

CITIZENS UNITED, STEVENS, AND HUMANITARIAN LAW PROJECT: FIRST AMENDMENT RULES AND STANDARDS IN THREE ACTS

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The confluence of Justice Stevens' retirement from the United States Supreme Court and the five-year anniversary of Chief Justice Roberts' ascension provides an opportunity for a new look at the familiar debate over the relative desirability of rigid rules and contextualized, fact-specific analysis in constitutional cases.¹ In a trio of recent First Amendment cases, the Court has stated and applied, and then retreated from, strict doctrinal rules and the refusal to defer to congressional findings that normally accompany such rules.² These cases raise anew the question of the appropriateness of such rules and their durability as meaningful constraints on courts confronting difficult fact patterns. To convert into a question Justice Souter's defense of such rules: does deciding First Amendment cases based on "fairly strict categorical rules" really "keep[] the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said"?³

This short Article considers three First Amendment cases decided during the 2009–2010 term: *United States v. Stevens*,⁴

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1. For a general introduction to the rules-standards debate, see H.L.A. Hart, *The Concept of Law* 121–150 (Oxford U. Press 1961).

2. *Holder v. Humanitarian L. Project*, 130 S. Ct. 2705 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Citizens United v. Fed. Election Commn.*, 130 S. Ct. 876 (2010).

3. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

4. 130 S. Ct. 1577.

Citizens United v. Federal Election Commission,⁵ and *Holder v. Humanitarian Law Project*.⁶ Each of these cases speaks to the issue of strict (or even categorical)⁷ versus contextual approaches to the First Amendment.⁸ *Stevens* reflects First Amendment rigidity in its refusal to engage in ad hoc balancing to determine whether categories of speech fall completely outside constitutional protection.⁹ *Citizens United* reflects a related (if distinct) rigidity, both in its stringent application of the rules against content and identity-based speech restrictions and in its refusal to defer to congressional judgments relevant to the First Amendment issue.¹⁰

Humanitarian Law Project rejects both types of rigidity on display in *Citizens United*.¹¹ In his opinion for the majority, Chief Justice Roberts stated that the Court was applying a “demanding” First Amendment standard,¹² but the Court nonetheless subjected the statute at issue to fairly mild review.¹³ As part of that mild review, it largely deferred to congressional judgments

5. 130 S. Ct. 876.

6. 130 S. Ct. 2705.

7. This Article distinguishes between “strict” or “rigid” approaches, such as the strict scrutiny rule for content-based speech restrictions, and “categorical” approaches, such as a rule that absolutely prohibits government from imposing certain speech restrictions. On the modern Court, the most prominent proponent of such categorical rules is Justice Kennedy. See Araiza, *infra* n. 16, at ___ (ms. at 36–38) (discussing Justice Kennedy’s categorical approach to First Amendment issues). Thus, this Article considers three types of approaches to the First Amendment: contextual, flexible standards (such as those championed by Justice Stevens); rigid standards (such as the strict scrutiny standard for content-based speech restrictions); and categorical standards, or rules (such as Justice Kennedy’s argument for a per se prohibition on content-based speech restrictions). As the context requires, this Article may describe either of these latter doctrines as “rules” or “standards.” Given the salience of the rule-standard distinction in legal theory, the reader is cautioned not to import those broader implications automatically into this Article’s use of one term or the other.

8. For an excellent summary of the distinction between rules and standards and the benefits and drawbacks of each, see Joseph Blocher, *Roberts’ Rules: The Assertiveness of Rules-Based Jurisprudence*, 46 *Tulsa L. Rev.* ___ (forthcoming 2011) (copy on file with Author).

9. See 130 S. Ct. at 1585 (stating that “[t]he First Amendment’s guarantee of free speech does not extend only to categories of speech that survive ad hoc balancing of relative social costs and benefits”).

10. See 130 S. Ct. at 911, 913, 945–947 (holding fast to the rules against content and identity-based restrictions and refusing to defer to Congress’ judgments pertaining to the First Amendment issue).

11. See 130 S. Ct. at 2724–2731 (providing the reasons why the Court rejects both types of rigidity).

12. *Id.* at 2724.

13. See *id.* at 2724–2731 (discussing the government’s interest protected by the statute).

about the dangers presented by the speech the statute restricts.¹⁴ While there may be good reasons for such deference, given the national security context of the case, the Court's approach nevertheless creates at least some tension with the stiffness of the Court's standards in *Stevens* and *Citizens United*.

The Stevens retirement¹⁵ and the five-year anniversary of the Roberts Court frame this issue neatly.¹⁶ Chief Justice Roberts authored two of the majority opinions in these cases. His now (in)famous comparison of judging to baseball umpiring, with all of its promises of neutrality and objectivity, has direct relevance to the question of whether rigid doctrinal tests can satisfactorily answer the difficult free-speech questions that reach the Court.¹⁷ In contrast to a rigid approach stands the more contextual approach often associated with Justice Stevens. Justice Stevens was well known for eschewing a rigid, rule-based analysis of First Amendment issues in favor of one based on principles and factual context.¹⁸ Instead of relying on rules, such as the strict scrutiny requirement for content-based restrictions, Justice Stevens instead preferred to decide First Amendment cases by recourse to broad principles, such as a general disfavoring of speech restric-

14. *Id.*

15. See generally Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement Is Political Test for Obama*, N.Y. Times A1 (Apr. 9, 2010) (discussing Justice Stevens' retirement).

16. In other writing, I have discussed at greater length how Justice Stevens' jurisprudence compares with that of Chief Justice Roberts with regard to rules versus standards. See William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law beyond the Rules*, 44 Loy. L.A. L. Rev. ____ (forthcoming 2011) (ms. at 35–47, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758021).

17. The third opinion considered, *Citizens United*, was authored by Justice Kennedy, who at times has taken the most categorical First Amendment approach of all the current Justices. See e.g. *Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (calling for a categorical prohibition on content-based speech restrictions except for those restricting unprotected speech). His call for such a categorical jurisprudence—similar to Justice Black's insistence that, in the context of the First Amendment, no law means no law—also raises the question of the workability of such an approach to First Amendment cases. See *Beauharnais v. Ill.*, 343 U.S. 250, 275 (1952) (Black, J., dissenting) (stating that “I think the First Amendment . . . ‘absolutely’ forbids such laws without any ‘ifs’ or ‘buts’ or ‘whereases’”).

18. See e.g. John Paul Stevens, *The Freedom of Speech*, 102 Yale L.J. 1293, 1304–1305 (1993) (“There are . . . decisions . . . that depart from the prohibition on content-based regulation without undermining its central goals. They do so by supplementing, if not replacing, the black-letter rule with a sensitivity to fact and context that allows for advancement of the principles underlying the protection of free speech.”); see also Araiza, *supra* n. 16, at ____ (ms. at 5–47) (discussing Justice Stevens' First Amendment jurisprudence).

tions motivated by paternalistic governmental concern that citizens will use information poorly.¹⁹

Justice Stevens' positions in at least two of these three cases are telling. In *Citizens United*, he wrote the dissent for the four liberals, which is a full-throated attack on rigid, categorical analysis in First Amendment law.²⁰ But in *Humanitarian Law Project*, which, as explained below, represents a less rigid approach to the First Amendment, Justice Stevens broke with the liberal bloc and joined Chief Justice Roberts' majority opinion.²¹ Thus, his positions in these cases²² present a window through which one can consider both the Roberts Court's commitment to rigid First Amendment standards and the merits of such a commitment.

I. CITIZENS UNITED, STEVENS, AND HUMANITARIAN LAW PROJECT

A. *Citizens United*: "Glittering Generality"²³

In *Citizens United*, the Court overruled two of its campaign-finance precedents and protected corporate and union speech that explicitly endorsed or attacked political candidates.²⁴ Writing for the five-Justice majority, Justice Kennedy used broad language in reaching the Court's result. He acknowledged his own view that the First Amendment categorically prohibits restrictions on political speech before adopting, for purposes of deciding the case, the more mainstream view that such restrictions are subject to strict scrutiny.²⁵ He also concluded that the First Amendment

19. See e.g. *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 497 (1996) (observing that the First Amendment frowns on speech restrictions motivated by paternalistic government concerns that people cannot be trusted with information).

20. *Citizens United*, 130 S. Ct. at 929–979 (Stevens, J., concurring in part and dissenting in part).

21. 130 S. Ct. at 2712.

22. Justice Stevens joined Chief Justice Roberts' majority opinion in *Stevens*. 130 S. Ct. at 1582.

23. *Citizens United*, 130 S.Ct. at 930 (Stevens, J., concurring in part and dissenting in part). This term comes from Justice Stevens' critique of the majority's broad statement that the First Amendment prohibits identity-based restrictions on speech. *Id.* (Stevens, J., dissenting).

24. 130 S. Ct. 876.

25. Justice Kennedy stated:

While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, . . . [*Federal Election Commission v. Wisconsin*

“[p]rohibit[s] . . . restrictions distinguishing among different speakers,”²⁶ conceding only that such restrictions have been upheld in pursuit of the government “interest in allowing governmental entities to perform their functions.”²⁷

Justice Kennedy was as good as his word in applying these principles. He weaved his way through pre-*Buckley v. Valeo*²⁸ precedent that appeared to allow such identity-based restrictions,²⁹ explained away *Buckley*’s failure to strike down an identity-based speech restriction in the law it otherwise exhaustively reviewed,³⁰ minimized or ignored cases between *First National Bank of Boston v. Bellotti*³¹ and *Austin v. Michigan Chamber of Commerce*³² that upheld identity-based restrictions on political speech,³³ severely criticized the rationales in *Austin* that implied the appropriateness of identity-based restrictions,³⁴ and rejected the argument that an interest in fighting government corruption or (in the case of corporate restrictions) protecting dissenting shareholders could justify limits on corporate or union speech.³⁵

In addition to applying its strict doctrinal rule against identity-based speech restrictions, Justice Kennedy’s majority opinion also gave short shrift to any claim that the Court should defer to Congress’ conclusions about the political-integrity implications of unlimited corporate and union spending. In language that echoes

Right to Life, Inc., 551 U.S. 449 (2007), which requires strict scrutiny of restrictions on political speech,] provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

Id. at 898.

26. *Id.*

27. *Id.* at 899 (citing cases dealing with speech by students, prisoners, military personnel, and federal employees).

28. 424 U.S. 1 (1976).

29. *Citizens United*, 130 S. Ct. at 899–901.

30. *See id.* at 902 (stating that “*Buckley* did not consider [Section] 610’s separate ban on corporate and union independent expenditures. . . . Had [Section] 610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that precedent.”).

31. 435 U.S. 765 (1978).

32. 494 U.S. 652 (1990).

33. *See Citizens United*, 130 S. Ct. at 903 (transitioning directly from *Bellotti* to *Austin* without considering cases such as *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982), both of which upheld identity-based restrictions).

34. *Id.* at 904–908.

35. *Id.* at 908–911.

some of the Court's more aggressive opinions reining in congressional power to enforce the Fourteenth Amendment, he wrote:

When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. . . . We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of [corrupting] influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule.³⁶

Justice Kennedy did not directly consider the argument that Congress could not be trusted to write speech-restrictive campaign-finance legislation because of its members' self-interest in protecting the advantages of incumbency. At oral argument in the case, however, Justice Scalia pressed the government on this point.³⁷ Moreover, as Justice Stevens noted in his dissent, Justice Scalia's dissenting opinion several years earlier in *McConnell v. Federal Election Commission*³⁸ expressed the view that, in general, restrictions on political speech tend to favor incumbents.³⁹ Thus, in *Citizens United* Justice Kennedy applied a rigid, speech-protective principle and failed to consider seriously the possibility that Congress should receive deference for its conclusions about the corrupting effect of corporate and union speech expenditures.⁴⁰

Justice Stevens wrote a lengthy dissent that engaged Justice Kennedy on both of these points. He argued that the majority

36. *Id.* at 911.

37. Transcr., *Citizens United v. Fed. Election Commn.*, [http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205\[Reargued\].pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf) at 50:22–25 to 51:1–3 (Sept. 9, 2009) (130 S. Ct. 876 (2010)).

38. 540 U.S. 93 (2003).

39. *Citizens United*, 130 S. Ct. at 969 (Stevens, J., concurring in part and dissenting in part) (citing *McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part and dissenting in part)).

40. Indeed, Justice Kennedy questioned whether, as a theoretical matter, the type of favoritism or access such speech expenditures ensured could be considered corrupting at all. See *Citizens United*, 130 S. Ct. at 910 (“Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. . . . Democracy is premised on responsiveness.”) (quoting *McConnell v. Fed. Election Commn.*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)).

“dramatically overstate[d] its critique of identity-based distinctions.”⁴¹ He noted the contexts in which Justice Kennedy conceded the existence of precedent upholding identity-based distinctions, but he questioned whether those cases could be cabined as easily as Justice Kennedy suggested.⁴² He also noted additional cases in which the Court had upheld identity-based restrictions on political speech.⁴³ This discussion provided the foundation for Justice Stevens’ argument that it was appropriate for Congress to single out corporate and union speech, given the unique problems such speech presented.

Justice Stevens also provided a more nuanced discussion of the argument for deference to congressional findings about the corrupting effect of corporate and union speech. He criticized as “airy speculation” the Court’s statements (and past statements by members of the *Citizens United* majority) that restrictions on such speech had the effect of favoring incumbents, noting the lack of record evidence that such restrictions had either that effect or that purpose.⁴⁴ This is not to say Justice Stevens embraced unquestioning deference in this context. He recognized that deference would not be appropriate “if there were a solid basis for believing that legislative action was motivated by the desire to protect incumbents or that it will degrade the competitiveness of the electoral process.”⁴⁵ But he condemned the Court’s attitude toward Congress’ factfindings as a “cavalier[] [disregard],” contrasting the majority’s approach with “conscientious policing for impermissibly anticompetitive motive or effect in a sensitive First Amendment context.”⁴⁶ Thus, both on the larger doctrinal point and on the deference point, Justice Stevens took issue with the majority’s rigidity, calling for less categorical and more fact- or context-specific analysis.

41. *Id.* at 948 (Stevens, J., concurring in part and dissenting in part).

42. *Id.* at 946 n. 46.

43. *Id.* at 946–947 (citing *Ark. Educ. TV Commn. v. Forbes*, 523 U.S. 666 (1998); *Burson v. Freeman*, 504 U.S. 191 (1992)).

44. *Id.* at 968–970.

45. *Id.* at 969.

46. *Id.* at 970.

B. *Stevens*: The Rejection of Ad Hoc Balancing

In *Stevens*, the Court struck down, on First Amendment grounds, a federal law forbidding the sale of depictions of animal cruelty.⁴⁷ For the purpose of this Article, the most relevant part of the case is the Court's explanation of *Chaplinsky v. New Hampshire*'s⁴⁸ traditional categories of speech that fall outside the protection of the First Amendment.⁴⁹ In arguing for an expansion of that list to include animal cruelty depictions, the government relied heavily on prior judicial analysis of unprotected speech.⁵⁰ Seizing on *Chaplinsky*'s famous statement that the categories it identified encompass speech that is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,"⁵¹ the government argued that depictions of animal cruelty could also be so described, and thus merited exclusion from the First Amendment's protections.⁵² Writing for the Court, Chief Justice Roberts would have none of it:

As a free-floating test for First Amendment coverage, [the government's argument] is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. . . .

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and moral-

47. 130 S. Ct. at 1592.

48. 315 U.S. 568 (1942).

49. See *Stevens*, 130 S. Ct. at 1584 (citing *Chaplinsky* and listing cases upholding restrictions on the content of specific types of speech).

50. *Id.* at 1585.

51. 315 U.S. at 572.

52. *Stevens*, 130 S. Ct. at 1585.

ity.” *R.A.V. [v. City of St. Paul]*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky*). In *New York v. Ferber*, 458 U.S. 747 (1982), we noted that within these categories of unprotected speech, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,” because “the balance of competing interests is clearly struck.” The Government derives its proposed test from these descriptions in our precedents.

But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his [or her] speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.⁵³

The Court then went on to explain that its decision in *New York v. Ferber*⁵⁴ to accord unprotected status to child pornography reflected a “special case” in which “[t]he market for child pornography was ‘intrinsically related’ to the underlying [child] abuse, and was therefore ‘an integral part of the production of such materials, an activity illegal throughout the Nation.’”⁵⁵ Chief Justice Roberts thus described *Ferber* as having “grounded its analysis in a previously recognized, long-established category of unprotected speech”: speech that was an integral part of unlawful conduct.⁵⁶

Thus, in *Stevens* Chief Justice Roberts explicitly and forcefully rejected ad hoc balancing of the value of a given type of speech against its social costs. This rejection does not necessarily reflect a completely rigid doctrinal framework; Chief Justice Roberts recognized that new categories may be added in the future. But he insisted that such “new” categories would have always existed, rather than being created as a result of contemporary balancing.⁵⁷ Because this historical method—like originalism in general—implies not a *creation* of new categories but a *discovery* of categories that have always existed, it is presumably

53. *Id.* at 1585–1586 (emphasis in original) (some citations omitted).

54. 458 U.S. 747 (1982).

55. *Stevens* 130 S. Ct. at 1586 (quoting *Ferber*, 458 U.S. at 759, 761).

56. *Id.*

57. *Id.*

impervious to context-based analysis or the perceived needs of the moment, at least to the extent a court employs it conscientiously and at the high level of generality implied by the issue in *Stevens*—the protected status of broad categories of speech.⁵⁸

C. *Humanitarian Law Project*: The Grutter of the Roberts Court?

After *Citizens United* and *Stevens*, the Court's analysis in *Humanitarian Law Project* may come as something of a surprise. In *Humanitarian Law Project*, the Court upheld a statute prohibiting speech made in conjunction with a terrorist group and amounting to "material support" for the group, even when the speech consisted of training the group how to use peaceful methods of conflict resolution.⁵⁹ It is easy to understand the Court's concern about terrorism and speech that may assist terrorist groups, regardless of whether one agrees with the result in the case. But the Court's analytic path in reaching the result suggests a retreat from the starchy standards on display in *Citizens United* and *Stevens*.

In *Humanitarian Law Project*, the Court conceded that, at least as applied to the plaintiffs, the statute constituted a content-

58. The sudden "discovery" of a new category of speech that historically has been unprotected seems unlikely. Perhaps we will see new applications of the First Amendment's exception for speech integrally related to criminal conduct as conduct (such as child abuse) is newly criminalized. But entirely new categories seem unlikely, unless a new trove of historical information suddenly reveals the historically unprotected status of certain categories of speech that individuals in the modern world have not attempted to engage in or that governments have not attempted to suppress, and the constitutional status of which thus have not been litigated.

On this point, more hints may come from the Court's pending decision in *Schwarzenegger v. Entertainment Merchants Association*, No. 08-1448 (U.S. docketed May 21, 2009), which considers the constitutionality of restrictions on the sale of violent video games to minors. Indeed, at oral argument in *Entertainment Merchants*, Justice Sotomayor referred to *Stevens* and asked the attorney for the state how its restriction on violent video game sales responded to a historical consensus that such speech was unprotected. Transcr., *Schwarzenegger v. Ent. Merchants Assn.*, http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf at 8:12 to 8:21 (Nov. 2, 2010). Justice Scalia asked essentially the same question. *Id.* at 15:23 to 15:25, 16:1 to 16:22, 17:8 to 17:13. While these two exchanges involved the attorney for the state, Chief Justice Roberts engaged in a colloquy with the game developers' lawyer suggesting that children had in fact traditionally been protected from speech of the sort the statute sought to restrict. *Id.* at 33:2 to 33:12, 33:21 to 33:25; 34:5 to 34:8, 34:10, 34:14 to 34:19. On the other hand, Justice Alito pressed the gaming industry's lawyer on whether the newness of the video game medium rendered *Stevens*' historical analysis at least partially irrelevant. *Id.* at 37:16 to 37:25, 38:2 to 38:10.

59. 130 S. Ct. at 2725, 2730.

based restriction on speech.⁶⁰ It was not a complete ban; the plaintiffs could advocate as they wished as long as they did not do so in concert with the organizations themselves.⁶¹ Nevertheless, the statute clearly implicated the First Amendment.⁶² Indeed, its impact on the First Amendment was not a collateral effect of a ban on some other conduct; as the Court observed, the conduct at issue in *Humanitarian Law Project* “consist[ed] of communicating a message.”⁶³ For these reasons, the Court rejected application of the intermediate scrutiny it applied in *United States v. O’Brien*⁶⁴ to restrictions on conduct that had the collateral effect of restricting expression.⁶⁵ Instead, it concluded that “a more demanding standard” was called for.⁶⁶

This preliminary statement of the applicable law already suggests some softening in the Court’s First Amendment jurisprudence—in contrast to Justice Breyer’s dissent, the Court did not speak the words “strict scrutiny.”⁶⁷ But more slippage was in the offing. In reviewing the speech restriction, Chief Justice Roberts’ majority opinion largely deferred to judgments made by Congress and the Executive Branch.⁶⁸ The Court deferred to Congress’ determination that any aid to the target organizations was fungible, in that it translated into assistance that could be used to further their violent acts, even if the Court also stated that it was independently convinced of this argument.⁶⁹ Much of its argument

60. *Id.* at 2723.

61. *Id.* at 2730.

62. Indeed, after *Citizens United* it would have been difficult for the *Humanitarian Law Project* Court to rely on the plaintiffs’ ability to speak on their own to conclude that the statute did not implicate the First Amendment. After all, under the Bipartisan Campaign Reform Act, Pub. L. No. 107–155, 116 Stat. 81 (2002), corporations were always allowed to speak via a political-action committee and could have spoken on their own outside of the immediate pre-election period. Yet the *Citizens United* Court still analyzed the statute as a content-based prohibition on speech. 130 S. Ct. at 899, 928.

63. 130 S. Ct. at 2724.

64. 391 U.S. 367 (1968) (upholding a statute prohibiting the burning of selective-service certificates after finding the government had a substantial interest in prohibiting such conduct and that the statute was narrowly tailored to serve the government’s non-expression-suppressing interest).

65. *Humanitarian L. Project*, 130 S. Ct. at 2723–2724.

66. *Id.* at 2724 (quoting *Tex. v. Johnson*, 491 U.S. 397, 403 (1989)).

67. *Id.* at 2734 (Breyer, J., dissenting).

68. *Id.* at 2725 (majority).

69. *Id.*

on this point simply referred to an affidavit filed by a State Department official.⁷⁰

Beyond deferring to the other branches on this “empirical”⁷¹ question, the Court did not apply any real narrow-tailoring analysis or otherwise discuss whether the statute, as construed, swept too broadly.⁷² Indeed, the Court’s only discussion of tailoring concerned the tailoring Congress engaged in through the limitations it built into the statute.⁷³ Of course, such legislative care may help convince a court that a statute truly is narrowly tailored. But normally a narrow-tailoring discussion does not simply cite the statute’s internal boundaries without an independent judicial determination that those limitations suffice to render the statute sufficiently narrowly tailored. As with the empirical question of the fungible nature of assistance to such groups, here too the Court deferred.⁷⁴

So understood, *Humanitarian Law Project* can be thought of as the Roberts Court’s *Grutter*. In *Grutter v. Bollinger*,⁷⁵ the Court purported to apply strict scrutiny to the University of Michigan Law School’s race-conscious admissions program.⁷⁶ But as the dissenters in that case pointed out, the majority’s analysis largely deferred to the school’s judgments on the issues relevant to strict scrutiny analysis and discussed narrow tailoring only minimally.⁷⁷

Justice Breyer’s dissent in *Humanitarian Law Project* echoes this aspect of the dissents in *Grutter*. In *Humanitarian Law Project*, Justice Breyer took on the unusual (for him) position of adhering to rigid legal categories, without the interest-balancing

70. *Id.* at 2727.

71. *Id.* at 2724.

72. *Cf.* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379, 397 (1985) (distinguishing between rules and standards, and describing as a “rule-like position” the view “that once speech is found to be protected, it remains protected regardless of the weighty reasons the state might advance to justify suppression or regulation”).

73. *Humanitarian L. Project*, 130 S. Ct. at 2722–2727.

74. *Id.* at 2729.

75. 539 U.S. 306 (2003).

76. *See id.* at 326–327 (stating that “[w]ith these principles [of strict scrutiny] in mind, we turn to the question whether the Law School’s use of race is justified by a compelling state interest”).

77. *Id.* at 347 (Scalia, J., concurring in part and dissenting in part); *id.* at 350 (Thomas, J., concurring in part and dissenting in part); *id.* at 380 (Rehnquist, C.J., dissenting); *id.* at 387 (Kennedy, J., dissenting).

that marks so much of his approach to constitutional law.⁷⁸ For example, he considered whether the plaintiffs' proposed speech fell within one of the accepted categories of unprotected speech, and found it did not.⁷⁹ Then, finding the statute to be a content-based restriction on speech, he questioned why the Court simply did not announce the proper standard to be applied—strict scrutiny.⁸⁰ He also determined that the statute's application to the plaintiffs' proposed speech was not narrowly tailored.⁸¹ Finally, in performing a narrow-tailoring analysis, he refused to defer to what he described as overly general factual findings by Congress.⁸² These characteristics of his dissent put Justice Breyer in the position of the dissenting Justices in *Grutter*, who protested what they saw as the majority's abandonment of the elements of the doctrine they were purporting to apply.⁸³ Like them, Justice Breyer in *Humanitarian Law Project* insisted that the Court apply the rules implied by the Court's own description of the government action—here, as a content-based restriction on speech.

Whether the analogy is perfect is beside the point. The fundamental insight is that in *Humanitarian Law Project*, the doctrinal principles trumpeted by the Court in cases such as *Citizens United* and *Stevens* gave way to the Court's perception of the practical realities of the situation, which justified the effective abandonment of the standards it announced as applying to the case.

II. CHIEF JUSTICE ROBERTS, JUSTICE STEVENS, AND THE LIMITS OF FIRST AMENDMENT RIGIDITY

In considering the appropriateness of rigid First Amendment standards, it is useful to think about Justice Stevens' role in these

78. *But see Humanitarian L. Project*, 130 S. Ct at 2734 (Breyer, J., dissenting) (assuming, for purposes of argument, that the statute is content-neutral, and concluding that the Court should nevertheless “measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment”).

79. *Id.* at 2732–2733.

80. *Id.* at 2734.

81. *Id.* at 2734–2735.

82. *Id.* at 2735–2741.

83. *See e.g. Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) (stating that the Court “does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.”).

three cases. In *Citizens United*, he wrote the dissent, relying heavily on his context-rich view of the First Amendment.⁸⁴ In *Humanitarian Law Project*, he deserted his liberal colleagues and joined Chief Justice Roberts' opinion, which departed in reality (and arguably in form as well)⁸⁵ from the rigidity of the content-neutrality rule. In both cases, then, he embraced the sort of context-rich approach that has marked his First Amendment analysis more generally.⁸⁶

His approach has its limits. Judging cases based on general principles invites different applications of those principles, especially when—as here—they cabin judicial discretion only at a high level of generality. Justice Stevens' approach to equal protection issues illustrates this problem: his insistence that judges deciding equal protection challenges apply a single rationality standard⁸⁷ opens the door for enormously variable results that feature a heavy element of judicial subjectivity.⁸⁸ His principles-based First Amendment approach risks similar variability—in particular, his emphasis on factual context surely tempts judges to reach the results they like based on the facts in front of them.⁸⁹

On the other hand, Chief Justice Roberts' claim in *Humanitarian Law Project* to be applying demanding scrutiny⁹⁰ is also problematic. It is not particularly honest. Just as important, the deference he gives in that case belies the entire point of such standards: to constrain the Court's temptations when faced with

84. 130 S. Ct. at 929 (Stevens, J., concurring in part and dissenting in part).

85. For a review of Chief Justice Roberts' opinion, consult *supra* notes 66–74 and accompanying text.

86. See Stevens, *supra* n. 18, at 1304–1305 (espousing a context-based approach to First Amendment analysis); see also Araiza, *supra* n. 16, at ___ (discussing Justice Stevens' approach to First Amendment cases).

87. See e.g. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451–453 (1985) (Burger, C.J., & Stevens, J., concurring in the judgment) (discussing the basic context-based analysis every equal protection case undergoes).

88. See Araiza, *supra* n. 16, at ___ (ms. at 27) (discussing this risk in Justice Stevens' equal protection jurisprudence).

89. See e.g. Blocher, *supra* n. 8, at ___ (ms. at 6) (noting that the cost of allowing deviations from rigid rules is the risk of creating “a ‘lawless’ and unpredictable system in which individual judges have all the power and can rule according to their own political preferences or prejudices”); see also David E. Pozen, *Justice Stevens and the Obligations of Judgment*, 44 Loy. L.A. L. Rev. ___ (forthcoming 2011) (ms. at 108, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1740572) (explaining how Justice Stevens crafted “tools of self-restraint” to avoid engaging in the “idiosyncratic and instrumental behavior” that otherwise potentially flowed from his interpretive method).

90. 130 S. Ct. at 2724.

unpopular speech or speech that the government has a keen political interest in attempting to suppress.⁹¹ If the difficult fact pattern in *Humanitarian Law Project* leads the Court to recite the formula of strict scrutiny (or, in the Court's words, "a more demanding standard" than intermediate scrutiny)⁹² but then to apply it in a deferential way, then little is left of the promise that "keep[ing] the starch in the standards" will help courts resist speech restrictions in "those moments when the daily politics cries loudest for limiting what may be said."⁹³ In other words, it is fair to wonder whether such seemingly stringent standards do any better at constraining judicial discretion than Justice Stevens' approach.

The contrast between rigid rules and more context-based analysis is illuminated by a fascinating *sotto voce* dialogue between Justice Stevens' dissent in *Citizens United* and Chief Justice Roberts' majority opinion in *Humanitarian Law Project*. In *Citizens United*, Justice Stevens mocked the majority's categorical rejection of identity-based First Amendment restrictions by asking whether, under the majority's approach, Tokyo Rose would have had a First Amendment right to engage in pro-Japanese speech during World War II.⁹⁴ In *Humanitarian Law Project*, Chief Justice Roberts similarly satirized the dissent's argument that advocacy of peaceful dispute resolution should generally be allowed, concluding that the dissent would presumably have protected assistance to Imperial Japan in the methods of peaceful conflict resolution during World War II.⁹⁵ Both uses of the Japan analogy make the point that rigid, acontextual standards simply do not work in all cases. If such a standard does not work in the hard cases,⁹⁶ then presumably it fails in its core mission.⁹⁷ Factual context matters.

91. See e.g. *id.* at 2726–2727 (noting the foreign relations complications that might arise from a ruling protecting the speech at issue).

92. *Id.* at 2724.

93. *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 774 (Souter, J., concurring).

94. 130 S. Ct. at 947 (Stevens, J., concurring in part and dissenting in part).

95. 130 S. Ct. at 2730.

96. This is not to suggest that the Japan examples present hard cases—although presumably in some contexts analogous cases today might. The larger point is that a standard that does not work in all cases will presumably find especially difficult sledding in the hardest cases.

97. See *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 774 (Souter, J.,

In sum, both rigid and more contextual approaches to First Amendment analysis have flaws. As an empirical matter, it may be that rigid-but-not-categorical rules are largely unable to cabin judges' inclination to give the government the benefit of the doubt when the speech restriction at issue is either popular or reflects serious, legitimate concerns. For example, Justice Douglas expressed concern with the "clear and present danger" test on the ground, among others, that courts were often too quick to find such a danger to exist.⁹⁸ Similarly, Justice Kennedy justified his call for a categorical rule prohibiting content-based restrictions of First Amendment-protected speech based in part on the fear that non-categorical standards—even rigid ones such as strict scrutiny—invite the government (and perhaps courts) to experiment with watering down free-speech protection.⁹⁹ This failure may mean that such standards provide the false certainty of a tough-sounding rule that fails when it is most needed. At the same time, it allows judges to hide behind that standard when striking down

concurring) (finding that "fairly strict categorical rules" really "keep[] the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said").

98. *Brandenburg v. Ohio*, 395 U.S. 444, 450, 454 (1969) (Douglas, J., concurring).

I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling. . . .

When one reads the opinions closely and sees when and how the 'clear and present danger' test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous.

Id. at 454.

99. See *Simon & Schuster, Inc.*, 502 U.S. at 124, 127 (Kennedy, J., concurring in the judgment) ("When we leave open the possibility that various sorts of content regulations are appropriate, we discount the value of our precedents and invite experiments that in fact present clear violations of the First Amendment, as is true in the case before us."). Ironically, Justice Kennedy himself is not immune from such experimenting—an observation that perhaps lends credence to his own warning. For example, in *City of Los Angeles v. Alameda Books, Inc.*, he argued that the city's secondary effects justifications for limiting adult businesses are content based; nevertheless, he approved of the intermediate scrutiny the Court has applied to such restrictions. 535 U.S. 425 (2002) (Kennedy, J., concurring in the judgment).

But further experimenting of a more serious sort might flow from the application of his proposed categorical rule. In particular, if labeling a restriction as content based necessarily requires its invalidation, it is possible that courts will strain to avoid attaching that label. Compare *e.g. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 649, 651 (1994) (holding that federal rules requiring cable operators to carry the signal of over-the-air broadcasters were content neutral and thus approving of intermediate scrutiny review of those rules) with *e.g. id.* at 676–678 (O'Connor, J., concurring in part and dissenting in part) (arguing that the restrictions are content based).

speech restrictions that may be justified by their unique factual or social context.¹⁰⁰

Ultimately, the main benefit of rigid standards may lie in the fact that in the mine run of difficult but not excruciatingly difficult cases, they provide enough of a thumb on the judicial scale to produce predictable results that do a reasonably good job of protecting the constitutional value at issue. Thus, such rigid standards, like Newtonian physics, do a good enough job of providing satisfactory answers in most cases, failing only in the exceptionally difficult ones. This is a somewhat disappointing result, given Justice Souter's hope that they could accomplish more.¹⁰¹ More importantly, it is an open question whether this limited benefit outweighs the possible harms such rigid standards cause, both in terms of judicial transparency and the limits they place on government speech regulation that non-dogmatic (but still careful) analysis would uphold.

Regardless of these uncertainties, several facts remain clear. First, we are in the early years of Chief Justice Roberts' tenure on the Court. Second, Justice Kennedy is likely to remain on the Court for at least several more years. Third, the remainders of these two Justices' tenures are likely to be marked by serious concerns over national security. When combined, these facts mean that we are likely to witness further tests of rigid First Amendment rules against serious government interests in restricting speech. How those rules perform will tell us much about their value.

100. See *Citizens United*, 130 S. Ct. at 929 (Stevens, J., concurring in part and dissenting in part) (arguing that the special features of corporate and union political speech justify restrictions).

101. See *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 774 (Souter, J., concurring) (finding that "fairly strict categorical rules" really "keep[] the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said").