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To Defer or Not to Defer? Deference and Its Differential Impact on First Amendment Rights in the Roberts Court

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TO DEFER OR NOT TO DEFER? DEFERENCE AND ITS DIFFERENTIAL IMPACT ON FIRST AMENDMENT RIGHTS IN THE ROBERTS COURT

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ABSTRACT

This Article examines the concept of deference as it affects First Amendment speech rights under the Roberts Court. Using six recent decisions as analytical springboards, including high-profile disputes in *Brown v. Entertainment Merchants Ass'n* and *Citizens United v. FEC*, the Article illustrates that deference often determines a case's outcome. The Article also demonstrates profound disagreements among the Justices on the use of deference in all six cases. Thus, like a spigot, deference is turned on and off by individual Justices, and even when turned on, it can flow freely or be reduced to a trickle. It is precisely such malleability that makes deference a critical concept on today's Court when speech rights hang in the balance. Deference, the Article argues, muddies judicial analysis because it is a judicial wildcard that Justices can play—regardless of whether they purport to apply strict scrutiny, intermediate scrutiny, or rational basis review—to help sustain a law's constitutionality and, in the process, sacrifice free speech.

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INTRODUCTION

More than a half-century ago, sociologist Erving Goffman defined deference as "that component of activity which functions as a symbolic means by which appreciation is regularly conveyed *to* a recipient *of* this recipient, or of something of which this recipient is taken as a symbol, extension, or agent."[1] But when courts engage in deference by acknowledging the wisdom, expertise, or understanding of others—be it legislative bodies, administrative agencies,[2] institutions, or individuals such as arbitrators,[3] social scientists,[4] and

1. Erving Goffman, *The Nature of Deference and Demeanor*, 58 AM. ANTHROPOLOGIST 473, 477 (1956).

2. *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position . . . ." (footnotes omitted)); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (explaining the level of deference owed to an administrative agency's construction of a statute that it administers, and noting that, in the absence of express congressional intent, the Court must determine if the agency has adopted "a permissible construction of the statute").

3. *See, e.g.*, Garvey v. Roberts, 203 F.3d 580, 588 (9th Cir. 2000) ("[W]e start with the proposition that judicial review of an arbitrator's decision in a labor dispute is extremely limited.").

4. *See infra* Part II.A (describing the majority's abject lack of deference toward social scientists in Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011)).

educators[5]—their actions are anything but symbolic. Deference granted and deference denied may, in fact, have profound constitutional implications that affect free speech rights and reflect on the duties of the judiciary.[6] This is especially true when judicial deference involves blanket reliance on the authority of someone or something else to restrict constitutional rights.[7]

On the other hand, deference seems essential in some situations. For instance, there is "widespread agreement that Congress's decisions warrant deference [by the Court] because it is a coequal branch that represents the popular will."[8] Similarly, when it comes to the President of the United States, former Chief Justice Warren Burger once wrote for a unanimous Court that "[t]he President's need for complete candor and objectivity from advisers calls for great deference from the courts."[9]

This Article examines how deference—or the lack thereof—has significantly affected multiple First Amendment-based speech[10] decisions by the United States Supreme Court since John G. Roberts, Jr. became Chief Justice in September 2005. The sextet of cases analyzed here, starting with the most recent decision, are: (1) *Brown v.*

5. *See infra* Part II.B (describing the majority's grant of substantial deference to a public school principal's interpretation of a message's meaning in Morse v. Frederick, 551 U.S. 393 (2007)).

6. For instance, Justice Antonin Scalia branded it "a striking abdication of judicial responsibility" for the U.S. Supreme Court to take as "*binding*" the views of the executive branch concerning the meaning of a statute or the views of Congress about the constitutionality of particular legislation. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513–14.

7. *Cf.* Howard Richards, *Deference*, 74 ETHICS 135, 138–39 (1964) ("[Deference may] result in reliance on some authority. A may say, 'I will defer to D's judgment, since she seems to have a greater understanding of human emotions than I have.' Or he may say, 'I will ask my analyst and do what he says.'").

8. Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 894–95 (2003).

9. United States v. Nixon, 418 U.S. 683, 706 (1974).

10. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties that apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (explaining that freedom of speech and press are protected "from impairment by the States" by the due process clause of the Fourteenth Amendment).

Entertainment Merchants Ass'n;[11] (2) *Holder v. Humanitarian Law Project*;[12] (3) *Citizens United v. FEC*;[13] (4) *FCC v. Fox Television Stations, Inc.*;[14] (5) *Morse v. Frederick*;[15] and (6) *Beard v. Banks*.[16] These cases were selected for scrutiny because they

- cover a factually diverse range of deference scenarios;
- demonstrate deep disagreements among the justices when it comes to bestowing deference and, more specifically, to how much deference should be bestowed; and
- illustrate the often negative consequences that granting substantial deference has on free speech interests.

Although scores of law journal pages are filled with articles about general concepts like administrative deference,[17] scant scholarship is devoted specifically to how deference affects First Amendment speech rights under the Roberts Court across a broad swath of free expression cases. The cases explored here stretch from governmental regulation of both violent video games (*Brown*) and broadcast indecency (*Fox Television Stations*) to laws or actions affecting national security (*Humanitarian Law Project*), political speech fund-

11. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).
12. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).
13. Citizens United v. FEC, 130 S. Ct. 876 (2010).
14. FCC v. Fox Television Stations, Inc. (*Fox I*), 556 U.S. 502 (2009).
15. Morse v. Frederick, 551 U.S. 393 (2007).
16. Beard v. Banks, 548 U.S. 521 (2006).
17. *See, e.g.*, Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671 (2007) (examining the lack of deference given by Judge Richard A. Posner to administrative judgments on immigration issues); Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito,* Chevron*,* Auer*, and* Chenery *in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1, 42 (2007) (examining the deployment of administrative deference by the Supreme Court and concluding that during the 2006 term, the Court "accorded administrative agencies more deference in the past year"); Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011) (examining deference in the context of administrative law and, in particular, within the context of serial litigation in administrative law); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1817 (2010) (examining the deference regimes adopted by Supreme Court Justices, and concluding that "the Justices apply deference doctrine inconsistently, responding to their ideological preferences, the policies underlying the major deference regimes, and the preferences of Congress and the President").

ing by corporations (*Citizens United*), student speech (*Morse*), and inmate expression (*Beard*).

Part I of this Article, drawing on literature from outside the law, initially examines and explicates deference.[18] Part I then illustrates how the Supreme Court deployed deference in a broad array of First Amendment cases predating the Roberts Court.[19] After providing this essential context, Part II analyzes the previously noted opinions rendered during Chief Justice Roberts's tenure,[20] concentrating on the different ways in which deference, or the lack thereof, affected the free speech interests at stake.[21]

Finally, the Article concludes by asserting that deference, given the wide disagreements about it in each of the half-dozen cases analyzed here, constitutes a judicial wildcard that Justices can play when dealt a First Amendment hand. Specifically, deference is a malleable concept they can invoke, regardless of the name of the standard of review they purport to apply, to help ease the burden of sustaining a law's constitutionality or, in the case of *Morse*, a government official's censorial actions.[22] Ultimately, the Article demonstrates that deference's elasticity makes it ripe for misuse and abuse that often leave First Amendment rights hanging out to dry.[23]

I. EXPLICATING DEFERENCE AND ITS ROLE IN FIRST AMENDMENT JURISPRUDENCE

This Part has two sections, the first of which provides a primer on deference, while the second explores how deference seeps into modern, yet pre-Roberts First Amendment jurisprudence.

A. The Pervasive and Persuasive Nature of Deference

Deference is a type of behavior that permeates human existence from an early age. Cornell University Professor Robert V. Presthus wrote more than fifty years ago that "from infancy on the individual is trained to defer to authority. He develops over time a generalized deference to the authority of parenthood, experience, knowledge, power, and status."[24] It thus comes as no surprise that deference infuses the legal system, in which multiple people and institutions

18. *See infra* Part I.A.

19. *See infra* Part I.B.

20. *See supra* notes 11–16; *infra* Part II.

21. *See infra* Part II.

22. *See infra* Part II.B.

23. *See infra* Conclusion.

24. Robert V. Presthus, *Toward a Theory of Organizational Behavior*, 3 ADMIN. SCI. Q. 48, 57 (1958).

hold positions of authority—from the Justices on the High Court to the members of Congress to the chairs of administrative agencies.

Acts of deference constitute "status behaviors" based on honor and esteem.[25] In particular, as sociology professor Brian Colwell observed, "[a]cts of deference communicate one person's yielding of their own will, ideas, or interests to those of another, and by doing so, highlight the power and prestige differences between them."[26] Although drawn from sociology, this description is relevant for the law because one must query whether it is constitutionally proper for Supreme Court Justices to yield their own will to the ideas of others. How much power, for example, should be bestowed on social scientists (*Brown*), educators (*Morse*), prison officials (*Beard*) or administrative agencies (*Fox Television Stations*) when First Amendment interests hang in the balance?

Sociologists observe that "[d]eference is symbolic power in potential form: once deference is acquired, it can be deployed as the symbolic power to frame actions, situations, and events in ways that induce compliance and constitute the social order."[27] Here too one finds relevance for the study of judicial deference in free speech cases. One must consider, for instance, whether sanctioning social scientists with deference improperly vests them with too much power to influence judicial framing of censorship issues. A pivotal problem is the vast disconnect between social science frames and legal frames. Framing issues in terms of statistical significance, derived from tightly controlled—more derisively, contrived—experiments, simply does not comport with framing legal issues in terms of real-world injuries and the more subjective interests-of-justice balancing that transpire in First Amendment contexts.

Although difficult to define from a legal perspective, deference generally "involves a decisionmaker (*D1*) setting aside its own judgment and following the judgment of another decisionmaker (*D2*) in circumstances in which the deferring decisionmaker, *D1*, *might* have reached a different decision."[28] As Paul Horwitz encapsulated it, deference can be defined "as a decisionmaker's decision to follow a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question

25. Brian Colwell, *Deference or Respect? Status Management Practices Among Prison Inmates*, 70 SOC. PSYCHOL. Q. 442, 442 (2007).

26. *Id.* at 443.

27. Tim Hallett, *Between Deference and Distinction: Interaction Ritual Through Symbolic Power in an Educational Institution*, 70 SOC. PSYCHOL. Q. 148, 149 (2007).

28. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1073 (2008).

independently."[29] Professors Larry Alexander and Frederick Schauer offered an even simpler definition, writing that "we temporarily set aside the issue of the strength of deference and consider a decisionmaker to have deferred *whenever she takes someone else's decision to be a reason for making the same decision.*"[30]

To the extent judicial deference is not mandated by another authority,[31] it necessarily is discretionary.[32] In such discretionary situations, *when* deference should be given, *to whom* deference should be given and *how much* deference should be given thus become key issues. Deference, in brief, is not binary but a matter of degree. In some areas of the law, it ranges on a continuum "from great respect at one end to near indifference at the other."[33] John Paul Stevens wrote in June 2010, shortly before his retirement from the Court,[34] that "[t]he degree to which we defer to a judgment by the political branches must vary up and down with the degree to which that judgment reflects considered, public-minded decisionmaking."[35] Cases thus often initially revolve around deciding what "the appropriate level of deference" is.[36]

B. Deference and Free Speech

Deference often influences cases involving the First Amendment freedom of speech, despite the High Court's rather ringing statement more than thirty years ago in *Landmark Communications, Inc. v. Virginia* that "[d]eference to a legislative finding cannot limit judicial

29. *Id.* at 1078.

30. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1363 (1997) (emphasis added).

31. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971 (1992) (describing the "principle of *mandatory deference*" in which "courts are compelled to defer to agency interpretations because Congress has directed them to defer").

32. *See id.* (explaining that in this model, courts defer in the name of "sound judicial decisionmaking").

33. United States v. Mead Corp., 533 U.S. 218, 228 (2001) (internal citations omitted).

34. *See Biographies of Current Justices of the Supreme Court*, SUPREME CT. U.S., http://www.supremecourt.gov/about/biographies.aspx (last visited Sept. 19, 2012) (observing that "Justice Stevens retired from the Supreme Court on June 29, 2010").

35. Doe v. Reed, 130 S. Ct. 2811, 2830 n.3 (2010) (Stevens, J., concurring).

36. *See, e.g.*, Lopez v. Terrell, 654 F.3d 176, 180 (2d Cir. 2011) ("We determine first the appropriate level of deference to afford the agency's interpretation . . . ."); Jock v. Sterling Jewelers, Inc., 646 F.3d 113, 124 (2d Cir. 2011) ("It is worth reemphasizing that the primary thrust of our decision is whether the district court applied the appropriate level of deference when reviewing the arbitration award.").

inquiry when First Amendment rights are at stake."[37] For instance, when considering the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 in *Turner Broadcasting System, Inc. v. FCC*, Justice Anthony Kennedy observed that predictive judgments by Congress must be given substantial deference.[38] The Court's role in such cases, Kennedy opined, is only to ensure that Congress drew reasonable inferences based on substantial evidence.[39] He added that "substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency."[40] Such vast deference is granted because of both congressional expertise[41] and separation-of-power concerns regarding respect for congressional authority. As Justice Kennedy put it:

> We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.[42]

Subsequent to *Turner*, the Supreme Court in *Boy Scouts of America v. Dale* considered whether a New Jersey public accommodations law that required the Boy Scouts to admit a gay adult as an assistant scoutmaster violated "the Boy Scouts' First Amendment right of expressive association."[43] In concluding this right was indeed violated, Chief Justice William Rehnquist wrote for the majority that "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."[44] Professor Nat Stern thus wrote that "*Dale* proclaimed a doctrine of deference to

37. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 843 (1978).

38. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997).

39. *Id.*

40. *Id.*

41. *See id.* at 196 ("Though different in degree, the deference to Congress is in one respect akin to deference owed to administrative agencies *because of their expertise*." (emphasis added)).

42. *Id.*

43. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

44. *Id.* at 653.

both an association's assertion of the substance of its message and its view of conditions for preserving that expression."[45]

Rehnquist's position revealed a deep division, however, among the Justices on the intersection of deference and First Amendment rights. In a dissent joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer, John Paul Stevens called Rehnquist's belief about deference

> an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, "we are obligated to independently review the factual record." It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims.[46]

Dale plainly illustrates that whether and when to grant deference in First Amendment disputes is not a task on which *all* Justices agree in *all* cases. In fact, as Part II of this Article illustrates, disagreements on deference have pervaded multiple high-profile speech cases since John Roberts first donned the Chief Justice's robes in late 2005. Indeed, deference is a notion over which today's Justices often badly fracture.

In another First Amendment context, the Court is wary of granting too much deference. This is the situation when administrative agencies involved in licensing and permit cases create schemes conferring upon themselves too much discretion to curb speech.[47] In the context of administrative law, deference, as Professor James T. O'Reilly wrote, can be loosely defined "as the willingness of a court to accept an agency's interpretations of a statute or policy over competing interpretations offered by regulated persons or public interest groups."[48]

The various tests and rules the Supreme Court uses to measure the constitutional validity of restrictions on speech also reflect what might be considered built-in levels of deference. For instance, the Court's time, place, and manner jurisprudence involving intermediate

45. Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 911 (2011).

46. *Dale*, 530 U.S. at 686 (Stevens, J., dissenting) (citation omitted).

47. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029, 2049 (2011).

48. James T. O'Reilly, *Losing Deference in the FDA's Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 941 (2008).

scrutiny has been characterized by First Amendment scholar Kathleen Sullivan as "relatively deferential."[49] In contrast, the strict scrutiny standard of review[50] that typically applies to content-based restrictions on speech is far less deferential.[51]

But even when they interpret the meaning of (and apply) a relatively deferential test like intermediate scrutiny, the Justices sometimes still disagree on how much deference should be afforded to another body or institution. For instance, in *Ward v. Rock Against Racism* the majority upheld a noise-amplification restriction imposed on a bandshell in New York City's Central Park as a permissible time, place, and manner regulation.[52] In doing so, the majority chastised the lower appellate court for "failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician."[53] In addition, the majority held that intermediate scrutiny does not require a government entity to adopt "the least restrictive or least intrusive means"[54] of serving a substantial interest but, rather, only that "the means chosen are not substantially broader than necessary to achieve the government's interest."[55]

In sharp contrast, Justice Thurgood Marshall, in a dissent joined by Justices William Brennan and John Paul Stevens, found the majority's analysis in *Ward* far too deferential:

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49. Kathleen M. Sullivan, *Discrimination, Distribution, and City Regulation of Speech*, 25 HASTINGS CONST. L.Q. 209, 217 (1998).

50. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) ("[A] content-based speech restriction . . . can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." (citation omitted)); *see also* Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 745 (2003) ("Under the guise of strict scrutiny, the Supreme Court has interpreted the First Amendment to require that state actors imposing a content-based restriction on speech prove that the restriction (1) advances a compelling government interest, and (2) is narrowly tailored to achieve that end. The Court includes under the latter prong an inquiry into whether the state action in question offers the least restrictive means of achieving the state's allegedly compelling interest." (footnote omitted)).

51. *See* Grutter v. Bollinger, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting) ("Deference is antithetical to strict scrutiny, not consistent with it.").

52. Ward v. Rock Against Racism, 491 U.S. 781 (1989).

53. *Id.* at 800.

54. *Id.* at 798.

55. *Id.* at 800.

> Until today, a key safeguard of free speech has been government's obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, *the majority replaces constitutional scrutiny with mandatory deference*. The majority's willingness to give government officials a free hand in achieving their policy ends extends so far as to permit, in this case, government control of speech in advance of its dissemination.[56]

Commercial speech[57] is also subject to a more relaxed form of intermediate scrutiny,[58] but here again Justices sometimes split on the appropriate degree of deference that must be given. For instance, in *Metromedia, Inc. v. City of San Diego*,[59] which involved a restriction on billboards due partly to aesthetic concerns, Justice Byron White sparred with then-Justice Rehnquist. White wrote that despite Rehnquist's belief that the essence of democracy involves deference to legislative judgments that distinguish between categories of content, "it has been this Court's consistent position that democracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgments in this area."[60] In White's view, Rehnquist "misconceive[d] the nature of the judicial function in this situation."[61]

56. *Id.* at 803 (Marshall, J., dissenting) (emphasis added).

57. What constitutes commercial speech is not easily defined, with the U.S. Supreme Court observing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993). *See* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 74 (2007) ("[T]he Supreme Court has cryptically offered a number of different—and not always consistent—definitions of commercial speech . . . .").

58. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339 (2010) (noting that the Supreme Court "held that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny"); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring) (describing the intermediate scrutiny applied in Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980)); *see also* Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, 41 LOY. L.A. L. REV. 181, 182 (2007) ("[T]he commercial speech doctrine creates a category of speech subject to intermediate scrutiny under the First Amendment.").

59. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion).

60. *Id.* at 519.

61. *Id.* at 520.

Also weighing in with White on the side of a less deferential approach was Justice William Brennan, who observed that "[o]f course, it is not for a court to impose its own notion of beauty on San Diego. But before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment."[62]

Rehnquist, however, took an opposite tack—one of extreme deference:

> I do not think a city should be put to the task of convincing a local judge that the elimination of billboards would have more than a negligible impact on aesthetics. Nothing in my experience on the bench has led me to believe that a judge is in any better position than a city or county commission to make decisions in an area such as aesthetics.[63]

Indeed, when it comes to matters such as aesthetics in considering whether they constitute important or substantial interests under intermediate scrutiny, attorney Darrel C. Menthe recently wrote that "*the legitimacy of such justifications largely depends on deference to legislative pronouncements of purpose*. There is rarely any strong connection between the stated purpose and the effects of the legislation."[64]

In 1991, the Justices again disagreed on deference, this time in *Gentile v. State Bar of Nevada*[65] when considering the constitutionality of state rules restricting extrajudicial statements by Nevada attorneys. Justice Kennedy captured well the disagreement in *Gentile* as to whether to defer to the professional judgment of the State Bar of Nevada in disciplining its attorneys for their exercise of speech. He wrote that "[w]e have not in recent years accepted our colleagues' apparent theory . . . that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms."[66] In other words, Kennedy suggested that when free speech interests are at stake, deference should not be given to professional organizations such as a state bar. In opposition to this view, Chief Justice Rehnquist opined that

62. *Id.* at 531 (Brennan, J., concurring).

63. *Id.* at 570 (Rehnquist, J., dissenting).

64. Darrel C. Menthe, *Aesthetic Regulation and the Development of First Amendment Jurisprudence*, 19 B.U. PUB. INT. L.J. 225, 228 (2010) (emphasis added).

65. Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

66. *Id.* at 1054.

> [t]he State Bar of Nevada, which made its own factual findings, and the Supreme Court of Nevada, which upheld those findings, were in a far better position than we are to appreciate the likely effect of petitioner's statements on potential members of a jury panel in a highly publicized case such as this.[67]

This Part of the Article made it apparent that deference is an extremely pliable concept upon which Justices often disagree, both as to whether it should be bestowed and, if so, the level or quantum of deference that should be granted. With this background in mind, the Article now examines six First Amendment cases—all decided during John Roberts's tenure as chief justice—to better understand both when and how deference is deployed by the Court and on whom it is bestowed. Perhaps more importantly, they reveal how deference given and deference denied affect freedom of speech today.

II. FREE SPEECH RULINGS UNDER THE ROBERTS COURT: SIX CASES ILLUSTRATE VARYING DEGREES OF DEFERENCE AND DISAGREEMENTS AMONG THE JUSTICES

This Part analyzes a half-dozen decisions by the Roberts Court affecting First Amendment speech rights in which the Justices fractured on the level of deference—if any—that should be extended to another entity, institution, or individual. Each case demonstrates divisions among the Justices on deference that sometimes are reflected in back-and-forth exchanges across majority, plurality, and dissenting opinions.

A. Brown v. Entertainment Merchants Ass'n*: Should Deference Be Given to Social Scientists?*

The case that perhaps best illustrates the split among the current Justices on deference is the most recent one examined here, *Brown v. Entertainment Merchants Ass'n*.[68] The deference issue in *Brown* actually was double layered. The first level involved the extent of deference the Justices should give to the expertise and findings of social scientists when it comes to the alleged harms caused by playing violent video games. The second layer, in turn, centered on how much deference the Justices should grant to the legislative bodies (in this case, the California legislature) that rely on such social science evidence in adopting legislation.

As explained later, the majority in *Brown* granted no deference to the findings of the social scientists in declaring California's violent video game law unconstitutional.[69] That law required the labeling,

67. *Id.* at 1080 (Rehnquist, C.J., dissenting).

68. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

69. *See infra* notes 80–86 and accompanying text.

with a solid white "18" outlined in black, of all violent video games imported into or distributed in the Golden State,[70] and also made it an offense, punishable by a maximum $1,000 fine,[71] to "sell or rent a video game that has been labeled as a violent video game to a minor."[72] The social science research that California contended supported the law in *Brown* consisted largely of work by Iowa State University's Dr. Craig Anderson.[73]

Stephen Breyer, it turned out, was the lone Justice to defer both to the social scientists and to California lawmakers, like Leland Yee, who relied on social science data in proposing the law at issue in *Brown*.[74] Breyer did this despite acknowledging disagreements among social scientists as to whether playing violent video games causes harm. In a key paragraph, Justice Breyer opined:

> Like many, perhaps most, studies of human behavior, each study has its critics, and some of those critics have produced studies of their own in which they reach different conclusions. (I list both sets of research in the appendixes.) *I, like most judges, lack the social science expertise to say definitively who is right.* But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.[75]

In other words, Justice Breyer deferred, letting associations of public health professionals serve as arbiters of the value and merit of

70. CAL. CIV. CODE § 1746.2 (West 2009).

71. *See id.* § 1746.3 ("Any person who violates any provision of this title shall be liable in an amount of up to one thousand dollars ($1,000), or a lesser amount as determined by the court. However, this liability shall not apply to any person who violates those provisions if he or she is employed solely in the capacity of a salesclerk or other, similar position and he or she does not have an ownership [or managerial] interest in the business . . . .").

72. *Id.* § 1746.1(a).

73. *See* Video Software Dealers Ass'n v. Schwarzenegger, No. C-05-04188 RMW, 2007 U.S. Dist. LEXIS 57472, at *31 (N.D. Cal. Aug. 6, 2007) (noting that California "relie[d] heavily on the work of Dr. Anderson"), *aff'd*, 556 F.3d 950 (9th Cir. 2009), *aff'd sub nom.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

74. When California Governor Arnold Schwarzenegger signed Assembly Bill 1179 into law in October 2005, Yee asserted that "[s]tudy upon study shows that these ultraviolent games have harmful effects on our children." John M. Broder, *Bill is Signed to Restrict Video Games in California*, N.Y. TIMES, Oct. 8, 2005, at A11.

75. *Brown*, 131 S. Ct. at 2769 (Breyer, J., dissenting) (emphasis added).

social science data produced by researchers such as Dr. Anderson. Breyer, for instance, cited reports and statements by groups including the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, and the American Academy of Family Physicians.[76]

Breyer followed up this substantial serving of deference to research and professional experts with a heaping helping of deference to the legislative body that relied on those experts:

> Unlike the majority, I would find sufficient grounds in these studies and expert opinions *for this Court to defer to an elected legislature's conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind*, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases.[77]

Justice Breyer's deferential approach is extremely significant for three main reasons. First and most obvious, Breyer's deference would have resulted in a pro-censorship decision upholding California's law had he been able to gather support for his views from enough of his fellow Justices in *Brown*. The expertise of social scientists, at least in terms of proving harms to minors, would have been sufficient to trump the First Amendment rights of those same minors, along with the speech rights of those who create and distribute violent video games.

Second, Breyer's deference to social scientists involves a two-step methodology. Specifically, Breyer did *not* defer directly to individual social scientists such as Dr. Anderson. Instead, Breyer relied on the review, vetting, and analysis of their work by learned organizations. In other words, he depended on the stamp of approval or the imprimatur of organizations such as the American Academy of Pediatrics and the American Psychological Association.[78] Thus, while individual social scientists themselves may possess expertise, Breyer did not bow to that expertise until larger bodies, composed of multiple experts, endorsed or otherwise gave their stamp of approval to that research.

Third, Breyer demonstrated a willingness to defer to the judgment of the abovementioned learned organizations despite recognizing a disagreement among individual social scientists about whether playing violent video games causes harm.[79] In brief, a discrepancy

76. *Id.* at 2769–70.

77. *Id.* at 2770 (emphasis added).

78. *Id.* at 2769–70.

79. *Id.* at 2769.

among experts at the individual or *micro level* did not bother Breyer because, at the organizational or *macro level*, there was agreement among a cadre of experts. This appears to be a quite realistic approach in terms of embracing social science research because disagreements among social scientists seem inevitable.

In stark contrast, the five-Justice majority, in an opinion authored by Justice Antonin Scalia and joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, offered social scientists no deference or slack. Justice Scalia wrote that social science evidence must be "compelling"[80] and entail more than "ambiguous proof"[81] in order to demonstrate, with a "degree of certitude,"[82] the existence of an "actual problem."[83] Furthermore, Scalia was clear that social scientists must produce data that possess real-world generalizability[84] such that they demonstrate more than "minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game."[85] Justice Scalia emphasized that contrived experiments conducted by social scientists can be so far removed from legal issues as to be irrelevant. For example, he wrote that one study cited by California

> found that children who had just finished playing violent video games were more likely to fill in the blank letter in 'explo_e' with a 'd' (so that it reads 'explode') than with an 'r' ('explore'). The prevention of this phenomenon, which might have been anticipated with common sense, is not a compelling state interest.[86]

In summary, *Brown* indicates a dramatic disconnect among the current Justices on the deference that should be accorded to social scientists and, more specifically, to their research findings. Justice Breyer's embrace of a deferential approach—one that tolerates ambiguity in research findings and defers to the seal of approval granted by learned organizations—led him to pen a dissent that cuts deeply

80. *See id.* at 2739 (majority opinion) ("The State's evidence is not compelling.").

81. *Id.* ("[A]mbiguous proof will not suffice.").

82. *Id.* at 2739 n.8.

83. *Id.* at 2738 (quoting United States v. Playboy Entm't Grp., 529 U.S. 803, 822 (2000)).

84. External validity is "the measure of a particular study's generalizability." JENNINGS BRYANT & SUSAN THOMPSON, FUNDAMENTALS OF MEDIA EFFECTS 15 (1st ed. 2002).

85. *Brown*, 131 S. Ct. at 2739.

86. *Id.* at 2739 n.7 (citation omitted).

against First Amendment freedoms. In contrast, the majority's rigorous demands imposed on social scientists and their research—a decidedly non-deferential approach—led to a pro-free speech result. Deference—or, more accurately, the lack thereof—thus proved critical in *Brown*.

Justice Scalia and the majority must be lauded for not being deferentially blinded, as it were, by science.[87] It often is difficult not to be blinded because, as Professor Elaine E. Sutherland wrote in 2006 when considering the persuasiveness of expert scientific testimony:

> Science is perceived as solid, knowable, measurable: in short, science offers certainty. These factors combine to place the person who *does* understand science, the expert, in an incredibly powerful position. After all, if one is coming from a position of ignorance, the person who holds the key to that certain body of knowledge is something of a savior.[88]

Whether future decisions involving the consideration of social science evidence by the Roberts Court come down hard on social scientists or whether they adopt the far more deferential stance of Justice Breyer remains to be seen.

B. Morse v. Frederick*: Deference to Educators in Interpreting an Ambiguous Message's Meaning*

When it comes to students' speech rights, there is a widely held assumption or perception that courts inevitably will defer to the judgments of school officials.[89] But this has not always been the case. Most notably, Justice Hugo Black found himself isolated in dissent in the seminal student-speech case of *Tinker v. Des Moines Independent Community School District*[90] when he called for unbridled judicial deference to the decisions of school authorities.[91]

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87. *Cf.* THOMAS DOLBY, *She Blinded Me with Science*, *on* THE BEST OF THOMAS DOLBY: RETROSPECTACLE (EMI 1994) (singing, in early new wave fashion, "she blinded me with science and failed me in biology").

88. Elaine E. Sutherland, *Undue Deference to Experts Syndrome?*, 16 IND. INT'L & COMP. L. REV. 375, 381–82 (2006) (footnote omitted).

89. *See, e.g.*, Frank D. LoMonte, *Shrinking* Tinker*: Students Are "Persons" Under Our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1348 (2009) (remarking on "*the extraordinary deference that is afforded to administrators in managing school affairs* and the relatively low value afforded to the speech of young people" (emphasis added)).

90. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

91. Criticizing the *Tinker* majority's ruling in favor of the First Amendment speech rights of public school students, Justice Black wrote that "*the Court arrogates to itself, rather than to the State's elected officials*

Fast-forward to the Roberts Court and, more specifically, to five years ago in *Morse v. Frederick*.[92] That's when the Justices faced a student-speech controversy involving a banner that cryptically,[93] albeit somewhat amusingly, bore the message "Bong Hits 4 Jesus."[94] A key issue in the case was the meaning of this sign, with its student-creator, Joseph Frederick, claiming "the words were just nonsense meant to attract television cameras"[95] and that it was "meaningless and funny."[96] Principal Deborah Morse, however, believed it "would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use."[97]

In ruling in favor of the principal's decision to suspend Frederick and, in the process, in favor of the principal's interpretation of the meaning of the 420ish-turned phrase[98] "Bong Hits 4 Jesus," Chief Justice John Roberts deferred on the pivotal question of meaning to Deborah Morse's interpretation. In particular, the Chief Justice labeled her understanding "plainly a reasonable one."[99] Deference to the principal's interpretation under this very lax reasonableness standard,[100] in turn, resulted in a pro-censorship decision. This came despite Chief Justice Roberts's frank acknowledgement that

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charged with running the schools, the decision as to which school disciplinary regulations are 'reasonable.'" *Id.* at 517 (Black, J., dissenting) (emphasis added). Black blasted this "permissiveness in this country fostered by the judiciary" in allowing students to "defy and flout orders of school officials to keep their minds on their own schoolwork." *Id.* at 518.

92. Morse v. Frederick, 551 U.S. 393 (2007).

93. *Id.* at 401 ("The message on Frederick's banner is cryptic.").

94. *See id.* at 397 (explaining that student Joseph Frederick and his friends, while standing across the street from Juneau-Douglas High School as the Olympic Torch Relay passed through Juneau, Alaska, "unfurled a 14-foot banner bearing the phrase: 'BONG HiTS 4 JESUS'").

95. *Id.* at 401 (quoting Frederick v. Morse, 439 F.3d 1114, 1117–18 (9th Cir. 2006)).

96. *Id.* at 402 (quoting *Morse*, 439 F.3d at 1116).

97. *Id.* at 401.

98. *Cf.* Colleen O'Connor & John Ingold, *A Number of Things to Rally Around at 420*, DENVER POST, Apr. 21, 2010, at 1B ("The term '420,' now street slang for marijuana use, was first used by a group of San Rafael, Calif., high school students to refer to the time they'd meet after school to smoke dope. The annual pot celebration is held April 20.").

99. *Morse*, 551 U.S. at 401.

100. Justice Thomas wrote elsewhere that "[i]t was reasonable for her to conclude that the banner promoted illegal drug use." *Id.* at 410 (Thomas, J., concurring).

"[g]ibberish is surely a possible interpretation of the words on the banner."[101] The *Morse* majority's decision to accede to the principal's interpretation of meaning thus is consistent with what Professor Lee Goldman called in 2011 the Court's "increasing deference to the choices made by school administrators" since *Tinker*.[102]

John Paul Stevens, however, dissented in *Morse*. A key part of his dissent questioned the deference bestowed to Principal Morse's interpretation. As Stevens wrote, "it is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy."[103] The third party here, of course, is Deborah Morse, and the obscure message is "Bong Hits 4 Jesus." Criticizing the majority's approach to meaning, Stevens added that "[o]n occasion, *the Court suggests it is deferring to the principal's 'reasonable' judgment that Frederick's sign qualified as drug advocacy.* At other times, the Court seems to say that *it* thinks the banner's message constitutes express advocacy. Either way, its approach is indefensible."[104] Stevens, in brief, refused to grant Principal Morse's interpretation of meaning any deference and, instead, concluded that the banner's "silly" and "nonsensical" messages should be protected by the First Amendment.[105]

As with *Brown*, *Morse* reveals the power of deference to affect free speech rights. In particular, *deference granted* would have resulted in censorship in both *Brown* (had the Court adopted Justice Breyer's deferential stance to social scientists in his dissent) and *Morse* (where the majority did, in fact, defer to the principal's interpretation of the message), while *deference denied* would lead to First Amendment victories in both cases (as it did in *Brown*, where the majority granted no deference to the expertise of either social scientists or the state legislature, and as it would have in *Morse* had Justice Stevens's dissent been able to carry the day). Both cases, in turn, reveal that the Justices are not unified when it comes to granting deference to either social scientists or public school administrators.

Does the majority's deference to public school educators in *Morse* square with prior student-speech decisions? In a post-*Morse* article, Professor Aaron H. Caplan of Loyola Law School in Los Angeles asserts that the Supreme Court's analysis nearly seventy years ago in the flag-salute case of *West Virginia State Board of Education v.*

101. *Id.* at 402 (majority opinion).

102. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 398 (2011).

103. *Morse*, 551 U.S. at 439 (Stevens, J., dissenting).

104. *Id.* at 441 (first emphasis added) (footnotes omitted).

105. *Id.* at 446.

Barnette[106] features its most lengthy, intense statement on deference to educators.[107] The *Barnette* majority made readily apparent that it would not grant blanket deference to educators, opining that school boards are imbued with

> important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. *That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual*, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[108]

On the other hand, a majority of the Court in 1975 made it evident that some deference is owed to educators, noting that "[t]he system of public education that has evolved in this Nation relies *necessarily upon the discretion and judgment of school administrators and school board members*."[109]

Perhaps the pre-*Morse* decision that best illustrates an unsettled notion of deference to public school educators is *Bethel School District No. 403 v. Fraser*.[110] In upholding school officials' right to punish a student for giving a speech packed with sexual innuendoes to a captive audience of minors,[111] the majority of the Court opined that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board" and "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."[112]

Yet, in a concurring opinion apparently designed to rein in deference to educators, Justice William Brennan wrote that school officials do *not* possess "limitless discretion to apply their own notions

106. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

107. Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 89 (2010) ("Justice [Felix] Frankfurter's cries for deference to school administrators were relegated to a fretful dissent in *Barnette*, and no subsequent Supreme Court decision about student speech rights has restated it at similar length or intensity." (footnote omitted)).

108. *Barnette*, 319 U.S. at 637 (emphasis added).

109. Wood v. Strickland, 420 U.S. 308, 326 (1975) (emphasis added).

110. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

111. *See id.* at 677 (observing that student Matthew Fraser delivered a speech nominating a fellow student for student elective office in front of about 600 students, and noting that Fraser described "his candidate in terms of an elaborate, graphic, and explicit sexual metaphor").

112. *Id.* at 683.

of indecency. Courts have a First Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar . . . ."[113] Two years after *Fraser*, Brennan, joined by Justices Thurgood Marshall and Harry Blackmun, again dissented in a student-speech case, *Hazelwood School District v. Kuhlmeier*.[114] Brennan wrote that while the Court generally defers to local school boards on the daily operations of school systems, "[w]e have not, however, hesitated to intervene where their decisions run afoul of the Constitution."[115] Demonstrating no deference to the decision of the principal in *Kuhlmeier* to censor articles relating to students' experiences with pregnancy and the impact of divorce on students, Brennan brusquely wrote that the principal

> objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. *Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.*[116]

Such language reflects a decided lack of deference to school officials. It thus is clear that the split on deference in *Morse* regarding the meaning of "Bong Hits 4 Jesus" is nothing new but instead reflects long-standing differences among various Justices in the student-speech arena.

While a majority of Justices in *Morse* certainly embraced deference, the dissent of Justice Stevens, which was joined by Justices Ginsburg and Souter, demonstrates that deference is neither automatic nor uniformly agreed upon in educational settings. One thing is clear, however: *when deference is bestowed on school officials, it*

113. *Id.* at 689–90 (Brennan, J., concurring) (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

114. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). This case involved censorship in a high school newspaper of student-written articles about pregnancy and divorce. The majority held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. The majority suggested such pedagogical concerns include "speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.* at 271.

115. *Id.* at 279 (Brennan, J., dissenting).

116. *Id.* at 290 (emphasis added).

results in censorship. Judicial pushback from the likes of Stevens, Ginsburg, and Souter in *Morse* thus is essential as a bulwark to safeguard student expression from the censorial proclivities of school officials in a post-Columbine world.[117]

C. Citizens United v. FEC*: Deference Denied to Congress Opens Spending Spigots for Political Speech*

One of the most controversial[118] First Amendment-based decisions during the Roberts Court was its 2010 fractured ruling in *Citizens United v. FEC*.[119] Justice Anthony Kennedy delivered the opinion of the Court: (1) overruling *Austin v. Michigan State Chamber of Commerce*;[120] (2) holding that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether;"[121] and (3) striking down a federal law restricting corporate independent expenditures prior to elections.[122]

These results, this Section argues, reflect a rejection of deference by a majority of the Justices in *Citizens United* on two distinct levels:

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117. *See generally* Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 243–44 (2008) ("[S]ince the tragedy at Columbine High School in April 1999, courts have granted vast deference to school officials when it comes to squelching any speech that can be perceived as a threat of violence." (footnote omitted)).

118. For instance, the Supreme Court's holding in *Citizens United* has been compared with the Court's infamous decision in *Scott v. Sandford*, 60 U.S. 393 (1857), that treated blacks as property rather than citizens. Current U.S. Senator and erstwhile presidential candidate John Kerry called *Citizens United* "the worst, the most dangerous decision in the country since *Dred Scott*." Alex Leary, *Attack Ads Grow with Rise of the Super PAC*, ST. PETERSBURG TIMES (Fla.), July 24, 2011, at 1A. And Duke Thomas, the founder of a political action committee called "We Are the 99% Movement," said, "*Citizens United* is the worst decision for this country since Dred Scott. Saying corporations are people is as bad as saying people are property." Luke Rosiak, *The Super PAC to End All Super PACs?*, WASH. TIMES, Feb. 6, 2012, at A3.

119. Citizens United v. FEC, 130 S. Ct. 876 (2010).

120. Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990). In *Austin*, the Court upheld a Michigan statute that required corporations to make all independent political expenditures through a segregated fund consisting of money solicited expressly for political purposes because the law "reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections." *Id.* at 669.

121. *Citizens United*, 130 S. Ct. at 886.

122. *Id.* at 917.

- *rejection of deference to congressional action* that was taken in the name of remedying perceived flaws in political speech marketplaces; and

- *rejection of the deference accorded to prior decisions* that is embodied in the principle of *stare decisis*, at least when those prior decisions conflict with long-standing principles of First Amendment theory.

The central issue in *Citizens United* involved the constitutionality of portions of a federal law[123] prohibiting corporations from using general treasury funds to make independent expenditures for electioneering communications and for speech expressly advocating the election or defeat of a candidate.[124] Also at issue was a related series of FEC regulations that were so complex they would, as Justice Kennedy wrote, "force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day."[125] The overall effect was to make it "a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election."[126]

In declaring the law unconstitutional, Justice Kennedy perfunctorily referenced the "due deference"[127] that must be given to Congress and acknowledged that the Court "must give weight to attempts by Congress"[128] to remedy perceived problems. In this case, those congressionally identified problems were the alleged "corruption or its appearance"[129] that corporate political speech might cause on elections and that, in turn, a ban on corporate expenditures might prevent.

But Justice Kennedy quickly made it clear in the same paragraph that such deference is not extensive, at least when: (1) the speech is

123. 2 U.S.C. § 441b (2006), *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

124. *Citizens United*, 130 S. Ct. at 886 ("Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate.").

125. *Id.* at 889.

126. *Id.* at 897.

127. *Id.* at 911.

128. *Id.*

129. *Id.* at 908.

political; (2) the imposed sanctions are criminal;[130] and (3) congressional action conflicts with supposedly long-standing First Amendment principles. After stating the obvious—"Congress may not choose an unconstitutional remedy"[131]—Kennedy elaborated that congressional remedial action "must comply with the First Amendment; and, *it is our law and our tradition that more speech, not less, is the governing rule.* An outright ban on corporate *political speech* during the critical pre-election period is not a permissible remedy."[132]

In brief—and, at least, in Justice Kennedy's view—the congressionally imposed remedy for its anticorruption interest could not permissibly take the form of a speech-reducing statute due to its conflict with the time-honored counterspeech doctrine[133] that Congress chose to ignore. As Justice Louis Brandeis wrote for the High Court eighty-five years ago: "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[134] In summary, the congressional action at issue in *Citizens United* conflicted with long-standing First Amendment theory and, in turn, the First Amendment theory of "*more speech, not less*"[135] simply had to prevail.

In addition, much like Justice Scalia (with whom Kennedy joined) in *Brown* lambasted social science for failing to demonstrate causal evidence of any harm to minors,[136] Kennedy in *Citizens United* found that Congress offered "only scant evidence that independent expenditures even ingratiate,"[137] much less corrupt.[138] In other words, just as the non-deferential approach of Justice Scalia in *Brown* lead to his conclusion that there was no evidence of any problem that justified remedial legislative action, so too did Justice Kennedy's deference-light approach in *Citizens United* result in a determination

130. On this point, Kennedy wrote that "under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design." *Id.* at 917.

131. *Id.* at 911.

132. *Id.* (emphasis added).

133. *See generally* Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. REV. 553 (discussing the counterspeech doctrine and providing examples of its use).

134. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

135. *Citizens United*, 130 S. Ct. at 911 (emphasis added).

136. *See supra* Part II.A.

137. *Citizens United*, 130 S. Ct. at 910.

138. *See id.* ("Ingratiation and access, in any event, are not corruption.").

that there was no evidence demonstrating an actual problem requiring legislative redress existed.

University of Chicago Law School Professor Aziz Z. Huq recently observed that "the *Citizens United* Court pointed to a specific absence of evidence that the asserted government interest was furthered by the corporate expenditure ban"[139] and "catalogued the absence of evidence that corporate expenditures were being exchanged for legislative votes."[140] In accord with the same decidedly non-deferential evidentiary approach in *Brown*, Professor Huq characterized the majority's tack in *Citizens United* as "a truly *strict* scrutiny standard,"[141] adding his own emphasis to the word strict. Professor Huq sums up *Citizens United* as reflecting "beady-eyed skepticism."[142]

Chief Justice John Roberts filed a concurring opinion in *Citizens United* that was joined by Justice Samuel Alito.[143] Like Kennedy, the Chief Justice suggested that deference to congressional findings is essential when he quoted a concurrence authored eighty-five years earlier by Justice Oliver Wendell Holmes, Jr., for the proposition that "[j]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called upon to perform.'"[144] Yet Roberts, in supporting Justice Kennedy's decision to go beyond the statutory issue—the constitutionality of 2 U.S.C. § 441b—and reach the larger question of whether *Austin* remained good law, bluntly wrote that "[t]here is a difference between judicial restraint and judicial abdication."[145]

Justice Kennedy, in *Citizens United*, found that deference could not stand in the way of striking down a statute that conflicted with long-standing First Amendment principles that provide political speech with heightened protection to serve enlightened self-government[146] and the counterspeech tradition.[147] Likewise, Chief Justice Roberts would

139. Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 23 (2012).

140. *Id.* at 18–19.

141. *Id.* at 18.

142. *Id.* at 29.

143. *Citizens United*, 130 S. Ct. at 917 (Roberts, C.J., concurring).

144. *Id.* at 917–18 (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

145. *Id.* at 919.

146. *See id.* at 898 (majority opinion) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." (citation omitted)).

147. *See generally* Richards & Calvert, *supra* note 133 (discussing the counterspeech doctrine and providing examples of its use).

not let the deference counseled by the principle of *stare decisis*[148] stop the Court from overruling a precedent in "*Austin* [that] threatens to subvert the 'principled and intelligible' development of our First Amendment jurisprudence."[149] Roberts was particularly concerned that the government in *Citizens United* was making new arguments to save *Austin*—arguments he contended depended "on radically reconceptualizing [the *Austin* decision's] reasoning"[150] and that were never relied upon by the *Austin* Court to support its decision.[151] For the Chief Justice, deference to past decisions was not due under *stare decisis* because

> [*s*]*tare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.[152]

Ultimately, as Citizens United's counsel James Bopp wrote in 2011, the majority's ruling stands for the following principle: "when evaluating laws in the First Amendment context, courts must determine whether legislative remedies comply with the Constitution, *without deference* to the legislature's determination of the remedy's constitutionality."[153] In accord with Professor's Huq's observation about the Court putting the "strict" in strict scrutiny in *Citizens United*,[154] Bopp argued that the decision made it clear "courts owe no deference to the remedy the government chooses"[155] in the First Amendment context and that under strict scrutiny, "the government must be put to its proof."[156] Similarly, Professor William D. Araiza

148. Roberts, for instance, referred to "the special deference we accord to precedent." *Citizens United*, 130 S. Ct. at 924 (Roberts, C.J., concurring).

149. *Id.*

150. *Id.*

151. *See id.* ("The Court in *Austin* nowhere relied upon the only arguments the Government now raises to support that decision.").

152. *Id.*

153. James Bopp, Jr. et al., *The Game Changer:* Citizens United*'s Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251, 322 (2011) (emphasis added).

154. Huq, *supra* note 139, at 18 (using *Citizens United* as an example of the Court applying "a truly *strict* scrutiny standard").

155. Bopp, *supra* note 153, at 331.

156. *Id.*

wrote that *Citizens United* reflected "rigidity" in the Court's "refusal to defer to congressional judgments relevant to the First Amendment issue."[157]

For some liberal-leaning constitutional scholars, this abject lack of deference to Congressional determinations in *Citizens United* is more than a little ironic because it reflects judicial activism by an ostensibly conservative Roberts Court. Constitutional law scholar Dean Erwin Chemerinsky captured this sentiment extremely well in a recent article:

> *Citizens United* should put to rest the constant conservative attack on judicial activism. By any measure, *Citizens United* was stunning in its judicial activism. The deference to the democratic process so often preached by conservatives in attacking liberal rulings protecting rights was nowhere in evidence as the conservative majority struck down restrictions on corporate spending that have existed for decades.[158]

Illustrating the rift on deference among the Justices in *Citizens United*, Justice Stevens filed a lengthy dissent that, as Professor Araiza pointed out, "took issue with the majority's rigidity"[159] on what Araiza called "the deference point."[160] Professor Araiza contended that Justice Stevens "provided a more nuanced discussion of the argument for deference to congressional findings about the corrupting effect of corporate and union speech."[161]

Justice Stevens, for instance, wrote that the Court "shows great disrespect for a coequal branch."[162] He derided the majority's decision, opining at one point that "[r]ather than show any deference to a coordinate branch of Government, the majority thus rejects the anticorruption rationale without serious analysis. Today's opinion provides no clear rationale for being so dismissive of Congress."[163] Suggesting the majority's non-deferential approach conflicted with its traditional tack, Stevens asserted that "[m]any of our campaign

157. William D. Araiza, Citizens United*,* Stevens*, and* Humanitarian Law Project*: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 822 (2011).

158. Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863, 873 (2011).

159. Araiza, *supra* note 157, at 827.

160. *Id.*

161. *Id.*

162. Citizens United v. FEC, 130 S. Ct. 876, 940 (2010) (Stevens, J., dissenting).

163. *Id.* at 968 (footnote omitted).

finance precedents explicitly and forcefully affirm the propriety of such presumptive deference."[164]

The bottom line from *Citizens United* is a clear split on the deference owed to Congress when it adopts laws affecting political speech. While Justice Kennedy's overt lack of deference to Congress is perhaps best encapsulated by his assertion that the First Amendment is "[p]remised on mistrust of governmental power"[165]—in other words, a mistrust of legislative action that mandates ultra-strict scrutiny by the judiciary—Justice Stevens adopted a more deferential stance that would have upheld the stricken statute.

D. Holder v. Humanitarian Law Project*: Divisions on Deference Granted to Congress in the Name of National Security Stifles Speech*

As with *Citizens United*, the 2010 case of *Holder v. Humanitarian Law Project*[166] involved both political expression and a question of how much deference Congress deserves when adopting a law that allegedly violates the First Amendment. But unlike *Citizens United*, a majority of justices in *Humanitarian Law Project* gladly granted deference to Congress because of the presence of a variable decidedly *not* at stake in *Citizens United*—national security.

Humanitarian Law Project (a case argued on behalf of the government by soon-to-be Justice Elena Kagan) involved an as-applied, First Amendment-based challenge to the constitutionality of a federal statute[167] prohibiting the giving of material support—including "expert advice or assistance"[168]—to a foreign terrorist organization.[169] The plaintiffs wanted to provide material support in the form of speech to two organizations, the Kurdistan Workers' Party (also known as the Partiya Karkeran Kurdistan) and the Liberation Tigers of Tamil Eelam.[170] The parties agreed that the Government's interest in combating terrorism is urgent and of the highest order.[171]

In authoring the majority opinion upholding the prohibition on material support to terrorist groups, Chief Justice Roberts, joined by

164. *Id.* at 969.

165. *Id.* at 898 (majority opinion).

166. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

167. 18 U.S.C. § 2339B (2006).

168. § 2339B(g)(4).

169. *See Humanitarian Law Project*, 130 S. Ct. at 2722 (observing that the Court had to "consider whether the material-support statute, as applied to plaintiffs, violates the freedom of speech guaranteed by the First Amendment").

170. *Id.* at 2713–14.

171. *Id.* at 2724.

five colleagues,[172] gave great deference to both Congress and the executive branch.[173] Although making it clear deference in this area is neither absolute nor the same as judicial abdication,[174] Roberts wrote, among other things:

- "[E]valuation of the facts by the Executive, like Congress's assessment, is *entitled to deference*. This litigation implicates sensitive and weighty interests of national security and foreign affairs."[175]
- "It is vital in this context 'not to substitute . . . our own evaluation of evidence for a *reasonable evaluation* by the Legislative Branch.'"[176]
- "[W]hen it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked,' and *respect for the Government's conclusions is appropriate*."[177]
- "In this area perhaps more than any other, the *Legislature's* superior *capacity for weighing competing interests* means that 'we must be particularly careful not to substitute our judgment of what is desirable for that of Congress.'"[178]

These bullet points indicate that deference is owed to Congress on national security issues because of its perceived expertise—its "superior capacity for weighing competing interests"[179]—and, con-

172. Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito joined Chief Justice John Roberts's opinion. *Id.* at 2712.

173. *See id.* at 2727 ("In analyzing whether it is possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities, we do not rely exclusively on our own inferences drawn from the record evidence. We have before us an affidavit stating the Executive Branch's conclusion on that question.").

174. *See id.* ("[C]oncerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake.").

175. *Id.* (emphasis added).

176. *Id.* (emphasis added) (quoting Rostker v. Goldberg, 453 U.S. 57, 68 (1981)).

177. *Id.* (emphasis added) (citation omitted) (quoting *Rostker*, 453 U.S. at 65).

178. *Id.* at 2728 (emphasis added) (quoting *Rostker*, 453 U.S. at 68).

179. *Id.*

versely, because of the Court's own "lack of competence"[180] in collecting and evaluating evidence on such issues. The only inquiry left for the Court is to determine if Congress made a "reasonable evaluation"[181] of the evidence.

Deference in such situations is not surprising. As Professor George D. Brown recently wrote, a lawsuit like that in *Humanitarian Law Project* represents a "challenge[] to the government's anti-terrorism policies. What is the proper role of the courts in such challenges? They inevitably produce calls for judicial deference in matters of national security, calls which are often heeded."[182] While deference is common in national security cases, Professor Peter Margulies nonetheless believed the Court went too far in *Humanitarian Law Project*, deriding its decision as "an unnecessary expansion of deference."[183]

In contrast to Chief Justice Roberts's approach, Justice Breyer authored a dissent, joined by Justices Ginsburg and Sotomayor, that openly criticized the majority's deferential tack. Breyer, for instance, opined that while the majority "would *defer strongly* to Congress' 'informed judgment,'"[184] he found "no evidence that Congress has made such a judgment regarding the specific activities at issue in these cases."[185] Although conceding "the Government's expertise in foreign affairs may warrant deference in respect to many matters,"[186] Breyer emphasized that "it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment."[187] Breyer encapsulated his views (and those of Ginsburg and Sotomayor) on deference in national security matters, writing that

> these cases require us to consider how to apply the First Amendment where national security interests are at stake. When deciding such cases, courts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national

180. *Id.* at 2727 (quoting *Rostker*, 453 U.S. at 68).

181. *Id.* (quoting *Rostker*, 453 U.S. at 68).

182. George D. Brown, *Accountability, Liability, and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 197 (2011).

183. Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 463 (2012).

184. *Humanitarian Law Project*, 130 S. Ct. at 2739 (Breyer, J., dissenting) (emphasis added).

185. *Id.*

186. *Id.*

187. *Id.*

> defense, and that it grants particular authority to the President in matters of foreign affairs. Nonetheless, this Court has also made clear that authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals.[188]

The deference problem illustrated by *Humanitarian Law Project* is obvious: both the majority and dissent claimed *not* to adopt all-or-nothing, absolutist stances on deference regarding national security, yet they clearly diverged on where the proper metes and bounds of deference to Congress on national security interests lie when First Amendment speech interests are jeopardized. Deference thus is not a binary concept but, instead, is one with shades of gray that are seemingly adopted based on each Justice's personal sensibilities about striking an appropriate balance between judicial abdication and judicial activism.

E. Banks v. Beard*: Disagreement on Deference Owed to Prison Officials in the Name of Serving Penological Interests*

The last time the Supreme Court directly addressed the First Amendment right of inmates to access media content was in 2006 in *Beard v. Banks*.[189] *Beard* centered on a Pennsylvania prison policy prohibiting the most "specially dangerous and recalcitrant inmates"[190] from accessing any newspapers or magazines.[191] Under the policy, the only media content these inmates may lawfully possess are "legal and personal correspondence, religious and legal materials, two library books, and writing paper."[192]

Justice Stephen Breyer delivered the judgment of the Court in a plurality opinion joined by three Justices.[193] Two other Justices concurred in the judgment.[194] Breyer explained that the basic, substantive principles governing the case were rooted in the Court's 1987

188. *Id.* at 2743.

189. Beard v. Banks, 548 U.S. 521 (2006) (plurality opinion).

190. *Id.* at 525.

191. *See id.* at 526 (noting that, under the policy at issue for prisoners in Level 2 of Pennsylvania's Long Term Segregation Unit, inmates "have no access to newspapers, magazines, or personal photographs").

192. *Id.*

193. *Id.* at 524. Justice Breyer announced the judgment of the Court and delivered an opinion, in which Chief Justice Roberts and Justices Anthony Kennedy and David Souter joined.

194. *See id.* at 536–42 (Thomas, J., concurring). Justice Clarence Thomas, joined by Justice Antonin Scalia, concurred only in the judgment, as he would uphold the restrictions based solely on the Eighth Amendment. *Id.* at 537.

opinion in *Turner v. Safley*[195] and its 2003 decision in *Overton v. Bazzetta*.[196] Synthesizing these two prisoner-rights cases, Breyer made four key points: (1) prisoners do possess First Amendment speech rights;[197] (2) those rights, however, are not the same as those possessed by non-incarcerated individuals;[198] (3) *substantial deference* must be granted to prison officials when evaluating restrictions on prisoners' rights;[199] and (4) the constitutional rights of prisoners may permissibly be abridged if they are reasonably related to legitimate penological concerns.[200]

The *Turner*-based test deployed in *Beard* amounts to a very relaxed form of judicial scrutiny.[201] The Court calls it a "reasonableness standard,"[202] in stark contrast to strict scrutiny,[203] and legal commentators refer to it as "a rational basis standard of review."[204] Professor Giovanna Shay asserts that the *Turner* test "emphasizes deference to prison officials and the relative technical and administrative expertise of corrections authorities."[205]

Expounding on the nature of the substantial deference owed to prison officials, Justice Breyer wrote that when it comes to "disputed

195. Turner v. Safley, 482 U.S. 78 (1987).

196. Overton v. Bazzetta, 539 U.S. 126 (2003).

197. *See Beard*, 548 U.S. at 528 ("This Court recognized in *Turner* that imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment.").

198. *See id.* ("[T]he Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere.").

199. *See id.* (quoting *Overton*, 539 U.S. at 132) ("[C]ourts owe 'substantial deference to the professional judgment of prison administrators.'").

200. *Id.* (citing *Turner*, 482 U.S. at 87).

201. *See* Matthew D. Rose, Comment, *Prisoners and Public Employees:* Bridges *to a New Future in Prisoners' Free Speech Retaliation Claims*, 5 SEVENTH CIRCUIT REV. 159, 160 (2009) ("*Turner* . . . established a very deferential rational basis standard of review.").

202. Thornburgh v. Abbott, 490 U.S. 401, 409 (1989). The Court explained that the decision to use a reasonableness standard in *Turner* and subsequent cases "stemmed from its concern that . . . a strict standard simply was not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons." *Id.* at 409–10.

203. *See supra* note 50 and accompanying text (explaining the strict scrutiny standard).

204. Rose, *supra* note 201, at 170.

205. Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 341 (2009).

matters of professional judgment,"[206] the Court's "inferences must accord deference to the views of prison authorities."[207] This reflects a trend of greater deference toward correctional administrators that emerged during the 1980s and 1990s.[208]

The High Court's test for measuring the validity of restrictions on inmates' speech reflects deference because, unlike strict scrutiny, it requires a very low burden of proof—namely, whether or not the regulations are reasonably related to legitimate penological concerns.[209] Swapping out the word penological for pedagogical, this test mirrors the equally deferential test developed by the Court in *Hazelwood School District v. Kuhlmeier*[210] to address cases involving student speech that occurs as part of the curriculum or is school sponsored. As one commentator observed, "[t]he notion of reasonable relatedness employed in both tests gives wide berth to the enforcing authorities' discretion, be it prison officials or school administrators, as compared to a hypothetically more stringent 'directly related' nexus requirement."[211]

Applying this deferential standard in *Beard*, Breyer and the plurality ruled for the Pennsylvania prison officials and their speech-restrictive policy, opining that they "set forth adequate legal support for the policy. And the plaintiff, a prisoner who attacks the policy, has failed to set forth 'specific facts' that, *in light of the deference that courts must show to the prison officials*, could warrant a determination in his favor."[212]

In reaching this pro-censorship conclusion, Breyer pointed out that prison officials tendered multiple reasons for restricting access to reading materials,

> including the need to motivate better behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to ensure

206. Beard v. Banks, 548 U.S. 521, 530 (2006) (plurality opinion).

207. *Id.*

208. Christopher E. Smith, *Justice John Paul Stevens and Prisoners' Rights*, 17 TEMP. POL. & CIV. RTS. L. REV. 83, 90 (2007).

209. *Beard*, 548 U.S. at 528.

210. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). In *Hazelwood*, the Court wrote that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

211. Clay Calvert, *Bylines Behind Bars: Fame, Frustration & First Amendment Freedom*, 28 LOY. L.A. ENT. L. REV. 71, 98 (2008).

212. *Beard*, 548 U.S. at 525 (emphasis added).

> prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire.[213]

Breyer determined that the first of these justifications—giving inmates enhanced incentives to rehabilitate their behavior by depriving them of media content—was adequate to support the ban and he went no further into the other interests.[214] The ostensible incentive for good behavior, under the Pennsylvania policy, is that positive conduct eventually leads to "somewhat less severe restrictions, including the right to receive one newspaper and five magazines."[215] Justice Breyer thus reasoned that "[t]he articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, are logical ones."[216]

Professor Christopher Smith labels the *Beard* plurality's approach "an especially deferential application of an already-deferential test for violations of prisoners' rights."[217] Another legal commentator goes even further:

> [T]he Court provided *unprecedented deference* in light of the serious deprivation involved. Accepting the administrations' justification that prisoners should have limited access to reading materials to encourage better behavior and reduce the threat of violent or destructive behavior, the Court rolled over, leaving room for the great possibility that any fundamental right could be acceptably denied if justified by rehabilitation.[218]

Justice Breyer and the plurality's deferential approach in *Beard* drew pushback in the form of a dissent by Justice Ginsburg—a dissent that prompted Breyer to respond that "[c]ontrary to JUSTICE GINSBURG's suggestion, we do not suggest that the deference owed prison authorities makes it impossible for prisoners or others attacking a prison policy like the present one ever to succeed or to survive summary judgment. After all, the constitutional interest here is an important one."[219] The latter sentence, of course, is a reference to

213. *Id.* at 530.

214. *See id.* at 531 ("[W]e believe that the first rationale itself satisfies *Turner*'s requirements.").

215. *Id.* at 526.

216. *Id.* at 531–32.

217. Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 881 (2011).

218. Anna C. Burns, Note, Beard v. Banks*: Restricted Reading, Rehabilitation, and Prisoners' First Amendment Rights*, 15 J.L. & POL'Y 1225, 1269 (2007) (emphasis added).

219. *Beard*, 548 U.S. at 535 (citation omitted).

First Amendment interest in free speech, while the former seemingly represents an effort to blunt the charge that the plurality's approach is so deferential as to completely cut off inmates' possibilities of having any success under it.

In her *Beard* dissent, Justice Ginsburg raised the specter of judicial abdication of duty by the plurality.[220] In particular, she was concerned that the plurality's deferential approach eclipsed evidentiary assumptions traditionally made in favor of the non-moving party in summary judgment motions. She wrote that while notions of deference to prison officials "can and should be incorporated into the evaluation of a motion for summary judgment, that deference should come into play, pretrial, only after the facts shown are viewed in the light most favorable to the nonmoving party and all inferences are drawn in that party's favor."[221] She explained:

> All inferences are to be drawn in favor of the prisoner opposing the regulation, and the question is not which side has the better argument, but whether the Secretary has shown he is entitled to a judgment *as a matter of law*. By elevating the summary judgment opponent's burden to a height prisoners lacking nimble counsel cannot reach, the plurality effectively tells prison officials they will succeed in cases of this order, and swiftly, while barely trying. It suffices for them to say, in our professional judgment the restriction is warranted.[222]

In addition to Justice Ginsburg, Justice Stevens filed a dissent also intimating that the plurality's approach was too deferential, at least in terms of scrutinizing the assertions and evidence set forth by Pennsylvania prison officials. In particular, Stevens called the evidentiary support for Pennsylvania's position "exceedingly tenuous. When the logical connection between prison officials' stated interests and the restrictions on prisoners' constitutional rights is not self-evident, we have considered whether prison officials proffered any evidence that their regulations served the values they identified."[223] It is important to recognize that Justice Stevens purported to apply the exact same test or rule as the plurality,[224] but he gave far less hands-off deference when it came to evaluating the government's evidence under the test.

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220. *Id.* at 554–55 (Ginsburg, J., dissenting).

221. *Id.* at 555.

222. *Id.* at 556.

223. *Id.* at 550 n.4 (Stevens, J., dissenting).

224. *See id.* at 542 (noting that the reasonably related to legitimate penological concerns test was the correct rule to be applied "[w]hen a prison regulation impinges upon First Amendment freedoms").

Justices Ginsburg and Stevens are not the only ones to criticize the plurality's deferential approach in *Beard*. In a 2011 law journal article, Erwin Chemerinsky blasted Justice Breyer's opinion:

> *The Court's deference to the government was stunning.* This is a regulation that denies prisoners access to all newspapers, magazines, and even family photographs. It is hard to imagine a more extensive restriction of First Amendment rights. There was no evidence that this actually improves prisoner behavior, and in fact, the Court said that none was needed. The government's assertion of a benefit was sufficient to justify the restriction on speech.[225]

Ultimately, then, even when the Justices appear to agree in theory to apply the same legal rule—one that is itself already deferential—they nonetheless may disagree on the metes and bounds of that deference in practice. Deference in practice thus dirties the semantic hygiene that a seemingly clear sounding rational basis test like that in *Beard* appears to provide. *Beard*, in turn, illustrates that there can be both: (1) deferential applications of already deferential legal standards; and (2) more rigorous approaches to those same deferential standards.

F. FCC v. Fox Television Stations, Inc.*: Deferring to an Administrative Agency in the Realm of Indecency*

Under federal law,[226] the Federal Communications Commission can fine[227] over-the-air broadcasters for conveying indecent content, which it currently defines as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities."[228] Although the Supreme Court's 2009 ruling in *FCC v. Fox Television Stations, Inc.*[229] did not reach the substantive First Amendment issues surrounding the FCC's

225. Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 728 (2011) (emphasis added) (footnotes omitted).

226. *See* 18 U.S.C. § 1464 (2006) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

227. *See* 47 U.S.C. § 503(b)(2)(C)(ii) (2006) (providing, in relevant part, that the FCC can issue a maximum forfeiture penalty of $325,000 for each violation for broadcasting obscene, indecent, or profane language).

228. *Guide: Obscenity, Indecency and Profanity*, FCC, http://www.fcc.gov/guides/obscenity-indecency-and-profanity (last visited Sept. 19, 2012).

229. FCC v. Fox Television Stations, Inc. (*Fox I*), 556 U.S. 502 (2009).

broadcast indecency policies[230]—and the Court again dodged the First Amendment issues in 2012[231]—the majority nonetheless engaged in an exceedingly deferential review under the Administrative Procedure Act (APA) in upholding the Commission's ability to change its indecency policy and, in the process, to further limit the speech rights of broadcasters. Under the FCC's new policy, the lack of repetition of an expletive "is not a safe harbor"[232] for broadcasters, and the FCC can instead enforce its policy against "isolated or fleeting broadcasts"[233] of indecent language. Prior to reaching the Supreme Court, the United States Court of Appeals for the Second Circuit held that the FCC failed to provide a reasoned explanation for justifying its about-face in suddenly targeting fleeting expletives after years of having not done so.[234]

In delivering the opinion of the Court in the FCC's favor, Justice Scalia explained the deferential approach—what he called a "narrow"[235] standard of review—that the Justices must take under the APA. In particular, they will only reverse an agency's policy change if its decision was arbitrary or capricious,[236] a statutorily mandated standard of review.[237] For the Scalia majority, this meant that the

230. *See id.* at 516, 529 (declining "to address the constitutional questions," and adding that the change to the FCC's indecency policy "is a separate question to be addressed in a constitutional challenge").

231. After the Supreme Court reversed and remanded on the APA issue, the Second Circuit found the FCC regulations impermissibly vague under the First Amendment. 613 F.3d 317 (2d Cir. 2010). The Court again granted certiorari, this time "for decision on the constitutional question." FCC v. Fox Television Stations, Inc. (*Fox II*), 132 S. Ct. 2307 (2012). The Court determined in *Fox II* that FCC's abrupt about-face on fleeting expletives and brief nudity failed to provide the broadcasters with sufficient notice, and the FCC's standards were therefore unconstitutionally vague under the Due Process Clause. *Id.* at 2320. Because the Court struck down the FCC's indecency policy on Fifth Amendment grounds, the Court refrained from addressing the First Amendment implications of the policy. *Id.*

232. *Fox I*, 556 U.S. at 512.

233. *Id.* at 509.

234. *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 455 (2d Cir. 2007) ("The Networks contend that the Remand Order is arbitrary and capricious because the FCC has made a 180-degree turn regarding its treatment of 'fleeting expletives' without providing a reasoned explanation justifying the about-face. We agree."), *vacated*, 556 U.S. 502 (2009).

235. *Fox I*, 556 U.S. at 513.

236. *Id.*

237. *See* 5 U.S.C. § 706(2)(A) (2006) (providing that a court can hold unlawful and set aside agency action, findings, and conclusions found to

FCC's predictive judgments about what might happen to the use of expletives in the broadcast medium if its policy did not change "merits deference,"[238] and the FCC

> need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.[239]

One highlight from Justice Scalia's *Fox I* opinion illustrates the vast deference given to the FCC and, perhaps more importantly, provides a stark contrast with his decidedly non-deferential approach on the proof-of-harm question in *Brown*.[240] In particular, Scalia contended in *Fox I* that

> [t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.[241]

The only evidence necessary to support the FCC's position was, in Scalia's view, common sense: "Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives."[242] Justice Scalia's view about the non-necessity of empirical proof of harm fits neatly with the Supreme Court's observation in the obscenity[243] case of *Paris Adult*

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be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

238. *Fox I*, 556 U.S. at 521 ("[E]ven in the absence of evidence, the agency's predictive judgment (which merits deference) makes entire sense. To predict that complete immunity for fleeting expletives, ardently desired by broadcasters, will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance.").

239. *Id.* at 515.

240. *See supra* Part II.A.

241. *Fox I*, 556 U.S. at 519.

242. *Id.*

Theatre I v. Slaton that "[f]rom the beginning of civilized societies, legislators and judges have acted on various *unprovable assumptions*." [244]

Counterposed to such a deferential evidentiary tack, Justice Breyer dissented in *Fox I*. He concluded the FCC's change in policy to target fleeting expletives was, in fact, arbitrary and capricious.[245] Illustrating his rigorous approach to the APA's facially deferential standard, Justice Breyer called attention to the First Amendment interests at stake that, in his view, should have been factored into the FCC's change-of-policy calculus:

> [T]he FCC said next to nothing about the relation between the change it made in its prior "fleeting expletive" policy and the First-Amendment-related need to avoid "censorship," a matter as closely related to broadcasting regulation as is health to that of the environment. The reason that discussion of the matter is particularly important here is that the FCC had *explicitly* rested its prior policy in large part upon the need to avoid treading too close to the constitutional line.[246]

This observation is important because Breyer suggested that even when a transparently deferential arbitrary-and-capricious standard of review is deployed, it must be implemented in a rigorous fashion when First Amendment interests are at stake. Furthermore, agencies must provide courts with much more detailed explanations for their changes in policy, with Justice Breyer observing that

> the FCC's answer to the question, "Why change?" is, "We like the new policy better." This kind of answer, might be perfectly satisfactory were it given by an elected official. But when given by an agency, in respect to a major change of an important policy where much more might be said, it is not sufficient.[247]

Justice Breyer thus concluded that the Second Circuit was correct in *Fox Television Stations* that the FCC's policy switch on indecency did, in fact, violate the APA.[248] Ultimately, as Professor Robin

243. Obscene expression is not protected by the First Amendment's guarantee of free speech. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 124 (1989) ("We have repeatedly held that the protection of the First Amendment does not extend to obscene speech."); Roth v. United States, 354 U.S. 476, 485 (1957) ("[O]bscenity is not within the area of constitutionally protected speech or press.").

244. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973) (emphasis added).

245. *Fox I*, 556 U.S. at 547 (Breyer, J., dissenting).

246. *Id.* at 553.

247. *Id.* at 567.

248. *Id.*

Kundis Craig wrote, *Fox I* "leaves federal courts with multiple rules for how to approach arbitrary-and-capricious review when a federal agency changes policy."[249] Deference granted to the FCC led to a pro-censorship result, just as it did in *Morse*, *Beard*, and *Humanitarian Law Project*.

CONCLUSION

This Article deployed deference as a lens for analyzing a half-dozen decisions by the Roberts Court affecting free expression. Using this data set of factually diverse cases, the Article illustrated how varying conceptions and standards of deference affect First Amendment rights in different circumstances and contexts.

Furthermore, the Article demonstrated the pliant nature of deference and the related disagreements among the Justices over when and how much deference should be afforded in any given case. Perhaps most significantly, this Article revealed how the Justices differed on deference in several high-profile First Amendment cases including *Brown v. Entertainment Merchants Ass'n*, *Morse v. Frederick*, *Citizens United v. FEC,* and *Holder v. Humanitarian Law Project*. That quintet of cases illustrates disparate views on deference toward:

- social scientists;
- public school administrators;
- Congress; and
- an administrative agency (the FCC).

Even in cases not so visible to the public, such as the prison speech case of *Beard v. Banks*, there are disagreements among the Justices on deference. Indeed, the split in *Beard* suggests that what purports to be a deferential standard of review to start with can be applied in either an exceedingly deferential or minimally deferential fashion.

Encapsulating the findings from the six cases examined here, the majority or plurality's denial of (or reduced level of) deference led to free speech victories in *Brown* (denial of deference to social scientists resulted in striking down California's violent video game statute) and *Citizens United* (denial of deference to Congress resulted in striking down federal rules limiting the political speech rights of corporations and unions). In contrast, the deference granted to Congress in

249. Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L.J. 1, 40 (2011).

Humanitarian Law Project, to prison officials in *Beard*, to educators in *Morse*, and to the FCC in *Fox I* all resulted in pro-censorship outcomes.

Deference, of course, is merely one lens through which to filter First Amendment-based cases. This Article, however, laid bare the pivotal role deference can play in a case's outcome. Like a spigot, deference can be turned on and off by the Court, and even when it is turned on, it can be made either to flow freely and with full force or it can be reduced to a mere trickle. It is precisely such subjectivity and flexibility that makes it a critical concept to understand. Deference amounts to a judicial wildcard, as it were, that justices can employ—regardless of whether they claim to be applying strict scrutiny,[250] intermediate scrutiny, or rational basis review—to help sustain a law's constitutionality. Merely claiming to apply strict scrutiny, for instance, does not necessarily result in rigorous judicial review if deference is factored into the equation. The bottom line is that deference is an elastic concept that muddies judicial analysis and sacrifices First Amendment rights when deployed in large doses.

Given the disparities among the Justices on the Roberts Court regarding deference in First Amendment-based controversies, as illustrated in this Article, it is apparent that deference, as a concept, is too loosely bandied about and trotted out on an as-needed basis, rather than being used with consistency, predictability, and analytical rigor. This is particularly troublesome because failing to bestow any deference on an entity like Congress can lead to charges of judicial activism[251] that seriously undermine the Court's legitimacy. Conversely, being perceived as overly deferential can result in perhaps equally damning allegations of judicial abdication.[252]

How can one explain the differences in deference across the various First Amendment cases addressed here? It is not always necessary. For example, perhaps the greater deference afforded to public school officials by the majority in *Morse*, as compared to the lack of deference given to social scientists by the majority in *Brown*, can be parsed in several ways. First, public school principals and administrators are, like the Justices themselves, government officials tasked with a specific governmental leadership role. The deference may thus be explained, in part, as a natural conferral of respect,

250. The notion of applying deference in the strict scrutiny context seems oxymoronic—strictly deferential?—but it exists. *See* Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1256–58 (2010) (describing the majority's mix of strict scrutiny and deference in Grutter v. Bollinger, 539 U.S. 306 (2003)).

251. *See, e.g.*, Chemerinsky, *supra* note 158, at 867 (discussing the current judicial activism of the Court).

252. *See supra* note 6 and accompanying text (discussing Justice Scalia's negative view of judicial deference).

esteem, and expertise from one governmental official to another. And although social scientists may be experts in their fields and also may be government employees (if they work at state-related universities), they need not be government employees (if they work at private universities or corporations or think tanks). Furthermore, even when social scientists are government *employees* of public universities, their roles as social scientists are not those of government *officials* tasked with leadership responsibility on a scale with public school administrators who are in charge of hundreds and sometimes thousands of students, teachers, and others.

Second, educators' decisions necessarily entail subjective judgment calls about when student speech should be censored. In contrast, social scientists—at least those whose work was at issue in *Brown*—deal in the world of empirical facts. The former realm, given its inherent murkiness and the need for quick, on-the-fly decision making when a speech crisis arises unexpectedly on campus, demands more deference than the latter realm, which purports to objectively measure outcomes, in highly controlled situations, with statistical significance.

In other situations, the authors of this Article posit that there may be latent assumptions—assumptions hidden behind the typical reasons for granting deference of perceived expertise and knowledge—about why deference actually is granted. For instance, in both *Morse* and *Beard* the individuals impacted by the bestowal of deference on, respectively, school officials and prison administrators are, for all intents and purposes, second-class First Amendment citizens[253]—namely, minors and prisoners. Put differently, it may be easier to grant deference to would-be censors in these scenarios because the classes of individuals whose speech rights are gored in the process are perceived as somehow less worthy of receiving full First Amendment protection. Similarly, negatively affecting the speech rights of a non-profit human rights group like the Humanitarian Law Project[254] may seem like a small price to pay for providing deference that safeguards more than 300 million people in the name of national security.

253. This term has been used by others to describe the judicial treatment under the First Amendment of both broadcasters and the purveyors of commercial speech. *See* Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U. L. REV. 321, 323 n.19 (2010) (describing uses of the phrase "second-class First Amendment citizens").

254. The group describes itself as "a non-profit organization founded in 1985, dedicated to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights laws and humanitarian law." HUMANITARIAN L. PROJECT, http://hlp.home.igc.org (last visited Sept. 19, 2012).

A final point is important: Chief Justice Roberts has been highly successful in some extremely controversial First Amendment-based cases, such as *United States v. Stevens*[255] and *Snyder v. Phelps*,[256] in bringing together nearly all of his colleagues in rendering pro-speech decisions. As Chief Justice, Roberts should find it equally important—certainly for purposes of adding clarity and consistency to judicial decision making, and perhaps more selfishly for securing his own legacy—to try to bring the Justices together on conceptions of deference. Without consistency across the Justices on deference, standards such as strict scrutiny lose clarity. For example, if two Justices both purport to apply strict scrutiny, but one embraces deference for the governmental entity that proposed the law in question and the other does not, it is hard to claim they are, in fact, using the same strict scrutiny test.

Ultimately, the cliché goes that the devil is in the details. If that is the case, then deference certainly is the devil in the details of judicial analysis that plagues clarity and predictability in a diverse range of First Amendment-based scenarios under the Roberts Court.

255. United States v. Stevens, 130 S. Ct. 1577 (2010). Justice Samuel Alito found himself isolated in *Stevens* from his eight colleagues on the Court as the lone dissenting justice. *Id.* at 1592–1602 (Alito, J., dissenting).

256. Snyder v. Phelps, 131 S. Ct. 1207 (2011). Justice Samuel Alito was isolated in *Snyder* from his eight colleagues on the Court as the solitary dissenter. *Id.* at 1222–29 (Alito, J., dissenting).

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