup>20</sup> See Ronald K.L. Collins, *Foreword: Exceptional Freedom—The Roberts Court, The First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409 (2013)

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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MR. LIPTAK: --that last point that Ron made.

MR. COLLINS: --before I forget.

*Citizens United*, at least if Jeffrey Toobin's new book, *The Oath*, is correct, the Chief Justice had assigned the opinion to himself. It was to be a narrow opinion. And then, as Toobin tells it, Kennedy, Scalia, and Thomas had called for a much more expansive ruling, and so he aided and abetted, called for re-argument, and then let Kennedy run with it, but had he had his way, originally that opinion would have been his as well.<sup>23</sup>

MR. LIPTAK: Are there general thoughts from the other panelists about this overview before we move into particular cases?

MR. ALAN MORRISON: Well, can I just say a word, Adam?

On the funeral case, the animal case, the video games, the Stolen Valor Act, and indeed the *Fox Communications* case, all of those are relatively narrow First Amendment cases. That is, in each of the cases, if you read them carefully, the facts are emphasized, and they look—the Court looks like it's giving out to the legislature to draw a more careful line. Or in the case of the funeral protest case, they get it out of the tort area and put in into areas of regulation, like the abortion picketing statutes.

And so, I think that even in those cases, which are viewed as pro-First Amendment cases, they haven't taken the real strong First Amendment position. They've just fly-specked the statutes and said, in the animal crush case, well, you could have said this and you could have said that, and it wasn't as—you didn't do it as precisely, and since this is the First Amendment, we're going to hold you to a high standard. So it remains to be seen whether those are ultimately going to be victories if anybody cares enough to try to go back and rewrite at least some of those statutes.

MR. LIPTAK: And that's not a theoretical point only. In both the animal cruelty setting and in the military protest setting, there are actual new laws that--

MR. ROBERT RICHARDS: And the Stolen Valor Act.

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<sup>23</sup> See JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 167–68 (2012).

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MR. LIPTAK: And so, basically--

MR. RICHARDS: From last week.

MR. LIPTAK: --the Supreme Court sends out, and this is part of the theme I think that's developing here, this very strong message, and yet may achieve as a practical matter on the ground, relatively little.

MR. RICHARDS: And that was just--

MR. COLLINS: I just want to--oh, go ahead.

MR. RICHARDS: It was just said, last week, the Congress entertained a new law for the Stolen Valor Act.

What they did is they took Justice Kennedy saying that, you know, if you're doing it for some type of pecuniary, monetary reason, then maybe you can have these types of statutes. So that's what the new law is written as.

MR. MORRISON: Does that cover elections too?

*(Laughter)*

MR. MORRISON: That is, if you say you're running for Congress and you're going to get paid \$150,000 a year, does the statute cover that?

MR. LIPTAK: Wrong panel, Alan.

*(Laughter)*

MR. COLLINS: You know, just to comment, I think that there has been much too much, in terms of some of the comments made about how much discretion was left to Congress. I mean, the fact is that this Stolen Valor amendment only deals with cases where there's clear fraud, you know, and you're doing it for some economic purpose. That could have been regulated. The Court granted that at the case, it could have regulated it before the case, during the case, after the case, so I don't see that as anything, you know, and in terms of the violent crush videos case, they just pigeonholed that

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into a traditional exception, namely obscenity. Had the case started out like that, the First Amendment claim would have been denied.

One point that I didn't make, and I wanted to make, is that the Roberts' Court, and I think this is significant, has said that if, unless speech falls into one of these very narrow categories—the *Chaplinsky* Court said five,<sup>24</sup> and then in one opinion Justice Scalia said three, and then another opinion, Chief Justice Roberts said five, and then another opinion, Justice Kennedy said there were eight exceptions. All right. As long as those exceptions are limited in number, and limited in scope, the First Amendment protection in that line of thinking is going to be very expansive.

But I've counted up forty-two exceptions.<sup>25</sup> And so either somebody is sleeping at the switch, or if they're going to continue going down that road and say that speech is protected unless it falls into one of the excepted categories, and I've counted forty-two, all right, and no doubt Alan and others can add more, this is not going to be a very speech-protective test, in the long run.

MS. HERMAN: If I could just add one comment on the general overview front.

You were mentioning Monica Youn's summary of the First Amendment cases, where she counted that ten out of twenty-nine had won.<sup>26</sup> Six of those were campaign finance cases, which as we know from this morning, are difficult and complicated. And the others were—you called them goofy cases, Monica Youn called them slam dunks. The cases like the Stolen Valor Act, the funeral protest, the crush films, the violent video games, those cases were decided eight-to-one, seven-to-two. There had never been any conflict in the circuits on any of these issues, and they really were, as Adam said before, they're just strong messages saying "We really do mean our First Amendment principles, and even if they're speech that we really hate, even if it's, you know, being nasty to families who are the families of fallen soldiers, we still think that the First Amendment principle has to prevail, no matter how awful the facts are."

MR. RICHARDS: And they're slam dunks, because they really don't break any new legal ground.

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<sup>24</sup> See 315 U.S. 568, 571–72 (1942).

<sup>25</sup> Collins, *supra* note 20.

<sup>26</sup> See *supra* notes 5–7 and accompanying text.

MS. HERMAN: Exactly, exactly.

MR. LIPTAK: I'd like to turn to Bob O'Neil now to drill down a little bit about a couple of these cases.

MR. ROBERT O'NEIL: Delighted to do so, and thank you. Let's see ... is this on? Yes. Okay?

Two weeks ago, I had the great pleasure of reading Ron Collins's superb foreword. I even went through almost all of the forty-two exceptions, to make sure that they were all, and they are indeed, plausible exceptions. But that was two weeks ago.

This is now two weeks later. And it seems to me that we are potentially in a different environment. Indeed, this could be described as the week, or week and a half of contending blogs in which we no longer have the clarity of Ron's absolutist, or quasi-absolutist, or neo-absolutist view, even though many scholars, legal analysts, journalists, continue to focus on that same judicial pattern.

But at the same time, the question that lies ahead in the next, say, three to six months, may turn out to be a very different one.

In the event of a challenge such as the anti-Muslim video that surfaced,<sup>27</sup> and it was only within the last two weeks, I wonder if we're really prepared to build upon the absolutist, or absolutist-like, context. And specifically, I would ask whether the precedents of the last fifty years, and I'll just take a moment to identify them, whether these precedents still apply during such turbulent times that we seem to be facing this month. Or, do they only work in calmer moments involving anti-war protests, Ku Klux Klan rallies, Neo-Nazi marches, and the like?

The answer, at least after last week, turns out to be curiously ambiguous. Let me just take a very quick tour, crediting all that Ron has done to provide a superb context.

It was almost a century ago that Justice Holmes left us in *Schenck*,<sup>28</sup> in *Frohwerk*,<sup>29</sup> in *Debs*,<sup>30</sup> with some elegant language,

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<sup>27</sup> To see the actual video which sparked this entire controversy, visit <http://www.youtube.com/watch?v=6ySE-yYeelE>.

<sup>28</sup> See 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

<sup>29</sup> See 249 U.S. 204, 208-09 (1919) ("We do not lose our right to condemn either measures or men because the country is at war . . . But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame . . .").

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but pitifully little constitutional guidance. I've often thought if Judge Learned Hand had had the opportunity to write on that same issue, I think we would have had a great deal more guidance than we now have, but happily things moved on fairly quickly. And by 1931, we already had precedents like *Near v. Minnesota* on prior restraint,<sup>31</sup> and *Stromberg v. California*, with respect to displaying red flags,<sup>32</sup> and such.

Although by this time, the late '20s, early '30s, the targeted speakers and publishers were, for the most part, hate mongers, radical labor organizers, or religious fanatics. Curiously, these are hardly ever even mentioned anymore.

There were, in 1937, two strikingly speech protective decisions, albeit by a five-to-four margin, involving two Communist Party speakers, or organizers, in Georgia and Oregon. The language in both cases reflected what seemed to me a strikingly firm commitment to free expression, albeit aided and abetted by less than impeccably precise, or narrowly drawn, state syndicalism laws.

Ron has given us much insight into *Chaplinsky*, and in his foreword, he develops a lot more about *Chaplinsky*,<sup>33</sup> we've both written on it. Let me just offer two comments, not so much about *Chaplinsky*, but about what happened in the ensuing decade, specifically in the *Dennis* case of the anti-Communist conspiracy.<sup>34</sup>

In the spiritual presence of Justice Robert Jackson, as we obviously are in this law school, let me recall that Justice Jackson, right after he returned from the Nuremberg Trials, distinguished the gravity of the international communist conspiracy to overthrow the government as he did, he would have reserved clear and present danger for, in his words, "a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag."<sup>35</sup> These being lesser dangers or risks, and the international communist conspiracy, the focus in the *Dennis* case, obviously, being the real danger or risk.

Interestingly, to the same point, Justice Douglas, in dissent to be

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<sup>30</sup> *Debs v. United States*, 249 U.S. 211 (1919) (drawing multiple analogies to the Court's reasoning and holding in *Schenck*).

<sup>31</sup> 283 U.S. 697 (1931).

<sup>32</sup> 283 U.S. 359 (1931) (striking down a California statute which banned the public display of red flags on the grounds that such a ban on peaceful symbolic expression violated the First and Fourteenth Amendments).

<sup>33</sup> See Collins, *supra* note 20.

<sup>34</sup> *Dennis v. United States*, 341 U.S. 494 (1951); see also Martin H. Redish & Michael T. Downey, *Criminal Conspiracy As Free Expression*, 76 ALB. L. REV. 697 (2013).

<sup>35</sup> *Dennis*, 341 U.S. at 569 (Jackson, J., concurring).

sure, but nonetheless with a rather different view; he struck the same contrast. Quote:

“In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a shortcut by revolution might have a chance to gain adherence. But today, there are no such conditions.”<sup>36</sup>

Interestingly, here is Douglas and Jackson, in *Dennis*, saying exactly, or essentially, the same thing, with respect to this contrast.

Let me now briefly fast-forward just before we get to the current violence, where now almost thirty countries have seen violent protest, and a fair number of deaths, over the anti-Muslim video.

Well, after the *Dennis* era, of course the *Brandenburg*<sup>37</sup> and *Hess*<sup>38</sup> cases not only essentially turned the tables very dramatically, but they established broad free speech and press principles, that for most purposes, as Ron so ably explains, gave us guidance that we’ve had for essentially forty years.

*Brandenburg* declared simply that the constitutional guarantees of free speech and free press do 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, as is likely to incite or produce such action.<sup>39</sup>

Well, it seems to me the current dilemma, or paradox, is how we adapt the *Brandenburg* language, and corollary language in the *Hess* case, to the circumstances that we are now seeing every night on televised and other news media.

Let me close by flagging three other concerns that I have, that are closely related.

First, of course, is simply the enormous impact of the Internet.

We are all still learning just how dramatically different it is, cyberspace. Exposure to rapidly moving volatile images, and the specific effect of social media across the world, when even a street corner hothead is videotaped, and the image disseminated

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<sup>36</sup> *Id.* at 587 (Douglas, J., dissenting).

<sup>37</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overturning the conviction of a Ku Klux Klan leader on the grounds that the pertinent state law, which criminalized the teaching of a doctrine without considering whether those words actually were “likely to” spur people to “imminent lawless action”, violated the First and Fourteenth Amendments).

<sup>38</sup> *Hess v. Indiana*, 414 U.S. 105 (1973) (holding that a war protestor’s obscenity-filled statement that a crowd of protestors should take back the street from the police was unlikely to provoke “imminent disorder” and thus was still protected under the First and Fourteenth Amendments).

<sup>39</sup> *Brandenburg*, 395 U.S. at 449.

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instantaneously around the world, problems abound.

Second, let me offer a word about the, I think, greatly exaggerated impact of the Pentagon Papers case.<sup>40</sup> We, as First Amendment lawyers and analysts, tend to have celebrated the Pentagon Papers decision; no more prior restraint, it says here. In fact, I think we have tended to overlook a host of closely related issues, having to do with other than the prior restraint issues.

Justice White observed in the Pentagon Papers that “The criminal code contains numerous provisions, potentially relevant to these cases.” That, I would call a classic understatement.

For example, the controversy between CNN and General Noriega remains to this day unresolved, just hanging out there.<sup>41</sup> Or the case involving *The Progressive* and how to make an H-Bomb, which eventually ended up, I think, in *Ladies Home Journal* or *Home and Garden*.<sup>42</sup> That also remains essentially unresolved.

Finally, let me offer a gratuitous comment about the Obama administration’s efforts to limit access to the YouTube video.

As I think Floyd Abrams, were he still with us this afternoon, would strongly concur, there’s nothing inherently improper about a national government administration seeking to limit access in such a situation, any more than Secretary Condoleezza Rice several times asking the major news media to refrain from randomly re-broadcasting the most inflammatory tapes of Osama Bin Laden’s post-9/11 speeches. I think Floyd Abrams would strongly concur.

A couple of other examples that one might cite would be, for example, the pressure that was brought to bear on the *Washington Post* and the *New York Times* to publish however many pages of small single-spaced type constituted the Unabomber’s Manifesto, and, of course, through the publication of this document, we all learned who the Unabomber was because Theodore Kaczynski’s brother immediately identified the source, once it was published.<sup>43</sup>

So these are just a few cautions along the way, but, Adam, I guess as I look ahead, I think we have a profound difference between what I’ll call the Shea view and the Greenfield view, there are others who have—and for the first time, I see a genuine dissonance between these views.

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<sup>40</sup> See *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>41</sup> See *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990).

<sup>42</sup> *United States v. Progressive, Inc.*, 467 F.Supp. 990 (D.C. Wis. 1979).

<sup>43</sup> For a good summary of the extremely bizarre events surrounding this situation, see William Claiborne, *FBI Gives Reward to Unabomber’s Brother*, WASH. POST, Aug. 21, 1998, at A2.

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And who's right? Well, we can say they're both right, or the truth lies somewhere. I don't think that's terribly helpful. And it seems to me that within the next six months, all of us, particularly those of us who comprise this panel, are going to have to struggle with that issue.<sup>44</sup>

MR. LIPTAK: So Bob raises a great and timely question, but doesn't really give us an answer, and I'm going to try to push a little bit.

MR. O'NEIL: Yup.

MR. LIPTAK: And maybe ask the other panelists.

We can agree that there's nothing wrong with the government asking. Is there a situation, presumably through the court system, where the government should be able to compel Google, owner of YouTube, to take down these videos because they appear to be inciting violence abroad? What's the answer to that?

MR. COLLINS: Well, they can only do so at the outset, to make an old federalist point—that's not Federalist Society, that's federalist as in federalism, without in any way disparaging the Federalist Society—but the government can only do what it's authorized to do. So if, you know, I would assume that if there were a statute, and the President were duly authorized to, you know, take such action, so that would be the first place.

But before we get to a question of limitation on rights, we need to raise the question: Has the government been authorized to so act?

You know, clearly there is existing precedent, contrary to what is taught in most law schools.

Those terrible cases, *Schenck*, *Frohwerk* and those other cases, they've never been overruled. People talk about *Brandenburg v. Ohio*, that's a non-wartime case, can be easily distinguished, and the *Dennis* case has never been overruled. So there's bad precedent here if one wants to use it. But I would just say this, we are—we heard today a wonderful line from Justice Roberts, and that was that the Constitution's not a suicide pact.

MS. HERMAN: No. From Jackson.

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<sup>44</sup> For a detailed discussion of the United States' unique degree of protecting "hate speech" and other inflammatory forms of communication, see Robert O'Neil, *Hate Speech, Fighting Words, and Beyond—Why American Law is Unique*, 76 ALB. L. REV. 467 (2013).

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MR. COLLINS: Or excuse me, Justice Robert Jackson—thank you, thank you, thank you.

MS. HERMAN: You're welcome.

MR. COLLINS: That's a sacrilege, being blasphemous here. But yes, Justice Robert Jackson, you know, as it came off the lips I thought it didn't sound right, so thank you, for that amicus help there. But--

MS. HERMAN: It's the teamwork.

MR. COLLINS: Yes. Justice Robert Jackson, when he said the Constitution is not a suicide pact, indeed it is true. But by the same token, I think Hugo Black had it right when he said, we must not be afraid to be free.

And one of the things that the First Amendment involves is taking risks. If you don't believe in taking risks, if you don't believe in tolerating offensive speech, then what's the point? I mean, you just protect speech that makes you feel safe, that you agree with.

The whole idea of the First Amendment is that we're going to take risks. I think Holmes had it right when he said that law, like life, is an experiment. Experiments fail. Sometimes the bad guys win. But it seems to me that that's the essence, that kind of what the First Amendment does, in certain limits, I guess, it asks us to take these risks in life. It asks us to face the question, are we willing to be free? And I think this case, like the one that was just mentioned, really kind of puts that right up to us and says, "Are we going to let our democracy rule the way other countries, non-democracies, are ruled?" And I happen to believe that we should err on the side of risk. But certainly reasonable minds, who balance and see things through lenses called reasonableness, may view this differently, and may view with some warrant.

MS. HERMAN: But most of our First Amendment precedent tells us that there are exceptions to the First Amendment, and if there really could be a case made out that there is this danger, and that it's necessary, to a compelling interest to limit speech, it is possible.

But in terms of—you know, I think President Obama has taken the right position, in saying that we should not bow to the standards of other countries that, you know, they will defend—he

was continuing to defend our ability to have free speech, even if the understandings in other countries are not the same. Apparently, a lot of people in the affected countries don't understand how an individual could really have come out with a film like this, if the government doesn't approve of it. And you know, they're just different from us, and so we have to—you know, we do live in the modern world, which is hard, but I think President Obama has taken the right position.

However, if the administration, with appropriate backing from Congress where necessary, were to take the position that it is necessary to a compelling interest to suppress this video, the classic First Amendment law would say that the government has an extremely high burden to bear to show that there is a compelling interest, et cetera.

What worries me is that, Ron, there's a much more recent precedent, which is the one I'm about to talk about, *Humanitarian Law Project*, which suggests that there's plenty of argument in there, plenty of material to say that the Court could be very deferential to government just saying that, and not be very demanding at all in terms of reviewing the First Amendment. But, yes, Adam, I'll have to set up some background before that.

MR. LIPTAK: Well, why don't we move to that?

What has the Roberts' Court told us about its view of the First Amendment when there's a national security interest, or a supposed national security interest on the other side?

MS. HERMAN: Well, what they've told is that their view is that they shouldn't really have a view, that they should just defer to what the Executive Branch and ostensibly Congress have to say.

And this is where, you know, all the materials that you have in your CLE materials to read in connection with this day are *Citizens United*, of course, the campaign finance case, very difficult, and four of the slam dunks, you know, the easy cases where the First Amendment prevailed.

What you don't have here is the dark side of the story, which is I think what I want to tell you, the counterexample. A case where the Supreme Court ruled against a First Amendment claim on some very dicey First Amendment law, among other things. So I need to give you a little background. How many of you know about the

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*Humanitarian Law Project*<sup>45</sup> case? Okay. Then I need to give you a little background.

Okay. So this starts with the material support laws. These first entered the United States law during 1994. They were expanded in many ways in 1996, after the Oklahoma City bombing, and then again after 9/11 and the Patriot Act.

And what the material support laws say are not only can't you give money or guns to terrorists— perfectly sensible criminal law, and something that would be covered by dozens of other criminal laws—but the material support laws draw an extremely wide dragnet by also including—let me read you a little bit of language.

You're not allowed to supply a terrorist group, which is either a group that has been designated as a foreign terrorist organization by the Secretary of State, in a very secret behind-closed-doors process, either they've been designated as a terrorist group, or you know that they're doing something terrorist.

In either of those cases, if you know it's a group that's been designated, or if you know that they're doing something, it's a crime to provide personnel, training, or expert advice and assistance to that group.

Now as has been pushed in many earlier cases, especially during the Red Scare era,<sup>46</sup> there are groups that have dual purposes. So some groups that have been designated as foreign terrorist organizations also run nursery schools. And what these material support laws say is, even if you are fully intending only to support a nursery school that is run by somebody connected with Hamas, you can be criminally prosecuted for giving any money in the direction of that terrorist organization, because money is fungible.

If you're supporting the nursery school, then they can use their money instead of paying for the nursery school, to buy bombs and blow us all up.

So that's the basic idea of the material support statute.

Now as you can see, the language is extremely broad. Humanitarian Law Project is a group of peace activists and human rights activists from California. And in the original case, there's like six other plaintiffs, and there were all sorts of claims, but I just want to tell you about the one claim that really was the centerpiece of the Supreme Court litigation.

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<sup>45</sup> Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

<sup>46</sup> For further information in this regard, see Marjorie Heins, *The Supreme Court and Political Speech in the 21st Century: The Implications of Holder v. Humanitarian Law Project*, 76 ALB. L. REV. 561 (2013).

What the Humanitarian Law Project was doing, among other things, was they were working with a group called the Kurdistan Workers Party. Now this is a group mostly in Turkey; some of you may know that the Kurds in Turkey are not very happy with the government's treatment of them. They're a dissident insurgent group.

So what the people at the Humanitarian Law Project wanted to do, which they had been doing, but you wondered if they could continue to do this and not be subject to criminal prosecution, they wanted to work with people in the Kurdistan Workers Party about how they could resolve their grievances with the Turkish government through peaceful dispute resolutions mechanisms, like through the UN. And they wanted to really train them about how you could do things peacefully, instead of having a civil war and using violence.

Okay. So they become worried when they looked at all this vague language in the material support statutes; did that mean that they were providing training, or personnel, or expert advice or assistances?

So they litigated for twelve years in the California Courts, incredibly intricate. If you ever want to see an amazing example of legal process, they were—it was a moving target, the statute kept changing, they had all different claims, and some were coming, and some were going. But the bottom line is, you can tell from the title of the case, they actually ended up winning in the 9th Circuit as to this particular claim.

Was it, in fact, a violation of the material support laws to teach terrorists how not to be terrorists?

Well, the Supreme Court amazingly enough said, "Yes." It is a violation of the material support laws.<sup>47</sup>

The first thing that they do is they settle any doubt as to the vagueness of the statute. And they say under this broad language that we've just read, not too broad, as applies in this case, they say that there's no doubt that what the Humanitarian Law Project wants to do in teaching terrorists not to be terrorists is the expert advice or assistance, or something like that.

As is, if you're not nervous enough already, Elena Kagan, the Solicitor General at the oral argument, when asked by Justice Kennedy, I think it was, well, would this also apply to a lawyer filing a brief on behalf of a foreign terrorist organization? And she

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<sup>47</sup> *Humanitarian Law Project*, 130 S. Ct. at 2730–31.

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said, in obviously a carefully planned out answer, “Yes.” Yes, it would.

As David Cole, the lawyer arguing the case pointed out, the *New York Times* actually editorialized against the Supreme Court’s opinion, under the Court’s opinion—under their decision, the *New York Times* could also be prosecuted, probably, for publishing an op-ed piece by a member of Hamas. So this is an extremely broad dragnet.

Nobody had prosecuted the Humanitarian Law Project, but what they wanted to know is, could they continue to hold themselves out as peace activists, and do this without telling their supporters that they were risking being criminally prosecuted.

Okay. So there’s your background, in terms of what the Supreme Court is deciding.

I want to talk about three kinds of things, one of which I would really like to open up to the whole panel, heeding Adam’s injunction. Three things about this case.

One is that it’s a very messy First Amendment case. So those of you who have studied First Amendment law know that First Amendment cases go in tiers. There is strict scrutiny, which is, you know, sort of the First Amendment norm.

In the usual case, you had the smut videos and funeral protests and et cetera. The question is whether the government can meet the burden of proving that they do, indeed, need to restrict the speech involved, in order to serve a compelling interest.

There’s two parts to that. One is, “Do they really have a compelling interest?” and the other is, “Are they narrowly tailoring their response; do they really need to do it this way?” Or could they have served their goal in some way that doesn’t really limit speech so much?

Well, the government argued that that standard should not apply in this case, that the strict scrutiny should not apply, because this case wasn’t about speech; it was about conduct. It’s really about what you’re doing for a terrorist organization. And therefore, they argued that a lesser standard, called intermediate scrutiny, from the *O’Brien* case,<sup>48</sup> for those of you who are First Amendment fans, should apply.

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<sup>48</sup> *United States v. O’Brien*, 391 U.S. 367, 377 (1968); see also *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) (“A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” (citing *O’Brien*, 391 U.S. at 377)).

Well, Justice Roberts—Chief Justice Roberts, who takes this opinion for himself, and he’s writing this himself, very courageously I think, he says, no, no, the government is wrong. The *O’Brien* standard should not apply. Our standard that we apply here should be “more demanding.”<sup>49</sup>

Okay. More demanding, what does that mean? He doesn’t talk the talk or walk the walk of strict scrutiny anywhere in the opinion. He doesn’t say—everybody agrees, by the way, that of course preventing terrorism is a compelling interest, but the question is, is this actually a good way to prevent terrorism, to prohibit peace activists from teaching terrorists not to be terrorists, you know.

So that’s the question: “Okay—so what standard is he applying?” He never talks about narrow tailoring, he never talks about less-restrictive alternatives, and—this is really, to me, the most-troubling part of the opinion—he doesn’t really demand that the government prove that there is any connection here.

The government has no evidence. They have opinions. It seems that Congress and the Legislative hearings on this, they never really considered this particular example, so it’s not like they think that this really needs to be prohibited. The statute was focusing on other examples.

But the Executive Branch writes an affidavit saying, essentially, “We believe that this is a good way to prevent terrorism.” And that, you know, “We need to have the power to do this.”

Well, what ends up happening in the case, is that really, the Court just defers to the Executive Branch, and ostensibly Congress—even though they didn’t really say anything—just defers to their conclusion here, without having any evidence.

So to give you some examples of the kinds of things that they say, and not all of this was based on the government’s brief, they come up with some arguments that the government did not make.

Okay. The first thing that Humanitarian Law Project says is, they say, basically, “Well, okay, we get this “money is fungible” idea, that even if we didn’t have an intent to support terrorism, if we’re funding the nursery school, maybe they could use the money for something else, but we’re not giving them money. How does it help them that we’re giving them training on how to go to the UN?”

And the Supreme Court says, in essence, “Well, they might misuse that training. They might pretend that they’re undergoing alternative dispute resolution mechanisms, while really they’re just

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<sup>49</sup> *Holder*, 130 S. Ct. at 2723.

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rearming and preparing to attack people, so they could reuse that.” So—and chief argument here, what do we know, we’re just the Court? Yes. This is what the Executive Branch says, we should be deferential.

The second kind of argument was a legitimization argument. The idea is that, well, if the Humanitarian Law Project is treating this terrorist group seriously, they legitimize them. And what the government’s preference here is to have that group being treated as radioactive. Nobody should talk to them at all. And that’s what the government says.

So again and again in this opinion, Chief Justice Roberts says, okay, you know, here are these theories—do we know whether they work? No, we don’t, and therefore, we should be deferential to the Executive Branch because they’re the ones with the institutional competence to make this decision.

Okay. So my point number one, line up this part of the decision with *Citizens United*, where the Court is looking at, with I–Aziz Huq called it “beady-eyed skepticism”<sup>50</sup>—at everything that the government says, right, Alan, about the connection between limiting campaign finance and expenditures and the interest that they’re claiming. The Court is extremely strict in their scrutiny and looking very hard, and really very skeptical about everything the government has to say.

Here, when the government says national security, the Court just says, “Oh, okay, fine. You know, what do we know, we’re just judges.”

The second thing—and this, I think, gets directly to Bob’s point about the film—the second point that they make is that in addition to having national security expertise, the government also has foreign affairs authority, an area which, again, the courts aren’t supposed to tell them what to do.

So the Court says, “Well, you know, Turkey might be upset, if we allowed these people to talk to the Kurds, because they don’t like these Kurds, they don’t want anybody to talk to them; and therefore, we should defer to the President’s decision that, you know, this is not a good thing.” And the Secretary of State basically says, “This group should be radioactive, and we have to defer to that, because we’re not the foreign affairs experts.”

Okay. Now think about that in terms of the film. This is not even

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<sup>50</sup> Aziz Z. Huq, *Preserving Political Speech from Others and Ourselves*, 112 COLUM. L. REV. SIDEBAR 16, 23 (2012).

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strict scrutiny. If we're just going to defer, if somebody—you know, if the Obama administration were to change its mind and say, this is really dangerous what we're doing. It's going to cause other governments to be really unhappy with us. It's foreign affairs powers. Does that mean that even on a lesser standard of scrutiny, it would be permissible to censor this film?

So, should I stop there and invite some comment, even though I'd like to make a couple of comments about--

MR. LIPTAK: Yes. I mean, on that last point--

MS. HERMAN: --other things?

MR. LIPTAK: --I mean, that resonates very much with the Pentagon Papers, where the government--

MS. HERMAN: Exactly.

MR. LIPTAK: --said this is going to hurt our efforts to protect democracy—to protect diplomacy.

Reactions to Susan's thoughts? Yes.

MR. O'NEIL: In terms of the Pentagon Papers, since I worked many years ago with Justice Brennan, I'm always struck by his use of the *Near* case analogy of a troop ship underway, the itinerary of which is disclosed surreptitiously, and is underway in time of war.<sup>51</sup> Which everyone—with the possible exception of Justice Black—seemed to endorse.

It also brings to mind the cases involving the Agent of the Month, whose picture and *modus operandi* appeared each month in kind of an undercover magazine—I forget the name of the magazine, but eventually—

MR. LIPTAK: *Counterstrike*—

MR. O'NEIL: Yes. And eventually there was a federal statute, which was passed and not even challenged, putting this magazine out of business, because each of the agents of the month, whose picture and *modus operandi* appeared, did not last for more than a few days. They were immediately targeted and assassinated.

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<sup>51</sup> See *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

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And I think we also sort of assume that somewhere toward that range, the troop ship in time of war, and the Agent of the Month, there are circumstances driven largely by national security, even though under domestic conditions, let alone foreign conditions.

MR. LIPTAK: I thought I might, because no one else will, I imagine, speak up on behalf of an aspect of the decision.

Susan correctly says that it's hard to reconcile it with *Citizens United*, but there is one way in which the two cases are similar.

Chief Justice Roberts does say, listen, all we're talking about here is coordinated speech. You can speak out on behalf of Hamas all you want. What you can't do is coordinate with, give advice directly to Hamas.

That may or may not be the right answer, but it's very much the structure of *Citizens United*, which says "You can't contribute to the political candidate, but you can speak out on his or her behalf."

MR. COLLINS: Well, just a couple of things since we're on-- I'm inclined to agree with that, Adam.

I mean, I think the analogy to *Citizens United* to get us to think about, if you will, the schizophrenia of the Roberts' Court, is this.

On the one hand in *Citizens United*, that case could have easily and readily been disposed of on non-constitutional statutory interpretation grounds. There's a doctrine that this Court loves to preach called the Doctrine of Constitutional Avoidance. We don't reach a Constitutional question unless we have to.

*Citizens United* was a clear example of that case could have been easily disposed of, but they wanted to reach a First Amendment Claim. All right? Really a claim that hadn't been raised, hadn't been briefed, hadn't been argued, I mean, just all sorts of things. They wanted to reach a First Amendment claim, and they wanted to reach a certain result, a near-absolutist result.

Now if you think of the *Humanitarian Law Project* case, another case where they could have disposed of the claim under the statute, right, but they decided again that they didn't want to dispose of the case under the statute. They wanted to get to First Amendment claim, and here, instead of giving absolute protection, they take the protection and almost drill it through the floor. All right?

So you have both cases. A Court that's opposed to judicial activism, heaven forbid, we don't do that, right. On the one hand, you know, taking the statue—going beyond a statute that could have been resolve—could have resolved the case, and giving near

absolute protection. And another case, ignoring the statute, which they could have interpreted to end the case, and giving virtually, you know, Obama's rational basis review 'cause it's not quite clear exactly what is that tests that are enunciated. And particularly, I think, as Susan mentioned, when you think about how they actually did the work they did, it's largely deferential. It almost takes us back in time to 1919 and the kind of deference that Court gave to the Wilson Administration.

MS. HERMAN: Just let me follow up, Ron, on what you were saying. Because it seems to me there's a little bit of a difference, in terms of the statutory interpretation and Humanitarian Law Project.

What the Humanitarian Law Project said, and what Justice Breyer thought in his dissent, was that you could use the constitutional avoidance doctrine to not get to the First Amendment doctrine, but what you would have to say is, we are implying a specific intent requirement in the statute. Because if you have a specific intent requirement, if you're only going after people giving material support to terrorism who actually intend to support the terrorist's activities—as opposed to, they're trying to teach terrorists not to kill people, or they're supporting the nursery school—then you don't have a problem.

So Justice Breyer says, as Ron says, "That's the way out of the case."

But Chief Justice Roberts makes the case that that would actually be a really activist thing for the Court to do, and in terms of the text of the statute, you can't get there except through the First Amendment. Unless you say "This really would violate the First Amendment unless," and they don't get there because they don't think it violates the First Amendment.

MR. LIPTAK: Alan, did you have a reaction?

MR. MORRISON: Yes. Adam, I just want to be clear that in *Citizens United*, the Court didn't say that the ban on corporate contributions was legal. It said we weren't going to decide in this case, whether it's legal or not. So in that sense, it doesn't provide quite the line that you've decided.

Second, it does have an aspect, in *Citizens United*, of *Humanitarian Law Project* being the same as *Citizens United*, which is that it is a mixture of speech and conduct in both cases.

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That the spending of money is speech related. We recognize that it has some First Amendment protection, and so here, the giving of advice is talking, which we normally think of as speech protected.

On the other hand, if it leads to action or if it's in connection with other actions, which are entirely impossible to separate, then maybe it's something different.

I have a somewhat more cynical view, which is that these First Amendment cases are being decided, in large respect, regarding the political preferences of the Court. They are in favor of corporations speaking in elections, and they are opposed to individuals helping groups like this, when the government doesn't want them to help it like this.

I think the Roberts' Court has a long history, even in the few years it's been there, of providing substantial protections to corporations in many, many contexts outside *Citizens United*, and it certainly is one way of looking at it to say that this is simply another line. They're happy with corporations getting more and more power, and they're not happy with people helping Hamas when the government says that we don't want them to help Hamas.

MS. HERMAN: If I could add one more point there that may tie into the *Citizens United*.

One thing that Justice Breyer points out about this whole point about coordination, with the distinction that Adam is drawing, it matters whether or not you're coordinating with the group or speaking independently.

And Chief Justice Roberts says we're being perfectly respectful of the First Amendment here, because if you just wanted to say, "We think the Kurds in Turkey are great," that would be fine. The First Amendment allows you to do that. You're just not allowed to coordinate with them.

Justice Breyer, in his dissent, takes this back to what the Court thought was the rationale for allowing the material support possible prosecution in the first place, which was the idea of legitimizing the group. And what he really says is, "Doesn't it legitimize the group more, if there's an independent person you're saying we think they're great, as opposed if you're saying that as insider in the group?"

So you --there's something very strange here, and I actually relate it in a way to what Floyd Abrams was talking about this morning, about the difference between pushing of the support, not through the political parties, but to independent people. And so the

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coordination, I think, is one very interesting aspect in kind of a not-successful, very fuzzy line.

MR. LIPTAK: So let's turn to another area where--

MS. HERMAN: Could I actually make my two little points first? I had opened that up, because there were just two—I'll be very quick.

MR. LIPTAK: Be my guest.

MS. HERMAN: Thank you. Because that was the First Amendment.

I just wanted to make two small comments about *Humanitarian Law Project* which kind of move us in a broader direction.

One is that I also think that it's a separation of powers decision, and I think a very bad one. Because the Court is deferring here, what they tell us is that the courts do not have the institutional competence—and this gets to Ron's categories—to decide certain kinds of cases; so therefore, they have to defer to the Executive Branch when they say this is a good way to fight terrorism.

And what Chief Justice Roberts says, he says, "Well, judges do not start every morning by getting a briefing on threats about terrorism, and therefore, we're not qualified to make these decisions."

Now, it seems to me in Article III terms, that's exactly why we have independent judges who we want to decide on whether you have First Amendment rights here, because they don't get briefings every morning, and they're supposed to be independent. So that's separation of powers.

This is part of a pattern that the Court has, in all of the War on Terror cases, of what I call "abjudication," where the Court has just been declining to hear any case, unless the government lost below, in which case they'll hear the case, and that's *Holder v. Humanitarian Law Project*.

My final point is that I think that this case is also a real problem for democracy.

The sentence of the whole opinion that I think I hated most is when Chief Justice Roberts says, well, when you get right to the bottom of it, plaintiffs just disagree with Congress and the President. As if, you know, that ends the case—well, they disagree, so of course we should listen to the President and Congress.

Well, my understanding of the First Amendment is that the whole

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point is that we are entitled to disagree with the government, unless the government actually has some evidence that we are actually doing some harm that, you know, that should be preventable by our disagreement.

So I just think in addition to being a very messy First Amendment case, which, you know, if anyone has any more comments on that, it's a very messy First Amendment case. But it's a really bad case also on separation of powers, as well as, just you really kind of, let's trust the government and, you know, who cares what we all think. That's it.

MR. LIPTAK: Do you have any sense on the consequences on the ground? Are people being prosecuted as of a consequence of this decision?

MS. HERMAN: Not under the Obama Administration. But, you know, as people realize, you know, he might not be president forever.

The problem is, I think the dragnet, it chills speech, it chills association, and to the extent that people don't know about, it probably doesn't chill people quite as much, but if people read this decision, and thought about, you know, maybe Obama won't always—and Holder will not always be the Attorney General, I think people would be pretty terrified.

I think if you look at, you know, in terms of Bob's question about the film, when you look at how deferential the Court is here, as long as the government mumbles something about, "Well, we believe it's a good thing," the Court says, "Oh, all right." And they're willing to cut a hole in the First Amendment. So this, to me, is a really alarming case.

But I think that, Adam, in terms of your question, I think it's likely to be limited to the national security area. Plus the Court does have some distinctions. They say it's still an open question whether they would apply this to domestic groups, you can belong to the group, you know, there are some limits.

MR. LIPTAK: So that—Susan has presented what she says is one dark side of the Court's First Amendment jurisprudence, and I'm going to ask Bob Richards to talk about what, at least what some of the students in this room might think is another dark side--

MR. RICHARDS: Another dark side.

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MR. LIPTAK: --of the Court's decisions.

MR. RICHARDS: Yes. We're going to focus on that, actually now switching gears a little bit, not with the Supreme Court, but really what they are avoiding in the last couple of terms.

And that's looking at the notion of just how far student speech, and here I'm talking about high school students, middle school students, and so forth, should be protected under the Constitution.

Now for those of us who like public school speech issues, middle-schoolers and high school students are really the gift that just keeps on giving.

*(Laughter)*

MR. RICHARDS: Just when you think you've seen everything that they can do, they come up with something even more outrageous, and it leads to a case.

Despite that, the Supreme Court doesn't seem to want to take those cases. In fact, as you know, or many of you know, there's only been really four major Supreme Court decisions in this area, in as many decades. And yet, within the last couple of terms, there have been four cases presented to the Court that they could have taken, and actually help resolve a really important issue that's going on there in public schools, and we're going to get to that in a minute.

Let me just take a minute to go through some of the precedent. It's very quick, and it's very easy to go through, because they haven't done very much in that area.

You're probably all familiar with the 1969 case of *Tinker*.<sup>52</sup>

*Tinker* and—Mary Beth *Tinker* and her brother and her friend—wore black armbands to school, in the protest of the war in Vietnam. And the principals were upset about that, so they decided to create a regulation and said, "If you wear armbands to school, you're going to be suspended." Well, what did the students do? They wear this armband to school. They get suspended. And they file a lawsuit.

When the case reached the Supreme Court, we really got some of the great rhetorical First Amendment flourishes by the Supreme Court. You know, that it's—you can't—let me read it exactly, "that it can't hardly be argued that either students or teachers shed their constitutional right to freedom of speech or expression at the school

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<sup>52</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

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house gate.”<sup>53</sup> Okay?

And that school house gate is actually something I’m going to be focusing on, because now, in just a couple of minutes, we’re going to see just how far beyond the school house gate those, the schools are now punishing students for their speech, have gone.

So anyway, what the—the standard that *Tinker* set out was sort of a substantial and material disruption standard. If it can be shown that the student’s speech substantially and materially disrupts the operation of the school, then the kid can be punished. And that’s sort of the baseline.

The baseline, and if you look at the three cases that came after that, you can kind of look at them as exceptions to the *Tinker* rule. And as I said, there’s been some very long spans of time between cases in this area. In fact, it was about seventeen years, before this Court took up the case of Matthew Fraser.<sup>54</sup>

Fraser gave a nominating speech for his friend, who was running for student government. And as the Court said, that he did so “in terms of an elaborate, graphic, and explicit sexual metaphor.”<sup>55</sup> And he was punished for doing so. One of his punishments was that he could not be on the list of potential graduation speakers, which I think made plenty of sense if you’re the school district.

*(Laughter)*

But distinguishing that case from *Tinker*, the Court ruled that the First Amendment doesn’t prevent the school officials from determining that a vulgar and lewd speech such as Fraser’s, *Fraser* would undermine the school’s basic educational mission.<sup>56</sup>

So we have this first exception now. Okay. There’s no substantial and material disruption, but if it’s vulgar and lewd, it’s part of your educational mission to stop that sort of thing.

Two years later, the Court took up the case of *Hazelwood v. Kuhlmeier*.<sup>57</sup> That was involving a high school student newspaper. It was going to the last issue of the year, and the principal was unhappy with two stories; one about teen pregnancy, the other one about the impact of divorce on students. And so he removed those pages from the paper. And Cathy Kuhlmeier, the editor, sued.

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<sup>53</sup> *Id.* at 506.

<sup>54</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

<sup>55</sup> *Id.* at 675.

<sup>56</sup> *See id.* at 686.

<sup>57</sup> 484 U.S. 260 (1988).

The principal defended his decision on the basis of privacy and editorial balance, and the Supreme Court ruled that, indeed, they could—the school could do so, they could edit for style and content, providing they do so for legitimate pedagogical reasons.<sup>58</sup> Okay. Which is large enough to drive a big school bus through.

Then the Court went on hiatus again, for about nineteen years on this issue.

Until along came this case, my favorite case. Joseph Frederick, Sr., at Juneau-Douglas High School in Juneau, Alaska, wanted to get on television, so he thought it'd be fun, to hold—unfurled a 14-foot banner that said, "BONG HiTS 4 JESUS".<sup>59</sup> And he did so just as the Olympic Torch was passing by, so he was able to get on television, as he wanted to do.

Principal Deborah Morse was appalled by this. She went over, she grabbed the banner, crumpled it up. Adam might know this—I don't know if the exhibit is still up in the museum, but they do have that banner up there--

MR. LIPTAK: No, it is.

MR. RICHARDS: It's not there anymore?

MR. LIPTAK: No. No, it is there, proudly and all crumpled.

Mr. RICHARDS: It's all crumpled up, and so you can see it. And the kid used duct tape to actually write "BONG HiTS 4 JESUS", that's another use of duct tape.

Now I attended the oral argument, and as you might imagine, it's quite unsettling to hear Ruth Bader Ginsburg talking about bong hits. But—

MR. MORRISON: Or Jesus.

MR. RICHARDS: Or Jesus.

*(Laughter)*

MR. RICHARDS: But in June of 2007, Justice Roberts—Chief Justice Roberts was able to get a coalition of five people—five

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<sup>58</sup> *Id.* at 272–76.

<sup>59</sup> *Morse v. Frederick*, 551 U.S. 393 (2007).

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justices together, that said, okay, you can punish this speech, we have another exception to *Tinker*, provided that it is—it can be reasonably understood to give a—convey a pro-drug message.<sup>60</sup> And apparently “BONG HiTS 4 JESUS” gives a pro-drug message.<sup>61</sup>

Now interestingly enough, Justices Alito and Kennedy actually wrote a concurring opinion where they said, well, we’re going to join the opinion, but as—to the extent that it’s just talking about pro-drug messages, if there is any social or political message in there—they even gave examples about legalizing medical marijuana, and that sort of thing—then the speech is going to be protected.<sup>62</sup>

Okay. So that’s our four cases.

Equally as interesting in this case was Justice Thomas’ concurring opinion. Because Justice Thomas believes that students in the public school have no First Amendment rights.<sup>63</sup> Okay. Apparently, in terms of abortion, life begins at conception, but in terms of the First Amendment, when you’re 18, it begins, so ...

So that kind of brings us to the issue that we have today in the Court. Which is cases where students have created speech on their own computer, on their own time, away from school, and the school finds about it. This is again, the gift that keeps on giving.

The most recent case is a case called *Kowalski v. Berkeley County School*.

Kara Kowalski was a senior in high school, and she had a MySpace.<sup>64</sup> That shows you how even these cases that are new are kind of dated. She had a MySpace.com website called “S.A.S.H.,” which stood for “Students Against Sluts Herpes.” And she had a particular student in mind. I’m glad I didn’t make a slip of the tongue and say she had a particular slut in mind, but that was kind of the basis of the website. And it was a student named Shay.

And so people started posting pictures of Shay, with some unflattering things, like Shay has herpes, Shay’s a whore, that sort of thing. She was punished for that speech—Kara was punished for that speech. The school said that she created this hate website, violated the school’s harassment policy. She was suspended for ten days, and in what I think is a wonderful blast of irony, she was not able to crown the next queen of charm, having held that title herself.

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<sup>60</sup> *Morse*, 551 U.S. at 403.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 422–25 (Alito, J., concurring).

<sup>63</sup> *Id.* at 410–22 (Thomas, J., concurring).

<sup>64</sup> *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011).

(Laughter)

MR. RICHARDS: Now as I said, I can't make this stuff up, they're the gift that keeps on giving.

So the school, the Fourth Circuit handled the case, and they were not convinced by the student's argument that this was all taking place off campus, and so forth, and they argued that they should adopt the Second Circuit view—or this school district argued, of a case called *Doninger v. Niehoff*,<sup>65</sup> a case that they also—the Supreme Court has also denied to serve in.

Which basically says that if you have a foreseeable risk that the speech is going to reach campus, and then once there, is going to create this disruption, then you can punish the speech.<sup>66</sup> It's quite a big leap; it's sort of a two-part step there.

So suffice to say that *Doninger and Kowalski* stand in contrast to the Third Circuit's ruling in two cases, and that's my circuit, *J.S. v. Blue Mountain School District*<sup>67</sup> and *Layshock v. Hermitage School District*.<sup>68</sup>

J.S. had a website, a MySpace profile as well, and she wrote, "Hello children." Yes, now at the MySpace profile, they pretend to be somebody else. In this case, they pretend to be their school principal. And she says, "Yes, it's your oh-so-wonderful Harry, expressionless sex addict fag ass put on this world with a small dick principal." And the content went down from there.

What they did is they went on and they grabbed a photograph of the principal from the school's district's website, put it on there, and that's supposed to be his profile, and the speech never got to school. The way it got to school was some student who—she, by the way, kept this private. She had twenty-two friends, I guess. One of them wasn't really a friend, because he went to the principal, or she went to the principal and told the principal about it. And the principal said, "Hey, do me a favor, print that out and bring it to school," because the computers in that school had been disabled from reaching MySpace. They couldn't even access that site. So he prints the thing out, brings it to school.

Okay. First, we had this—this case went up and down with it, it had a panel decision by the Third Circuit, then it went down en

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<sup>65</sup> 527 F.3d 41 (2d Cir. 2008).

<sup>66</sup> *See id.* at 51–53.

<sup>67</sup> 650 F.3d 915 (3d Cir. 2011).

<sup>68</sup> 593 F.3d 249 (3d Cir. 2010).

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banc.

And finally, and I'll get to the punch line here, or the end, the Third Circuit decided in this case that the—sitting en banc, that it was off campus, it was on their own time, it's not a school speech case.<sup>69</sup> Okay. So they ruled in favor of the student, even though in the district court it originally ruled in favor of the school district in her case.

And second case, just briefly, *Layshock*, same thing. MySpace profile, okay, of the principal, takes a picture, does the whole thing. And asks, you know, "In the past month, have you gone skinny dipping?" He writes, "big lake, not big dick." Okay. Apparently the size of the principal's member is very important in the student's mind. "In the past month, have you drunk alcohol?" "Big keg behind my desk." Everything was the theme of big there. Okay.

In the District Court *Layshock* won in that decision, and as I said, *J.S.* lost. They went to three separate—two separate panels before the Third Circuit, and on the decision that came down on the same day from those two separate panels, they reached opposite conclusions. One had ruled for the student, one had ruled for the school district, then, they went en banc and ruled for the student.

Again, that case—those cases combined went up to the Supreme Court, the Supreme Court doesn't take the case.

So it really—you know, we have differing standards now developing now around the country in the various circuits, maybe something the Supreme Court should look at. And we have a Supreme Court that has historically demonstrated very little interest in this area, but maybe they ought to address this issue. But then you have to ponder, do we really want them addressing this issue, when you have somebody like Justice Thomas saying that there are no First Amendment rights for anybody in the public schools.

MR. LIPTAK: Well, you've got—the poor Supreme Court, you know, is very busy. They decided sixty-five cases last year.

*(Laughter)*

MR. LIPTAK: Nine Justices, each of them with four brainiac law clerks, you divvy up the work; it's a lot of work.

But more seriously, the question that Bob ended with, and I—

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<sup>69</sup> See *J.S.*, 650 F.3d at 930–31.

sometimes I hear people from the ACLU, maybe including Susan, say that half the battle with the Supreme Court is to keep your case out of the Supreme Court, because nothing good will happen there, at least in some kinds of cases. I don't know if this is that kind of case. What do we think? Is this a case where the Supreme Court would ever help student speech?

MS. HERMAN: Well, it seems to me, I mean, these cases—the student speech cases keep the ACLU extremely busy, and *Morse v. Frederick* was an ACLU of Alaska case, so these are all over the place, it's, you know, a lot of what our affiliates do.

I met Mary Beth Tinker recently. She's on the ACLU Board in D.C. She's still an activist. And that was, you know, it was a Warren Court case, but it was amazing that the Supreme Court was really able to say the Constitution doesn't stop at the school house door.

What alarms me recently—and this is where I want to draw a comparison between the student speech cases, that Bob was just talking about on the national security cases—is how the Supreme Court is falling back into this mode of deference.

They're deferential to the President about national security; they're deferential to the principal in *Morse v. Frederick* about what's harmful and what isn't. In addition, there's the war on drugs, war on terror. Once you call it a war, forget rights.

So you know, they do the same thing in the prison cases, what do we know institutional competence, we should defer to the warden, so you would like to think that the Supreme Court would be better on these issues and follow *Tinker* and the precedent, but this whole idea of what the Court does where there's kind of judicial supremacy and we know better than Congress and *Citizens United*, but there are these other places where we went to defer. Clear, very ideological, and that's what sort of concerns me.

MR. COLLINS: *Tinker* is alive only on the pages of the Supreme Court. The Supreme Court, as has been mentioned, has had three decimating, just incredible rulings, basically taking the guts out of *Tinker*, and they're letting the lower courts do the damage. But I must say, since there are lawyers in the—I mean, law students and lawyers in the audience, let me just say something about this.

The results—a lot of the results in these school cases are the product of bad lawyering.

I've gone through these cases, and in very, very few of them, will

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one find any statutory authority; that allows a Principal to regulate off-campus speech. It's incredible. And those claims are rarely, if ever, raised, and these cases all turn into big constitutional cases, when it should be a very simple matter.

Where does the principal get the authority to regulate off-campus speech? So for example, if my son were at a shopping mall, and he said something derogatory about the principal, and then somebody went back and told the principal that, I mean, it would be clear, right, that these principals cannot be super nannies, so what we have here, is because of this obsession with constitutional law, people have forgotten the first rule of government, and that is government can only do what it's authorized to do. And these claims are rarely raised, and what happens is, you have a lot of bad precedent, a lot of "balancing", and *Tinker* and the cases following, if you look at the cases as Bob and others have done in the lower courts, it's basically, student speech is being abridged constantly, and now it's being abridged off campus, and it's really—I think a lot of it has to do with bad lawyering.

MR. MORRISON: Well, I wish that were indubitably the case. I think part of the problem is, that the question of whether the principal has the authority or not is a question of state law, or maybe local law, and the—you know, like the inherent power of the president; what's the inherent power of the principal to see that order is maintained in the school, and they start from there.

So I agree with you, it's a way of challenging it, but I'm not sure it would make much difference, because if the—the district court is going to be very reluctant to start second guessing the applicable state law on these questions, unless they think there's a First Amendment issue to avoid, which, of course, there doesn't appear to be.

The other thing I say about these cases that makes them particularly hard for students is that the principal has all of the power. And the principal can act, like teachers can act to expel students from the classroom, and it takes a very gutsy, well informed, and financially able student, or one who has access to the ACLU, or someone else, to even get the case as far as the courtroom. And frankly, the principals are not very concerned about that happening. And so they take these actions, if they don't like something, they don't want to be called soft on letting the students run the—the inmates run the institution, as they say. And so, I mean, that's the dynamics of what's happening, and unless the

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Court steps in, and it may be that it doesn't matter, the Court—if the Court issues some more bad opinions, so what? I mean, it can't make it any worse than it is now, in terms of what's actually happening on the ground.

MS. HERMAN: Well, there are a lot of cases that ACLU affiliates actually win in terms of school speech, just by writing a letter. You know, these cases aren't usually litigated, but that's because you can still quote *Tinker*. Too many holes in *Tinker* and you lose it, but let me point out on Ron's off-campus point that the first thing Roberts says in *Morse v. Frederick* is, this was a school-sponsored activity.

MR. RICHARDS: Right.

MS. HERMAN: Going to the parade.

MR. RICHARDS: Right. It wasn't even considered an off-campus expression in that case.

And if you want to track one place in history, whereas Ron said, about the lower courts, Columbine High School, huge change. Post-Columbine, lower courts are giving great deference to the schools. They will bend over backwards, and if you look at the cases right after Columbine, they really bent over backwards to support the principal.

And I guess if you're a judge, you're going to say, I'm not going to be the person who's going to let the next, you know, Eric Harris, or whatever-his-name-is-Klebold, go in there and blow up the school. We're going let the principals have a lot of leeway, a lot of latitude in doing this.

MR. LIPTAK: Thank you, Bob.

Let me turn to Alan for one last topic area. Would you give us a little overview about what we can say about the Roberts' Court in the area of commercial speech.

MR. MORRISON: Well, I think probably, fortunately not very much because they haven't had much to do with it.

For those of you who are law students, you may not know, but that until 1977, lawyers were not allowed to advertise at all. It was considered commercial speech, and commercial speech wasn't until a year before that, entirely outside the First Amendment. A series

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of cases came along, and commercial speech was recognized, although given lesser protection.

There are those of us who supported the commercial speech doctrine, who kind of wish we didn't get it when we see things like tobacco advertising, and when we see the kind of—not—those weren't the kind of lawyers we were talking about advertising on late night television, the kind that we see all the time. But, we have to take the good with the bad, and I think on balance, those of us who supported the commercial speech doctrine are okay with it.

I think the only commercial speech case that the Roberts Court has had is a case called *IMS v. Sorrell*.<sup>70</sup> And the problem with this is, it's not clear that it's a commercial speech case. Indeed, Justice Breyer dissented on the grounds that he thought that was a commercial regulation case, and not a commercial speech case. So let me tell you about it and maybe you can tell me what you think, whether this is a commercial speech case or not.

Of course, one of the great things about the First Amendment, as we've seen with these web cases, is that the First Amendment changes. Technology changes lots of things around.

So for many years, doctors would prescribe drugs. They would send a prescription over to the druggist. The druggist would keep the prescription, and they would send—fill the prescription, keep it on file.

As a result of the revolution in computers, much of this work is done on computers now. And in any event, the pharmacist has to actually keep all the records of what the doctor prescribes. They're on computers, and they are sent in, and they're used, among other things, to be—to look for doctors overprescribing certain kinds of medicines, for non-medical purposes. Anyway, these are all now available.

The pharmacist were now approached by the drug manufacturers, and they want to get the list of what the doctor is prescribing, not with the name of the patient on it, but they want to be able to go send their detail men out to the doctors and say them, doctor, you're not prescribing enough of our medicine, and we want you to prescribe more of ours and less of that, and tell me, what you—why do you think this is good and that's bad. They want to engage doctors in that discussion.

Needless to say, the doctors didn't like that. They just didn't want to be bothered. They didn't want to be interfered with; they

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<sup>70</sup> 131 S. Ct. 2653 (2011).

liked doing what they wanted to do.

And so, largely doctor driven, the states passed a law, New Hampshire passed one, Maine had one, Vermont had one, all of which said that it is impermissible to sell these lists to the pharmacies, for—to the drug manufactures for commercial—to be used for commercial purposes.

And these were challenged on First Amendment grounds. So the first question you have to ask is, what's the First Amendment going on here? Is it the buying and selling of the list, is that a First Amendment activity? Is it not—so one of the things they say is, well, we're buying and selling words, which are methods of communication, and then they say, you're interfere—drug companies say you're interfering with our First Amendment right to speak to the doctors, because without this information, we can't go to them and we can't speak, and that's if it's a kind of interference with a First Amendment speech. It's a different kind of interference.

In any event, the Court, by a vote of five to four, said yes, it's interference with speech.<sup>71</sup> It's commercial speech to be sure, but the state hasn't given a good enough reason. If the doctor doesn't want to see the drug detailer, then he just has to say no. And that's the end it.<sup>72</sup>

Justice Breyer dissents and says, no, this is a matter of economic regulation.<sup>73</sup> And it may or not be good regulation, it may or may not be wise, but it surely does not involve speech, even in the commercial context. And so they're not—no one's buying and selling a product, like lawyer advertising, or drug pricing advertising; and therefore, it's not commercial speech.

So to me, the interesting question is, not what happens if it's decided to be commercial speech, but is this commercial speech, or is it another form of government regulation, which under our current thinking, is subject to much less judicial review. And the Court gets to an economic regulation, which they obviously didn't think that it was worth doing and interfered with a legitimate business, drug companies, pushing drugs on doctors. For that reason they say it's commercial speech, and therefore, we can breach it.

So I think that we're going to see more and more of this trying to

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<sup>71</sup> *Sorrell*, 131 S. Ct. at 2672.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2685 (Breyer, J., dissenting).

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decide what speech, and bringing it in that way, rather than trying to decide what's legitimate under commercial speech, although we may see some of that.

There's a case that was just decided by the DC Circuit, in which the DC Circuit said unanimously that some very graphic ad requirements for tobacco manufacturers to put on their products went too far, and it violated their First Amendment right not to speak and disparage products which they are trying to sell. So the government may very well take that up, and we'll see what happened with that one.<sup>74</sup>

MR. LIPTAK: What'd you think of that decision?

MR. MORRISON: It's hard to tell. I think it's a close case. I mean, everybody agrees that you could put black boxes and warnings on, and—but they said this graphic thing goes too far, and it's hard to know what's too far, and why they think it's too far.

MR. LIPTAK: If you buy the first part, the second part sort of seems to follow.

MR. MORRISON: Meaning?

MR. LIPTAK: You buy the standard warning we've all become inured to, if that's okay; if you can compel them to do that.

MR. MORRISON: Yes. But the problem is, they didn't work; and therefore, I mean—but it was—actually one of the most interesting things, if you read the opinion, the manufacturers admit that the regular warnings don't work, and they're worried about these, because they will work.

The FDA is saying, "Well, the regular warnings don't work, but these are only a little bit, work more, but we really, really need to have the ones that are only a little bit more." And you leave scratching your head. What's going on here? I mean, this is one of those "what's the big deal?" cases.

MR. COLLINS: Alan, I'm a little surprised you even paused. I would have thought that would have been a slam dunk, no protection. I mean, as you know, Floyd Abrams is also representing the corporate tobacco companies in that case, and I—to be honest with you, I was a little surprised when I heard you pause, I—I would have thought you would have said--

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<sup>74</sup> For a detailed discussion of this case and its ramifications, see R. George Wright, *Are There First Amendment "Vacuums?": The Case of the Free Speech Challenge to Tobacco Package Labeling Requirements*, 76 ALB. L. REV. 613 (2013). See also Danielle Weatherby & Terri R. Day, *The Butt Stops Here: The Tobacco Control Act's Anti-Smoking Regulations Run Afoul of the First Amendment*, 76 ALB. L. REV. 121 (2013) (positing "that the graphic images mandate of the Tobacco Control Act cannot pass constitutional muster").

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MR. MORRISON: Well, remember, these--

MR. LIPTAK: Because whatever Floyd thinks, Alan should think the opposite of?

MR. COLLINS: Well ... that's a good lit-- that's as good litmus test as any.

MR. MORRISON: Well, it's-- remember, this case is the opposite of the typical commercial speech case in which somebody who wants to speak is being forbidden from speaking. These are compelled speech cases in which tobacco companies are being required to say something. We know they can be required to say something about their products. That's been going on for years. The question is, can they be compelled to say something meaningful, and that's a somewhat different question than the other question.

MR. COLLINS: So we're compelling a corporation, which is not a person involved in a business transaction--

MR. MORRISON: Well, no, no. They are.

MR. COLLINS: --which results in millions of lives being lost each year, and yet somehow there's a First Amendment corporate right to do that? That's a rhetorical question, by the way.

MR. MORRISON: Well, even I don't think the corporation should be forbidden from advertising just because they're corporations. I don't take that view. There are others who do, but that's not my view of the First Amendment.