Casenote

Taking a Bite Out of Speech Regulation: The Supreme Court Upholds First Amendment Protection for Depictions of Animal Cruelty in *United States v. Stevens*

I. INTRODUCTION

The First Amendment[1] is tested most strenuously when called upon to protect expression that many people would find indefensible. This occurred in *United States v. Stevens*[2] when the Supreme Court of the United States refused to categorically remove depictions of animal cruelty from the bulwark of free speech.[3] Further, the Court invalidated

1. U.S. CONST. amend. I. The amendment states as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*
2. 130 S. Ct. 1577 (2010).
3. *Id.* at 1586.

section 48 of Title 18 of the United States Code,[4] which prohibited the creation, sale, or possession of depictions of animal cruelty,[5] as unconstitutionally overbroad.[6] By not allowing speech to be categorically excluded from First Amendment protection because of its inherent lack of value, the Court revealed an increasingly libertarian approach to speech regulation.

II. FACTUAL BACKGROUND

Robert Stevens is a pit bull enthusiast. From his rural Virginia home, the 68-year-old ran Dogs of Velvet and Steel, a business that sold informational material and equipment on the care and handling of pit bulls.[7] Among the items he sold were films he produced about the breed, including *Catch Dogs and Country Living*, *Pick-A-Winna: A Pit Bull Documentary*, and *Japan Pit Fights*.[8] Footage from *Catch Dogs* shows the dogs being trained to catch wild boar and includes gruesome shots of a pit bull attacking a domestic farm pig.[9] In *Pick-A-Winna*, Stevens compiled portions of footage shot by others that show modern

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4. 18 U.S.C. § 48 (2006), *declared unconstitutional by* United States v. Stevens, 130 S. Ct. 1577 (2010). The statute read as follows:

> (a) CREATION, SALE, OR POSSESSION.–Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.
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> (b) EXCEPTION.–Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.
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> (c) DEFINITIONS.–In this section–
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> (1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and
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> (2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.

Id.

5. *Id.* § 48(a).

6. *Stevens*, 130 S. Ct. at 1592.

7. Brief for Respondent at 2, United States v. Stevens, 130 S. Ct. 1577 (2010) (No. 08-769), 2009 WL 2191081.

8. *Id.* at 3-5.

9. United States v. Stevens, 533 F.3d 218, 221 (3d Cir. 2008) (en banc).

day pit bull fights in Japan as well as United States dog fights from the 1960s and 70s. *Japan Pit Fights* features additional fights that Stevens documented in Japan.[10] In each video, Stevens, who also authored a book on pit bulls,[11] offers commentary about the onscreen action.[12]

Federal authorities bought copies of the films from Stevens in 2003 after he advertised them for sale in *Sporting Dog Journal*, an underground publication featuring articles on illegal dog fighting.[13] Based on this evidence, a federal grand jury in the Western District of Pennsylvania indicted Stevens in March 2004.[14] The grand jury charged him with three counts of violating 18 U.S.C. § 48[15] by "knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce."[16] Stevens sought dismissal of the indictment, arguing that under the First Amendment[17] the federal statute was facially invalid.[18] The district court denied his motion, likening depictions of animal cruelty to obscenity or child pornography, and held that such depictions were categorically exempt from First Amendment protection.[19] Stevens was subsequently convicted on all charges in January 2005 and sentenced to three concurrent sentences of thirty-seven months imprisonment and three years supervised release.[20]

On appeal, the United States Court of Appeals for the Third Circuit, sitting en banc, ruled § 48 unconstitutional on its face and vacated Stevens's sentence in July 2008.[21] The court did not recognize depictions of animal cruelty as a new category of unprotected speech, refusing the Government's attempt to equate such depictions to child pornography.[22] The Supreme Court granted the Government's petition for writ of certiorari[23] and in April 2010 affirmed the Third Circuit's ruling.[24]

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10. Brief for Respondent, *supra* note 7, at 4-5.
11. BOB STEVENS, DOGS OF VELVET AND STEEL: PIT BULLDOGS: A MANUAL FOR OWNERS (1983).
12. *Stevens*, 533 F.3d at 221.
13. *Id.*
14. *Id.*
15. 18 U.S.C. § 48 (2006), *declared unconstitutional by* United States v. Stevens, 130 S. Ct. 1577 (2010).
16. *Stevens*, 533 F.3d at 221.
17. U.S. CONST. amend. I.
18. *Stevens*, 130 S. Ct. at 1583.
19. *Id.*
20. *Id.*
21. *Stevens*, 533 F.3d at 235.
22. *Id.* at 224.
23. United States v. Stevens, 129 S. Ct. 1984 (2009).
24. *Stevens*, 130 S. Ct. at 1592.

III. LEGAL BACKGROUND

A. History of 18 U.S.C. § 48

In 1999 Congress passed and President Clinton signed into law 18 U.S.C. § 48,[25] prohibiting the creation, sale, or possession of a depiction of animal cruelty with the intention of placing that depiction into interstate or foreign commerce.[26] Dog fighting, however, was not at the forefront of legislators' minds when they wrote the statute. Rather, lawmakers were more intent on shutting down the growing market for crush videos, which are short films that show women crushing small animals to death, either with their bare feet or while wearing high-heeled shoes and speaking in a dominatrix fashion.[27] The films, designed to satiate a peculiar sexual fetish, were commonly available on the Internet and could be made to order. Yet despite their ubiquity, existing animal cruelty laws made it difficult to prosecute the film-makers. Participants, shooting locations, and dates when animals were killed often could not be identified, enabling the accused to raise jurisdictional and statute of limitations defenses. With § 48, elected officials chose to target the market for crush videos rather than the underlying activity. The idea was to eliminate the films' profitability, thus defeating the desire for such behavior in the first place.[28]

B. Relevant Case Law

Congress can make no law that abridges the freedom of speech.[29] This means that generally, the government may not restrict expression based on its message, ideas, subject matter, or content.[30] Even though this protection is extensive, it is not absolute. Certain narrowly defined speech categories are exempt from absolute First Amendment protection and are subject to content regulation.[31] These categories include

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25. *See* Act of Dec. 9, 1999, Pub. L. No. 106-152, 113 Stat. 1732.

26. *Id.*

27. H.R. REP. NO. 106-397, at 2 (1999). These women usually kill mice, hamsters, or other small animals, though occasionally they stomp to death dogs, cats, and even monkeys. *Id.*

28. *Id.* at 2-3.

29. U.S. CONST. amend. I.

30. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (quoting Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002)).

31. *Id.*

obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[32] Of potential import to *Stevens* is case law related to obscenity and speech that is integral to criminal conduct.

1. Free Speech and Obscenity. Obscenity occupies a special place in First Amendment jurisprudence. Unlike other categories of speech that are proscribed for fear of some consequential harm, obscenity is outlawed purely because its content is offensive.[33] For speech to be so offensive that it is obscene, the speech must be sexual in nature and appeal to an individual's prurient interest.[34] In *Roth v. United States*,[35] the Supreme Court first declared obscenity unworthy of First Amendment protection.[36] The defendant sold books, photographs, and magazines, using circulars and advertising media to solicit sales.[37] New York authorities deemed these materials "obscene" and in violation of 18 U.S.C. § 1461,[38] which prohibits the mailing of such items.[39] The Court held that obscene material does not merely portray sex but "deals with sex in a manner appealing to prurient interest;" obscene material incites "itching, morbid, or lascivious longings."[40] Obscenity exists, the Court concluded, when the average person applying contemporary community standards feels that the dominant theme of the material, taken as a whole, appeals to prurient interest.[41]

The Court reframed this definition less than twenty years later in *Miller v. California*[42] when it established the current view of obscenity.

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32. *Id.* (citations omitted).

33. *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973); United States v. Loy, 237 F.3d 251, 262 (3d Cir. 2001); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 574-75 (7th Cir. 2001); United States v. Moore, 215 F.3d 681, 686 (7th Cir. 2000).

34. *See Miller*, 413 U.S. at 23-24 (citation omitted) ("[S]tatutes designed to regulate obscene materials must be carefully limited. As a result, we . . . confine the permissible scope of such regulation to works which depict or describe sexual conduct."); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen., 383 U.S. 413, 418 (1966) ("[I]t must be established that . . . the dominant theme of the material taken as a whole appeals to a prurient interest in sex . . . ."); Roth v. United States, 354 U.S. 476, 487 (1957) ("Obscene material is material which deals with sex in a manner appealing to prurient interest.").

35. 354 U.S. 476 (1957).

36. *Id*. at 485.

37. *Id.* at 480.

38. 18 U.S.C. § 1461 (2006) (originally enacted as Act of June 25, 1948, ch. 645, 62 Stat. 768). The Court applied the original version of the statue, ignoring the 1955 amendment. *Roth*, 354 U.S. at 479 n.1.

39. *Roth*, 354 U.S. at 479 n.1, 480.

40. *Id.* at 487 & n.20.

41. *Id.* at 489.

42. 413 U.S. 15 (1973).

Miller mailed brochures that advertised the sale of "adult material" to an unsuspecting recipient.[43] The brochures depicted men and women enjoying group sex and prominently displayed their genitals.[44] This violated the California Penal Code.[45] The Court decided that obscenity exists under the *Roth* standard only when the work is "patently offensive" and lacks "serious literary, artistic, political, or scientific value."[46] Further, the Court said there are no national, uniform standards for deciding what is prurient or patently offensive; individual communities must figure it out on their own based on local values.[47] Notably, though the plain meaning of "patently offensive" could describe many types of speech, the Court intended that it apply only to material of a sexual nature.[48]

In recent years there have been various efforts to stretch obscenity to include not just sex-related speech but also speech that depicts violence. These efforts have failed, at least at the appellate level. The United States Court of Appeals for the Eighth Circuit, in declaring unconstitutional a Missouri statute that prohibited the rental or sale of violent movies to minors, held that obscenity only includes expressions of a sexual nature, and that material containing violence, but not sex, is not obscene.[49] The United States Court of Appeals for the Second Circuit refused to recognize as obscene trading cards that depict "heinous crime."[50] The United States Court of Appeals for the Sixth Circuit would not expand its obscenity jurisprudence to include violent rather than sexually explicit content in video games, movies, and Internet websites.[51] The United States Court of Appeals for the Seventh Circuit declared that obscene speech and speech that conveys violence "are

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43. *Id.* at 16-18 (internal quotation marks omitted). The brochures served as promotional material for a film, *Marital Intercourse*, and four books, *Intercourse*, *Man-Woman*, *Sex Orgies Illustrated*, and *An Illustrated History of Pornography*. *Id.* at 18.

44. *Id.* at 18.

45. *Id*. at 16. The court applied the original version of the code, which made it a misdemeanor to knowingly distribute obscene matter, because Miller committed the alleged offense prior to the code's June 25, 1969 amendment. *Id.* at 16 n.1.

46. *Id.* at 24.

47. *Id.* at 30.

48. *See id.* at 24. Consider further the Court's language in defining what a legislature may permissibly regulate as obscene: "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" or "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

49. Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 687-88 (8th Cir. 1992).

50. Eclipse Enters., Inc. v. Gulotta, 134 F.3d 63, 64, 67 (2d Cir. 1997).

51. James v. Meow Media, Inc., 300 F.3d 683, 687, 698 (6th Cir. 2002).

distinct categories of objectionable depiction."[52] Thus, the court concluded that the exclusion of obscenity from First Amendment protection neither compels nor forecloses the same treatment of violence.[53] Judge Richard A. Posner, authoring the opinion, pondered how violent material might fit into obscenity:

> Maybe violent photographs of a person being drawn and quartered could be suppressed as disgusting, embarrassing, degrading, or disturbing without proof that they were likely to cause any of the viewers to commit a violent act. They might even be described as "obscene," in the same way that photographs of people defecating might be . . . included within the legal category of the obscene, even if they have nothing to do with sex. In common speech, indeed, "obscene" is often just a synonym for repulsive, with no sexual overtones at all.[54]

The Supreme Court weighed in next: Less than a week after the Court's April 20, 2010 decision in *Stevens*, the Court agreed to hear *Schwarzenegger v. Entertainment Merchants Ass'n*,[55] in which the state of California argued that it may regulate as obscene the sale of violent video games to children.[56] The Court heard oral arguments in the case on November 2, 2010.[57]

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52. *Am. Amusement Mach.*, 244 F.3d at 574.

53. *Id.*

54. *Id.* at 575 (citations omitted).

55. 130 S. Ct. 2398 (2010).

56. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 957-58 (9th Cir. 2009). California derives its argument from Ginsberg v. New York, 390 U.S. 629 (1968). In *Ginsberg*, the Supreme Court announced a so-called "variable obscenity" standard, *Schwarzenegger*, 556 F.3d at 953, by allowing the government to regulate sexually-explicit material as obscene when sold to children, even though the material was not obscene for adults. *Ginsberg*, 390 U.S. at 632-35, 637. The Court chose not to subject the New York statute to strict scrutiny because it supported parents' constitutional right to direct the upbringing of their children and because of the state's independent interest in the well-being of its youth. *Id.* at 639-40. California seeks to apply this justification to the regulation of violent content. *Schwarzenegger*, 556 F.3d at 958.

57. SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-1448.htm (last visited Apr. 28, 2011) (Docket No. 08-1448, entry of Nov. 2, 2010). During oral arguments, the justices agreed that to rule in favor of California would require them to expand obscenity to encompass expressions of violence. Adam Liptak, *Justices Debate Video Game Ban*, N.Y. TIMES, Nov. 2, 2010, http://www.nytimes.com/2010/11/03/us/03scotus.html. Interestingly, Chief Justice Roberts, joining justices Stephen G. Breyer and Samuel A. Alito, Jr. was among the three who seemed most interested in trying to save the statute. *Id.* Meanwhile, Justice Antonin Scalia provided vocal opposition, and Justice Sonia Sotomayor asked whether the Court could reconcile with *Stevens* a decision that allowed California to regulate depictions of violence: "How is this any different . . . than what we said we don't do in the First Amendment field in *Stevens*, where we said we don't look at a category of speech and decide that some of it has

2. Free Speech and Underlying Criminal Activity: Child Pornography. In other contexts, such as child pornography, the Supreme Court has specifically rejected the use of obscenity and deployed different theories of speech regulation. Accordingly, in *New York v. Ferber*,[58] the Court recognized that child pornography may pass *Miller's* obscenity test, but the Court held for the first time that such material does not deserve First Amendment protection because producing the pornography requires child abuse.[59] The Court's decision addressed a section of Article 263 of the New York Penal Law[60] that prohibits using a child in a sexual performance.[61] Bookstore proprietor Paul Ferber challenged the statute after he was arrested for selling to an undercover cop two films of young boys masturbating.[62] In upholding the law, the Court ruled that the government had a compelling interest in protecting the physical and psychological welfare of children, and, when acting in this interest, could permissibly infringe upon freedoms of speech.[63] The Court grounded this decision not so much in the offensive content of child pornography but in its intrinsic relation to the underlying, illegal sexual abuse that is necessary for its production.[64] "The advertising and selling of child pornography provide[s] an economic motive for" its creation; thus, advertising and selling are

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low value?" *Id.* (internal quotation marks omitted).

58. 458 U.S. 747 (1982).

59. *Id.* at 761. The Court recognized that *Miller* did not reflect the State's compelling interest in prosecuting people who sexually abused children. *Id.* Whether speech appealed to an individual's prurient interest had no relation to whether a child was physically or psychologically harmed by the production of the speech. *Id.* Further, the Court recognized that it was possible for work to simultaneously have literary, artistic, political, or scientific value and still be hardcore child pornography. *Id.* That the work had such value was irrelevant to the juvenile victim. *Id.*

60. N.Y. PENAL LAW art. 263 (McKinney 2011).

61. *Ferber*, 458 U.S. at 750-51. The jury acquitted Ferber of two counts of promoting an obscene sexual performance under N.Y. PENAL LAW § 263.10 (McKinney 2011) but convicted him on two counts of violating N.Y. PENAL LAW § 263.15 (McKinney 1975) (current version at N.Y PENAL LAW § 263.15 (McKinney 2011), which specifically addresses child pornography. *Ferber*, 458 U.S. at 751-52. At the time, the text of § 263.15 read: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." *Id*. at 751 (internal quotation marks omitted). The statute was amended in 2000 to raise the child's age to seventeen years. Sexual Assault Reform Act, § 21, 2000 N.Y. Laws 1, 6.

62. *Ferber*, 458 U.S. at 751-52.

63. *Id.* at 756-58.

64. *Id.* at 759.

integral to its manufacture.[65] The Court agreed that law enforcement's best chance of stopping the abuse was to "dry up" the market through significant criminal sanctions on the speech itself.[66]

The Court in *Ashcroft v. Free Speech Coalition*[67] further underscored, as a prerequisite to government regulation, the need for an integral connection between speech and the abuse required for its production. The Court in *Ashcroft* struck down portions of the Child Pornography Prevention Act of 1996 (Act)[68] as unconstitutionally overbroad.[69] In addition to banning images made using actual children, the Act also forbade what the court termed "virtual child pornography," images that were computer-generated or that merely conveyed the impression that the participant in the sexual act was a child.[70] The Court distinguished this from the ruling in *Ferber*, which was based upon how child pornography was made, not what it communicated.[71] Because virtual child pornography is not "intrinsically related" to the sexual abuse of children–recording no crime and creating no victims by its production–it could not be outlawed purely because of its content.[72]

3. Free Speech and Overbreadth Analysis. When the Court considers challenges to statutes that touch on constitutional issues, the general rule is that a person accused of violating the statute cannot contest its constitutionality based only on how it might affect other people in other situations not before the Court.[73] In the mid-1960s, the Court began to recognize the development of a First Amendment

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65. *Id.* at 761.

66. *Id.* at 760.

67. 535 U.S. 234 (2002).

68. Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (1996). At issue was the portion of the Act that added 18 U.S.C. § 2256(8)(A) (2006), which defines "child pornography." *Ashcroft*, 535 U.S. at 241.

69. *Ashcroft*, 535 U.S. at 256.

70. *Id*. at 241 (internal quotation marks omitted). The Court was not persuaded by the content-based reasons Congress offered for regulating virtual child pornography that did not involve actual children: that pedophiles might use the material to seduce children, to "whet their own sexual appetites," and that it would be more difficult to detect pornography that used real children. *Id*. at 241-42 (internal quotation marks omitted).

71. *Id*. at 250-51.

72. *Id.* at 250 (internal quotation marks omitted).

73. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973); *see also* United States v. Raines, 362 U.S. 17, 21 (1960); New York *ex rel.* Hatch v. Reardon, 204 U.S. 152, 160 (1907); Austin v. Alderman, 74 U.S. (7 Wall.) 694, 698-99 (1868).

exception to this principle.[74] This exception enables an individual to challenge a statute as overly broad even though he has not shown that it violates his own speech rights because, theoretically, the statute's very existence chills constitutionally protected speech that might be expressed by those not before the court.[75] Overbreadth analysis aims to balance this potential chilling effect against the harm of throwing out a law that in some of its applications is completely constitutional, particularly a law that targets conduct so antisocial that it has been made criminal.[76]

Over the years, the Court has consistently described the overbreadth doctrine as a narrow exception–"strong medicine" to be used with hesitation and after all other options have been exhausted.[77] Facial invalidation is proper only when the statute is substantially overbroad, not just in an absolute sense but as judged against its "plainly legitimate sweep."[78] Because this requires the Court to consider many more applications of the statute than those that are immediately before it, the lawfulness of the instant application ought to first be determined.[79] Further, the exception weakens when the behavior that the government is forbidden to regulate "moves from 'pure speech' toward conduct and that conduct–even if expressive–falls within the scope of otherwise valid criminal laws."[80] In *Ferber*, for example, the Court held that the statute at issue was not overbroad.[81] The Court construed the law as targeting hardcore child pornography and let the law stand knowing that it would adversely affect some protected expression, including medical textbooks, *National Geographic* pictorials, and other educational or artistic works.[82]

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74. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

> Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression–of transcendent value to all society, and not merely to those exercising their rights–might be the loser. For example, we have consistently allowed attackes [sic] on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.

Id. (citation omitted).

75. *Broadrick*, 413 U.S. at 612.

76. United States v. Williams, 553 U.S. 285, 292 (2008).

77. *Broadrick*, 413 U.S. at 613; *see also Williams*, 553 U.S. at 293; L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999); *Ferber*, 458 U.S. at 769.

78. *Broadrick*, 413 U.S. at 615; *see also Williams*, 553 U.S. at 292; Bd. of Trs. v. Fox, 492 U.S. 469, 485 (1989); *Ferber*, 458 U.S. at 770.

79. *Fox*, 492 U.S. at 485.

80. *Broadrick*, 413 U.S. at 615.

81. 458 U.S. at 773.

82. *Id.* at 773-74.

IV. THE COURT'S RATIONALE

A. The Majority

The Court, with Chief Justice John Roberts writing for an 8-1 majority, structured its opinion around two key rulings: First, the Court refused to add "depictions of animal cruelty" to the categories of speech that are exempt from First Amendment[83] protection.[84] Second, the Court struck down 18 U.S.C. § 48[85] as "substantially overbroad" and thus invalid under existing First Amendment doctrine.[86]

As the Court considered the categorical exemption of depictions of animal cruelty from the First Amendment, it described § 48 as presumptively invalid because the law explicitly regulated speech content.[87] The Court also acknowledged, however, that First Amendment jurisprudence had evolved to exclude a few narrowly defined categories of speech from protection: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[88] Further, the Court accepted that animal cruelty as an action in itself has been forbidden since the earliest settlers arrived in the colonies.[89]

Even so, the Court found no known tradition forcing depictions of such conduct outside of the First Amendment shelter.[90] Moreover, the Court utterly rejected the Government's argument that, rather than tradition, the test for categorical exclusion of certain types of speech from First Amendment protection should only require balancing the speech's value against its societal costs.[91] The Court viewed this test as "startling and dangerous" and proclaimed free speech guarantees to extend farther than merely those speech categories that survive an ad hoc balancing of costs and benefits.[92] Furthermore, the Court declared that the very existence of the First Amendment reveals that the American people find the benefits of restricting government regulation of speech to exceed the

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83. U.S. CONST. amend. I.

84. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) (internal quotation marks omitted).

85. 18 U.S.C. § 48 (2006), *declared unconstitutional by* United States v. Stevens, 130 S. Ct. 1577 (2010).

86. *Stevens*, 130 S. Ct. at 1592.

87. *Id.* at 1584.

88. *Id.*

89. *Id.* at 1585.

90. *Id.*

91. *Id.*

92. *Id.*

costs, and the Constitution bars any attempt to alter this judgment just because some speech is not worth it.[93]

The Court offered *New York v. Ferber*[94] as an example of when it balanced the interests of child protection against the speech value of child pornography yet actually decided the case based on the intrinsic relation of the market for child pornography to the illegal, underlying abuse.[95] Thus, the Court explained, the analysis in *Ferber* was rooted in a previously recognized and long-established category of unprotected speech: that which is integral to criminal conduct.[96] The holding in *Ferber* did not create a "freewheeling" authority to exclude new speech categories from the First Amendment.[97] Further, even if there still exist unidentified categories of historically unprotected speech, there is no evidence that they include "depictions of animal cruelty."[98]

Proceeding to the second part of the ruling, the Court invoked the First Amendment overbreadth exception to hold § 48 unconstitutional on its face.[99] The Court first had to interpret the statute to determine whether it was substantially overbroad, such that its unconstitutional applications were too numerous relative to its legitimate applications.[100] The Court read the law "to create a criminal prohibition of alarming breadth."[101] Starting with the statute's text, which defined "depiction of animal cruelty" as any portrayal "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,"[102] the Court saw no requirement that the depicted conduct be cruel.[103] Specifically, the terms "wounded" and "killed" did not convey cruelty; thus, the Court rejected the Government's argument that an element of cruelty should be read into the definitional terms based on both the definiendum "depiction of animal cruelty" and the canon of *noscitur a*

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93. *Id.* The Court acknowledged that in previous decisions, the Court described traditionally unprotected categories of speech as having scant social value compared to the evils that arise if the speech is not effectively regulated. *Id.* The Court emphasized, however, that such descriptions are only that and are not meant to set a certain standard or imply a general test for determining whether a category of speech should be protected. *Id.* at 1586.

94. 458 U.S. 747 (1982).

95. *Stevens*, 130 S. Ct. at 1586.

96. *Id.*

97. *Id*.

98. *Id.* (internal quotation marks omitted).

99. *Id.* at 1592.

100. *Id.* at 1587.

101. *Id.* at 1588.

102. *Id*. (internal quotation marks omitted); *see also* 18 U.S.C. § 48(c)(1).

103. *Stevens*, 130 S. Ct. at 1588.

sociis.[104] The Court ignored these interpretive doctrines by deciding that "wounded" and "killed" were unambiguous terms whose ordinary meaning did not require cruelty.[105]

The Court next declared § 48's requirement that the depicted conduct be "illegal" as insufficient to properly limit its application.[106] First, the statute ignored the fact that many federal and state laws governing animal treatment are not structured to prevent cruelty, making no distinction as to why the intentional killing of an animal has been outlawed.[107] Second, the Court saw the scope of § 48 as greatly expanded by the fact that a depiction of conduct that is lawful in one jurisdiction may wind up in a jurisdiction where such behavior is unlawful.[108] The Court thought this troublesome because even though society may agree that animal cruelty is bad, there is significant debate as to what behavior is "cruel," and even regulations not related to cruelty differ from place to place.[109] For example, the Court suggested, hunting is illegal in the District of Columbia, so hunting magazines and videos showing the intentional killing of an animal could not be sold legally in D.C. even though they have circulations in the millions and vastly exceed the estimated demand for crush videos or depictions of dog fights.[110] Additionally, § 48 allowed any jurisdiction to subject the rest of the country to its laws, creating a "bewildering maze of regulations" that makes compliance difficult.[111]

The Court held that the statute's exceptions clause did not effectively narrow its reach either.[112] By using language from *Miller v. Califor-*

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104. *See id.* When a word's meaning in a statute is unclear, the doctrine of *noscitur a sociis* enables courts to craft a definition based on the word's relationship to other words with which it is grouped, so that a more general word may be limited and qualified by another word of similar meaning. NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION 347-51 (7th ed. 2007). The Government also relied on Leocal v. Ashcroft, 543 U.S. 1 (2004). *Stevens*, 130 S. Ct. at 1588. There, the Court gave meaning–and a heightened mens rea requirement–to the text of 18 U.S.C. § 16 (2006) based on the term which it defined, "crime of violence." *Leocal*, 543 U.S. at 3, 11 (internal quotation marks omitted).

105. *Stevens*, 130 S. Ct. at 1588.

106. *Id.* (internal quotation marks omitted).

107. *Id.* The Court offered as examples laws that forbid the humane killing of certain animals to protect endangered species, laws that regulate the slaughter of livestock for the purpose of protecting human health, and laws that create hunting and fishing rules designed to raise revenue, preserve animal populations, or prevent accidents. *Id.*

108. *Id.* at 1589.

109. *Id.*

110. *Id.*

111. *Id.* at 1588-89.

112. *Id.* at 1590.

nia[113] to remove from regulation only a few specific speech types that had "serious . . . value,"[114] the statute impermissibly set preconditions for protecting certain speech in the first place.[115] Nor was the Court persuaded by the Government's claim that because the executive branch interprets § 48 to reach only *extreme* cruelty, the Government will not use the statute to prosecute something else.[116] The First Amendment does not subject citizens to the mercy of prosecutorial discretion, and an unconstitutional statute should not be left intact simply because the government promises to use it responsibly.[117] Further, the Court refused to invoke the constitutional avoidance canon[118] to rein in the statute because the law was not "readily susceptible" to a limiting construction.[119] It would have to be rewritten, not reinterpreted, and that would entail an unacceptable encroachment on the legislative domain.[120]

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113. 413 U.S. 15 (1973).

114. 18 U.S.C. § 48(b). The statute exempted "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id*.

115. *Stevens*, 130 S. Ct. at 1591. To save the statute, the Government hoped to define "serious . . . value" as anything more than "scant social value," but the Court declined to do so, ruling that "serious should be taken seriously." *Id.* at 1590 (internal quotation marks omitted). The Court interpreted the clause to require that the speech be "significant and of great import" before it may escape regulation. *Id.* (internal quotation marks omitted). Plus, the Court noted there is much constitutionally protected speech that does not fit squarely within one of the seven categories. *Id.* For example, hunting videos have primarily entertainment value and are not necessarily instructional, and while the Government offered depictions of Spanish bullfights as having historical value, the Government did not explain why they would have inherent value and depictions of Japanese dog fights would not. *Id.*

116. *Id.* at 1591.

117. *Id.* The Court noted that by prosecuting Stevens under § 48, the Government had turned to a statute that President Clinton in his signing statement had announced would apply "only [to] depictions of wanton cruelty to animals designed to appeal to a prurient interest in sex." *Id.* (internal quotation marks omitted). To the Court, this indicated the danger of putting faith in the Government's promise to practice prosecutorial restraint. *Id.*

118. The constitutional avoidance canon says that statutes should be construed to avoid unconstitutionality rather than discarded based on an interpretation that makes it unconstitutional. SINGER & SINGER, *supra* note 104, at 81. When a statute may reasonably be interpreted in two ways–one that renders it unconstitutional and one that does not–a court should apply the interpretation that maintains the law's constitutionality. *Id*. at 81-83. Further, if a law is partly unconstitutional and partly not, the part that is constitutional may be sustained unless the entire point of the law is made moot by discarding the offensive portions. *Id*. at 89.

119. *Stevens*, 130 S. Ct. at 1591-92 (internal quotation marks omitted).

120. *Id.* at 1592.

In so construing § 48, the Court decided the constitutional question: the statute was substantially overbroad and invalid under the First Amendment.[121] Notably, the Court did not determine whether a statute specifically limited to crush videos or other depictions of extreme animal cruelty would pass constitutional muster.[122]

B. Justice Alito's Dissent

Justice Samuel Alito's first disagreement with the Court was one of standing; he suggested the Court remand the case back to the Third Circuit to determine whether the statute was constitutional as specifically applied to Stevens.[123] Though he acknowledged the First Amendment exception to overbreadth analysis, he described it as narrow.[124] He argued that an overbreadth challenge should not be allowed when the contested statute is unconstitutional as applied to the challenger.[125] Rather, the statute should first be assessed for validity as applied to Stevens, and overbreadth should be a question only of last resort.[126]

Even if the overbreadth doctrine must be used, however, Justice Alito asserted that § 48 did not proscribe a substantial amount of protected speech.[127] In declaring a statute substantially overbroad relative to its plainly legitimate sweep, he argued the Court must use real-world conduct rather than "fanciful hypotheticals."[128] He chastised the Court for refusing to decide the constitutionality of § 48 as applied to two real-world depictions of animal cruelty–crush videos and dog fights–while relying on depictions of hunting and slaughterhouse practices to

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121. *Id.* The Government, while arguing that crush videos and dog fights were analogous to obscenity, and that the ban was narrowly tailored to aid restrictions on underlying illegal conduct, had not defended the law beyond its application to crush videos or animal fighting. *Id.* Further, the Court noted that the Government had not challenged the notion that unconstitutional applications of § 48 outnumbered its permissible uses–that the market for dogfight or crush videos was significantly smaller than the market for legitimate depictions such as hunting magazines and videos. *Id.*

122. *Id.*

123. *Id.* at 1593 (Alito, J., dissenting).

124. *Id.*

125. *Id.*

126. *Id.* at 1593-94.

127. *Id.* at 1597.

128. *Id.* at 1594.

conclude that the statute reaches too much protected speech to survive.[129]

For two reasons, Justice Alito found the Court's determination that § 48 applied to depictions of either hunting or slaughterhouse practices "seriously flawed."[130] First, because the language of the statute should be construed to avoid constitutional problems, and because § 48 targets depictions of animal cruelty, the law should apply only to depictions involving acts that state or federal law define as "animal cruelty" and not to depictions of acts that are illegal for reasons entirely unrelated to animal cruelty.[131] Second, such depictions should fall within the statute's exceptions clause as having "serious . . . scientific, educational, or historical value."[132] Justice Alito also questioned the Court's characterization of hunting: the activity is legal in all fifty states, and Washington, D.C. is unique in its ban on the sport.[133] Thus, hunting depictions are legal under § 48 in nearly all jurisdictions.[134] Plus, the statute's legislative history revealed that Congress did not intend to reach hunting depictions.[135]

Thus, Justice Alito declared that § 48 did not have many unconstitutional applications, either in the absolute sense or when judged against its plainly legitimate sweep.[136] He found, however, a number of permissible uses.[137] He thought it undisputed that the conduct depicted in crush videos could be constitutionally prohibited.[138] Because the videos are so closely linked to violent criminal conduct, and because their restriction provides the sole avenue toward meaningful prosecution, the First Amendment should not stand in the way.[139] Justice Alito identified *Ferber* as the most relevant comparison, in which the illegal sexual abuse underlying the production of child pornography, and not its content, was targeted.[140] Like child pornography, he reasoned, the conduct that crush videos and animal fight videos depict is illegal and cannot be stopped without targeting the creation, sale, or possession of such depictions.[141] Such videos show the commission of

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129. *Id.*
130. *Id.* at 1595.
131. *Id.* at 1595, 1597.
132. *Id.* at 1595 (footnote omitted) (internal quotation marks omitted).
133. *Id.* at 1594-95.
134. *Id.* at 1595.
135. *Id.* at 1596.
136. *Id.* at 1597.
137. *Id.*
138. *Id.* at 1598.
139. *Id.* at 1598-99.
140. *Id.* at 1599 (quoting *Ferber*, 458 U.S. at 759).
141. *Id.* at 1599-1600.

violent criminal activity, are "produced as part of a low-profile, clandestine industry," and are integral to commission of the crime itself.[142] While protecting children is more important than protecting animals, the government still has a compelling interest in preventing animals from being tortured.[143] Furthermore, he argued, the harm caused by the underlying crime vastly outweighs the content of the speech.[144]

Justice Alito ultimately concluded that § 48 is valid when applied to crush videos and videos of animals fighting.[145] This gave the statute a substantial core of constitutionally permissible applications.[146] When properly interpreted, he wrote, the statute did not ban a substantial amount of protected speech.[147] For these reasons, Justice Alito rejected the claim that § 48 was facially unconstitutional under the overbreadth doctrine.[148]

V. IMPLICATIONS

The most immediate and practical result of the Court's decision has been a new proliferation of crush videos. Market regrowth began as soon as 2008, following the Third Circuit's ruling. Shortly after that decision, a Humane Society of the United States investigation found crush videos once again "easily available for purchase" over the Internet.[149] On one website, Humane Society investigators found for sale more than one hundred videos of small animals being crushed, burned, drowned, or impaled by hammer and nail.[150] These same investigators found other websites which offered to sell them a dozen crush videos featuring rabbits and nearly twenty videos featuring mice.[151] Similar videos remained online after *Stevens*[152] was decided

142. *Id.* at 1601 (quoting *Ferber*, 458 U.S. at 760) (internal quotation marks omitted).
143. *Id.* at 1600.
144. *Id.* at 1600, 1602.
145. *Id.* at 1602.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Crush Videos Make a Comeback*, THE HUMANE SOCIETY OF THE UNITED STATES (Sept. 15, 2009), http://www.humanesociety.org/news/news/2009/09/crush_video_091509.html.
150. *Id.*
151. *Id.*
152. 130 S. Ct. 1577 (2010).

and were being sold for about $80 via downloadable links.[153] Because of this resurgence, and in response to the Court's ruling in *Stevens*, Congress passed in December 2010 the Animal Crush Video Prohibition Act of 2010 (Act),[154] which is specifically tailored to crush videos.[155]

The Court-ordered destruction of former 18 U.S.C. § 48,[156] however, and the subsequent narrowing of the Act that replaced it, blunts what would otherwise have been a potentially powerful tool for prosecuting illegal animal fighting.[157] Integral to the success of these fights are videos "memorializing" the action[158] because they document crucial victories, generate revenue, are used as training guides, serve as marketing tools, and encourage gambling activity.[159] The ability to arrest those possessing or distributing such depictions would open an avenue into an underground culture that otherwise is difficult for law enforcement to penetrate. As Justice Alito observed, the comparison between depictions of dogfights and depictions of children engaged in sexual acts is hard to deny;[160] in both cases, the speech supports a market for and encourages the underlying criminal activity. By closing a *New York v. Ferber*[161]-like path to prosecution in the context of animal cruelty, however, the Court has drawn a line between the potential subjects of abuse. The Court declared a compelling government interest in preventing the abuse of children but did not recognize such interest in preventing the abuse of animals. While this analysis probably did not weaken *Ferber*, it de-emphasized the link between speech and underlying behavior and placed greater focus on the identity of the victim. In doing so, even as the Court acknowledged an American tradition of outlawing animal cruelty, it also undermined this tradition.

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153. *New Evidence Shows Animal Torture Videos Remain Available Online*, HUMANE SOCIETY LEGISLATIVE FUND (July 29, 2010), http://www.hslf.org/press-releases/crush-video-report.html.

154. Pub. L. No. 111-294, 124 Stat. 3177 (2010).

155. *Id.* The Act outlaws the creation or distribution of animal crush videos, which are defined as any depiction of "actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury . . . and . . . is obscene." *Id.* § 3.

156. 18 U.S.C. § 48 (2006), *declared unconstitutional by* United States v. Stevens, 130 S. Ct. 1577 (2010).

157. All 50 states have general laws forbidding animal cruelty, and they all specifically outlaw dog fighting. Brief for the United States at 25-27, *Stevens*, 130 S. Ct. 1577 (No. 08-769), 2009 WL 1615365.

158. Brief of Amicus Curiae the Humane Society of the United States in Support of Petitioner at 5, 130 S. Ct. 1577 (No. 08-769), 2009 WL 1681460.

159. Brief of Amicus Curiae, *supra* note 158, at 9.

160. *See Stevens*, 130 S. Ct. at 1599 (Alito, J., dissenting).

161. 458 U.S. 747 (1982).

The Court's ruling could significantly limit the effect of future legislative attempts to curtail animal cruelty if such regulations have to withstand strict scrutiny from the judiciary because they protect dogs rather than children.

Yet in spite of some of the lamentable real-world consequences of § 48's destruction, *Stevens* displays unflinching support for First Amendment[162] interests. The case reveals the current Court's development of a decidedly libertarian approach to content-based speech regulation. Not only will government infringement in this area not be tolerated, but it will not be tolerated even when the content of the speech is inherently or historically of little value. Consider, for example, that *Stevens* was decided only a few months after the Court in *Citizens United v. Federal Election Commission*[163] dramatically altered its take on corporate speech, a speech type that traditionally had occupied a low rung of importance to society.[164] The Court went out of its way to reject existing precedent so that it could overturn government restrictions in this arena.[165]

Likewise, in *Stevens* the Court's resistance to government interference with speech that many would find devoid of value is revealed by the extent to which it reached to declare § 48 unconstitutional. By rejecting the Government's balancing test for categorical exclusion,[166] the Court exposed a substantial distaste for removing newly-described types of speech from First Amendment protection. The Court buttressed its position with rather broad language, declaring that the Constitution

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162. U.S. CONST. amend. I.

163. 130 S. Ct. 876 (2010). *Citizens United* was decided in January of that year. *Id.*

164. *Id.* at 979 (Stevens, J., dissenting). Justice Stevens stated:

> At bottom, the Court's opinion is . . . a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

Id.

165. *See id.* at 886. The Court overturned *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), cases that had upheld federal statutory limits on "electioneering communication" under the theory that political speech could be banned because of the speaker's corporate identity. *Citizens United*, 130 S. Ct. at 886 (internal quotation marks omitted). In holding that the government may require disclaimers and disclosures on corporate speech but could no longer suppress it, the Court declared that stare decisis no longer required it to follow the reasoning it first laid down in *Austin*. *Id.*

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

does not permit the conclusion that some speech is not worth protecting merely because its value is minimal.[167] This effectively closes the door to just about any new categorical exemption of speech based solely on its lack of value to society, and through *Stevens* the Court has cast doubt on the idea that there still exist any categories of speech that may be pushed outside First Amendment protection for this reason.

At best, removing low-value speech from First Amendment protection will require that it somehow be linked to already exempted categories of speech. Obscenity will not provide this link, as the Court in *Stevens* made no movement to expand the doctrine's reach beyond speech that possesses some sexual aspect. One does not have to make a large leap to declare that the average person would find most depictions of animal cruelty "patently offensive" in the plain meaning of the phrase. Yet when that key element of prurient sexual interest is missing, the Court has suggested that no matter how offensive the speech, it may not be declared obscene. So even speech that communicates extreme violence, but is entirely nonsexual in nature, is unlikely to be recognized as obscene by the current Court.

Finally, the deliberateness with which the Court in *Stevens* selected and ignored certain tools of statutory construction in interpreting § 48 further suggest the Court's bent toward speech deregulation. The Court specifically bypassed an opportunity to save the statute by finding it unconstitutional as applied only to the defendant Stevens.[168] This hints at a broader role for overbreadth analysis in future First Amendment cases. If no longer invoked as a last resort, the doctrine could become the Court's device for chilling legislative attempts to regulate speech. Similarly, it is significant that the Court deliberately rejected common canons of statutory construction such as *noscitur a sociis*[169] and the constitutional avoidance doctrine.[170] With these tools, the Court could have preserved § 48. Instead, the Court obliterated it.

J. MATTHEW BARNWELL

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167. *Id.*

> The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."

Id. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

168. *See id.* at 1587.

169. *Id.* at 1588.

170. *Id.* at 1595 (Alito, J., dissenting).