a reasonable and viewpoint-neutral restriction on participation in a limited public forum. But this easy formalism is wholly inadequate to explain why the state was permitted in this case to offer students benefits on the condition that they surrender a portion of their right to free speech. As Justice Holmes once observed in a different context, "General propositions do not decide concrete cases."[85] The Court should not have pretended otherwise.

3. Material Support for Terrorism. — Having determined that "any contribution" to a foreign terrorist organization "facilitates" that organization's terrorist activity,[1] Congress made it a federal crime "knowingly [to] provid[e] material support or resources to a foreign terrorist organization."[2] Under this material support statute, "material support" was defined to include not only money and weapons, but also, among other things, "training" and "personnel."[3] Yet, since this statute's enactment, the boundaries of what exactly constitutes material support have been subject to repeated congressional revision and near-constant litigation. Last Term, in *Holder v. Humanitarian Law Project*[4] (*HLP*), the Supreme Court clarified these constitutional boundaries. Upholding a ban on providing any type of nonmedical or nonreligious training or assistance to terrorist organizations, the Court insisted that Congress could, consistent with the First Amendment, criminalize even the teaching of how to apply the Universal Declaration of Human Rights so long as the lesson's recipient had been designated a foreign terrorist organization.[5] Central to this decision was the Court's broad deference to the national security judgments of Congress and the executive branch as to what constituted a likely threat of furthering terrorism. Yet, the Court's uncritical reliance on these judgments stood in fundamental tension with the heightened scrutiny that it purported to apply. At the same time, this broad deference reflected the Court's longstanding tendency to defer to the political branches' empirical judgments about serious, unpredictable national security threats.

In 1997, the Secretary of State designated thirty groups as foreign terrorist organizations,[6] including the Kurdistan Workers' Party (PKK)

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of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.").

[85] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[1] 18 U.S.C. § 2339B (2006 & Supp. III 2009).

[2] *Id.* § 2339B(a)(1).

[3] *Id.* § 2339A(b)(1).

[4] 130 S. Ct. 2705 (2010).

[5] As long as teaching to such organizations derived from "specialized knowledge" or imparted a "specific skill," according to the Court, it fell under the statute. *See id.* at 2720.

[6] Congress gave the Secretary of State the authority to designate an entity "a foreign terrorist organization" and defined the criteria by which the Secretary would make such a designation. *See* 8 U.S.C. § 1189(a)(1), (d)(4) (2006).

and the Liberation Tigers of Tamil Eelam (LTTE).[7] Worried that their planned support for the lawful humanitarian and political activities of the PKK and the LTTE could be prosecuted under the new material-support statute, two U.S. citizens and six domestic organizations filed suit in federal court in 1998 contending that the statute violated their First and Fifth Amendment rights.[8] First, the plaintiffs claimed the statute violated their freedoms of speech and association because it criminalized provision of material support to the PKK and LTTE without requiring proof of specific intent to further the unlawful ends of those organizations. Second, the plaintiffs insisted the statute's language was unconstitutionally vague, violating their due process rights.[9]

Although the district court rejected the First Amendment speech and association claims,[10] it granted an injunction on due process grounds, enjoining enforcement because the terms "training" and "personnel" were impermissibly vague.[11] The Ninth Circuit affirmed, emphasizing that the law needed to meet a higher standard of clarity because it risked criminalizing protected First Amendment activities.[12] Furthermore, to avoid Fifth Amendment concerns that one could be convicted of providing material support despite having no knowledge of the organization's designation or unlawful activities, the Ninth Circuit, in a subsequent decision affirming a permanent injunction, construed the statute to require proof "that a person acted with knowledge of an organization's designation" or "knowledge of the unlawful activities that caused the organization to be so designated."[13]

As this litigation was progressing through the courts, Congress responded to the attacks of September 11, 2001, by amending the material-support statute's definition of "material support" to include "expert advice or assistance."[14] In 2003, the plaintiffs filed a second action challenging the constitutionality of that term as applied to them,

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[7] *See* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997). The PKK was founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. The LTTE was founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. *HLP*, 130 S. Ct. at 2713.

[8] *HLP*, 130 S. Ct. at 2714.

[9] *See id.* In their original motion for a preliminary injunction, the plaintiffs made additional arguments, *see* Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1185 (C.D. Cal. 1998), but these were dropped by the time the case reached the Supreme Court.

[10] *See Humanitarian Law Project*, 9 F. Supp. 2d at 1196–97.

[11] *See id.* at 1204–05. This injunction was later made permanent. *See* Humanitarian Law Project v. Reno, No. CV-98-1971 ABC (BQRx), 2001 WL 36105333, at *12 (C.D. Cal. Oct. 2, 2001).

[12] *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137–38 (9th Cir. 2000). Since it was "easy to imagine protected expression that falls within the bounds" of "training" and "personnel," the Ninth Circuit argued, those terms were void for vagueness. *Id.*

[13] Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 393–94 (9th Cir. 2003).

[14] *See* 18 U.S.C. §§ 2339A(b), 2339B(g)(4) (2006 & Supp. I 2009).

and the district court agreed that this term was also unconstitutionally vague.[15] Then, at the end of 2004, Congress again amended § 2339B,[16] clarifying the mental state necessary to violate § 2339B by requiring knowledge of either the foreign group's designation as a terrorist organization or the group's commission of terrorist acts.[17] Congress also expanded the definition of "material support" to encompass any "service," more concretely defined as "training" and "expert advice or assistance,"[18] and clarified the scope of the term "personnel" by providing that it applies only to those who "work under [the] terrorist organization's direction or control" or who "organize, manage, supervise, or otherwise direct the operation of that organization."[19] The Ninth Circuit vacated its earlier decision and ordered the district court to reconsider the vagueness claims in light of these developments.[20]

After consolidating both actions on remand and allowing the plaintiffs to challenge the new term "service," the district court rejected the plaintiffs' argument that due process required proof of specific intent to further the organization's unlawful aims before criminal liability could be imposed.[21] Recalling the Ninth Circuit's earlier decision on the matter,[22] the court reasoned it was sufficient that the amended statute now demanded that the government prove a defendant acted with *knowledge* of the organization's terrorist connections.[23] The court also rejected the claim that the statute was facially overbroad because the protected speech covered by the statute was insubstantial relative to the kind of conduct — aiding terrorism — legitimately restricted.[24] However, because the terms "training," "expert advice or assistance," and "service" encompassed protected speech and advocacy activities, thereby chilling the exercise of First Amendment freedoms, they were unconstitutionally vague.[25] The Ninth Circuit affirmed,[26] finding no error with the district court's adherence to its prior decisions.

The Supreme Court reversed.[27] Writing for the Court, Chief Justice Roberts[28] addressed the vagueness issue first, arguing that the

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15 Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1200–01 (C.D. Cal. 2004).

16 Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3761, 3762–64 (codified as amended in scattered sections of 18 U.S.C.).

17 18 U.S.C. § 2339B(a)(1).

18 *Id.* § 2339A(b)(1)–(3).

19 *Id.* § 2339B(h).

20 Humanitarian Law Project v. U.S. Dep't of Justice, 393 F.3d 902, 903 (9th Cir. 2004).

21 *See* Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1142–48 (C.D. Cal. 2005).

22 *See* Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 385 (9th Cir. 2003).

23 *See Humanitarian Law Project*, 380 F. Supp. 2d at 1148.

24 *See id.* at 1153.

25 *See id.* at 1148–52.

26 Humanitarian Law Project v. Mukasey, 552 F.3d 916, 933 (9th Cir. 2009).

27 *HLP*, 130 S. Ct. at 2731.

28 Chief Justice Roberts was joined by Justices Stevens, Scalia, Kennedy, Thomas, and Alito.

Ninth Circuit had conflated its First Amendment and Fifth Amendment analyses and applied the wrong standard.[29] It did not matter if the statute was not clear in every possible application that one could hypothesize if its terms were sufficiently clear in their application to the conduct that the plaintiffs actually proposed.[30] In this case, the terms that Congress had refined were clear enough to give the plaintiffs fair notice that their proposed activities — as opposed to activities hypothesized for the purpose of legal argument — were prohibited.[31]

Chief Justice Roberts then moved to the freedom of speech question. Rejecting the government's insistence that the statute primarily regulated conduct in a content-neutral manner, he acknowledged that the statute regulated speech on the basis of its content — that is, based on what the plaintiffs wanted to say. Thus, a standard of constitutional review greater than intermediate scrutiny was appropriate.[32] And since no one questioned whether the government's interest in combating terrorism was compelling, the key question for assessing whether the statute passed this heightened scrutiny became whether the statute's means for pursuing this interest were appropriately tailored.[33]

To answer this question, Chief Justice Roberts addressed the broader "empirical question" of whether support for a terrorist organization's legitimate activities could be "meaningfully segregate[d] . . . from support of terrorism" and would not ultimately further terrorism.[34] Four considerations supported the conclusion that support for a terrorist organization's legitimate activities carried a real risk of furthering terrorism. First, material support, particularly money, is fungible. Since terrorist organizations do not maintain organizational firewalls, funds raised for civil, nonviolent activities could be redirected to further terrorism, or at the very least "free[] up other resources within the organization that may be put to violent ends."[35] Second, material support for an organization's legitimate activities, such as charitable and humanitarian activities, "helps lend legitimacy . . . that makes it easier for those groups to persist, to recruit mem-

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[29] *See HLP*, 130 S. Ct. at 2719.

[30] *See id.* at 2720. In addition to engaging in political advocacy, plaintiffs wanted to "train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes," and "teach PKK members how to petition various representative bodies such as the United Nations for relief." *See Humanitarian Law Project*, 552 F.3d at 921 n.1.

[31] *See HLP*, 130 S. Ct. at 2720–22. To the extent that problematic ambiguity remained, according to the Court, it was ambiguity in what the plaintiffs had proposed to do. *See id.* at 2722.

[32] *See id.* at 2723–24.

[33] *See id.* at 2724.

[34] *Id.*

[35] *Id.* at 2725. Even the apparently innocuous skills that plaintiffs wished to impart, the Court hypothesized, could be put to use by the terrorist organization to "lull[] opponents into complacency," to acquire financial resources, and "to take advantage of international entities." *Id.* at 2729.

bers, and to raise funds — all of which facilitate more terrorist attacks."[36] Third, providing foreign terrorist groups with material support in any form could harm the United States's relationships with key allies such as Turkey (in the case of the PKK) and undermine cooperative efforts between nations to prevent terrorist attacks.[37] Finally, the executive branch — the branch both practically and institutionally most competent to make informed judgments about national security and foreign policy — had not only confirmed the seriousness of the three dangers above, but also had itself endorsed "Congress's finding that all contributions to foreign terrorist organizations further their terrorism."[38] Deference to the combined judgment of the political branches was especially appropriate in the terrorism context, in which "conclusions must often be based on informed judgment rather than concrete evidence."[39] For these reasons, together with the great constitutional care with which Congress had crafted the statute,[40] the Court concluded that the statute's broad means were "necessary" to prevent terrorism.[41]

Justice Breyer dissented.[42] His opinion did not question the Court's Fifth Amendment analysis but vigorously challenged its First Amendment argument, pointing out that the First Amendment usually affords greatest protection to precisely the kind of political speech at issue.[43] Moreover, in light of the freedom of association, even coordination with a foreign terrorist organization should not deprive the plaintiffs of First Amendment protection if such coordination was not aimed at engaging in unlawful activities.[44] According to Justice Breyer, strict scrutiny was the appropriate standard in this case.[45] But, even if it were not, the Court should have asked whether the means were appropriate to achieve the admittedly compelling end, and it was here that the statute failed.[46] First, there was little empirical basis for

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[36] *Id.* at 2725.

[37] *See id.* at 2726–27.

[38] *See id.* at 2727–28.

[39] *Id.* at 2728.

[40] *See id.* For example, Congress had deliberately "avoided any restriction on independent advocacy or other activities not directed to, coordinated with, or controlled by foreign terrorist groups." *Id.*

[41] *Id.* at 2728–29. At the end of its opinion, the majority also briefly addressed the plaintiffs' freedom of association claim. Agreeing with the Ninth Circuit, Chief Justice Roberts determined that "the statute does not penalize mere association with a foreign terrorist organization," *id.* at 2730, and, for the same reasons that speech could narrowly be curbed, the statute could properly prohibit other forms of association. *Id.* at 2731.

[42] Justice Breyer was joined by Justices Ginsburg and Sotomayor.

[43] *See HLP*, 130 S. Ct. at 2732 (Breyer, J., dissenting).

[44] *See id.* at 2732–33.

[45] *See id.* at 2734.

[46] *See id.*

the claim that the support in question was fungible,[47] and it was not clear whether Congress had made an informed judgment on this specific matter.[48] Second, the scope of the majority's legitimacy argument proved too broad for Justice Breyer. Although the majority claimed it was justifiable to prohibit speech that might help legitimize terrorist groups, the Court would not countenance banning the freedoms to affiliate with a group or to advocate independently for a group, both of which were also likely to confer legitimacy on the group, especially the latter.[49] In addition, the majority's attempt to minimize the import of the First Amendment burden by pointing out that the statute left independent advocacy untouched was unconvincing because the distinction between coordinated advocacy and independent advocacy was barely tenable in practice.[50]

Given these constitutional doubts, Justice Breyer urged the Court to fulfill its obligation to interpret the statute in a way that avoided the constitutional conflicts.[51] He proposed requiring proof of knowledge or intent of providing support that bears a "significant likelihood" of furthering "the organization's terrorist ends."[52] This interpretation would not clearly contravene congressional intent.[53] He further urged remanding to the lower courts to "consider more specifically the precise activities in which the plaintiffs still wish[ed] to engage."[54]

The fundamental division between the majority and the dissent — even if neither side explicitly characterized its dispute in this way — was a disagreement over the proper scope of deference to the political branches' factual assessments. Specifically, the majority granted the highly generalized judgments of the political branches great deference, not because these judgments were the products of unique information and expertise that had been directly applied to the plaintiffs' proposed activities, but simply *as* national security judgments by the political branches addressing the dangerous and amorphous threat of terrorism. While such broad deference was in fundamental tension with the heightened scrutiny that the majority purported to apply, it reflected the Court's longstanding tendency to defer to the political branches' empirical judgments about serious, unpredictable national security threats.

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47 *See id.* at 2735.

48 *See id.* at 2735–36, 2741–42.

49 *See id.* at 2736.

50 *See id.* at 2737 ("I am not aware of any form of words that might be used to describe 'coordination' that would not, at a minimum, seriously chill not only the kind of activities the plaintiffs raise before us, but also the 'independent advocacy' the Government purports to permit.").

51 *Id.* at 2739–40, 2742.

52 *Id.* at 2740.

53 *Id.* at 2741–42.

54 *Id.* at 2742–43.

Although the Court did not explicitly rest its decision on deference, deference was unmistakably necessary to its holding. First, the other justifications the majority advanced, even if plausible, did not establish that the statute's broad speech restrictions satisfied heightened scrutiny. Focusing relatively little on the proposed activities themselves but rather more generally on how support for any of a terrorist organization's legitimate activities furthered terrorism,[55] the Court offered less-than-persuasive arguments for banning the plaintiffs' activities. One of the Court's rationales — the fungible nature of financial support — did not appear to apply to the plaintiffs' speech.[56] Another rationale — that the plaintiffs' speech would contribute legitimacy to a terrorist group — had a dubious logic that applied at least as well to independent advocacy and membership,[57] both of which the majority said could not be prohibited,[58] thereby calling into question the tightness of the fit between the statute and the government's goal. In addition, the majority's arguments applying directly to the proposed conduct verged on the conclusory,[59] were dependent on hypotheticals of dubious probability,[60] or were plausible but insufficient to satisfy heightened scrutiny in the First Amendment context.[61]

Second, a close reading of the majority's opinion highlights its reliance on the political branches' judgment in claiming a "necessary"[62] connection between prohibiting the plaintiffs' activities and preventing terrorism. Emphasizing that its analysis was based on more than just its own "inferences drawn from the record evidence,"[63] the Court admitted placing "significant weight" on "the considered judgment of Congress and the Executive that providing material support to a . . . terrorist organization . . . bolsters [its] terrorist activities."[64] This

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[55] *Compare id.* at 2729–30 (majority opinion) (addressing the specific connection between plaintiffs' proposed speech and the promotion of terrorism), *with id.* at 2724–29 (addressing the broader connection between supporting the legitimate activities of a terrorist organization and the promotion of terrorism).

[56] *See id.* at 2738–39 (Breyer, J., dissenting) (pointing out that the majority's fungibility argument misunderstood the plaintiffs' proposal to teach methods for seeking *political* relief as a proposal to teach methods for seeking *monetary* relief).

[57] *See id.* at 2736.

[58] *See id.* at 2728, 2730 (majority opinion).

[59] *See id.* at 2729 (insisting, without offering any arguments or factual information, that the possibility that "[a] foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt" is "real, not remote").

[60] *See id.* at 2730 (hypothesizing that "[t]raining and advice on how to work with the United Nations" might "readily" help the PKK use U.N. refugee camps as bases for terrorist activities).

[61] *See id.* at 2739 (Breyer, J., dissenting) (arguing that "the fact that other nations may like us less for granting [First Amendment] protection cannot in and of itself carry the day").

[62] *Id.* at 2728 (majority opinion).

[63] *Id.* at 2727.

[64] *Id.* at 2728.

"evaluation of the facts . . . is entitled to deference," insisted the majority, and "respect for the Government's conclusions is appropriate."[65]

Yet, broad deference to highly generalized judgments while determining a First Amendment issue, as the *HLP* Court strongly appeared to do despite its insistence to the contrary,[66] raises a serious problem because uncritically relying on such judgments does not seem consistent with the application of heightened scrutiny.[67] The theory motivating the use of heightened scrutiny is that it ensures a close connection between means and ends to avoid unnecessary restrictions on liberty. That inquiry means little, however, if courts defer to factual claims without examining their foundations.[68] In *HLP*, the majority implicitly chastised the dissent for "[a]t bottom . . . simply disagree[ing] with the considered judgment of Congress and the Executive."[69] In the general case, this critique would be right: both institutional competence and democratic accountability support deference to the political branches in foreign affairs and national security, especially with respect to predictive judgments assessing future threats.[70] But to defer in this way when applying heightened scrutiny, according to which the *government* must rigorously justify its choices (and hence account for the claims underlying those choices), is to reverse the normal burden.[71] Furthermore, uncritical deference to a highly generalized judgment, as in *HLP*, leaves serious questions regarding the degree to which that judgment actually applied to the specific matter at issue.[72]

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[65] *Id.* at 2727. Moreover, the majority noted, "where information can be difficult to obtain and the impact of certain conduct difficult to assess," demanding "'detail,' 'specific facts,' and 'specific evidence'" instead of offering deference was "dangerous." *Id.* at 2727–28.

[66] *See id.* at 2727 ("Our precedents, old and new, make clear that concerns 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.").

[67] *See* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 456–57 (2005) ("In *Korematsu*, the Court's adoption of this level of factual deference rendered its ostensibly stringent legal scrutiny a virtual nullity."); *cf.* John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 79 n.45 (2008) (recognizing that the Court might change its standard of review while "cloaking this move under the guise of more or less deference," but critiquing this approach for its ambiguity and lack of candor).

[68] *See* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1432 (2009) (emphasizing that the political branches may possess "[c]omparative accuracy" in assessing the means necessary to confront a threat, but that "deference is not appropriate on this ground absent a showing that the decision actually exploited" "superior access to information or expertise" in a "reliable manner").

[69] *HLP*, 130 S. Ct. at 2728.

[70] *See* Chesney, *supra* note 68, at 1409–11.

[71] *See* James B. Speta, *Of Burdens of Proof and Heightened Scrutiny*, 60 FED. COMM. L.J.F. 58, 59 (2008), http://www.law.indiana.edu/fclj/pubs/v60/no3/SpetaResponse.pdf (explaining that "[h]eightened scrutiny is designed to shift the burden of proof to the government" in cases where "the government may be infringing fundamental liberties").

[72] *See HLP*, 130 S. Ct. at 2735–36, 2741–42 (Breyer, J., dissenting).

The majority struggled to cite case law justifying this kind of deferential reliance in a First Amendment case applying heightened scrutiny.[73] Yet, its approach was nonetheless consistent with approaches the Court has adopted in cases involving serious but amorphous national security threats. For example, in *Korematsu v. United States*[74] and *Dennis v. United States*,[75] neither of which the *HLP* majority cited, the Court exercised categorical deference to broad executive branch judgments, ultimately resulting in its sanctioning of the infringement of fundamental rights. In *Korematsu*, the Court famously articulated the principle that racial restrictions had to be subject to "the most rigid scrutiny,"[76] but still categorically deferred to the political branches' judgment that "there were disloyal members of that population" of uncertain number and strength.[77] Foreshadowing *HLP*'s debate over the proper scope of deference, Justice Murphy's dissent contended that the case's specific facts[78] demonstrated that the military's claim of necessity had "neither substance nor support."[79]

Similarly, Justice Jackson's concurrence in *Dennis* rejected as overly exacting the "clear and present danger" test to evaluate a statute that burdened the free association right (by prohibiting Communist Party membership),[80] paralleling Chief Justice Roberts's rejection in *HLP* of the demand for "specific facts" and "concrete evidence" as

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[73] Though cited by the majority, neither *Regan v. Wald*, 468 U.S. 222 (1984), which upheld the President's imposition of a travel ban on Cuba under "traditional deference to executive judgment" in foreign affairs, *id.* at 243, nor *Zemel v. Rusk*, 381 U.S. 1 (1965), which found restrictions on international travel not to infringe the Fifth Amendment, dealt squarely with First Amendment freedoms or equivalently weighty rights. To be sure, the *Zemel* Court conceded that the restrictions at issue diminished a citizen's ability to gather information. But it emphasized that these were *conduct* restrictions that only very indirectly impacted First Amendment freedoms. *See id.* at 16–17. *Rostker v. Goldberg*, 453 U.S. 57 (1981), which subjected gender classifications to intermediate scrutiny, and *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008), which held that the Navy's need to conduct realistic training outweighed the interest in protecting marine mammals, involved neither speech nor heightened scrutiny. Finally, *Haig v. Agee*, 453 U.S. 280 (1981), which *did* involve First Amendment claims, treated the passport revocation at issue as a regulation of conduct, the constitutional validity of which was based not on deference, but on a long factual record detailing the specific threat posed by the plaintiff to national security, *see id.* at 283–85 — a record absent in *HLP*. One case involving both restrictions on the First Amendment and heightened scrutiny was *United States v. Robel*, 389 U.S. 258 (1967), which held that a statute prohibiting employment of Communist Party members at a defense facility ran "afoul of the First Amendment" under heightened scrutiny because it swept "indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership," *id.* at 262; however, this case was only discussed by the dissent.

[74] 323 U.S. 214 (1944).

[75] 341 U.S. 494 (1951).

[76] *Korematsu*, 323 U.S. at 216.

[77] *Id.* at 218 (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)).

[78] *See id.* at 235–40 (Murphy, J., dissenting).

[79] *Id.* at 234.

[80] *Dennis*, 341 U.S. at 568–69 (Jackson, J., concurring).

"dangerous."[81] Instead, Justice Jackson argued, categorical deference was proper lest a higher standard require the Court to "appraise imponderables" beyond the Court's competence.[82] By contrast, Justice Douglas, like Justice Breyer in *HLP*, dissented on the ground that the government had not presented specific, on-point proof of the threat.[83] To be sure, the abridgement of free speech rights sanctioned by the majority in *HLP* was not nearly as severe as the deprivation of rights in either *Korematsu* or *Dennis*,[84] but its deferential analysis in the face of an amorphous threat reflected a familiar pattern.

HLP's quiet return to this jurisprudential tradition was particularly striking because the Court's recent detainee cases suggested a greater reticence to defer broadly to the political branches, even in the case of serious national security threats.[85] In both *Hamdi v. Rumsfeld*[86] and *Boumediene v. Bush*,[87] the Court pointedly refused to defer categorically to empirical judgments made by the executive branch.[88] Yet, given the threatened encroachment on judicial powers in those cases,[89] *HLP* may support the hypothesis that the Court's assertiveness toward the other branches is specifically tied to whether its power within the separation of powers framework is directly threatened. Underscoring this point, the Court did not hesitate to offer *some* deference to the political branches' factual determinations in *Hamdi* and *Boumediene* once the Court had assured itself of the power to review habeas

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[81] *HLP*, 130 S. Ct. at 2727–28.

[82] *Dennis*, 341 U.S. at 570 (Jackson, J., concurring).

[83] *See id.* at 587 (Douglas, J., dissenting) ("This record . . . contains no evidence whatsoever showing that the acts charged . . . have created any clear and present danger to the Nation.").

[84] Chief Justice Roberts was careful to emphasize that the material-support statute, as interpreted by the majority, applied only to foreign terrorist organizations and did not curb rights associated with either membership in groups or independent advocacy. *See HLP*, 130 S. Ct. at 2730.

[85] *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008) (holding parts of the Military Commissions Act unconstitutional); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (prohibiting use of military commissions independently established by the President); Rasul v. Bush, 542 U.S. 466 (2005) (holding that habeas corpus jurisdiction extended to Guantánamo Bay); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (ruling that detained unlawful citizen combatants must have the opportunity to challenge their detention before an impartial decisionmaker).

[86] 542 U.S. 507.

[87] 128 S. Ct. 2229.

[88] *See Boumediene*, 128 S. Ct. at 2277 (observing that "few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person"); *Hamdi*, 542 U.S. at 527 (plurality opinion) (rejecting the government's argument that courts should use "a very deferential 'some evidence' standard" to review whether a citizen is an enemy combatant).

[89] *See, e.g.*, *Boumediene*, 128 S. Ct. at 2263 ("The gravity of the separation-of-powers issues raised by these cases . . . render[s] these cases exceptional."); *Hamdi*, 542 U.S. at 535–36 (plurality opinion) (insisting that "the position that the courts must forego any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers").

cases.[90] And in *HLP*, the Court emphasized that its deference was partially justified by Congress's deliberate care in crafting a limited statute.[91] Ultimately, these patterns suggest that the scope of the Court's generally broad deference in the national security context may constrict or expand depending on the perceived modesty with which the political branches exercise their power vis-à-vis the Court.

4. Public Disclosure of Referendum Petitions. — The Supreme Court has repeatedly recognized the importance of government interests in the integrity of electoral processes and the promotion of an informed electorate.[1] On the basis of these two interests, it has upheld campaign-related disclosure requirements amid otherwise sweepingly successful First Amendment challenges.[2] A controversial state referendum concerning the rights of domestic partners[3] recently presented the Justices with an opportunity to reassert the general constitutionality of disclosure requirements. Last Term, in *Doe v. Reed*,[4] the Supreme Court held that compelled disclosure of referendum petitions does not facially violate the First Amendment.[5] The Court correctly found the government's interest in the integrity of its referendum process sufficient to justify disclosure of petition signatories' identities despite the potential chilling effect on their political participation. However, in declining to address the government's interest in informing the voting public, the Court failed to appreciate the full significance of the disclosure requirement. Had the Court accounted for this interest, it would have confronted competing First Amendment concerns that prove particularly weighty in the direct democracy context — concerns that not only support the Court's decision regarding the facial challenge, but also bear on the outcome of challenges to the disclosure requirement as applied to individual petitions. The Court's failure to address the "informational" interest thus leaves lower courts with insufficient guidance in granting case-specific exemptions to petition disclosure requirements, exemptions that threaten to undermine the very First Amendment values they are designed to protect.

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[90] *See Boumediene*, 128 S. Ct. at 2275 ("[W]hen habeas corpus jurisdiction applies . . . then proper deference can be accorded to reasonable procedures for screening and initial detention . . . ."); *Hamdi*, 542 U.S. at 533–34 (plurality opinion) (holding that, in constitutionally mandatory factfinding tribunals, normal procedural protections such as placing the burden of proof on the government or the ban on hearsay need not apply).

[91] *See HLP*, 130 S. Ct. at 2728.

[1] *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 913–16 (2010); Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989); Buckley v. Valeo, 424 U.S. 1, 66–68 (1976) (per curiam).

[2] *See, e.g.*, *Citizens United*, 130 S. Ct. at 913–16; *Buckley*, 424 U.S. at 66–68, 72.

[3] *See* Lornet Turnbull, *137,689 Names Later, Gay Community Asks: How Did They Do It?*, SEATTLE TIMES, Aug. 3, 2009, at A1.

[4] 130 S. Ct. 2811 (2010).

[5] *Id.* at 2821.