PERPLEXING PRECEDENT: *UNITED STATES V. STEVENS* CONFOUNDS A CENTURY OF SUPREME COURT CONVENTIONALISM AND REDEFINES THE LIMITS OF "ENTERTAINMENT"

I. INTRODUCTION

The details are too gruesome to convey.[1] Crush videos, which in widely graphic and disturbing detail, display women crushing animals to death with stilettos or bare feet, have been in existence since the 1950s to cater to men with a specific sexual fetish.[2] In the past twenty years, the proliferation of crush videos and other forms of animal abuse has exploded due to the advent of the Internet and the simplicity with which one can search for and download videos online.[3] Compared to videos produced in the early part of the century, "[t]he Internet has made distribution of such disturbing material much easier, providing a larger and more competitive market which spurs more production and spurs producers to make material more extreme."[4] The videos cater to a specific sexual fetish and

1. *See* Joseph J. Anclien, *Crush Videos and the Case for Criminalizing Criminal Depictions*, 40 U. MEM. L. REV. 1, 1-3 (2009) (describing acts of cruelty depicted in crush videos).

2. *See* Emma Ricaurte, Comment, *Son of Sam and Dog of Sam: Regulating Depictions of Animal Cruelty Through the Use of Criminal Anti-Profit Statutes*, 16 ANIMAL L. 171, 173-74 (2009) (discussing crush videos and their recent overwhelming proliferation). It is estimated that a minimum of 1,000 American men exhibit preferences for this specific sexual fetish. *See id.* (noting views of philosophy professor Richard C. Richards). Mr. Richards is a philosophy professor at California State Polytechnic University and focuses his studies on unusual tendencies. *See id.* (validating claims regarding crush video popularity). The videos became a true Internet craze in the late 1990s, thus prompting Congress to act. *See* Krista Gesaman, *Kitty Stomping is Sick*, NEWSWEEK (Oct. 2, 2009, 8:00 PM), http://www.newsweek.com/2009/10/02/kitty-stomping-is-sick.print.html (debating implications of *United States v. Stevens*).

3. *See* Ricaurte, *supra* note 2, at 173-74 (emphasizing influence of Internet on contemporary animal cruelty).

4. Michael Reynolds, Note, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 343 (2009) (explaining Internet's influence on crush video production and distribution and imploring Court to carve out additional categories of unprotected speech). "The birth of the internet opened the door for new types of animal abuse to emerge . . . . These videos are able to infiltrate mainstream audiences because of increased file sharing networks and the growing popularity of websites that display violent videos for their shock value." American Society for the Prevention of Cruelty to Animals, *Animal Cruelty*, LEARNING TO GIVE, http://learningtogive.org/papers/paper359.html (last visited Oct. 6, 2011) [hereinafter American Society].

sell for between $30 and $100.[5] Experts estimate that there are over three-thousand titles available that accommodate individual consumer desires and fetishes, and websites often provide consumers with the option to custom produce a video to gratify specific proclivities.[6] Annual sales in the industry are estimated to reach nearly $1 million.[7]

The crush video fabricators do not discriminate regarding the animals they select to torture and kill.[8] The videos primarily depict mice, hamsters, and other small animals.[9] Recently, even cats, dogs, and monkeys have become victims.[10] The videos usually feature a woman speaking in a dominatrix style voice with the painful sounds of abused animals audible over her narration.[11]

Eventually becoming the topic of immense litigation, which ultimately reached the Supreme Court in *United States v. Stevens*, in October 1999 Congress recognized the absence of legislation combating crush videos and other depictions of animal cruelty.[12] Although all fifty states and the District of Columbia criminalize animal cruelty, crush videos and other depictions present unique challenges to guaranteeing prosecution.[13] To ensure impossible

5. *See* Elizabeth L. Kinsella, Note, *A Crushing Blow: United States v. Stevens and the Freedom to Profit from Animal Cruelty*, 43 U.C. DAVIS L. REV. 347, 360 (2009) (mentioning range of crush video prices and estimating market size).

6. *See* H.R. REP. NO. 106-397, at 2-3 (1999) (detailing conduct depicted in crush videos and listing motivations behind their production); *see also* Kinsella, *supra* note 5, at 360 (outlining crush video proliferation).

7. *See* Brief of Amicus Curiae the Humane Society of the United States in Support of Petitioner at 9, United States v. Stevens, 130 S. Ct. 1577 (2009) (No. 08-769) [hereinafter Brief of Humane Society] (describing vast growth of crush video industry). "The Humane Society is the nation's largest non-profit animal protection organization with more than 10 million members and constituents." *Id.*

8. *See* Kinsella, *supra* note 5, at 360 (listing species of animals tortured in crush videos).

9. *See Id.* (reviewing popular cruelty targets).

10. *See* Anclien, *supra* note 1, at 2 (noting recent video confiscations containing large animals as subjects).

11. *See* Kinsella, *supra* note 5, at 361 (describing content of crush videos and role of women in their production).

12. *See* Anclien, *supra* note 1, at 3-4 (explaining shortcomings of prior animal cruelty legislation). For a detailed timeline of events leading up to the passage of 18 U.S.C. § 48 and post *Stevens*, *see The HSUS Applauds Signing of Animal Crush Video Prohibition Act*, HUMANE SOCIETY OF THE UNITED STATES (Dec. 9, 2010), http://www.humanesociety.org/news/press_releases/2010/12/crush_bill_signed_120910.html [hereinafter *The HSUS Applauds*] (praising government response to controversial Supreme Court holding in *Stevens*).

13. *See* Kinsella, *supra* note 5, at 361 (reviewing standing animal cruelty laws). All fifty states now outlaw dogfighting and cockfighting, and forty-three states make certain acts of animal cruelty a felony offense. *See* Ricaurte, *supra* note 2, at 177 (summarizing state anti-cruelty statutes).

prosecution under animal cruelty statutes, the human actor conceals his or her identity by restricting filming to the waist down.[14] Similarly, even if prosecutors identify the person responsible, it is difficult to establish whether filming occurred within the jurisdiction and within the statute of limitations.[15] Finally, animal cruelty statutes have been ineffective at combating the market for cruelty videos because although the conduct is illegal, the production, sale, and distribution of the videos remain permissible.[16] Thus, leveraging its power under the Commerce Clause of the United States Constitution, on December 9, 1999, Congress passed 18 U.S.C. § 48 outlawing certain depictions of animal cruelty.[17]

The statute's goal was to appropriately address the prosecution difficulties, stating, "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."[18] An exceptions clause applied to "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."[19] Furthermore, similar to the distinction drawn between depicting actual murder and staging murder for entertainment purposes, the animals portrayed in crush videos had to be live animals.[20] Accordingly, film producers that used computer generated or illustrated animals were not subject to prosecution under § 48.[21] Intending that the statute only target genuine, unjustified cruelty to animals, videos showing acts of ordinary hunting or

14. *See* Kinsella, *supra* note 5, at 361-62 (detailing form of female participation in crush videos). In other words, films only show women from the waist down. *Id.*

15. *See id.* at 361-62 (discussing prosecution difficulties); *see also* Ricaurte, *supra* note 2, at 182-83 (listing specific challenges facing government in identifying and prosecuting animal cruelty perpetrators).

16. *See* Ricaurte, *supra* note 2, at 182-83 (discussing limitations of current animal cruelty statutes).

17. *See* Kinsella, *supra* note 5, at 359 (introducing 18 U.S.C. § 48). Congress justified its actions under the Commerce Clause because crush videos often travel in interstate commerce. *See id.* at 360 (explaining Congress's Commerce Clause justifications). For the full text of the statute, see *infra* note 26. The bill passed the House of Representatives 372-42 and received unanimous consent in the Senate. *See* Louis Fisher, *Crush Videos: a Constructive Dialogue*, NLJ (Feb. 21, 2011), http://www.loufisher.org/docs/ci/crushsc.pdf (comparing original 1999 bill to recent amendments).

18. 18 U.S.C. § 48 (1999).

19. *Id.*

20. *See* H.R. REP. NO. 106-397, at 5 (justifying statutory content and disclaiming any restriction on expressive speech).

21. *See id.* (discussing exceptions clause).

fishing were excluded from prosecution.[22] President Clinton recognized the risk of the statute being perceived as over-inclusive and thus issued a statement shortly after the statute was passed clarifying that:

> [He] will broadly construe the Act's exception and will interpret it to require a determination of the value of the depiction as party of a work or communication, taken as a whole. So construed, the Act would prohibit the types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex.[23]

Therefore, the Department of Justice was instructed to employ proper judgment in determining which offenses to prosecute, favoring those offenses with videos that primarily appealed to salacious desires.[24]

The definitions provided in the statute narrowed the section's applications even further.[25] Cruelty was understood to represent conduct where an animal is "intentionally maimed, mutilated, tortured, wounded, or killed," and the conduct had to be illegal under federal law or the law of the state "in which the creation, sale, or possession takes place."[26] Thus, it was irrelevant whether the con-

22. *See id.* (excluding content with degree of value from statute's reach). Other exceptions included slaughtering animals for food, veterinary practices, pest control, using animals in research laboratories, and using animals for entertainment purposes. *See id.* at 4 (listing exclusions); *see also* Ricaurte, *supra* note 2, at 179 (noting state statute exceptions to animal cruelty).

23. Statement by President William J. Clinton upon signing H.R. 1887, Pub. L. No. 106-152, 1999 U.S.C.C.A.N. 324 [hereinafter Statement by President].

24. *See id.* (instructing Department of Justice to construe statute narrowly).

25. *See* 18 U.S.C. § 48 (narrowing statute's reach).

26. § 48. The full text of the statute reads:

(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.

(b) Exception.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) Definitions.—In this section—

(1) 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

duct was legally undertaken in a particular state. If the conduct was illegal in the state in which the video surfaced, the creator faced prosecution under § 48.[27]

There were five primary motives behind Congress's endeavor to pass § 48: protecting animals, preventing future harm to humans, protecting humans from infliction of emotional harm, protecting property interests, and preventing morally wrong behavior.[28] The acts depicted in crush videos and other displays of animal cruelty inflict an unimaginable, excruciating amount of pain on the victims portrayed.[29] Society has progressively altered its view of animals and has come to recognize certain basic interests that should be afforded to humans and animals alike.[30] Regardless, society maintains that human rights should trump animal rights,

---

> (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.

§ 48.

27. *See id.* (outlining broad sweep of statute); *see also* Kinsella, *supra* note 5, at 360 (describing statute's territorial reach).

28. *See* H.R. REP. NO. 106-397, at 3-5 (outlining Congressional goals behind § 48); *see also* Ricaurte, *supra* note 2, at 180 (listing governmental and societal interests in prohibiting animal cruelty). Representative Elton Gallegly initiated the bill in response to complaints from Michael Bradbury, the District Attorney of Ventura County, California. *See* Elton Gallegly, *Columnist Wrong on Motive Effect of Animal Cruelty Law*, THE HILL (Sept. 7, 2009, 4:46 PM), http://thehill.com/opinion/letters/57529-columnist-wrong-on-motive-effect-of-animal-cruelty-law (rejecting notion that § 48 resulted from successful lobbying). "This legislative idea was not brought to me by an animal rights organization or other lobbyist . . . it was in response to the loopholes in existing state law, not because of lobbyists, that I introduced the legislation." *Id.*

29. *See* Ricaurte, *supra* note 2, at 180-81 (conveying harm inflicted upon animal victims).

30. *See* Julie China, *Animal Welfare vs. Free Speech*, 57 FED. LAW. 4, 4 (2010) (encouraging societal progress in recognition of animal rights); *see also* Ricaurte, *supra* note 2, at 180-81 (mentioning society's shift from treating animals as property to recognizing them as genuine victims). Concern for animal rights can be traced back to ancient times where Hindu and Buddhist scriptures advocate ethical animal treatment. *See* Doris Lin, *Historical Timeline of the Animal Rights Movement*, ABOUT.COM, http://animalrights.about.com/od/animalrights101/a/timelinemodern.htm (last visited Oct. 6, 2011). For a detailed timeline of modern animal rights progression from 1975 to present, *see id.* Inclinations to protect animals from abuse can also be seen in writings from John Locke, Alexander Pope, and Immanuel Kant. *See The History of Human-Animal Interaction – In England, Philosophers Argue Against Cruelty to Animals*, NET INDUSTRIES, http://www.libraryindex.com/pages/2153/History-Human-Animal-Interaction-in-england-philosophers-argueagainst-cruelty-animals.html (noting animal protection proclivities are not and have never been localized to United States).

and thus, the human interests implicated from animal cruelty surpass all other motives.[31]

While not immediately obvious, there are various risks to humans associated with marketing depictions of animal cruelty.[32] First, there is a strong causal link between violence towards animals and later violence inflicted upon humans.[33] One commentator noted, "[t]here is growing evidence to suggest that childhood animal cruelty has the potential of 'upgrading' to violence towards humans at a later stage."[34] Through watching violent content, viewers subconsciously learn violent behavior and become desensitized to the abhorrent material.[35] The less shocking and disturbing the

31. *See* Reynolds, *supra* note 4, at 347-50 (discussing research regarding effects of animal cruelty on humans and society); *see also* Ricaurte, *supra* note 2, at 180-81 (listing government interests in passing § 48).

32. *See* H.R. Rep. No. 106-397, at 3-4 (describing human ills associated with animal cruelty); *see also* Reynolds, *supra* note 4, at 351-52 (summarizing effects of violence on victims and observers); Ricaurte, *supra* note 2, at 180-81 (emphasizing human risks associated with animal cruelty); Buddy Amato, *Animal Cruelty is a Precursor to Other Dangers*, AMATO'S GOJU-RYE, http://www.amatosgojuryu.com/columns/49.html (last visited Oct. 6, 2011) (recognizing limitations of advocating against animal abuse to those who are not animal or pet supporters); *Dangers of Cruelty to Animals*, NADER.ORG (June 26, 1989), http://www.nader.org/index.php?/archives/1628-dangers-of-cruelty-to-animals.html (discussing research showing human dangers stemming from animal cruelty); *Facts About Animal Abuse & Domestic Violence*, AMERICAN HUMANE ASSOCIATION, http://www.americanhumane.org/interaction/support-the-bond/fact-sheets/animal-abuse-domestic-violence.html (last visited Oct. 6, 2011) (listing animal abuse statistics in association with resulting human ills such as domestic violence and sexual abuse); Problem Child, *The Link Between Animal Abuse and Serial Killers*, YAHOO (Oct. 29, 2007), http://www.associatedcontent.com/article/425882/the_link_between_animal_abuse_and_serial.html?cat=17 (discussing serial killers, school shooters, domestic violence, and other violent acts against people with noted links to animal cruelty); Frank R. Ascione, *Animal Abuse and Youth Violence*, JUVENILE JUSTICE (Sept. 2001), http://www.ncjrs.gov/pdffiles1/ojjdp/188677.pdf (arguing animal abuse receives insufficient attention as causal link to dangerous behavior).

33. *See* H.R. Rep. No. 106-397, at 3-4 (explaining gateway between animal abuse and later human violence). Humans who commit violent acts often do so as a result of a long pattern of abuse, beginning with animal torture. *See id.* (summarizing human timeline of abuse). "Cruelty towards animals is the most basic example of the need for power and dominance." Dresden Quinn Jones, *Psychology of People Hurting Animals: What Early Violent Behavior Towards Animals May Indicate*, SUITE101 (June 22, 2009), http://www.suite101.com/content/psychology-of-people-hurting-animals-a125937.

34. Antonietta Salerno, *Childhood Animal Cruelty and Link to Violence Toward Humans*, SUITE101 (Dec. 2, 2010), http://www.suite101.com/content/childhood-animal-cruelty-linked-to-violence-toward-humans-a313159.

35. *See* Reynolds, *supra* note 4 at, 351-52 (formalizing effects of desensitization, called "mean world syndrome"). When surveyed, "more than half of the thirty-five convicted serial killers questioned by the FBI admitted torturing animals as children." Kinsella, *supra* note 5, at 379. *See also* Jeremy Wright & Christopher Hensley, *From Animal Cruelty to Serial Murder: Applying the Graduation Hypothesis*, 47(1) INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOL-

content becomes, the more people are inclined to accept the behavior as normal and face an elevated risk of committing the acts themselves.[36] A growing amount of research is being done in this area, and "[r]esearchers as well as FBI law enforcement agencies nationwide have linked animal cruelty to domestic violence, child abuse, serial killings and to the recent rash of killings by school age children . . . ."[37] Criminal violence often originates in childhood acts of animal cruelty because children fail to appreciate the value of life.[38] Additionally, research has linked the market for depictions of animal cruelty to other illegalities such as gambling, weapons possession, and gang activity, often offenses committed simultaneously.[39] Likewise, on the opposite end of the spectrum, there is a strong interest in protecting humans from infliction of emotional harm, as exposure to animal cruelty can induce a range of emotional disorders including depression, fear, and anxiety.[40] Despite animals' status in many homes as equal family members and beloved pets, they largely remain classified as personal property

---

OGY 71 (2003), *available at* http://ijo.sagepub.com/content/47/1/71.full.pdf (studying graduation hypothesis to equate early animal cruelty to adult murder). "[W]ithin the framework of the graduation hypothesis, children who are cruel to animals may then graduate to aggressive behaviors towards humans." *Id.* S*ee also What is the Link?*, NATIONAL LINK COALITION, http://www.nationallinkcoalition.org/index (last visited Oct. 6, 2011) (linking exposure to animal cruelty with desensitization effect). In fact, notorious serial killers Ted Bundy, David Berkowitz, and Jeffrey Dahmer all admitted to torturing and killing animals in their youth. *See id.* (providing background of strong link between childhood acts of animal cruelty and later violent crimes). Eric Harris and Dylan Klebold, the perpetrators of the gruesome Columbine shootings, bragged about their particular acts of animal cruelty to their friends, including mutilating and murdering animals. *See* Tigerquoll, *Animal Abuse Inculcates Social Deviance*, WE CAN DO BETTER (Apr. 3, 2010), http://candobetter.net/node/1929 (reviewing research suggesting animal abuse is a faultless predictor of social deviance).

36. *See* Kinsella, *supra* note 5, at 379 (discussing *Stevens* compelling interest rationale). "Nearly one-half of rapists and one-fourth of pedophiles engaged in the abuse of animals as children." Janie Ellington, *Understanding the Side Effects of Animal Cruelty*, AN APPLE A DAY (Mar. 2010), http://www.anapplemag.com/book/export/html/121.

37. Problem Child, *supra* note 32.

38. *See* H.R. Rep. No. 106-397, at 4 (justifying statutory content based on culminating harm); *see also* Brief of Florida et al. as Amici Curiae in Support of Petitioner at 16, United States v. Stevens, 130 S. Ct. 1577 (2009) (No. 08-769) [hereinafter Brief of Florida] (emphasizing roots of criminal violence in childhood acts).

39. *See* Ricaurte, *supra* note 2, at 180 (listing correlation between animal cruelty and other crimes); *see also Dog Fighting*, THE ANTI-CRUELTY SOCIETY, http://www.anticruelty.org/site/epage/36628_576.htm?printstyle=true (last visited Oct. 6, 2011) (describing harmful secondary effects of animal abuse). For a discussion specific to dogfighting, see *infra* notes 181-184 and accompanying text.

40. *See* Reynolds, *supra* note 4, at 351-52 (commenting on human psychological effects of viewing animal cruelty).

under the law, thus elucidating Congress's motivation to protect property interests.[41]

Finally, there is a general inclination to prevent morally wrong behavior.[42] "The [House] committee is of the view that the great majority of Americans believe that all animals . . . should be treated in ways that do not cause them to experience excessive physical pain or suffering."[43] The government justified its actions based on widespread belief that a reasonable person would find any redeeming value of the depictions to be severely outweighed by the desire to prevent the various harms associated with animal cruelty.[44]

Acknowledging the statute's most basic motive to eliminate the market for cruelty videos, the statute was a sweeping success, the market for crush videos rapidly dissipated, and the films, according to California State Representative Elton Gallegly, were expelled from existence.[45] Due to the Third Circuit and subsequent Supreme Court decisions in *Stevens*, crush videos reemerged in full force.[46] The Court struck down § 48 as overbroad, declining to recognize depictions of animal cruelty as a category of speech worthy of receiving a categorical exclusion from First Amendment protection.[47] The government's compelling interests were held trivial when balanced against competing First Amendment rights.[48]

---

41. *See* H.R. Rep. No. 106-397, at 4 (dictating legislature's goal to protect personal property); *see also* China, *supra* note 30, at 4 (rejecting animals' classification as property under law); Gary L. Francione, *Animals as Property*, 2 ANIMAL L. 1 (1996), *available at* http://www.animallaw.info/articles/arusgfrancione1996.htm (criticizing primary treatment of animals as property); Catherine L. Wolfe, *Animals are "Property" Under the Law*, WOLFE PACK PRESS, http://www.wolfepackpress.org/pdf/Animals_not_Property.pdf (claiming laws treating animals as property are "arcane" and detrimental to societal advancement).

42. *See* Ricaurte, *supra* note 2, at 180 (listing government interest in morality); *see also* Jeremy Pierce, *Moral Justifications for Laws*, PARABLEMAN (Sept. 27, 2005, 12:29 PM), http://parablemania.ektopos.com/archives/2005/09/moral_justifica.html ("Our laws are thoroughly based on a moral code. That's the primary justification for them.").

43. H.R. REP. NO. 106-397, at 4.

44. *See id.* (balancing harms of animal cruelty with any conceivable scant value in depictions).

45. *See* Anclien, *supra* note 1, at 5 (praising sweeping success of statute); *see also* Elton W. Gallegly, *Beyond Cruelty*, U.S. FED. NEWS, Dec. 16, 2007, *available at* 2007 WLNR 24908285 (justifying introduction of Federal Dog Protection act into Congress).

46. *See* Anclien, *supra* note 1, at 5 (noting reemergence of crush videos following Third Circuit decision).

47. *See* United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) (grounding analysis on well-established categories of unprotected speech).

48. *See id.* at 1586 (declining proposition to grant itself "freewheeling" authority to carve out categorical exceptions to First Amendment protection based on government's "highly manipulable" balancing test).

The purpose of this Note is to consider the widespread implications of *United States v. Stevens*.[49] Specifically, this Note will consider the likelihood of future findings of a compelling governmental interest, the level of harm required when balancing competing interests, Congress's ability to supplement ineffective laws, and the Court's ability to recognize new categories of speech unworthy of even basic First Amendment protection.[50] Part II outlines the facts of *Stevens*.[51] Part III reviews the background of relevant First Amendment law, including discussions of content-based versus content-neutral regulations, the Court's criteria for defining new categories of unprotected speech, the Court's general requirements and precedent for fulfilling a strict scrutiny analysis, and the Court's general approach to facial invalidity claims.[52] Part III also discusses the dogfighting industry and other instances of animal cruelty present in modern sports and entertainment culture.[53] Part IV deciphers the Court's reasoning behind the decision.[54] Part IV also provides an analysis of the Court's reasoning based on precedent and opines that the Court was hasty in forming its opinion without scrutinizing the far-reaching implications of its decision in other realms of law.[55] Finally, Part V examines the implications of the Court's decision in disparate areas of law outside the First Amendment context.[56] This Note concludes that the result of *Stevens* is that the government's burden to show a compelling interest will be virtually impossible to fulfill, and the Court constricted its ability to recognize new categories of unprotected speech in future cases.[57] The government will face a heightened burden to show

---

49. For a presentation of the basic tenets of this Note, see *infra* notes 50-58 and accompanying text.

50. *See infra* Part IV-VI (reviewing facts of case, Court's analysis, and author's conclusions).

51. *See infra* notes 59-72 and accompanying text (giving background of *Stevens* case).

52. *See infra* notes 73-173 and accompanying text (studying relevant background to *Stevens*).

53. *See infra* notes 174-207 and accompanying text (illustrating realities of dog fighting).

54. *See infra* notes 209-298 and accompanying text (providing narrative of case).

55. *See infra* notes 299-394 and accompanying text (giving critical analysis of case).

56. *See infra* notes 395-446 and accompanying text (concluding Note).

57. *See id.* (exposing now heightened barriers to litigating on behalf of animal rights).

requisite harm and will be constrained in its ability to revise laws that fail to serve their intended purpose.[58]

II. FACTS

The facts of *United States v. Stevens* are uncharacteristically simple for a Supreme Court case.[59] Respondent Robert J. Stevens ran a business entitled "Dogs of Velvet and Steel" through which he sold videos of various forms of dogfights.[60] There were three videos involved in Stevens's conviction, each depicting dogfights involving dogs or boars: "Pick-A-Winna," "Japan Pit Fights," and "Catch Dogs."[61] All three videos contained audio commentary and literature that Stevens wrote and recorded.[62] Stevens advertised the videos in the Sporting Dog Journal, "an underground publication featuring articles on illegal dogfighting."[63] When Pennsylvania law enforcement officers discovered Stevens's advertisements, they commenced an investigation and arranged to purchase three videotapes.[64] Investigators obtained a search warrant for Stevens's Vir-

58. *See id.* (noting *Stevens*'s effect on strict scrutiny doctrine and increased difficulty now faced by legislature because of Court's new standard).

59. *See* United States v. Stevens, 533 F.3d 218, 220-21 (3d Cir. 2008), *aff'd*, 130 S. Ct. 1577 (2010) (discussing facts of case); *see also* United States v. Stevens, 130 S. Ct. 1577, 1583-84 (2010) (reiterating Stevens's conduct leading to his conviction).

60. *See Stevens*, 533 F.3d at 220-21 (describing Stevens's dogfighting business). Stevens also ran a website entitled "Pitbulllife.com." *See* Ricaurte, *supra* note 2, at 184 (mentioning Internet link to Stevens's videos). Stevens claimed his business was educational, as it sold educational material about pit bulls, such as documents to help hunters catch prey. *See* Greg Stohr, *Animal 'Crush Video' Law Voided by U.S. Supreme Court (Update2)*, BUSINESSWEEK (Apr. 20, 2010, 11:43 AM), http://www.businessweek.com/news/2010-04-20/animal-cruelty-law-struck-down-in-u-s-supreme-court-ruling.html (on file with author) (discussing background of *Stevens*).

61. *See Stevens*, 533 F.3d at 220-21 (summarizing dogfights contained in Stevens's videos). "Pick-A-Winna" was filmed in the 1960s or 1970s in the United States and contained footage of organized fights between Pit Bulls. *See Stevens*, 130 S. Ct. at 1583 (commenting on origin of "Pick-A-Winna" video). "Japan Pit Fights" was filmed around the same time but depicted legal dogfights in Japan. *See id.* (noting slight difference in video content). Stevens said "Japan Pit Fights" was used to compare dogs trained for hunting and dogs trained for fighting. *See* Stohr, *supra* note 60 (reviewing videos forming basis of Stevens's indictment). "Catch Dogs" was a hybrid hunting video showing pit bulls hunting wild boar, "as well as a 'gruesome' scene of a pit bull attacking a domestic farm pig." *Stevens*, 130 S. Ct. at 1583-84 (conveying deplorable content in Stevens's third video).

62. *See Stevens*, 533 F.3d at 220-21 (mentioning Stevens's involvement in the videos and implying authorities effortlessly linked him to the videos' creation). Stevens described himself as "a book author and documentary film producer who specializes in promoting pit bulls." Stohr, *supra* note 60.

63. *See Stevens*, 533 F.3d at 220-21 (noting irony of Stevens's advertising and his resulting arrest). After discovering Stevens's advertising in the journal, authorities had a direct link and evidence to carry-out Stevens's investigation. *See id.* (describing investigation).

64. *See id.* (summarizing authorities' investigation of Stevens).

ginia residence on April 23, 2003, which allowed officers to find several copies of the videos, in addition to ample dogfighting merchandise.[65]

On March 2, 2004, a grand jury in the Western District of Pennsylvania indicted Stevens "with three counts of knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce for commercial gain in violation of 18 U.S.C. § 48."[66] Stevens unsuccessfully moved to dismiss the indictment, claiming the statute was facially invalid under the First Amendment.[67] After a jury trial, on January 13, 2005, the jury found Stevens guilty on all three counts, and he was sentenced to thirty-seven months imprisonment followed by three years of supervised release.[68]

On appeal, the Third Circuit declared § 48 facially unconstitutional and vacated Stevens's conviction.[69] The Third Circuit rested its decision upon the contention that § 48 regulates speech deserving of First Amendment protection, while emphasizing the Supreme Court's general unwillingness to carve out additional categories of unprotected speech.[70] Furthermore, the court conducted a strict scrutiny review and struck down § 48 as a content-based regulation of protected speech, meaning the government lacked a narrowly tailored, compelling interest and failed to use the

65. *See id.* (describing authorities' search of Stevens's residence).

66. *See id.* (dictating grand jury conviction). It is significant to note that Stevens's case was the first prosecution in the United States based on a violation of § 48. *See id.* (noting novelty of prosecution under § 48 as of Third Circuit's decision).

67. *See* United States v. Stevens, 130 S. Ct. 1577, 1583-84 (2010) (mentioning unsuccessful motion to dismiss on grounds of facial invalidity). The District Court held that the depictions covered under § 48 were categorically unprotected by the First Amendment, similar to obscenity or child pornography. *See id.* (summarizing district court holding). It also concluded that the statute was not overbroad due to the exceptions clause that narrowed the statute to allowable constitutional applications. *See id.* (commenting on district court's analysis of statute's exceptions clause).

68. *See id.* (reiterating Stevens's sentence); *see also Stevens*, 533 F.3d at 220-21 (reviewing district court's sentencing decision).

69. *See Stevens*, 130 S. Ct. at 1583-84 (discussing Third Circuit overbreadth analysis). Three judges dissented. *See id.* (noting Third Circuit split).

70. *See id.* (emphasizing reliance on Supreme Court precedent). The Third Circuit was particularly hesitant to carve out additional categories of unprotected speech due to the Supreme Court's unwillingness to do the same. *See* Reynolds, *supra* note 4, at 347 (arguing alternative analysis). Reynolds argued that the Third Circuit should have carved out an additional category of unprotected speech, regardless of Supreme Court inaction. *See id.* (rejecting Third Circuit reasoning).

least restrictive means to prevent animal cruelty.[71] The Supreme Court granted certiorari.[72]

III. BACKGROUND

A. More Than a Mere Hint of Unconstitutionality: Overbreadth Challenges

Stevens's case was the first violation of § 48 to proceed to trial, and thus case law specific to depictions of animal cruelty is virtually nonexistent.[73] Nevertheless, there is an abundance of precedent relevant to the First Amendment issues presented to the Supreme Court, specifically regarding the Court's application of strict scrutiny and its inclination to carve out additional areas of unprotected speech.[74]

As one of the most famously contested provisions of the United States Constitution, the First Amendment reads, "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."[75] The most common argument to invalidate a federal statute is to assert that the statute is overbroad and thus facially invalid.[76] The Court considered the issue in three notable cases.[77]

In the most recent Supreme Court decision dealing with the First Amendment, *United States v. Williams*, the Court examined a section of Title 18 that criminalizes "the pandering or solicitation of

71. *See Stevens*, 130 S. Ct. at 1584 (reiterating Third Circuit's strict scrutiny analysis). The Third Circuit also gave a cursory glance to the argument that § 48 is overbroad, but due to its substantive conclusions relying on stronger theories, the court declined to rest its conclusion on an overbroad basis. *See id.* (noting Third Circuit's unwillingness to consider an overbreadth challenge).

72. *See id.* (stating Supreme Court grant of certiorari).

73. *See Stevens*, 533 F.3d at 221 (recognizing primacy of § 48 analysis).

74. *See infra* notes 109-173 and accompanying text (discussing Court's strict scrutiny doctrine and illustrating Court's hesitation to carve out new categories of unprotected speech).

75. U.S. CONST. amend. I.

76. *See* United States v. Williams, 553 U.S. 285, 292-93 (2008) (outlining Court's overbreadth doctrine). For a discussion of the Court's history applying the overbreadth doctrine, see Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063 (1997) (arguing Court has not consistently applied overbreadth doctrine, leading to confusing and conflicting results).

77. *See Williams*, 553 U.S. at 292-93 (holding majority of pornography statute's applications raised no constitutional problems); Wash. v. Glucksberg, 521 U.S. 702, 706-07 (1997) (concluding social consensus was critical in considering assisted-suicide statute); United States v. Salerno, 481 U.S. 739, 741-43 (1987) (holding conceivable impermissible application of a statute does not warrant its invalidation).

child pornography."[78] Previously, the Court held that statutes preventing the distribution of all child pornography did not, on their face, violate the First Amendment, irrespective of whether the pornographic material in question qualified as obscene.[79] Further, a statute was overbroad and facially invalid if it prohibited a substantial amount of protected speech.[80] In its final analysis of whether the statute could criminalize soliciting child pornography, the Court balanced the social costs of upholding the statute against the threat of discouraging people from engaging in constitutionally protected speech.[81] It noted that striking down a law that has perfectly constitutional applications can be as harmful as stifling the free exchange of ideas.[82] Thus, "a statute's overbreadth [must] be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[83]

The first step in the overbreadth challenge was to construe the disputed statute to determine what conduct it covered.[84] Only after analyzing the statute's reach did the Court then determine if the statute criminalized a substantial amount of protected "expressive activity."[85] It is important to note the Court's clarification of the overbreadth doctrine: "The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."[86] In *Williams*, the majority of the statute's applications raised no constitutional problems, which implied that the Court conducts an overview of a

78. *See Williams,* 553 U.S at 288 (introducing child pornography statute).

79. *See id.* (commenting on child pornography). For further discussion of the Court's holding in several landmark child pornography cases, see *Ashcroft v. Free Speech Coal.*, *Osborne v. Ohio*, and *N.Y. v. Ferber.* *See infra* notes 153-172 and accompanying text (reviewing details of cases); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (holding general ban on virtual child pornography overbroad and undue restriction on freedom of speech).

80. *See Williams*, 553 U.S. at 292 (stating components of overbreadth test).

81. *See id.* (reiterating balance between speech and societal costs). The Court cited the theory of the free exchange of ideas, popularized by theorist John Stuart Mill. *See id.* (disclaiming inhibition of permissible free speech); *see also* Reynolds, *supra* note 4, at 355 (outlining justifications for free speech).

82. *See Williams*, 553 U.S. at 292 (emphasizing statutes directed "at conduct so antisocial that it has been made criminal").

83. *Id.*

84. *See id.* at 293 (stating first step in overbreadth analysis). The Court observed that it would be difficult to determine if a statute reached too far without first observing what areas the statute covers. *See id.* (justifying initial step in analysis).

85. *See id.* at 297 (introducing second step in an overbreadth discussion).

86. *Id.* at 303 (quoting Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984)).

statute's applications and identifies the permissible and impermissible applications of the provisions.[87]

Prior to *Williams*, the Court considered the overbreadth doctrine in *Washington v. Glucksberg* and *United States v. Salerno*.[88] *Glucksberg* is a notable case regarding a Washington statute that criminalized assisting a medical patient in committing suicide.[89] While the Court discussed the overbreadth doctrine in a similar fashion in its later *Williams* decision, the Court made several influential points relevant to an overbreadth analysis.[90] The Court reaffirmed its position that societal consensus in the form of a pattern of enacted laws is important to consider when analyzing the validity of a federal or state statute.[91]

In his concurrence, Justice Souter discussed the proper role of the judiciary.[92]

> It is no justification for judicial intervention merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review. It is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.[93]

Justice Souter also set forth several specific situations in which the Court should not defend a finding that the legislature acted arbitrarily.[94] First, "[when] there is a serious factual controversy over

87. *See id.* at 292-303 (applying overbreadth doctrine to content of statute).

88. *See* Wash. v. Glucksberg, 521 U.S. 702 (1997) (maintaining due process clause does not grant fundamental right to assisted suicide and government has legitimate interest in banning practice); United States v. Salerno, 481 U.S. 739 (1987) (holding pretrial detention not violation of procedural due process when person held poses future danger).

89. *See Glucksberg*, 521 U.S. at 706-07 (summarizing Washington's assisted-suicide laws).

90. *See id.* at 707-09 (noting plaintiff's facial challenge to statute).

91. *See id.* at 711 ("[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws.") (quoting Stanford v. Kentucky, 492 U.S. 361, 373 (1989)). In *Glucksberg*, opposition and condemnation of suicide were considered "enduring themes" in United States history, and thus, the Court extrapolated that assisted suicide would face a similar critique. *See id.* (recognizing extensive societal inclinations against assisted-suicide).

92. *See id.* at 768 (emphasizing level of deference properly accorded to legislature).

93. *Id.* He proceeded to clarify that only when the standard is in opposition to the statute can the individual properly claim a constitutional right. *See id.* (clarifying stated position).

94. *See id.* at 786-87 (discussing proper Supreme Court deference to legislative judgment).

the feasibility of recognizing the claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power."[95] The second exclusion from judicial judgment is when there are facts that are not readily ascertainable through judicial review, but are more properly reserved for discovery though the legislative process of factfinding and experimentation.[96] Justice Souter emphasized that the legislative setting is more apt to acquire facts necessary for a proper determination of statutory constitutionality.[97] Accordingly, societal consensus often emerges in the form of legislative judgment because the legislature operates in the suitable forum to analyze the issues and make valuable adjustments to statutory provisions based on feedback and criticism.[98]

Justice Souter's views were shared in an earlier Supreme Court case, *Salerno*, where the Court considered the constitutionality of The Bail Reform Act of 1984, which allowed the federal government, absent certain exceptions, to detain an arrestee if the safety of individuals or the community was at risk.[99] The Court noted that the statute was passed in response to the "numerous deficiencies" of the federal bail process.[100] Thus, the Court implied its acceptance of the legislature's attempt to rectify definitive problems in federal programs.[101] The *Salerno* case outlined the Court's application of the overbreadth doctrine, requiring the challenger to establish that "no set of circumstances exists under which the Act would be valid."[102] The fact that a statute may be unconstitutional in some conceivable situation is insufficient to render the statute wholly invalid.[103]

---

95. *Id.* at 786.

96. *See id.* at 786-87 (mentioning inability of judiciary to discern all relevant facts and contributing views).

97. *See id.* at 788 (contending legislature is uniquely situated to make statutory decisions). "Not only do they have more flexible mechanisms for factfinding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions." *Id.*

98. *See id.* at 711, 786-88 (describing emersion of societal consensus in the legislative forum).

99. *See* United States v. Salerno, 481 U.S. 739, 741-43 (1987) (reviewing Bail Reform Act of 1984 and its application).

100. *See id.* at 742 (noting deficiencies in Act).

101. *See id.* (accepting legislature's judgment that bail process could be reformed through Act's passage).

102. *See id.* at 745 (providing overview of overbreadth doctrine).

103. *See id.* (limiting application of doctrine). The Court noted that the overbreadth doctrine, as of 1987, had been limited exclusively to the First Amendment context. *See id.* (dictating that burden rests with respondents to prove Act is facially invalid).

As Justice Souter would discuss in the later *Glucksberg* decision, the Court in *Salerno* extensively discussed the importance of legislative intent in construing a controversial statute.[104] The Court stated,

> To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'[105]

In *Salerno*, a potential solution to a problematic societal problem was proper justification for the legislature to pass the Act to prevent danger to the community.[106] Therefore, the Court's overbreadth cases reveal its unwillingness to invalidate a statute simply because the statute has a conceivable unconstitutional application, along with the importance of discovering legislative intent before handing down a decision.[107] The Court wavered on its unwillingness in *Stevens*.[108]

B. Negligible Societal Value: Content-Based Restrictions on Speech

Aside from an overbreadth challenge, when First Amendment conflicts concerning content-based regulation of speech come before the Court, the Court often rests its decision on a strict scrutiny analysis.[109] As opposed to content-neutral regulations, "[c]ontent-based regulations focus on the communicative impact of speech. In other words, they restrict communication because of the

104. *See id.* at 747 (noting legislative intent is instructive in construing challenged statutes).

105. *Id.*

106. *See id.* (granting deference to legislative judgment).

107. *See supra*, notes 73-107 (surveying Court's jurisprudence on overbreadth doctrine).

108. *See supra* notes 223-252 and accompanying text for further discussion of the Court's reasoning in *Stevens*.

109. *See* Kinsella, *supra* note 5, at 355-58 (reviewing Supreme Court precedent concerning content-based versus content-neutral regulations). The Court reasoned that restrictions based on content often implicate censorship; censorship being an impermissible withholding of First Amendment protection. *See id.* at 355-56 (discussing justifications for more exacting Supreme Court scrutiny when regulation targets speech based on content).

message expressed."[110] While the Supreme Court's content-based strict scrutiny case law is expansive, this Note will focus on three decisions relevant to *Stevens*.[111]

In a landmark case concerning content-based regulations of speech, *R.A.V. v. City of St. Paul, Minnesota*,[112] the petitioner was charged with violating a crime ordinance after allegedly burning a cross on an African American family's lawn.[113] The Court legitimized its analysis by opining that the law prohibits speech based on speech content, ultimately concluding that the law did not serve the City's advanced compelling interests.[114]

The Court reaffirmed that certain content-based restrictions are permissible in limited circumstances where the speech is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[115] Likewise, non-verbal expressive activity is proscribable based on the action entailed, not necessarily because of the content of the "speech."[116]

The Court emphasized the importance of upholding neutral exclusions of certain speech, including content-based speech, where there is no danger of "idea or viewpoint" discrimination.[117] For example, a state may choose to prohibit obscenity catering towards a prurient interest that involves "lascivious" displays of sexual activity.[118] Addressing the City's argument that the regulation was an attempt at controlling the "secondary effects" of the speech, the Court recognized that these kinds of regulations are justified with-

110. *Id.* at 356.

111. *See infra* notes 113-135 (examining cases).

112. 505 U.S. 377, 379-80 (1992).

113. *See id.* (discussing facts of case).

114. *See id.* at 381, 395-96 (requiring heightened scrutiny for content-based restriction on speech). The City claimed the law prevented so called "secondary effects" of speech like provoking violence. *See id.* at 389 (rejecting City's secondary effects defense).

115. *See id.* at 382-83 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (implying acceptance of review of value of challenged speech).

116. *See id.* at 385 (distinguishing between expressive conduct and pure speech). For example, the Court clarified by providing an example: "[B]urning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *Id.*

117. *See id.* at 388 (distinguishing between viewpoint-based speech and general speech subject to neutral regulations).

118. *See id.* (illustrating Court's First Amendment obscenity exception). Conversely, obscenity including a political message is not subject to regulation. *See id.* (implying overwhelming importance of political speech).

out reference to the content of the speech, but only if the secondary effects are associated with obscenity.[119]

The Court also dealt with controversial content-based restrictions in its sole case contemplating animal cruelty: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[120] The case dealt with a city ordinance instituted to prevent people affiliated with the Santeria religion from practicing ritual animal sacrifices.[121] The attorney general intended to prohibit unmotivated acts committed "in the spirit of wanton cruelty" without any benefit or use to the perpetrator.[122] In subjecting the ordinance to strict scrutiny, the Court concluded that the City's concerns of preventing the suffering or mistreatment of the sacrificed animals, as well as the potential for health hazards from improper disposal, were legitimate government interests.[123]

Relying on precedent established in landmark equal protection cases, the Court listed several pieces of evidence courts may consider when scrutinizing government interests.[124] Justice Kennedy established several landmark pieces of evidence to consider:

> Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.[125]

---

119. *See id.* at 389 (summarizing secondary effects doctrine).

120. *See* Kinsella, *supra* note 5, at 362-63 (stating rarity of animal cruelty cases in Supreme Court docket).

121. *See* Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 525-27 (1993) (providing background of case and underlying controversy). In the Santeria religion, animal sacrifices are performed at birth, marriage, and death rites; to cure the sick; to initiate new members and religious leaders; and during annual celebration. *See id.* at 524-25 (listing milestones involving animal sacrifice). Animals subjected to sacrifice include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. *See id.* (showing range of animals subjected to sacrifice).

122. *See id.* at 527 (discussing attorney general motivation).

123. *See id.* at 535 (accepting City's justifications as legitimate). The Court did not decide if the interests were compelling. *See id.* (relying on City's stated justifications).

124. *See id.* at 540 (providing guidance for courts determining legislative intent).

125. *Id.* It is through these avenues of study that a court can assess discriminatory objectives. *See id.* (classifying objective standards for determining legislative purpose).

Nevertheless, after analyzing the evidence, the Court held that the City's legitimate interests in protecting public health and preventing animal cruelty could be achieved without a flat ban on the religious sacrificial practice.[126]

The Court comprehensively set forth standards for strict scrutiny regarding content-based regulations of speech in *United States v. Playboy Entertainment Group, Inc.*[127] The federal statute in question effectively forced Playboy to broadcast its material during certain hours of the day when it was unlikely children would be watching television, irrespective of whether other times of day were suitable for the material.[128] The statute regulated the content of the speech and the direct impact it supposedly had on viewers, which, according to the Court, is the essence of presumptively void, content-based regulations.[129]

Utilizing the traditional strict scrutiny standard used in content-based regulation cases, the Court noted that the statute must be narrowly tailored to promote a compelling government interest.[130] Should a less restrictive alternative arise, the government is obliged to utilize it, unless it can prove that the alternative would be ineffective to achieve stated goals.[131]

Clarifying even further, the Court opined that the objectives of "shield[ing] the sensibilities of listeners . . . [and] children does not suffice to support a blanket ban if the protection can be accomplished by less restrictive alternative."[132] Interestingly, the Court justified its decision by setting forth various theoretical interests behind the right of free speech.[133] The Court stated:

---

126. *See id.* at 538 (condemning City's measures as overly restrictive).

127. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811-19 (2000) (formalizing Supreme Court strict scrutiny analysis precedent).

128. *See id.* at 806-11 (explaining background of controversy).

129. *See id.* at 811-12, 817 (proscribing unjustified content-based restrictions on speech). The regulation was specifically targeted towards the supposed effect Playboy's content would have on young viewers. *See id.* at 811 (noting Congressional intent).

130. *See id.* at 813 (reiterating strict scrutiny test). In a strict scrutiny analysis, the government has the burden of establishing a compelling interest that is narrowly tailored. *See id.* (distributing the burden of proof in a strict scrutiny case).

131. *See id.* at 813, 816 (implying importance of government consideration of alternative means).

132. *Id.* at 814.

133. *See id.* at 817 (recognizing interests associated with First Amendment protection); *see also* Reynolds, *supra* note 4, at 354-66 (linking animal cruelty to theories supporting free speech); Anclien, *supra* note 1, at 34-48 (describing First Amendment policy interests).

> It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without government interference or control.[134]

After reviewing evidence of various less restrictive alternatives, the Court concluded that the statute did not serve compelling government interests that were narrowly tailored.[135]

C. Limiting Inclination to Carve Out New Categories of Unprotected Speech

Although occurring infrequently, when an overbreadth or strict scrutiny analysis failed, the Court carved out several categories of speech that were unworthy of receiving even the most minute First Amendment protection.[136] As early as 1942, the Court opined that there are certain well-defined and narrowly tailored classes of speech that do not raise constitutional problems when regulated.[137] In the fifty years following the Court's decision in *Chaplinksy v. New Hampshire*, the Court would carve out several additional categories of unprotected speech, adding to the lewd and obscene, the profane and libelous, and "fighting words."[138] In *Chaplinsky*, the court carved out an area of unprotected speech for speech that violates a valid criminal statute.[139] The Court's justification remained consis-

134. *Playboy*, 529 U.S. at 817.

135. *See id.* at 827 (contending government failed to establish that restriction was least restrictive alternative). For a further discussion of the Supreme Court's jurisprudence regarding content-based restrictions, see Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) and Reno v. ACLU, 521 U.S. 844 (1997).

136. *See* Ricaurte, *supra* note 2, at 188-94 (providing background of Supreme Court First Amendment cases).

137. *See* Chaplinksy v. New Hampshire, 315 U.S. 568, 571-72 (1942) (recognizing categories of speech unworthy of First Amendment protection).

138. *See id.* at 572 (listing categories of unprotected speech as of 1942). "Fighting" words are those "which by their very utterance inflict injury or tend to incite and immediate breach of the peace." *Id.* In 1969, the Court added a category of unprotected speech for activities that incite violence. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

139. *See Chaplinsky*, 315 U.S. at 571 (noting proper speech exclusions, despite religious nature). In this case, the statute was narrowly drawn and limited to punishing conduct within state power. *See id.* at 573 (illustrating proper statutory scope).

tent in many of its later cases, classifying such categories of speech as such "slight societal value" that any value in the speech is trumped by "the social interest in order and morality."[140]

Several years after deciding *Chaplinsky*, the Court in *Giboney v. Empire Storage & Ice Co.*[141] reaffirmed its conclusion that "the constitutional freedom for speech and press [does not extend] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[142] The Court recognized that the freedoms advanced by the First Amendment are vital to American society, and speech that is deemed an inconvenience or annoyance would not fall under the categories of properly regulated speech.[143] In an area that has been vehemently fought over and repeatedly brought in front of the Supreme Court, the Court has repeatedly reaffirmed that obscene speech should muster virtually zero First Amendment protection.[144]

In the first case to confront the issue directly, *Roth v. United States*, the Supreme Court firmly held that the First Amendment was not intended to protect all forms of speech, particularly obscene speech.[145] Repeating earlier language used in *Chaplinsky* and *Giboney*, the Court added that obscene material is that which "deals with sex in a manner appealing to [a] prurient interest."[146] Content dealing in or depicting sex alone does not guarantee rejection under the First Amendment; it is sexual content appealing to the *prurient interest* that raises constitutional issues.[147] The Court provided guidance for lower courts faced with an obscenity statute like the one in *Roth*.[148] It noted that the Constitution does not require impossible standards; the language of a statute must be adequately

140. *See id.* at 572 (reviewing proper balance of speech value and societal interests).

141. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

142. *See id.* (holding First Amendment does not exonerate when speech major element of criminal statute).

143. *See id.* at 501-02 (reaffirming grave offenses against society cannot be shielded from state control). In *Giboney*, the speech was used as "an essential and inseparable part of a grave offense against an important public law" and was properly subjected to state regulation. *See id.* at 502 (applying categorical exception to speech).

144. *See* Roth v. United States, 354 U.S. 476, 483 (1957) (contending First Amendment history implies that framers did not intend for obscenity to receive First Amendment protection).

145. *See id.* at 483 (excluding obscenity from First Amendment protection).

146. *See id.* at 487 (defining obscenity).

147. *See id.* (emphasis added) (excluding non-obscene sexual portrayals from Court scrutiny).

148. *See id.* at 491-92 (clarifying proper application of obscenity doctrine).

specific and detailed to provide warning to a party contemplating an act that would violate the statute.[149]

Almost twenty years later, the Court narrowed its obscenity doctrine in *Miller v. California*[150], which, like *Roth*, concerned a state obscenity statute and its application to a citizen.[151] While maintaining the "prurient interest" language, the Court narrowed the obscenity doctrine to reach only those offenses that "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[152] The obscenity doctrine paved the way for the Court to carve out an additional category of unprotected speech for child pornography.[153] In 1982, the case of *N.Y. v. Ferber* came before the Supreme Court after a bookkeeper was convicted under a statute criminalizing the sale of child pornography.[154] The Court's five-part discussion in *Ferber* would eventually become the basis for its decision in *Stevens* thirty years later.[155] In analyzing the statute, the Court granted the legislature significant deference in its decision-making because the legislature relied on research and literature discussing the harmful effects of child pornography on both children and society.[156]

The Court's most influential argument, which it later rejected in *Stevens*, was that the distribution of child pornography is "intrinsically related" to the abuse itself.[157] The Court emphasized that ensuring the physical and mental well-being of children is undeniably

149. *See id.* (standardizing application of obscenity doctrine). The Court stated that the language would be measured by "common understanding and practices." *See id.* at 491 (noting standard for measurement).

150. Miller v. Cal., 413 U.S. 15, 23-24 (1973).

151. *See id.* (narrowing scope of obscenity doctrine to "works which depict or describe sexual conduct").

152. *Id.* at 24. The trier of fact must look at the work as a whole to determine if an average person applying current community standards would find that the work appeals to a prurient interest. *See id.* (discussing guidelines for analyzing supposed obscene works). They must also determine if the work depicts or describes offensive sexual conduct that would fall under state law, and they must judge whether the work has redeeming value in any of the categories specified by the Supreme Court. *See id.* (reciting steps for trier of fact conducting an obscenity analysis).

153. *See* N.Y. v. Ferber, 458 U.S. 747, 757-58 (1982) (discussing state interests regarding well-being of minors and relevance of legislative judgment).

154. *See id.* at 751-52 (stating background of case).

155. For a further discussion of the Court's analysis concerning *Ferber*, see *infra* notes 218-222 and accompanying text.

156. *See Ferber*, 458 U.S. at 758 (relying on legislative research regarding harms to children resulting from participation in child pornography).

157. *See id.* at 759 (comparing conduct to its depiction). The Court's first reason was that videos and photographs are a permanent record of the conduct, a

a compelling state interest, as children form the basis for future societal growth and success.[158] The Court noted that to combat the conduct itself, the distribution network for such content must be eradicated.[159]

> The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions.[160]

Furthermore, embodying its rationale in *Giboney*, the Court concluded that the advertising and selling of child pornography provides an economic motive for people to produce the material, and thus, the marketing of such conduct is an "integral part" of the production of the materials.[161]

The Court also undertook a balancing test, opining that the value of the material is "*de minimis*."[162] It did not find merit that child pornography could classify as scientific, educational, or artistic.[163] Recognizing the importance of precedent in formulating a decision, the Court noted that carving out a new category of unprotected speech for child pornography would not offend earlier decisions.[164] This is especially important considering that the Court's decision in *Ferber* would form the basis for its later decision in *Ste-*

record that only serves to exacerbate the harm suffered. *See id.* (arguing exacerbation of harm due to permanent video record).

158. *See id.* (contending obviousness of compelling state interest in protecting children from harm).

159. *See id.* (opining closure of distribution network is most effective means of combating underlying harm).

160. *Id.* at 760.

161. *See id.* at 761 (quoting language from *Giboney* regarding lack of constitutional protection for speech used as integral part of violating criminal statute). The Court also emphasized the illegal nature of the conduct, which is prohibited throughout the United States. *See id.* (emphasizing nationwide illegality of child pornography).

162. *See id.* at 762 (arguing value of depictions is less than exceedingly modest).

163. *See id.* at 762-63 (recognizing possibility for including person of legal age in videos should literary value become feasible).

164. *See id.* at 763 (reviewing history of Supreme Court actions in carving out categories of unprotected speech).

vens.[165] Ensuring that First Amendment freedoms are not unnecessarily trampled, the Court mandated that proscribable conduct must be properly defined by state law, either "written or authoritatively construed."[166] In fact, the Court has noted that it and other courts often construe statutes specifically to *avoid* constitutional problems.[167]

Despite *Stevens* presenting the Court with the first comprehensive case to concern the First Amendment in relation to the Internet, the Court failed to regard the proliferation of the Internet as a factor to consider when construing statutes.[168] Yet, in *Ashcroft v. American Civil Liberties Union*, a case decided eight years prior to *Stevens*, the Court noted, "[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[169] The case surrounded the Child Online Protection Act, which prohibited knowingly transmitting inappropriate and harmful material over the Internet that could be accessed by minors.[170] Unfortunately, with the benefits of the Internet come the dangers of rapid dissemination and proliferation of materials across the web, enabling child pornography and other inappropriate or offensive conduct to spread like wildfire.[171] Therefore, the Internet presents problems to both regulating distribution of materials and prohibiting certain conduct all together, and the Court concluded it must approach the substantive issues from a modern angle contemplating contemporary standards.[172] Although the Court had not fully confronted the issue of the Internet in relation to the categories

---

165. For a further discussion of the Court's analysis concerning *Ferber*, see *infra* notes 218-222 and accompanying text.

166. *See Ferber*, 458 U.S. at 764 (mandating standard apply to both participant age and definition of sexual conduct).

167. *See* Osborne v. Ohio, 495 U.S. 103, 119 (1990) (emphasis added) (rejecting Osborne's contention that statutes should not be construed to avoid constitutional violations).

168. *See* Ashcroft v. ACLU, 535 U.S. 564, 566 (2002) (providing overview of Internet's place in First Amendment analysis).

169. *Id.* at 566. The Court proceeded to discuss the freedom one has when searching the Internet and the impressive range of materials one can discover while searching. *See id.* (implying Court must consider all-encompassing nature of Internet in First Amendment controversies).

170. *See id.* at 569 (discussing application of Child Online Protection Act).

171. *See id.* at 566-67 (describing heightened harm from rapid dissemination). The Court commented that while people can access content intentionally, often people stumble across horrid materials accidentally and without warning. *See id.* (discussing harm of Internet access).

172. *See id.* (reevaluating standards for analysis from modern perspective).

unworthy of First Amendment protection, the Court tackled the issue in *Stevens*.[173]

D. A Brief Glimpse into the "Entertainment" of Animal Cruelty

> In a dim cellar, two dogs are forced into a pit. Outside the pit's plywood walls, a crowd places bets. What comes next is what the dogs have been trained for all their short, miserable lives. The fight, which is just starting, will be brutal. It will last a long time. No one will call for help. An hour passes before one dog loses. He sinks into a corner, head and body covered with wounds. He will not survive. The other, also painfully injured, won't recover either. His owner takes the prize, a pocketful of cash, and leaves the 2-year-old dog to die.[174]

Dogfighting has been a "sport" since the twelfth century, popularized in the aftermath of the Roman invasion of Britain.[175] Currently, an estimated 20,000 to 40,000 people in the United States engage in professional dogfighting, a multi-billion dollar industry that is considered a felony in almost every state.[176] The illegal industry is fueled by the massive sums of money that promoters and participants earn by winning a fight.[177] The average fight nets around $10,000, but a top fight can pay upwards of $100,000.[178] Animal fighting expert John Goodwin explains the industry: "[y]ou

173. *See generally* United States v. Stevens, 130 S. Ct. 1577 (2010) (analyzing Internet in First Amendment framework).

174. *The Dangers of Dogfighting*, KIND NEWS ONLINE, (Jan., 2008), http://www.kindnews.org/feature/2008/feature_jan08.asp (on file with author).

175. *See* American Society, *supra* note 4 (describing British fondness of pitting their dogs against wild boar and bulls). After the use of larger animals was outlawed in 1835, fighters found that pitting their dogs against each other was a cheaper, legal alternative to using large animals. *See id.* (explaining transition from dog against large animal competitors to dog against dog matches). The sport made its way to the United States during the 1800s. *See* American Society, *supra* note 4 (noting initiation of dogfighting in the United States).

176. *See Dogfighting a booming business, experts say*, CNN U.S. (July 18, 2007), http://articles.cnn.com/2007-07-18/us/dog.fighting_1_illegal-blood-sport-underground-dogfighting-magazines-animal-shelters?_s=pm:us [hereinafter Dogfighting a Booming] (providing overview of modern dogfighting business); *see also* Frank Deford, *Beyond Vick: Animal Cruelty for Sport*, NPR (Aug. 8, 2007), http://www.npr.org/templates/story/story.php?storyid=12568999 (commenting on Humane Society estimation of dogfighting industry size); Kelly Naqi, *Source: Vick 'One of the Heavyweights' in Dogfighting*, ESPN (May 31, 2007), http://sports.espn.go.com/nfl/news/story?id=2884063 (discussing proliferation of illegal fighting).

177. *See Dogfighting a Booming*, *supra* note 176 (reporting growth of dogfighting despite its prohibition in all fifty states).

178. *See id.* (estimating prize sums); *see also* Naqi, *supra* note 176 (illustrating lure of dogfighting).

have an organized infrastructure for what is a criminal industry."[179] Dog fighters and enthusiasts publish around twelve underground magazines and around six registries to advertise fight locations, outcomes, and training tools.[180]

Dogfighting is highly elusive because matches take place on farms or other properties in rural areas, and participants station "lookouts" in the surrounding areas to warn of intruders or police presence.[181] The sport is often synonymous with other criminal activity like gambling, drugs, prostitution, and illegal firearms.[182] A Louisiana state trooper commented, "[t]he drugs and weapons associated with [the] sport are unbelievable."[183] Often, children are present at these events, either as spectators or participants in the wagering process.[184]

Dogfighting causes considerable harm to the animals involved.[185] The most widely used dogs are pit bulls.[186] To train the dogs to fight, trainers force dogs to run on makeshift treadmills for extended periods of time, file their teeth to a sharp point, and pack ground up glass in the dogs' fur before a fight.[187] Goodwin stated that "[t]he gameness that the dog fighters strive for – and 'gameness' is the willingness to continue fighting, even in the face of ex-

179. *Id.*

180. *See id.* (summarizing business aspects of dog fighting). The Sporting Dog Journal is considered the leading magazine for dogfighting enthusiasts with over 3,000 subscribers. *See* Tom Weir, *Vick Case Sheds Light on Dark World of Dogfighting*, USA TODAY (July 26, 2007, 7:19 PM), http://www.usatoday.com/sports/football/nfl/falcons/2007-07-18-vick-cover_n.htm (reiterating size of industry). "Police say copies of the magazine commonly are found at raid sites because it tracked breeding lines and performances in 1,500-2,000 fights a year." *Id.*

181. *See* Dogfighting a Booming, *supra* note 176 (noting lookouts can be stationed as far as eight miles away from fight locations).

182. *See Illegal Animal Fighting*, PET-ABUSE.COM, http://www.pet-abuse.com/pages/animal_cruelty/animal_fighting.php (last visited Oct. 6, 2011) (listing dangers associated with dogfights).

183. Weir, *supra* note 180.

184. *See Illegal Animal Fighting*, *supra* note 182 (discussing use of children as "runners" during matches). "[T]oddler-sized chairs and nearby milk and cookies suggest some people consider dogfighting family entertainment." Weir, *supra* note 180. "Dog fighting promotes crime, such as cruelty to animals, violence to others, theft, drug use/possession/distribution, illegal weapons use/possession, and gambling." *Dog Fighting*, *supra* note 39.

185. *See Dog Fighting*, *supra* note 39 (describing effects of dogfighting on animal participants).

186. *See id.* (emphasizing extreme danger to adults and children).

187. *See* Tori Richards, *Pit Bull Dogfighting Compound Raided in LA; 17 Dogs Rescued*, AOL ORIGINAL (Mar. 3, 2011, 3:37 PM), http://www.aolnews.com/2011/03/03/pit-bull-dogfighting-compound-raided-in-la-17-dogs-rescued/ (reporting horrors found during raid on dogfight compound); *see also* Weir, *supra* note 180 (describing dog cruelty discovered during dogfighting raids).

treme pain, even in the face of death – is something that's bred into the dogs."[188]

The post-fight environment provides little improvement for the animals.[189] The kennels used to house dogs are frequently covered in blood from untreated wounds.[190] Commonly, if a dog survives a lost fight, he will be electrocuted, shot, hung, or burned.[191] Any dogs fortunate to survive long enough to exit the dog fighting industry suffer irreparable physical and emotional scars.[192]

In what is surely the most well publicized, but by no means the first, illustration of the dogfighting industry, then Atlanta Falcon star quarterback Michael Vick was charged with animal fighting in 2007.[193] On April 25, 2007, during a search of Vick's Surry County, Virginia property, police discovered sixty-six dogs, rape stands, pry bars, treadmills, and bloodstains, all evidence of a comprehensive dogfight operation.[194] Investigators later discovered that Vick had trained over 2,000 dogs during his thirty-year involvement in the industry.[195] He was sentenced to twenty-three months in prison.[196]

The NFL responded swiftly, denouncing its players' participation in any dog fighting activities and assuring that it would thor-

188. Naqi, *supra* note 176.

189. *See* Weir, *supra* note 180 (summarizing housing environment for fight dogs).

190. *See id.* (describing inhuman conditions).

191. *See id.* (quoting findings of Washington state animal control officer).

192. *See* Richards, *supra* note 187 ("It's very difficult to rehab the animals because it's hard to turn them into loving pets after such a traumatic experience.").

193. *See* James Alder, *Michael Vick Dogfighting Scandal*, ABOUT.COM, http://football.about.com/od/teamsfalcons/i/Michael-Vick.htm (last visited Oct. 6, 2011) (outlining Vick's crimes). Vick was charged with "conspiracy to travel in interstate commerce in aid of unlawful activities and to sponsor a dog in an animal fighting venture." *Id.* Vick operated a dogfight operation named "Bad Newz Kennels." *See* Trish Turner, Michael De Dora Jr. & The Associated Press, *Michael Vick Dogfighting Case Makes Way to Floor of U.S. Senate*, FOX NEWS (July 19, 2007), http://www.foxnews.com/printer_friendly_story/0,3566,290061,00.html (summarizing Senate discussion of Vick case). Notably, former NBA forward Qyntel Woods and former NFL running back LeShon Johnson were also convicted of charges stemming from animal abuse. *See* Naqi, *supra* note 176 (questioning proliferation of dogfighting amongst professional athletes).

194. *See* Alder, *supra* note 193 (providing timeline of Vick investigation).

195. *See* Naqi, *supra* note 176 (evidencing long history of Vick's dogfights).

196. *See* Juliet Macur, *Vick Receives 23 Months and a Lecture*, N.Y. TIMES, Dec. 11, 2007, http://www.nytimes.com/2007/12/11/sports/football/11vick.html?_r=2 (commenting on harsh punishment handed down by U.S. District Court Judge Henry E. Hudson). Interestingly, Robert Stevens's sentence was fourteen months longer than Vick's, even though Vick actually participated in the dogfights. *See* Adam Liptak, *Free Speech Battle Arises from Dog Fighting Videos*, N.Y. TIMES, Sept. 18, 2009, http://www.nytimes.com/2009/09/19/us/19scotus.html?pagewanted=print (relating Stevens's case to publicized instances of dogfighting).

oughly investigate and punish any proof of the crime.[197] Unlike the animals used in his operation, the direct career repercussions for Vick were short-lived as the Philadelphia Eagles quickly signed Vick upon his release from prison.[198]

Aside from the postulated subculture of dogfighting in the athletic profession, examples of animal cruelty are rampant in contemporary entertainment culture.[199] Goodwin believes "that certain elements of the pop culture have glamorized dogfighting and glamorized big, tough pit bulls."[200] Examples of celebrity disregard for animals include: Kim Kardashian holding a kitten by its scruff, Paris Hilton and her seeming lack of concern for her pets, Cesar Millan and his training techniques, Jesse James and DMX caught dogfighting, and even Prince Harry who was accused of mistreating his polo horse.[201]

Currently, Mike Tyson is facing scrutiny for his new series "Taking on Tyson," which depicts Tyson's adventures in pigeon racing.[202] PETA claims that "racing pigeons are forced to fly hundreds of miles in all weather extremes as they attempt to get home, and are vulnerable to both natural predators such as hawks and cruel

197. *See* Naqi, *supra* note 176 ("Dogfighting is cruel, degrading, and illegal. We support a thorough investigation into any allegations of this type of activity. Any NFL employee proved to be involved in this type of activity will be subject to prompt and significant discipline under our personal conduct policy.").

198. *See* Patrik Jonsson, *In Philadelphia, a Michael Vick Atlanta Never Knew*, CHRISTIAN SCI. MONITOR, Sept. 22, 2010, http://www.csmonitor.com/USA/2010/0922/In-Philadelphia-a-Michael-Vick-Atlanta-never-knew (summarizing reasons for Vick's comeback and reputation renewal).

199. *See* Olivia Allin, *10 Celebrities Accused of Mistreating Animals*, THE FRISKY (Apr. 21, 2010, 6:00 PM), http://www.thefrisky.com/post/246-10-celebrities-accused-of-mistreating-animals (listing popular celebrities accused of mistreating animals).

200. Naqi, *supra* note 176.

201. *See* Allin, *supra* note 199 (outlining various accusations against celebrities regarding their treatment of animals); *see also* Jane Lasky, *Prince Harry: Animal Cruelty Charges Pending Against Him*, EXAMINER.COM (Sept. 4, 2010, 4:42 PM), http://www.examiner.com/celebrity-headlines-in-national/prince-harry-animal-cruelty-charges-pending-against-him-photos (criticizing Harry neglecting horse); Associated Press, *DMX arrested on drug, animal cruelty charges*, TODAY (May 9, 2008, 4:49 PM), http://today.msnbc.msn.com/cleanprint/cleanprintproxy.aspx?1300135574291 (detailing arrest and charges relating to dogfighting). *But see Celebrities Who Love Animals*, ANIMALS MATTER TOO!, http://www.animalsmattertoocom/celebrities.htm (last visited Oct. 6, 2011) (listing over one-hundred celebrities who advocate on behalf of animal rights).

202. *See* David Moye, *PETA Protests Mike Tyson Pigeon Show*, AOL ORIGINAL (Mar. 9, 2011, 1:00 PM), http://www.aolnews.com/2011/03/09/peta-protests-mike-tysons-pigeon-racing-tv-show/ (discussing PETA accusations).

humans who view them as 'pests.'"[203] Conduct aside, Tyson's new show reflects a growing trend of television networks' inclination to air programming that contains what many consider animal cruelty.[204]

Another example, the Discovery Channel's Man vs. Wild, has been likened to crush videos.[205] The host, Bear Grylls, has caught and bludgeoned a snake to death, consumed a live fish, and decapitated and consumed a small snake, all without provocation from the animals.[206] From dogfighting among athletes to cruelty on family programming, one can illustrate hundreds of examples of animal abuse in the current sports and entertainment realm.[207] The escalating issue came to a head in *United States v. Stevens*.[208]

IV. ANALYSIS

A. Narrative Analysis

1. *Steadfast Reluctance to Carve Out New Categorical Exception to Free Speech*

Before striking down § 48 as facially invalid, the Court briefly entertained the government's primary argument that the class of depictions of animal cruelty reached by the statute are categorically unprotected by the First Amendment.[209] Because § 48 regulates speech based on content, the Court restated its holding that content-based regulations of speech are presumptively void.[210] Reviewing past precedent, the Court described the limited areas of content-based speech that are subject to restriction without raising constitutional problems: obscenity, fraud, incitement, and speech integral to criminal conduct.[211]

203. *Id.* Pigeons are conditioned to fly up to six hundred miles at forty-five miles per hour, and a prized pigeon can sell for up to $140,000. *See id.* (commenting on motivation behind pigeon racing).

204. *See* Michael Mountain , *Discovery Channel's Crush Videos*, ALL-CREATURES.ORG, http://www.all-creatures.org/articles/ar-channel.html (last visited Oct. 6, 2011) (lamenting Discovery Channel's acceptance of animal show host behaviors).

205. *See id.* (struggling to distinguish between show and illegal crush videos).

206. *See id.* (pleading with Discovery Channel to cancel its troubling programming).

207. *See supra* notes 193-206 and accompanying text for further discussion of animal cruelty in pop culture and athletics.

208. *See* United States v. Stevens, 130 S. Ct. 1577 (2010) (addressing contention between depictions of animal cruelty and First Amendment).

209. *See id.* at 1584 (entertaining government contention regarding animal cruelty as a class).

210. *See id.* at 1584 (reiterating government's burden to rebut presumption).

211. *See id.* (reviewing prior precedent concerning categorical exclusions); Beauharnais v. Illinois, 343 U.S. 250 (1952) (defamation); Brandenburg v. Ohio,

The government argued that depictions of animal cruelty lack "expressive value" and are thus not only subject to regulation but are entirely outside of the realm of First Amendment protection all together.[212] While the Court found merit in the long history of Americans' condemnation of animal cruelty, it was unable to glean similar abhorrence for *depictions* of animal cruelty.[213] Relying on the legislature's finding that depictions of animal cruelty have *de minimis* redeeming value, the government proposed a balancing test for categorical exclusions: "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."[214] The government evidenced the Court's own language that the interest in prohibiting certain "evil" speech is so overwhelming that the balance of allowing expressive speech is inherently struck.[215] The Court quickly rejected the argument, describing the government's balancing test as "startling and dangerous."[216] The Court said when it recognizes categorical exceptions, it does not do so based on a cost-benefit balancing test.[217]

The Court relied on its analysis in *Ferber* to distinguish the type of speech in that case, child pornography, against the depictions of

---

395 U.S. 444, 447 (1969) (incitement); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (speech integral to criminal conduct); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (fraud). For further discussion of the Court's precedent in this area, see *supra* notes 109-173 and accompanying text.

212. *See Stevens*, 130 S. Ct. at 1585 (discussing government classification of animal cruelty within First Amendment framework). The Court classified these realms of unprotected speech as "'First Amendment Free Zone[s]'" (quoting Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987)). *See id.* (rejecting government's argument that depictions of animal cruelty fall into unprotected realm).

213. *See id.* (emphasis added) (drawing distinction between depictions of abhorred acts). The government contended that exemptions from First Amendment protection have long been recognized without any historical tradition of regulation in those areas. *See id.* (imploring Court to rely on legislative judgment in the area).

214. *Id.* The government pointed to precedent describing categorical exceptions as "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* (citing R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992)).

215. *See id.* at 1586 (illustrating precedent employing balancing test).

216. *See id.* at 1585 (condemning government balancing test). The Court rejected the idea that only categories of speech that satisfy an ad hoc balancing test against social costs and benefits should be permitted. *See id.* (reiterating invalidity of straight balancing).

217. *See id.* at 1586 (pointing to *Ferber*'s strict scrutiny analysis).

animal cruelty before the Court.[218] It reaffirmed the government's compelling interest in protecting children from abuse and emphasized the overwhelmingly minimal value of the speech in *Ferber*.[219] Furthermore, the Court distinguished *Ferber* because the market for child pornography was "intrinsically related" to the abuse and was "an integral part of the production of such materials, an activity illegal throughout the Nation."[220] The Court restated that speech used as an integral part of violating a criminal statute rarely receives constitutional protection.[221] Failing to draw any comparison between the speech in *Ferber* and the speech prohibited by § 48, the Court concluded its categorical exception analysis by recognizing that there may be areas of speech not yet classified by the Court as worthy of receiving a categorical exception, but that depictions of animal cruelty are not among the worthy few.[222]

2. *Overreaching Statutory Coverage: Facial Invalidity Claim*

Declining to carve out a categorical exception for depictions of animal cruelty, the Court proceeded to analyze Stevens's claim that any conviction secured under § 48 is unconstitutional and facially invalid.[223] The Court reiterated the test for facially invalid claims, stating that Stevens would have to prove "that no set of circumstances exists under which [§ 48] would be valid . . . or that the statute lacks 'any plainly legitimate sweep."[224] The Court also established its second approach to facial invalidity claims, stating a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[225]

Each side argued the facial invalidity claim in light of these two approaches.[226] Stevens argued that § 48 reaches lawful and unlawful activities equally and is thus overbroad.[227] The government em-

218. *See id.* (contending analysis did not rest on balancing of opposing interests).

219. *See id.* (reviewing *Ferber* justifications).

220. *Id.*

221. *See id.* (grounding analysis on well-established categories of unprotected speech).

222. *See id.* (declining proposition to grant itself "freewheeling" authority to carve out categorical exceptions to First Amendment protection based on government's "highly manipulable" balancing test).

223. *See id.* at 1586-87 (introducing facial invalidity challenge).

224. *Id.* at 1587.

225. *Id.*

226. *See id.* at 1586-87 (setting forth comprehensive argument for facial invalidity).

227. *See id.* (outlining permissible and impermissible reach of statute).

phasized its narrow interpretation of the statute as reaching only "extreme" materials.[228] It argued that the statute is plainly legitimate in the realm of crush videos and depictions of animal fighting.[229] Presented with these two arguments, the Court's ultimate determination rested on how broadly it construed the statute.[230]

First, the Court undertook to construe the statute to define its coverage.[231] The Court's first line of attack was directed at the language of the statute.[232] It noted that while the terms "maimed," "mutilated," and "tortured" do imply a degree of cruelty, "wounded," and "killed" do not.[233] Due to these word choices, the Court concluded that the text does not require any element of cruelty in the depictions.[234] The government responded by evincing a common canon of statutory construction, that "an ambiguous term may be 'given more precise content by the neighboring words with which it is associated.'"[235] The Court disagreed, concluding that § 48 contains little ambiguity, and the terms should be construed according to their ordinary meanings, not in relation to each other.[236]

The Court then rejected the government's contention that § 48 requires that the acts depicted be illegal, and there is no risk of innocent conviction under the statute.[237] The Court reasoned that the statute fails to clarify why certain intentional killings are made illegal, and the statute is not limited to violations of laws specifically

228. *See id.* at 1587 (weighing Stevens's argument that § 48 applies to ordinary, lawful depictions against government's contention that statute should be narrowly construed).

229. *See id.* (arguing validity of § 48). The government contended that § 48 has a plainly legitimate sweep and covers several circumstances under which the statute is valid. *See id.* (applying § 48 to overbreadth precedent).

230. *See id.* (construing statute to determine its reach).

231. *See id.* at 1587-88 (citing language derived from *Williams* overbreadth analysis). The Court opined that it would be impossible to classify a statute as overbroad before first deciding how far it reaches. *See id.* at 1587 (reaffirming content of overbreadth doctrine). As § 48 is a federal statute, the Court noted it was unnecessary to defer to the state court's interpretation of its own law. *See id.* at 1588 (justifying Court's head-on approach to interpretation).

232. *See id.* (conducting word-by-word analysis).

233. *See id.* (rejecting government interpretation of § 48). The government proposed that the Court should construe statutory terms in relation to accompanying language and in light of their respective meanings. *See id.* (analyzing government's construction of § 48).

234. *See id.* (commenting on statute's "alarming breadth").

235. *Id.*

236. *See id.* (noting ordinary meanings of "wounded" and "killed" do not automatically elicit cruel implications).

237. *See id.* (relying on state and federal animal laws that are not designed to guard specifically against cruelty).

targeted towards animal cruelty.[238] Furthermore, the Court evinced concern for the jurisdictional reach of the statute, opining that a depiction of legal activity in one state would be subject to regulation if later found in a state in which the conduct was illegal.[239] The Court was unwilling to allow the risk of someone legally producing and distributing a video in his own state and later facing prosecution for the video surfacing in another state through means outside of the perpetrator's control.[240]

The Court then analyzed the role of the exceptions clause in narrowing the statute.[241] The government's interpretation of the exclusions would include any material with "redeeming societal value," "at least some minimal value," "or anything more than 'scant societal value.' "[242] Unfortunately for the government, the Court read the term "serious value" to mean truly serious value, which would not include any material with more than "scant societal value."[243] The Court also noted that most speech would not fall within the statute's exceptions because the instructional value of certain videos is not immediately discernable.[244] The Court concluded that it would have to take an "unrealistically broad reading" of the statute's exception clause to uphold the law on this ground.[245]

The government also attempted to rely on *Miller* when formulating the statute's exceptions clause, a case which held that " 'seri-

238. *See id.* at 1588-89 (resting analysis on examples of legal humane slaughter and provisions designed to protect against endangered species).

239. *See id.* (showing concern for possible misapplication of statute). The Court rested its analysis on the fact that there is substantial disagreement in American society as to what constitutes cruelty to animals. *See id.* at 1589 (recognizing likelihood of broad societal consensus against animal cruelty and problem with relying on consensus alone). The Court proceeded to review the animal cruelty laws of several states, exemplifying its conclusion that the jurisdictional reach of the statute is overly broad. *See id.* (listing range of animal laws in different states).

240. *See id.* (expressing concern for statute's overly broad jurisdictional reach).

241. *See id.* at 1590 (reviewing applicability and reach of exceptions clause).

242. *Id.*

243. *See id.* (declining government's invitation for Court to rely on commonly accepted meaning of "serious").

244. *See id.* (providing examples of nonobvious instructional videos). For example, the Court relied on hunting videos and Spanish bullfights to illustrate its point that it is difficult to classify content that has "serious" value and that which does not. *See id.* (concluding statute cannot be adequately limited in scope).

245. *See id.* (explaining potential problems with government's overly limited reading of exceptions clause).

ous' value shields depictions of sex from regulation as obscenity."[246] The Court said its opinion in *Miller* did not imply that serious value could be used to shield other kinds of speech because most speech would not fall under the exceptions clause but are still subject to First Amendment protection.[247]

In its final failed attempt to redeem the statute, the government reassured the Court that the executive branch would invoke its prosecutorial discretion and would only construe § 48 to reach *extreme* cruelty.[248] The Court refused to honor the government's assurance, stating, "[w]e would not uphold an unconstitutional statute merely because the government promised to use it responsibly."[249] The Court justified its unwillingness on Stevens's conviction itself because despite President William J. Clinton's direction that § 48 only target depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex," Stevens's videos did not remotely fit this description.[250]

The Court emphasized that under no circumstances would it rewrite a law to conform to constitutional requirements.[251] Therefore, the Court held that § 48 was substantially overbroad, and it did not have occasion or necessity to decide whether a law targeted specifically towards crush videos would satisfy constitutional requirements.[252]

3. *Court Muddles Application of Precedent: Justice Alito Dissent*

In his dissent, Justice Alito adopted a slightly different approach than the majority, but also addressed the Court's arguments in his analysis of the statute.[253] He disagreed with the majority in the proposition that § 48 was enacted to suppress speech.[254] Instead, Justice Alito argued § 48 was passed to prevent "horrific acts

246. *See id.* at 1591 (explaining government's reliance on *Miller* when formulating § 48). For a further discussion of *Miller*, see *supra* note 151-152 and accompanying text.

247. *See id.* (determining serious value cannot act as general shield for speech).

248. *See id.* (emphasis added) (criticizing government's promise).

249. *Id.*

250. *See id.* (interpreting President Clinton's statement as catch-all limitation on statute's reach).

251. *See id.* at 1591-92 (noting risk of serious invasion of legislative domain).

252. *See id.* at 1592 (affirming Third Circuit judgment).

253. *See id.* at 1592-1602 (Alito, J., dissenting) (looking to intent behind enactment of § 48).

254. *See id.* (Alito, J., dissenting) (proposing alternative construction of § 48).

of animal cruelty," a form of entertainment with no social value.[255] He warned that the Court's decision had the effect of legalizing crush videos and would likely precipitate a reemergence of the depraved depictions.[256] In his view, the Third Circuit should have directly decided whether § 48 was unconstitutional as applied to Stevens's videos, instead of immediately holding the statute facially invalid.[257] Regardless, Justice Alito's dissent attacked the majority's overbreadth analysis.[258]

Justice Alito's proposed approach to an overbreadth challenge requires a party challenging the constitutionality of a statute to show that the statute violates the challenger's own rights.[259] Therefore, it would be unnecessary to apply an overbreadth analysis if the statute in question is unconstitutional as applied to the challenger before the Court.[260] Nevertheless, he did not believe that § 48 was overbroad in the analysis employed by the majority.[261]

Reaffirming the Court's interpretation of the overbreadth doctrine, Justice Alito discussed the balance to be struck and emphasized that the statute's overbreadth must be "*substantial*" relative to the statute's "plainly legitimate sweep."[262] He listed three important elements of the overbreadth challenge: that it be applied to "real-world conduct, not fanciful hypotheticals"; that it be determined from the statute's text and "*from actual fact*"; and that "there

255. *See id.* at 1592 (Alito, J., dissenting) (predicting harmful effect of Court's decision).

256. *See id.* (Alito, J., dissenting) (disclaiming Court's approach to analysis). In fact, the Third Circuit's decision had that precise effect, and the Supreme Court's decision will no doubt encourage a further proliferation of crush videos. *See also* Anclien, *supra* note 1, at 5 (emphasizing reemergence of crush videos on Internet in wake of Third Circuit decision).

257. *See Stevens*, 130 S. Ct. at 1593 (Alito, J., dissenting) (recognizing Court's unwillingness to adopt Third Circuit's reasoning). Justice Alito would remand the case for further review from the Third Circuit on the issue of the constitutionality of Stevens's videos. *See id.* (Alito, J., dissenting) (suggesting alternative course of action).

258. *See id.* (Alito, J., dissenting) (concluding § 48 does not ban substantial amount of protected speech).

259. *See id.* (Alito, J., dissenting) (discussing First Amendment exception to general overbreadth rules).

260. *See id.* at 1593-94 (Alito, J., dissenting) (encouraging use of overbreadth challenge as last resort).

261. *See id.* at 1594 (Alito, J., dissenting) (proposing flawed conclusion resulting from improper interpretation of § 48).

262. *See id.* (Alito, J., dissenting) (restating *Williams*'s overbreadth doctrine in regards to protected speech). "[T]he doctrine seeks to balance the 'harmful effects' of 'invalidating a law that in some of its applications is perfectly constitutional' against the possibility that 'the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech.'" *Id.* (Alito, J., dissenting) (quoting United States v. Williams, 553 U.S. 285, 292 (2008)).

must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections."[263] Justice Alito's main quarrel with the majority's opinion rested in its failure to decide whether § 48 was constitutional as applied to crush videos and depictions of animal fights.[264] Instead, the Court concluded that it was unconstitutional as applied to hunting videos and depictions of animal slaughter for food.[265]

Justice Alito evidenced serious flaws in the Court's interpretation of § 48 as applied to depictions of hunting activities.[266] First, he noted that hunting is legal in all fifty states, and § 48 only applied to depictions that were illegal in the jurisdiction in which the "depiction [was] created, sold, or possessed."[267] Therefore, an overwhelming majority of depictions of hunting activities would fall outside of the statute's reach.[268] Justice Alito's dissent then addressed the majority's contention that certain hunting activities are illegal in some states and that hunting is banned completely in the District of Columbia; thus, people selling depictions of certain illegal or legal hunting acts in the wrong jurisdiction would be subject to conviction under § 48.[269] He said the Court was flawed in this analysis because § 48 only applied to depictions of "animal cruelty."[270] Justice Alito would interpret the statute to "apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, not to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty."[271]

Furthermore, even if by some stretch of the imagination legal hunting activities came under the umbrella of § 48, Justice Alito concluded that these depictions would fall within the exceptions

263. *See id.* (Alito, J., dissenting) (listing critical components of overbreadth analysis).

264. *See id.* (Alito, J., dissenting) (rejecting majority's scope of review).

265. *See id.* (Alito, J., dissenting) (assuming Court accepted statute's validity as applied to depictions of dogfights and crush videos).

266. *See id.* at 1594-96 (Alito, J., dissenting) (criticizing Court's reliance on hunting videos to demonstrate overbreadth of § 48).

267. *See id.* at 1594-95 (Alito, J., dissenting) (stating Court's interpretation of statute as applied to hunting videos is flawed because hunting is legal in all fifty states).

268. *See id.* at 1595 (Alito, J., dissenting) (emphasizing majority's apparent strain to find overbreadth).

269. *See id.* (Alito, J., dissenting) (describing flawed Court opinion).

270. *See id.* (Alito, J., dissenting) (modifying Court's construction of § 48).

271. *Id.* (Alito, J., dissenting). Justice Alito discussed that most state laws exclude wildlife and other legal hunting activities, so the statute would reach virtually zero depictions of legal hunting activities. *See id.* (Alito, J., dissenting) (mentioning state specific definitions or exemptions).

clause, because "the predominant view in this country has long been that hunting serves many important values," and it is doubtful Congress intended § 48 to reach hunting activities.[272] He concluded by stating that even if there are isolated incidents where § 48 would reach legal hunting activities, these incidents are insubstantial and do not indicate that § 48 bans a "substantial amount of protected speech" as required in an overbreadth challenge.[273]

Justice Alito next considered § 48 as applied to depictions of legal animal slaughter, specifically slaughter for food purposes, and set out two reasons why these depictions did not warrant an overbreadth analysis.[274] Similar to his argument for depictions of hunting activities, Justice Alito again emphasized that § 48 only reached depictions of animal cruelty, and animal cruelty laws typically do not cover depictions of legal animal slaughters or tail docking of dairy cows.[275] Furthermore, these depictions would likely classify as having educational or journalistic value, forcing them into the exceptions clause of § 48.[276] The "veritable sliver of unconstitutionality" of a small subset of these videos would not be sufficient to strike down § 48 in its entirety.[277]

In his next approach, Justice Alito discussed crush videos specifically to argue that § 48 has "a substantial core of constitutionally permissible applications."[278] Reviewing the basis for Congress's initiative in passing § 48, Justice Alito pointed out that the underlying conduct in crush videos is unquestionably subject to prohibition but is extremely difficult to prosecute based on the nature of crush

272. *See id.* at 1595-96 (Alito, J., dissenting) (reviewing presidential and congressional acts illustrating American's general acceptance and admiration for hunting activities).

273. *See id.* at 1596 (Alito, J., dissenting) (reiterating requirement that challenged statute intrude upon substantial amount of protected speech).

274. *See id.* at 1596-97 (Alito, J., dissenting) (continuing comprehensive review of Court's examples of § 48 restricting speech).

275. *See id.* at 1597 (Alito, J., dissenting) (summarizing state statutes excluding humane slaughter and practices undertaken as ordinary dairy farming activities).

276. *See id.* (Alito, J., dissenting) (suggesting depictions of animal slaughters for food or tail docking would easily qualify under exceptions clause). Justice Alito envisioned videos showing the proper method of tail docking or news pieces regarding the inhumane treatment of animals. *See id.* (Alito, J., dissenting) (noting clear lack of substantial overbreadth).

277. *See id.* (Alito, J., dissenting) (emphasizing Court's duty to interpret statutes specifically to avoid "serious constitutional concerns").

278. *See id.* (Alito, J., dissenting) (introducing statute's plainly legitimate sweep).

videos.[279] Thus, the only effective means of combating the underlying conduct was to prohibit the commercial sales of the videos.[280] Not insignificantly, Justice Alito noted the overwhelming success of § 48, both domestically and internationally, at destroying the crush video industry.[281] Furthermore, Justice Alito emphasized the subsequent reemergence of crush videos in the wake of the Third Circuit's decision.[282]

Resting his dissent on his analysis of *Ferber*, Justice Alito concluded the Court's analysis of *Ferber* was misguided.[283] First, similar to the child pornography in *Ferber*, Justice Alito commented on the inherent link between crush videos and violent criminal conduct, as animal cruelty crimes are committed for the sole purpose of creating the videos.[284] He rejected the Court's disregard of *Ferber*, because "[t]he First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes."[285] In his reasoning, Justice Alito targeted three influential aspects of *Ferber* for comparison to crush videos: the fact that child pornography inflicts severe injury upon the videos' subjects; that the underlying crimes could not be eradicated without targeting the videos themselves; and that the value of child pornography is *de minimis* and greatly outweighed by the underlying evil.[286]

In comparison to crush videos, Justice Alito first pointed out that the conduct depicted in crush videos is illegal in all fifty states and inflicts severe injury and excruciating pain, ultimately resulting in the death of its subjects.[287] Secondly, the acts depicted in crush

279. *See id.* at 1598 (Alito, J., dissenting) (implying displeasure with Court's lack of deference to legislative judgment). Justice Alito noted the intentional shielding of the women torturers and the difficulty in identifying the location of video production for jurisdictional purposes. *See id.* (Alito, J., dissenting) (listing challenges to prosecution).

280. *See id.* (Alito, J., dissenting) (restating legislative justifications for passing § 48).

281. *See id.* (Alito, J. dissenting) (reviewing post- § 48 statistics).

282. *See id.* (Alito, J. dissenting) (praising overwhelming success of statute).

283. *See id.* at 1599 (Alito, J. dissenting) (emphasizing majority's misapplication of overbreadth analysis established in *Ferber*).

284. *See id.* (Alito, J. dissenting) (reevaluating legislature's reliance on evidence).

285. *Id.* at 1598-99 (Alito, J. dissenting).

286. *See id.* at 1599-1600 (Alito, J. dissenting) (comparing *Ferber* child pornography factors to crush videos and other depictions of animal cruelty).

287. *See id.* (Alito, J., dissenting) (arguing lack of First Amendment protection for persons who commit cruelty acts). Those who record and sell the videos are likely to be criminally culpable, as well as those who commission the production of crush videos to meet individual fetishes. *See id.* at 1600 (Alito, J. dissenting) (fail-

videos cannot effectively be prevented without prohibiting the targeted conduct.[288] Finally, like the conduct in *Ferber*, Justice Alito noted the harm caused by the production of crush videos outweighs any conceivable value the depictions may possess.[289] Justice Alito agreed with the Court that the harm to be prevented in crush videos pales in comparison to the harm to be prevented from child pornography.[290] Yet, despite this considerable distinction, the government nonetheless has a "compelling interest" in preventing the animal torture in crush videos and ensuring that criminals do not profit from their heinous crimes.[291]

Finally, Justice Alito also applied the *Ferber* framework to depictions of violent animal fights, concluding that § 48 is constitutional as applied.[292] First, he repeated his comparison of *Ferber* to Stevens's conduct by noting that depictions of dogfights, like crush videos, "record the actual commission of a crime involving deadly violence" and are illegal in all fifty states.[293] Similarly, Congress could, and did, properly conclude that the most effective method of combating dogfights was to combat the depictions of the criminal acts, as the success of the dogfighting industry rests on the success of the proliferation of the videos.[294] Thirdly, the depictions of dogfights subject to conviction under § 48 have no discernable so-

---

ing to distinguish between those who commit acts and those who knowingly aid in commission of those acts).

288. *See id.* (Alito, J. dissenting) (comparing difficulty in prosecuting animal cruelty actors to hurdles when combating child pornography). The alternative to banning the videos is tolerating the underlying criminal conduct, a choice Congress was not willing to accept. *See id.* (Alito, J. dissenting) (praising government actions in passing statute).

289. *See id.* (Alito, J. dissenting) (confirming proper application of statute and exceptions clause).

290. *See id.* (Alito, J. dissenting) (contending Court's conclusion rested on distinction between animals and children).

291. *See id.* at 1600-01 (Alito, J. dissenting) (rejecting Third Circuit's second-guessing of legislature's judgment). *See also* Ricaurte, *supra* note 2, at 195-205 (arguing for animal cruelty's inclusion in Court's acceptance of Son of Sam anti-profit statutes).

292. *See Stevens*, 130 S. Ct. at 1601 (Alito, J., dissenting) (narrowing analysis specifically to dogfights because of their commonality and relevance to Stevens's case).

293. *See id.* (Alito, J., dissenting) (applying *Ferber* framework to § 48).

294. *See id.* (Alito, J. dissenting) (mentioning underground nature of crush videos and dogfighting industry). As Justice Alito states, "[t]he commercial trade in videos of dogfights is 'an integral part of the production of such materials.'" *See id.* (Alito, J. dissenting) (citing N.Y. v. Ferber, 458 U.S. 747(1982)). Depictions of dogfights "fuel the market for, and thus [perpetuate] the perpetration of, the criminal conduct depicted in them." *Id.* (Alito, J., dissenting).

cial value.[295] Finally, the long-lasting harm inflicted upon the dogs greatly outweighs any appreciable social value the videos may contain.[296] Congress has a compelling interest in enforcing the nation's criminal laws against animal cruelty and preventing criminals from achieving monetary gain from their crimes.[297] In conclusion, Justice Alito reemphasized that § 48 has "a substantial core of constitutionally permissible applications" and that Stevens did not meet his burden of establishing that the statute's impermissible applications are "substantial" when compared to its "plainly legitimate sweep."[298]

B. Critical Analysis

1. *Faulty Application of Content-Based Speech Precedent*

The Court only briefly considered the issue of the statute as a content-based restriction on speech necessitating the application of strict scrutiny, but the case law suggests a different approach more appropriate for the content of § 48.[299] The Court's analysis in this regard suggests an evolving view of the type of restriction that qualifies as content-based versus content-neutral.[300] Typically, a content-based restriction on speech is one that restricts speech because of the message that is expressed.[301] Yet, it is difficult to discern the message that is expressed in either crush videos or dogfighting videos like those in *Stevens*.[302] These videos are not produced as a

295. *See id.* at 1602 (Alito, J. dissenting) (noting exceptions clause exempts material with appreciable social value).

296. *See id.* (Alito, J. dissenting) (referring to "trifling value" depictions arguably possess).

297. *See id.* (Alito, J. dissenting) (opining Congress's compelling interest in passing § 48).

298. *See id.* (Alito, J. dissenting) (concluding § 48 is not overbroad as applied by majority).

299. *See* Kinsella, *supra* note 5, at 372-81 (reviewing Supreme Court case law specific to strict scrutiny analysis). For a further discussion of the Court's strict scrutiny review, see *supra* notes 109-135 and accompanying text.

300. See Kinsella, *supra* note 5, at 372-81 (describing Supreme Court case law specific to strict scrutiny analysis). *See also* Recent Case, *Constitutional Law — First Amendment — En Banc Third Circuit Strikes Down Federal Statute Prohibiting the Interstate Sale of Depictions of Animal Cruelty*, 122 HARV. L. REV. 1239, 1245 (2009) (criticizing Third Circuit's application of case law). It should be noted that the Supreme Court followed the Third Circuit's reasoning in this respect. For a further discussion, see *supra* notes 209-222 and accompanying text.

301. *See* Kinsella, *supra* note 5, at 356 (defining content-based restrictions on speech). For further discussion of the Court's content-based jurisprudence, see *supra* notes 109-135 and accompanying text.

302. *See* Anclien, *supra* note 1, at 46-48 (attempting to discern possible expressive value contained in crush videos); *see also* Brief Amicus Curiae of Animal Legal Defense Fund in Support of Petitioner at 5, United States v. Stevens, 130 S. Ct.

means of advancing a political, social, or moral viewpoint, and it is perplexing to discern a motive besides economic reward.[303] The videos exist purely because of a commercial market that supports their production.[304] Additionally, even if the depictions, in some form, evince an expressive message, the content would be beyond the reach of § 48 which exempts protected messages.[305] The Court's analysis of the issue seems at odds with its reasoning in *R.A.V.*, *Church of the Lukumi*, and *Playboy*.[306]

The justifications for the right of free speech outlined in *Playboy* fail to justify why the Court classified § 48 as a content-based restriction on speech.[307] Crush videos and dogfighting videos do not influence, express, or test people's convictions and beliefs; they do not bring beliefs to bear on government and society; they do not contribute to the development of personality; and they do not aid the citizenry in seeking out and rejecting ideas.[308] The videos are driven by pure economic motive void of any speech or conduct worthy of First Amendment protection.[309]

1577 (2009) (No. 08-769) [hereinafter Brief of Animal Legal Defense] (arguing depictions of animal cruelty contain no expressive content, and § 48 does not criminalize protected speech). The Animal Legal Defense Fund employs the legal system to advance animal interests and protect animal lives. *See id.* at 1 (describing background of interest in amicus curiae). "This statute has nothing to do with the offense of the message. It has to do with trying to dry up an underlying market for animal cruelty." Bill Mears, *High Court Debates Dog Fighting Videos*, CNN.COM (Oct. 6, 2009), ERROR! BOOKMARK NOT DEFINED..

303. *See* Anclien, *supra* note 1, at 38-40 (contending crush videos do not fall within framework of policy interests supported by First Amendment rights). For a background of crush videos, *see supra* notes 1-11 and accompanying text. For a discussion of the industry surrounding animal cruelty, see *supra* notes 175-207 and accompanying text.

304. *See* Brief of Animal Legal Defense, *supra* note 302, at 26 (applying crush videos to *Ferber* factors, specifically the commercial market factor).

305. *See id.* at 29 (confirming lack of expressive messages in crush videos).

306. *See* Kinsella, *supra* note 5, at 362-76 (summarizing *Church of the Lukumi* analysis and arguing Court misapplied precedent). For a further discussion of the aforementioned cases, see *supra* notes 113-135 and accompanying text.

307. For a further discussion of the Court's reasoning in *Playboy*, see *supra* notes 127-135 and accompanying text.

308. *See* Reynolds, *supra* note 4, at 355-66 (providing overview of free speech theories and rejecting inclusion of depictions of animal cruelty within any posited theory).

309. *See* Anclien, *supra* note 1, at 32 (explaining economic incentive to produce crush and dogfighting videos); *see also* Ricaurte, *supra* note 2, at 200 (noting Court's compelling interest in preventing criminals, in particular animal cruelty perpetrators, from profiting from their crimes). *But see* Joan Biskupic, *Supreme Court Kills Animal-Cruelty Law*, USA TODAY (Apr. 22, 2010, 11:02 AM), http://www.usatoday.com/news/washington/judicial/2010-04-20-animal-cruelty-supreme-court_n.htm (applauding Court for affirmation of First Amendment rights regardless of social value).

Furthermore, in *R.A.V.*, the Court accepted a basic balancing test to weigh the societal value of speech against the social interest in order and morality.[310] If there is no danger of idea or viewpoint discrimination, then the restriction is likely to be deemed a content-neutral restriction on speech.[311] It is startling to think that the conduct depicted in crush videos and other depictions of animal cruelty can be perceived as conveying an idea or a particular viewpoint.[312] Additionally, despite contentions that crush videos likely classify as obscene, the Court sidestepped the issue of whether § 48 is an attempt at controlling the secondary effects of depictions of animal cruelty, which would classify it as a content-neutral restriction on speech.[313] In *R.A.V.*, the Court held that the government may control the secondary effects of speech without reference to the speech content.[314] Yet, in its analysis, the Court failed to consider even a single, well-evidenced secondary effect of permitting depictions of animal cruelty, such as gambling, weapons, and drugs.[315] The Court also did not address the established causal link between animal cruelty and societal ills, such as the resulting human cruelty.[316]

Finally, in *Church of the Lukumi*, the Court implied its acceptance of a compelling governmental interest in preventing the suffering or mistreatment of animals.[317] While it is well established

310. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382-83 (1992) (balancing social value of speech with social interest in prohibiting its dissemination).

311. *See id.* at 388 (distinguishing between viewpoint discrimination and content-neutral regulations).

312. *See* Anclien, *supra* note 1, at 46-48 (rejecting finding of expressive value); *see also* Brief of Animal Legal Defense, *supra* note 302, at 5 (failing to discern idea or viewpoint furthered by crush videos).

313. *See* Kinsella, *supra* note 5, at 383 (illustrating link between depictions of animal cruelty and human violence); *see also* Ricaurte, *supra* note 2, at 205 (listing secondary effects accompanying dissemination of depictions of animal cruelty).

314. *See R.A.V.*, 505 U.S. at 389 (explaining validity of secondary effects doctrine).

315. *See* Ricaurte, *supra* note 2, at 205 (using secondary effects of animal cruelty as justification for prohibiting production). For a discussion of additional research regarding harms associated with animal cruelty, see *supra* notes 32-40 and accompanying text.

316. *See* Kinsella, *supra* note 5, at 377-81 (displaying research regarding human ills associated with animal cruelty). "Violence against animals affects many people: the animal involved, the family members of the animal, the family of the abuser, and any potential future victims." Salerno, *supra* note 34. One source postulated that the Court sidestepped this issue because "legislators are unaware of the strong connection between violence towards animals and violence towards humans." Ellington, *supra* note 36.

317. *See* Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 535 (1993) (accepting government justification); *see also* Brief for a Group of American Law Professors as Amicus Curiae in Support of Neither Party at 9,

that the Court relies on precedent in reaching a decision, the comparison it attempted to draw between preventing cruelty to humans and the lesser interest in preventing cruelty to animals is an impossible standard to satisfy.[318] According to two commentators, "when animal and human interests come into conflict, human interests, quickly and unsurprisingly, trump the ethical and moral arguments favoring animal protection."[319] In fact, when the Court analyzes the issue of the legitimacy of a government interest, it often does so without reference to other disparate interests in other cases.[320] Simply because the interest in preventing harm to animals pales in comparison to the interest in preventing harm to humans does not mandate that animals should not receive protection from the government or the Court.[321]

2. *Court's Aversion to Create a New Category of Unprotected Speech*

In the Court's discussion of whether it should carve out an additional category of unprotected speech for depictions of animal cruelty, it both contradicted precedent and failed to appreciate the similarity between the speech prohibited by § 48 and prior categories of unprotected speech.[322] First, despite the Court's warning

United States v. Stevens, 130 S. Ct. 1577 (2009) (No. 08-769) [hereinafter Brief for Professors] (contending Court assumed government interest in preventing animal cruelty was compelling in *Church of the Lukumi*); Brief of Humane Society, *supra* note 7, at 18 (arguing Court's mistaken reliance on *Church of the Lukumi*).

318. *See* China, *supra* note 30, at 4 (conveying inappropriateness of comparing interests associated with child protection with that of animal protection); *see also* Reynolds, *supra* note 4, at 384-85 (arguing interests associated with animal protection must be similarly compelling to interests associated with humans as "debatable and inapposite").

319. Megan A. Senatori & Pamela D. Frasch, *The Future of Animal Law: Moving Beyond Preaching to the Choir*, 60 J. OF LEGAL EDUC. 209, 216 (2010).

320. *See* Reynolds, *supra* note 4, at 385 (devaluing Court's lack of occasion to consider whether animals garner similar compelling interests from government). For a further discussion of a finding of a compelling interest, see *supra* notes 73-135 and accompanying text.

321. *See* China, *supra* note 30, at 4 (rejecting comparison of interests associated with child protection with that of animal protection); *see also* Reynolds, *supra* note 4, at 384-85 (noting irrelevance of comparing human interests to animal interests).

322. *See* Reynolds, *supra* note 4, at 367-87 (justifying restrictions on depictions of animal cruelty under incitement of violence, obscenity, and child pornography doctrines); *see also* Ricaurte, *supra* note 2, at 188-95 (linking applications of animal cruelty to already established categories of unprotected speech). "[T]here are very specific types of speech that we, as a society, have deemed so despicable and so lacking in merit that they do not deserve protection, among them child pornography obscenity, threats and incitement of violence. Animal cruelty should be one of these unprotected categories." Chris Palmer & Peter Kimball, *Supreme Court Gets It Wrong With Animal Cruelty Ruling*, SFGATE.COM (Apr. 23, 2010), http://articles.sfgate.com/2010-04-23/opinion/20861742_1_animal-mutilation-animal-cruelty-act-

toward the government that it would never adopt a simple ad hoc, cost-benefit balancing test to determine if a particular type of speech warrants First Amendment protection, it used this precise approach in several free speech cases.[323] In *Chaplinsky*, the Court explicitly stated that certain speech has such slight societal value that the right to free speech can be trumped by the social interest in order and morality.[324] The Court repeated this language again in *Ferber*, *R.A.V.*, and *Williams*.[325]

The Court also failed to entertain the notion that depictions of animal cruelty can fall into several established categories of unprotected speech.[326] Yet, in *Giboney*, the Court's core premise was that speech integral to conduct in violation of a valid criminal statute is not worthy of First Amendment protection.[327] Even without the enactment of § 48, depictions of animal cruelty violate all fifty states' animal cruelty laws.[328] Violent criminal conduct is not protected even if it exhibits expressive value, which in Stevens's case, the dogfighting videos had no discernable value.[329] While discussing

free-speech. For a further discussion of categories of unprotected speech, see *supra* notes 136-172 and accompanying text.

323. *See* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (disclaiming application of ad hoc balancing test). For further discussion of the Court's rejection of a balancing test, see *supra* notes 214-217 and accompanying text.

324. *See* Chaplinksy v. New Hampshire, 315 U.S. 568, 572 (1942) (comparing speech value to valid social internets in restricting speech).

325. For a further discussion of *R.A.V.*, see *supra* notes 113-119 and accompanying text. For a further discussion of *Williams*, see *supra* notes 78-87 and accompanying text. For a further discussion of *Ferber*, see *supra* notes 153-166 and accompanying text.

326. *See* Reynolds, *supra* note 4, at 367-87 (including depictions of animal cruelty within incitement of violence, obscenity, and child pornography doctrines); *see also* Ricaurte, *supra* note 2, at 188-95 (discussing animal cruelty in relation to well-established categories of unprotected speech). For a further discussion of the Court's analysis in *Stevens*, see *supra* notes 209-222 and accompanying text.

327. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (carving out new category of unprotected speech). "To make money off a crime is to compound the crime . . . [b]ut we're expected to believe, 'It isn't murder, your honor – it's free speech!" Patt Morrison, *Does the First Amendment Protect Dog Snuff Films?*, HUFFINGTON POST (Apr. 30, 2009, 10:35 AM), http://www.huffingtonpost.com/patt-morrison/does-the-first-amendment_b_193351.html.

328. *See Stevens*, 130 S. Ct. at 1599-1600 (Alito, J., dissenting) (arguing for lack of First Amendment protection for producers or participators in crush videos); *see also* Brief of the Center on the Administration of Criminal Law as Amicus Curiae in Support of Petitioner at 10, United States v. Stevens, 130 S. Ct. 1577 (2009) (No. 08-769) [hereinafter Brief of the Center] (relating *Stevens* to *Giboney*). "The Center on the Administration of Criminal Law ('the Center') is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy." *Id.* at 1.

329. *See Stevens*, 130 S. Ct. at 1598-99 (Alito, J., dissenting) (emphasizing similarities between conduct condemned in *Ferber* and that accepted by Court in *Stevens*).

basic principles of the First Amendment, a University of Chicago professor stated, "the law separates the underlying illegality from the resulting speech."[330] Likewise, *Roth* dealt with obscenity, which is material catering towards a prurient interest.[331] The Court only had to reference President Clinton's statement regarding § 48 to discern that it was enacted specifically to target depictions of animal cruelty catering towards a prurient interest.[332] Crush videos generally qualify as unprotected under the established obscenity doctrine.[333] The government never made this argument, and the Court failed to propose it on its own accord.[334]

The main inconsistency in *Stevens* is the Court's analysis with regard to *Ferber*.[335] The Court severely undermined the "obvious parallels between child pornography and depictions of animal cruelty."[336] "Any rational person can draw the parallels between the

---

> [I]t's important to understand that a basic principle of First Amendment doctrine is that an individual ordinarily does not have a constitutional right to do an act that is otherwise unlawful merely because he wants to engage in free expression. For example, an individual does not have a First Amendment right to speed . . . because he wants to make a movie involving speeding; he does not have a First Amendment right to steal a camera in order to make a video; and he does not have a First Amendment right to wiretap a telephone conversation in order to prove that a congressman has taken a bribe.

Geoffrey R. Stone, *Dog-Fighting and the First Amendment*, HUFFINGTON POST (Apr. 25, 2010, 3:38 PM), http://www.huffingtonpost.com/geoffrey-r-stone/dog-fighting-and-the-firs_b_551138.html.

330. Stone, *supra* note 329.

331. *See supra* notes 144-149 and accompanying text for further discussion of *Roth*.

332. *See* Statement by President, *supra* note 23, at 324 (prohibiting "wanton cruelty to animals designed to appeal to a prurient interest in sex").

333. *See* Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Petitioner at 13, United States v. Stevens, 130 S. Ct. 1577 (2009) (No. 08-769) [hereinafter Brief of Washington Legal] (accentuating Third Circuit's admission that crush videos would qualify as obscene under *Miller* standard). The Washington Legal Foundation is a public interest law and policy center. *See id.* at 1 (providing background of foundation). The Allied Educational Foundation is a non-profit charitable foundation. *Id.*

334. For a further discussion, see *supra* notes 209-222 and accompanying text.

335. *See* Anclien, *supra* note 1, at 17 ("The reasoning of Ferber and its progeny is squarely applicable to crush videos."); *see also* Recent Case, *supra* note 300, at 1243 (disclaiming Court's application of *Ferber* in *Stevens*). For a further discussion of the Court's analysis of *Ferber*, see *supra* notes 219-222 and accompanying text.

336. *See* Brief Amicus Curiae of International Society for Animal Rights in Support of Petitioner at 30, United States v. Stevens, 130 S. Ct. 1577 (2009) (No. 08-769) [hereinafter Brief of International Society] (implying lack of inherent differences between children and animals as proposed by Court in *Ferber*). "International Society for Animal Rights . . . [promotes] 'protection of animals from all forms of cruelty and suffering inflicted upon them for the demands of science, profit, sport or from neglect or indifference to their welfare or from any other cause . . . ." *Id.* at 1; *see also* Brief for Amicus Curiae Northwest Animal Rights

Court's decision in *Ferber* and the videos at issue in *Stevens* . . . . The Court clearly ignores this, among other factual evidence that dogfighting videos drive the illegal act of dogfighting."[337] The Court relied on the Third Circuit's proposition that animals and children have inherent differences, and thus, animals should not receive the same degree of protection as children.[338] Yet, the Third Circuit never specified, and the Court did not clarify, what the inherent differences are and why those differences exempt animals from "societal and judicial solicitude."[339] Furthermore, even if the Court refused to recognize animals as living, intelligent beings that endure pain no differently than humans, the Court could have rested its analysis solely on the specific harms to children that result from animal cruelty.[340]

The Court also deviated from its usual deference to legislative judgment.[341] In *Ferber*, the Court emphasized that legislatures often rely on research and literature in determining the harmful effects of certain conduct.[342] The Court ordered deference to the legislature as to these findings because the legislature is uniquely situated to glean relevant evidence to make statutory decisions.[343] In *Stevens*, it does not appear that the Court granted the legislature any

Network in Support of Petitioner at 4-5, United States v. Stevens, 130 S. Ct. 1577 (2009) (No. 08-769) [hereinafter Brief for Northwest Animal] (listing similarities between child pornography and depictions of animal cruelty). Northwest Animal Rights Network is a volunteer animal protection organization. *See id.* at 1 (conveying interest in amicus curiae). "Both categories of speech are created by capturing in a visual medium the infliction of a serious injury, in a manner proscribed by state law, upon a vulnerable victim." *Id.* at 4-5. *See also* Stone, *supra* note 329 (comparing illegality of filming act of child pornography with illegality of depicting animal cruelty); Susan Estrich, *No Place in 1st Amendment for Animal 'Crush' Videos*, NEWSMAX (Apr. 23, 2010, 10:01 AM), http://www.newsmax.com/printtemplate.aspx?nodeid=356665 (arguing animals deserve same level of protection against abuse as do children with child pornography).

337. Katie Bray, *Decision on US v. Stevens Part 1: Not as Devastating as You May Think*, GAME DOG GUARDIAN (Apr. 20, 2010), http://www.gamedogguardian.com/education-and-resources/us-v-stevens-analysis.

338. *See* Brief of International Society, *supra* note 336, at 30 (repeating Court's contention in *Ferber* that children and animals have inherent differences and do not garner same level of judicial protection).

339. *See id.* at 30 (rejecting lack of evidence upon which Third Circuit relied in reaching its conclusion).

340. For further discussion of specific harms to children from animal cruelty, see *supra* notes 32-38, 184 and accompanying text.

341. For a further discussion of the Court's analysis in *Stevens*, see *supra* notes 209-252 and accompanying text.

342. *See* N.Y. v. Ferber, 458 U.S. 747, 758 (1982) (clarifying legislative approach to lawmaking).

343. *See id.* (highlighting legislative judgment regarding harms to children resulting from child pornography); *see also* Brief for Northwest Animal, *supra* note 336, at 6 (revisiting Court's usual deference to legislative judgment).

degree of deference or considered the relevant available evidence.[344]

The Court's main proposition in *Ferber* was that the distribution of child pornography is intrinsically related to the abuse itself, and the legislature could properly conclude that combating the market for the videos was the most effective means of combating the abuse itself.[345] The Court in *Stevens* undertook a challenging feat to compare animal cruelty to human cruelty.[346] While child pornography presents unique harms to which animal cruelty could never compare, the distribution of depictions of animal cruelty is similarly intrinsically related to the abuse itself.[347]

In both cases, there is a seemingly pure economic motive to produce the materials.[348] As is evidenced by the underground industry popularized by professional athletes, dogfighting videos are widespread, suggesting that the market is a lucrative business with profits channeling directly to the fight promoters.[349]

In both cases, there is severe injury, no eradication of the act without eradication of the videos, and minimal, if not zero, value.[350]

---

344. For further discussion of the Court's analysis in *Stevens*, see *supra* notes 209-252 and accompanying text.

345. *See Ferber*, 458 U.S. at 759 (discussing reasons depictions are intrinsically related to abuse).

346. *See* United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) (failing to find similarity between speech in *Ferber* and that in *Stevens*); *see also* China, *supra* note 30, at 4 (comparing interests associated with child protection with that of animal protection); Reynolds, *supra* note 4, at 384-85 (classifying argument that interests associated with animal protection must be similarly compelling to interests associated with humans as "debatable and inapposite"). "The allowance of [mistreatment of animals in contexts like hunting] clearly reveals that our society does not consider animal abuse on par with child abuse." Stone, *supra* note 329.

> [T]he balancing process is nothing more than an illusion in which the outcome has been predetermined in light of the very different status of the supposedly competing parties. It is simply not possible to balance meaningfully human interests, which are protected by claims of right in general and of a right to own property in particular, against the interest of property, which exist only as a means to the ends of persons.

Francione, *supra* note 41.

347. *See* Brief for Northwest Animal, *supra* note 336, at 4-5 (describing similarities between child pornography and depictions of animal cruelty).

348. *See* Anclien, *supra* note 1, at 32 (explaining pure economic incentive to produce crush and dogfighting videos); *see also* Brief for Northwest Animal, *supra* note 236, at 19 (accepting relationship is not as strong for dogfighting as child pornography, but nonetheless is sufficient to garner protection); Ricaurte, *supra* note 2, at 200 (noting Court's compelling interest in preventing criminals, in particular animal cruelty perpetrators, from profiting from their crimes).

349. *See* Brief of Washington Legal, *supra* note 333, at 19-20 (highlighting source of profit for dogfight promoters).

350. *See Stevens*, 130 S. Ct. at 1598 (Alito, J., dissenting) (discussing legislative justifications for passing § 48); Brief for Northwest Animal, *supra* note 336, at 7

It is especially noteworthy that the industry surrounding videos of animal cruelty presents harm not only to animals but also real, documented harms to humans, including children.[351] In both cases, the speech depicts individuals committing crime that is committed in order to depict the individuals' speech.[352] Simply because animals are not children should not be the only determinant of whether they receive protection, and the interest in protecting animals is no less compelling than the interest in protecting children.[353] Arguing that the Supreme Court reached the wrong conclusion in *Stevens*, two commentators proffered, "[t]here is no reason to ignore depictions of animal cruelty while rightfully criminalizing parallel depictions of child abuse."[354] The Court should make case-by-case determinations of the nature of the depictions in relation to the abuse, conducting the analysis in direct reference to the video at issue.[355] It neglected to take this approach in *Stevens*.[356]

(showing similarities between eradication of child pornography and elimination of depictions of animal cruelty). Furthermore, both are illegally captured in a visual medium and inflict serious injury upon helpless victims. *See* Brief for Northwest Animal, *supra* note 336, at 7 (justifying Court's finding of compelling interest). *But see* Stone, *supra* note 329 (detailing differences between animal abuse and child abuse). *See also* Estrich, *supra* note 336 (noting difficulty in discerning value of protecting depictions of animal cruelty).

351. *See* Brief of International Society, *supra* note 336, at 19 (reviewing "grave threats" to animals and humans); *see also* Kinsella, *supra* note 5, at 376-78 (imploring Court to consider various human ills associated with depictions of animal cruelty); Reynolds, *supra* note 4, at 347-54 (conveying reasons for restricting violent speech).

352. *See* Anclien, *supra* note 1, at 9 (mentioning notable relationship between speech and crime).

353. *See* Brief for Professors, *supra* note 317, at 33 (stating government interest "is no less compelling merely because the object of abuse is an animal and not a human being."); *see also* China, *supra* note 30, at 4 (promoting increase in rights for animals). "Whether its some crazed church group harassing families of soldiers killed in combat, racial slurs, child pornography, or dogfighting videos, we all seem to get it. It's wrong and we know it. Why is it so tough for the courts?" Bray, *supra* note 337. "Just as we protect children through carefully tailored bans on child pornography, so should we be entitled to protect animals from the effects of gratuitous and criminal violence." Estrich, *supra* note 336.

354. Palmer, *supra* note 322.

355. *See* Recent Case, *supra* note 300, at 1246 (concluding courts should consider context before applying Supreme Court precedent that is irrelevant to issue); *see also* Reynolds, *supra* note 4, at 384-85 (advocating finding of compelling interest for prevention of animal abuse).

356. For a further discussion of the Court's approach in *Stevens*, see *supra* notes 209-252 and accompanying text.

3. *Reducing Facial Invalidity Standard to Less Than Substantial Overbreadth*

The largest portion of the Court's analysis was dedicated to the issue of facial invalidity through applying an overbreadth test, but its analysis was inconsistent with precedent.[357] In *Osborne*, the Court noted that when conducting an overbreadth analysis, a statute should be construed in order to avoid constitutional conflicts.[358] The Court stated, "[i]t is a basic principle of constitutional adjudication that a statute should not be held unconstitutional unless the court has first determined that the statute cannot be saved by a validating construction."[359] This coincides with the deference the Court often grants the legislature in making statutory judgments.[360] In *Stevens*, the Court took the opposite approach and rejected consideration of the constitutional applications of § 48; it focused its attention solely on the possible unconstitutional applications.[361] It is probable that § 48 does have a "plainly legitimate sweep" as required by the overbreadth test, and the Court should have required Stevens to show that the statute was invalid specifically as applied to his dogfighting videos.[362] If the Court had conducted this analysis, it would have gleaned that both crush videos and Stevens's dogfighting videos fall within the narrow scope of the statute.[363]

357. For a further discussion of the Court's historical overbreadth analysis, see *supra* notes 73-107 and accompanying text. For a further discussion of the Court's overbreadth analysis in *Stevens,* see *supra* notes 223-252 and accompanying text.

358. *See* Osborne v. Ohio, 495 U.S. 103, 119 (1990) (providing standards for conducting overbreadth analysis).

359. Hill, *supra* note 76, at 1067.

360. For further discussion of the Court's grant of legislative deference, see *supra* notes 90-107 and accompanying text.

361. *See* Brief of Washington Legal, *supra* note 333, at 8 (advising Court to consider constitutional applications of § 48). For a further discussion of the Court's analysis in *Stevens*, see *supra* notes 223-252 and accompanying text. The Court barely acknowledged that the cruelty depicted is, in fact, illegal. *See* Bray, *supra* note 337 (lamenting outcome of *Stevens*).

362. *See* Brief of Washington Legal, *supra* note 333, at 9 (implicating impossibility of finding overbreadth if lower court applied § 48 directly to Stevens's dogfighting videos).

363. *See* Brief for the American Society for the Prevention of Cruelty to Animals as Amicus Curiae Supporting Petitioner at 27, United States v. Stevens, 130 S. Ct. 1577 (2009) (No. 08-769) [hereinafter Brief of American Society] (suggesting inclusion of dogfighting videos and crush videos in § 48). The American Society for the Prevention of Cruelty to Animals is the oldest humane organization in the United States. *See id.* at 1 (introducing interest of amicus curiae). One commentator criticized the Court's decision by noting "[t]he . . . Act simply criminalizes depictions of animal cruelty that are already illegal." Jim Moran, *Sadly Missed the Mark*, THE HILL (Sept. 7, 2009, 4:46 PM), http://thehill.com/opinion/letters/57529-columnist-wrong-on-motive-effect-of-animal-cruelty-law.

In fact, in *Salerno*, the Court articulated an unwillingness to strike down a statute simply because it has a conceivable unconstitutional application.[364] The Court has referred to the overbreadth doctrine as "strong medicine" that should be used "sparingly and only as a last resort."[365] Yet, in *Stevens*, the doctrine was not imposed as a last resort.[366] The Third Circuit never considered an overbreadth challenge in its analysis in *Stevens*, so it was seemingly hasty for the Court to consider an overbreadth challenge on appeal.[367] The Supreme Court has said that "[i]t is not the usual judicial practice . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily – that is, before it is determined that the statute would be valid as applied."[368]

Furthermore, Stevens's case was the first prosecution under § 48, so there was a complete lack of history and precedent regarding the statute's proper or improper application.[369] Applying the statute directly to hunting videos and animal slaughter videos, the Court concluded that § 48 was unconstitutional because it discerned the possibility of an improper conviction under the statute.[370] A conceivable basis for unconstitutionality does not automatically render a statute invalid, and the Court failed to ana-

---

364. *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (requiring more than fanciful basis for unconstitutionality).

365. *See* Brief of Washington Legal, *supra* note 333, at 10 (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)) (reviewing Third Circuit's unwillingness to conduct overbreadth analysis).

366. *See* Hill, *supra* note 76 (criticizing Court's contradictory application of overbreadth doctrine).

367. Brief of Washington Legal, *supra* note 333, at 11 (requesting Court refrain from conducting overbreadth analysis and confine its analysis specifically to Stevens's conduct).

368. *Id.* at 11-13 (citing Bd. of Tr. of St. Univ. of N.Y. v. Fox, 492 U.S. 469, 484-85 (1989). The Humane Society of the United States stated that,

> Declaring a statute facially overbroad after finding a party's speech protected 'would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting a gratuitous wholesale attacks upon state and federal laws.'

Id. at 25. "The tenuous nature of the Court's hold on the FAO Doctrine can be gauged from the fact that the Court has made contradictory statements about the remedial consequences of overbreadth, in apparent unawareness of any inconsistency." Hill, *supra* note 76.

369. *See* United States v. Stevens, 533 F.3d 218, 221 (3d Cir. 2008), *aff'd*, 130 S. Ct. 1577 (2010) (recognizing primacy of § 48 analysis); *see also* Brief of Washington Legal, *supra* note 333, at 12 (contending Court should wait to conduct overbreadth analysis until determining § 48 is an actual threat to First Amendment rights).

370. For a further discussion of the Court's analysis, see *supra* notes 223-252 and accompanying text.

lyze whether the statute was valid directly as applied to Stevens's dogfights.[371]

A brief review of state law reveals that § 48 is not overbroad, as the statute only prohibits depictions of acts that are already illegal in the states.[372] Currently, there is no documentation suggesting that any animal cruelty law has been interpreted to reach "culturally accepted commercial and recreational uses of animals."[373] Like § 48, state law creates exemptions for hunting, fishing, scientific research, and humane farming activities.[374] Evidencing the government's prudent approach to animal cruelty, there have not been any prosecutions against people who use animals in ways that evince humane purposes.[375] Furthermore, in failing to construe statutory terms in relation to other language in the text, the Court conflicts with its own direction to construe statutes to avoid constitutional problems.[376] Defining "serious value" is easily undertaken when referencing statutory text, in addition to consulting state anti-cruelty laws.[377]

In *Ashcroft*, the Court recognized the modern challenges of construing statutes due to the proliferation of the Internet, and the Court determined that it must construe statutes from a modern perspective.[378] Yet, in *Stevens*, the Court seemed to take less than a modern approach in interpreting the statute.[379] Given the proliferation of the Internet, children often have unrestricted access to

371. *See* United States v. Stevens, 130 S. Ct. 1577, 1593 (2010) (Alito, J., dissenting) (rejecting Court's unwillingness to consider § 48 as applied directly to Stevens); *see also* Brief of the Center, *supra* note 328, at 21 (disclaiming invalidation of statute in "fanciful hypotheticals").

372. *See* Brief for Northwest Animal, *supra* note 336, at 17 ("18 U.S.C. § 48 only prohibits *depicting* what the states prohibit *doing*.").

373. *See id.* (discussing lack of evidence suggesting improper application of § 48).

374. *See id.* (listing state exemptions).

375. *See id.* at 17-18 (excluding actions undertaken to inflict gratuitous pain that is unnecessary for conduct).

376. *See* Osborne v. Ohio, 495 U.S. 103, 119 (1990) (outlining method of statutory construction). For a further discussion of the Court's overbreadth analysis, see *supra* notes 231-236 and accompanying text.

377. *See* United States v. Stevens, 130 S. Ct. 1577, 1602 (2010) (Alito J., dissenting) (providing appendix containing animal cruelty laws from all fifty states). For the full text of § 48, see *supra* note 26.

378. *See* Ashcroft v. ACLU, 535 U.S. 564, 566-67 (2002) (promoting Court adaptability due to Internet proliferation).

379. For a further discussion, see *supra* notes 209-252 and accompanying text.

websites, and accidental or even intentional access to crush videos and other depictions of animal cruelty is inevitable.[380]

The primary inconsistency in the *Stevens* Court analysis concerns the issue of legislative judgment and societal consensus.[381] In *Glucksberg*, the Court opined that societal consensus is an important factor to consider when construing a statute.[382] Societal consensus often emerges in the form of legislative action, here, the enactment of § 48.[383] Virginia State Representative Jim Moran offered support for § 48, noting "[twenty-six] state attorneys general[s] . . . asked the federal courts to uphold this law because it's vital to protect animals and the larger community from violence, drug trafficking and other crimes that flow from those who perpetrate these maliciously cruel videos."[384] The Court rejected this argument in *Stevens*, despite its opinion in *Glucksberg* that the legislature acts in the proper forum to consider the most effective means of combating a problem.[385]

In *Salerno*, similar to the justification in *Stevens*, the statute in question was passed in response to the deficiencies of the current system.[386] Regardless, the fact that animal cruelty perpetrators hide their identities and film videos using a method that makes prosecu-

380. *See* Brief of International Society, *supra* note 336, at 20-21 (stating risk of juvenile access to depictions of animal cruelty as "certainty"). One commentator noted:

> [T]he Court is kidding itself concerning these technology cases if it thinks it can wait until some definite moment in the future when these technologies will stop changing and then suddenly announce a perfect standard. Technology never stops changing. And any standard will be imprecise until it is applied in actual cases.

Mark S. Kende, *The Impact of Cyberspace on the First Amendment*, 1 VA. J. L. TECH. 7, 15 (1997).

381. *See* Brief of International Society, *supra* note 336, at 22 ("Section 48 clearly and unambiguously identifies the legislative judgment upon which Section 48 rests . . ."); *see also* Kinsella, *supra* note 5, at 374-75 (recognizing neglect of societal consensus despite history and well known aversion to animal cruelty).

382. *See* Wash. v. Glucksberg, 521 U.S. 702, 711, 786-88 (1997) (emphasizing legislature's unique position to discern societal consensus); *see also* Brief for Northwest Animal, *supra* note 336, at 6 (commenting on Court's unwillingness to second-guess legislative decisions). Many leading First Amendment cases look to overwhelming state consensus to decide whether a state interest is compelling. *See id.* at 6 (pointing to *Roth* and *Ferber* as examples of legislative deference).

383. *See* Kinsella, *supra* note 5, at 374-75 (describing importance of consideration of societal consensus).

384. Moran, *supra* note 363.

385. *See Glucksberg*, 521 U.S. at 788 (conveying legislatures unique position); s*ee also* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (rejecting notion that abhorrence of animal cruelty is ingrained in historical tradition).

386. *See* United States v. Salerno, 481 U.S. 739, 742 (1987) (summarizing deficiencies of Act). For a further discussion of the Court's justifications in *Stevens*, see *supra* notes 209-252 and accompanying text.

tion virtually impossible, these factors bore no importance to the Court when judging the legislature's decision.[387]

American society places considerable importance on preventing unnecessary cruelty to animals.[388] As evidenced by nineteenth century cases and laws, "[s]ociety views the acts of cruelty at issue as antithetical to public mores and decency, as demonstrated by the longstanding illegality of such acts."[389] As early as 1641, there were laws proscribing acts of animal cruelty, and when the Court decided *Stevens*, all fifty states had laws criminalizing animal cruelty.[390] When *Ferber* was decided, child pornography was illegal in "virtually" every state.[391] The importance of animals in American society is further evidenced by the fact that the legal profession recognizes animal interests as legitimate and vital to the study of law.[392] Animal cruelty coincides with well-documented, considerable human ills, such as the palpable link between animal cruelty and violence against humans, domestic violence, and sexual assault.[393]

387. *See* Brief of Washington Legal, *supra* note 333, at 21 (displaying difficulties associated with prosecuting animal cruelty perpetrators). "The Court has recognized those logistical problems and the need to accommodate First Amendment doctrine to them." *Id.* (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)).

388. *See* Brief of Humane Society, *supra* note 7, at 14 ("Prohibitions on animal cruelty are deeply ingrained in American law."); *see also* Brief of Washington Legal, *supra* note 333, at 17 (imploring Court to recognize importance of preventing animal cruelty). "Because the government and states have a substantial interest in protecting animals from cruelty outlined in clear constitutional laws, and because depictions of animal cruelty serve to propagate animal cruelty, § 48 should be upheld." Bray, *supra* note 337.

389. Brief of Florida, *supra* note 38, at 4.

390. *See Stevens*, 130 S. Ct. at 1602 (Alito J., dissenting) (providing appendix containing animal cruelty laws from all fifty states); *see also* Brief of Humane Society, *supra* note 7, at 7 (noting inordinate costs spent by states on animal shelters). In fact, the Humane Society estimates that between $800 million and $1 billion is spent annually to support over 1,500 animal shelters in the United States. *See id.* at 16 (evidencing America's view that animals deserve humane treatment); *see also* Brief for Northwest Animal, *supra* note 336, at 7 (providing background of Nation's history regarding animal cruelty); Ricaurte, *supra* note 2, at 177 (summarizing state anti-cruelty laws).

391. *See* Brief for Northwest Animal, *supra* note 336, at 7 (comparing speed of state action to combat child pornography to haste with which states outlawed animal cruelty).

392. *See* Brief for Professors, *supra* note 317, at 3-4 (introducing background of animal law). "Animal law is currently taught at no less than 112 law schools, including Harvard, Northwestern, Columbia, Cornell, University of Chicago, Stanford, and Georgetown." *Id.* Likewise, at least fifteen states have bar groups committed to animal law. *See id.* at 4-5 (listing states with bar committees dedicated to animal law).

393. *See* Brief of American Society, *supra* note 363, at 3 (justifying restriction on depictions of animal cruelty); *see also* Brief for Northwest Animal, *supra* note 336, at 8-9 (summarizing negative impact of animal cruelty on society); Brief for

The link between animal cruelty and violence against humans formed the basis for the legislature's decision to enact § 48, and the Court should have found the legislature's interest compelling.[394]

V. IMPACT

The direct impact of the Supreme Court's decision in *United States v. Stevens* is uniquely short-lived.[395] After extensive deliberation to revise § 48, the Senate concluded that crush videos are undeniably excluded from First Amendment protection by implicitly citing to Supreme Court precedent such as *Giboney* and *Miller*.[396] Legislative consensus was in full effect; during Senate hearings about the new law, "not a single word of opposition was voiced to banning crush videos . . . ."[397] After the bill passed the House by a 416-3 vote, the Senate passed an amended bill by unanimous consent.[398] President Obama signed the bill into law on December 9, 2010.[399] An excerpt from the Animal Crush Video Prohibition Act reads:

Professors, *supra* note 317, at 28-29 (identifying link between serial killers and animal abuse). For a further discussion of notable mass murderers and their admissions regarding childhood animal cruelty, see Brief for Professors, *supra* note 317, at 28-29 and accompanying text. For a further discussion of the links between animal cruelty and human violence, see *supra* notes 32-44 and accompanying text.

394. *See* Brief of American Society, *supra* note 363, at 19 (restating legislative judgment in passing § 48). For a further discussion of the legislature's justifications behind the passage of § 48, see *supra* note 28-44 and accompanying text.

395. *See* Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177S. 3841, 111th Cong. (2010) [hereinafter Act] (providing content of revised statute); *see also Congressional Record, Prevention of Interstate Commerce in Animal Crush Videos Act of 2010 — (Senate - September 28, 2010),* UNITED STATES SENATE (Sept. 28, 2010), http://thomas.loc.gov/cgi-bin/query/z?r111:S28SE0-0059: (detailing justifications behind revision); *Senate Passes the Animal Crush Video Prohibition Act,* SENATUS (Sept. 29, 2010), http://senatus.wordpress.com/2010/09/29/senate-passes-the-animal-crush-video-prohibition-act/ (noting bill must pass House of Representatives, which previously passed its own version of the bill). The new law was co-sponsored by Senators Jeff Merkley of Oregon, Jon Kyl of Arizona, and Richard Burr of North Carolina. *See* Bill Mears, *Obama signs law banning 'crush videos' depicting animal cruelty*, CNN POLITICS (Dec. 10, 2010), http://articles.cnn.com/2010-12-10/politics/animal.cruelty_1_dog-fighting-videos-crush-videos-animal-cruelty?_s=pm:politics (reviewing changes to revised law). The law received overwhelming bipartisan support from both the House of Representatives and the Senate, especially from Representatives Elton Gallegly of California and Gary Peters of Michigan. *See* The HSUS Applauds, *supra* note 12 (praising swift government response to damaging Supreme Court decision).

396. *See* Congressional Record, *supra* note 395 (describing legislative judgment in forming revised statute).

397. *See* Martin Matheny, *Crush Video Ban Moving Forward in the U.S. Senate*, CHANGE.ORG (Sept. 16, 2010) (discussing unusually hasty congressional action).

398. *See* Fisher, *supra* note 17 (summarizing legislative process).

399. *See id.* (noting progression of Act).

> Sec. 48. Animal crush videos
>
> (a) Definition- In this section the term 'animal crush video' means any photograph, motion-picture film, video or digital recording, or electronic image that—
>
> (1) depicts 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 . . . .
>
> (2) is obscene.
>
> (b) Prohibitions-
>
> (2) DISTRIBUTION OF ANIMAL CRUSH VIDEOS- It shall be unlawful for any person to knowingly sell, market, advertise, exchange, or distribute an animal crush video in, or using a means or facility of, interstate or foreign commerce, or to attempt or conspire to do so.[400]

The statute contains various exceptions reminiscent of the Court's concerns in *Stevens*.[401]

Regardless of the Senate's actions and the passage of a revised law, the Court's opinion in *Stevens* has several potentially damaging implications for other areas of law.[402] The Court's half-hearted reliance on precedent suggests that it approaches novel cases using an ad hoc analysis, as its opinion in *Stevens* regarding First Amendment rights does not seem reliant on past case law.[403] If crush videos and dogfighting videos like Michael Vick's or Stevens's are classified as

400. Act, *supra* note 395. The Act imposes penalties of up to seven years in prison for violations. *See* Mears, *supra* note 395 (detailing contents of revised law).

401. *See* Act, *supra* note 395 (exempting acts like hunting, humane slaughter, or ordinary veterinary practices). "By cracking down on the creation and distribution of crush videos, this bipartisan law effectively protects both animals and free speech." *See* Mears, *supra* note 395 (quoting Senator Jeff Merkley). *But see* Tony Mauro, *President Signs Bill Banning Animal Crush Videos*, THE BLT (Dec. 10, 2010, 1:15 PM), http://legaltimes.typepad.com/blt/2010/12/president-signs-bill-banning-animal-crush-videos.html (raising possibility of future controversy over amended law). For the text of the bill, *see supra* note 400 and accompanying text. For a further discussion of the Court's concerns in *Stevens*, see *supra* notes 224-248 and accompanying text.

402. *See* Recent Case, *supra* note 300, at 1239 (discussing category specific implications); *see also* Kinsella, *supra* note 5, at 362-76 (imploring Court to recognize compelling interest or classify crush videos as obscene speech).

403. For further discussion of the Court's analysis in *Stevens*, see *supra* notes 209-252 and accompanying text. For a further discussion of Supreme Court balancing tests, see *supra* notes 323-325 and accompanying text.

expressive speech, it suggests the Court drastically reduced the standard for classifying speech as expressive.[404]

This proposition is further evidenced by the recent Supreme Court case of *Snyder v. Phelps*.[405] The Westboro Baptist Church congregation, headed by Fred Phelps, pickets and protests at funerals to convey the congregation's belief that the United States is overly tolerant of "sin" such as homosexuality, especially in the military.[406] Marine Lance Corporal Matthew Snyder was killed in Iraq while serving a tour of duty, and the Westboro Baptist Church picketed his funeral with signs like "Thank God for Dead Soldiers."[407] A jury awarded Snyder's family over ten million dollars in damages.[408]

The Court held that Phelps and his congregation had a right to public debate, despite the undeniably hurtful content of the speech.[409]

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[410]

---

404. *See* United States v. Stevens, 130 S. Ct. 1577, 1584-86 (2010) (comparing valid content-based restrictions on speech to depictions of animal cruelty). For further discussion of the Court's expressive speech precedent, see *supra* notes 109-135 and accompanying text. For further discussion of the Court's expressive speech analysis in *Stevens*, see *supra* notes 299-321 and accompanying text.

405. Snyder v. Phelps, 131 S. Ct. 1207 (2011). *See also* Andrea Stone, *Fred Phelps' Daughters May Misread Bible but They Know the Law*, AOL NEWS (Mar. 3, 2011, 5:49 PM), http://www.aolnews.com/2011/03/03/fred-phelps-daughters-may-misread-bible-but-they-know-the-law/ (describing Supreme Court holding).

406. *See Phelps*, 131 S. Ct. at 1213 (providing background of church and its leader).

407. *See id.* (listing various signs used during picketing events); *see also* Brent Kendall, *First Amendment Protects 'Hurtful' Speech, Court says*, WALL STREET JOURNAL, March 3, 2011, at A1, *available at* http://online.wsj.com/article/SB10001424052748703559604576176323629295598.html (reporting outcome of well publicized Supreme Court battle).

408. *See Phelps*, 131 S. Ct. at 1214-15 (summarizing procedural posture of case). The judge reduced the award to about five million dollars. *See* Kevin Goldberg, *Snyder v. Phelps: The Swami Makes the Call*, COMMLAWBLOG (Nov. 29, 2010), http://www.commlawblog.com/2010/11/articles/first-amendment/snyder-v-phelps-the-swami-makes-the-call/ (analyzing probable outcome of Supreme Court review in favor of Phelps).

409. *See* Kendall, *supra* note 407 (quoting Chief Justice John Roberts).

410. *Phelps*, 131 S. Ct. at 1220.

Justice Alito, the lone dissenter in *Stevens*, voiced his distaste for the Court's unyielding protection of First Amendment rights.[411]

> Respondents' outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered.
>
> In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner.[412]

If crush videos, dogfight videos, and vicious words directed at fallen soldiers evince expressive meaning, it is unlikely the Court will have grounds to uphold restrictions on free speech absent extremely rare circumstances.[413] The Court's holdings in *Stevens, Phelps,* and other recent cases "suggest that the Roberts court is prepared to adopt a robustly libertarian view of the constitutional protection of free speech."[414] Furthermore, First Amendment case law repeatedly uses language that implicates an application of a balancing test, despite the Court's contention that it refuses to apply ad hoc balancing and that the government's suggestion it do so was startling and dangerous.[415]

Additionally, the Court's rejection of the proposition that animals should glean similar protections afforded to humans places an enormous damper on the future of animal rights.[416] The decision inherently indicates that any time the Court is presented with an

411. *Id.* at 1222-29 (Alito, J., dissenting) (expressing horror at Court's holding).

412. *Id.* at 1229 (Alito, J., dissenting).

413. *See* Adam Liptak, *Justices Reject Ban on Videos of Animal Cruelty*, N.Y. TIMES, Apr. 20, 2010, http://www.nytimes.com/2010/04/21/us/21scotus.html (reviewing recent First Amendment doctrine).

414. *Id. See also* Bonnie Erba, *'Crush' Video Ruling: Another Supreme Court Power Grab*, POLITICS DAILY (Apr. 23, 2010), http://www.politicsdaily.com/2010/04/23/crush-video-ruling-another-supreme-court-power-grab/ (expressing disbelief over the holdings in *Stevens* and *Citizens United*). For another illustrative case on this point, see Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (striking down limits on political spending by corporations).

415. For a further discussion of the Court's balancing tests, see *supra* note 323-325 and accompanying text; *see also* United States. v. Stevens, 130 S. Ct. 1577, 1585-86 (2010) (disagreeing with suggestion to apply balancing test to Stevens). For a further discussion of the *Williams* balancing test, see *supra* notes 78-87 and accompanying text. For a further discussion of *R.A.V.* balancing, see *supra* notes 113-119 and accompanying text.

416. *See* Brief of Humane Society, *supra* note 7, at 21 (arguing Court's decision is devastating to animal welfare and interests of those who actively support animal rights). For a further discussion of the *Stevens* opinion, see *supra* notes 212-222 and accompanying text.

animal rights issue, it will automatically compare the rights at stake to similarly situated human rights.[417] In many cases, animal rights are inextricably intertwined with human rights, as evidenced by the suggestion the Court received that crush video perpetrators were interested in using a human child as a video subject.[418] The adult and child dangers from animal cruelty are near certainties.[419] It is undeniable that human rights trump animal rights, but that fact alone should not reduce the degree of support animals garner from the law.[420] After *Church of the Lukumi* in 1993, the Court was not presented with any issue of animal rights until *Stevens* almost twenty-years later, and it is unlikely the Court will grant certiorari in a case concerning animal rights for quite some time.[421]

Most startling is the effect *Stevens* may have on the Court's strict scrutiny doctrine.[422] The decision will constrict courts' ability to find a compelling interest, and it will render it impossible for courts to apply heightened scrutiny when confronted with a case involving animal rights.[423] The Court's decision has already created uncertainty in the lower courts, as evidenced by the Seventh Circuit decision in *United States v. Skoien*,[424] The case concerned Second Amendment rights and whether Congress could properly draw a

417. *See* Ricaurte, *supra* note 2, at 194 (describing changing view towards animal rights). It would likely require a legal shift to create a body of law where animals not only receive rights equal to humans, but in certain situations, rights beyond those granted to humans. *See id.* (noting necessary precedent shift).

418. *See* Brief of Florida, *supra* note 38, at 29 (providing evidence that many videos use toy dolls to represent human child); *see also* Brief of International Society, *supra* note 336, at 19 (reviewing "grave threats" to animals and humans); Anclien, *supra* note 1, at 9 (mentioning notable relationship between speech and crime); Kinsella, *supra* note 5, at 376-78 (imploring Court to consider various human ills associated with depictions of animal cruelty).

419. For a further discussion of the dangers of animal cruelty, see *supra* notes 32-40, 182-184, 315-316.

420. *See* China, *supra* note 30, at 4 (conveying inappropriateness of comparing interests associated with child protection with that of animal protection); *see also* Reynolds, *supra* note 4, at 384-85 (classifying argument that interests associated with animal protection must be similarly compelling to interests associated with humans as "debatable and inapposite"). For a further discussion of proper animal rights, see *supra* notes 388-404 and accompanying text.

421. *See* Brief of Humane Society, *supra* note 7, at 21 ("In the ensuing decade-and-a-half, no other court has decided this question and there is no reason to believe the issue will present itself in a posture meriting this Court's review again in the near future.").

422. *See id.* (extending implications to all animal welfare legislation that could conceivably be subject to strict scrutiny); *see also* Kinsella, *supra* note 5, at 381 (describing harm to social policy from Court's finding that depictions of animal cruelty do not serve compelling government interest).

423. *See* Brief of Humane Society, *supra* note 7, at 21.

424. U.S. v. Skoien, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1674 (2011).

categorical exclusion against possession of firearms for those convicted of misdemeanor crimes; in this case, domestic violence.[425] The court relied on the Supreme Court's analysis in *Stevens* but was unable to find guidance because the Court failed to decide how substantial the public interest must be to adopt a new categorical limit on free speech.[426] Fortunately, the Seventh Circuit was able to reach a holding on different grounds.[427]

The Court recently tested its strict scrutiny doctrine in *Brown v. Entertainment Merchants Association*.[428] The California law in question imposed restrictions on the sale or rental of violent video games to minors.[429] Holding that the law must pass strict scrutiny, the Ninth Circuit found that the state government's research regarding the harms of violent video games was faulty and not based on causation.[430] The law was struck down, and the Supreme Court granted certiorari and reached a decision in June 2011.[431] The Court was seemingly unconcerned with the form of violence in *Stevens* or the potential for serious physical and psychological harm to children, so it is unsurprising that based on the controversial studies presented to the Court in *Brown*, that the Court was unwilling break its trend of unwavering protection of First Amendment rights.[432]

The *Stevens* decision may also constrict the legislature's ability to refine laws to meet impossible Supreme Court standards.[433] If the government interests in passing § 48 did not muster recognition of a compelling interest, it appears the government is inevita-

425. *See id.* at 639 (describing background of case).

426. *See id.* at 642 (referring to Court's levels of scrutiny as "quagmire").

427. *See id.* at 645 (affirming conviction).

428. *See* Brown v. Entm't Merchs. Assoc., No 08-1448, slip op. at 1 (U.S. June 2011) (holding video games entitled to First Amendment protection and Act failed to satisfy strict scrutiny). *See also* Kendall, *supra* note 407, at A2 (listing most recent First Amendment cases to reach the Supreme Court).

429. *See* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 953-54 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 2398 (2010) (discussing facts of case).

430. *See id.* at 961-67 (analyzing California's supposed compelling interest).

431. *See id.* at 964-65 (holding state government did not employ least restrictive means); *see also* Brown, slip op. at 1 (explaining procedural posture leading to grant of certiorari).

432. *See* Transcript of Oral Argument at 1, Schwarzenegger v. Entm't Merchs. Ass'n, (No. 08-1448) (questioning differences between violent video games and depictions of animal cruelty); *see also Brown*, slip op. at 17 (commenting on states' failed attempts to shelter minors from violent entertainment).

433. *See id.* (predicting future legislative hesitation to enact laws targeting "depictions of atrocious and illegal cruelty").

bly estopped from passing valuable laws.[434] The Court disregarded evidenced harms of animal cruelty, and there is nothing to suggest it disregarded the harms for any truly justifiable reason.[435] Furthermore, in light of the *Stevens* opinion, it will be increasingly difficult for courts to classify speech as unprotected, such as speech that is obscene or integral to criminal conduct.[436] Crush videos appeal to a prurient interest in sex and represent speech integral to criminal conduct.[437] Yet, the Court rejected these clear notions and introduced precedent that muddles past case law and complicates future recognition of speech as falling into an unprotected category.[438]

Finally, the Court complicated its application of the overbreadth doctrine and left the ultimate capability of interpreting overbreadth precedent in the hands of a judge skilled in the art of complex puzzles.[439] § 48 had perfectly clear constitutional applications, but the Court instead focused on the unconstitutional appli-

---

434. *See* Brief of American Society, *supra* note 363, at 3 (justifying restriction on depictions of animal cruelty); *see also* Brief for Northwest Animal, *supra* note 336, at 8-9 (summarizing negative impact of animal cruelty on society); Kinsella, *supra* note 5, at 381 (showing implications of Court's finding to controversies involving violence); Ricaurte, *supra* note 2, at 180 (listing various government interests in prohibiting animal cruelty). For a further discussion of the government's compelling interest, see *supra* notes 28-44 and accompanying text. For a further discussion of notable mass murderers and their admissions regarding childhood animal cruelty, see Brief for Professors, *supra* note 317, at 29.

435. *See* Brief of American Society, *supra* note 363, at 3 (evincing harms of animal cruelty). For a further discussion of the Court's disregard of harms, see *supra* notes 209-252 and accompanying text. For a further discussion of the harms associated with animal cruelty, see *supra* notes 32-40, 182-184, 315-316 and accompanying text.

436. *See* Recent Case, *supra* note 300, at 1239 (conveying harm in *Stevens* precedent as its ability to constrict courts' ability to classify speech as falling within several categories of unprotected speech); *see also* Ricaurte, *supra* note 2, at 188-95 (summarizing issues stemming from Court's expansion or creation of new categories of unprotected speech).

437. *See* Reynolds, *supra* note 4, at 367-87 (justifying restrictions on depictions of animal cruelty under incitement of violence, obscenity, and child pornography doctrines); *see also* Ricaurte, *supra* note 2, at 188-95 (linking applications of animal cruelty to already established categories of unprotected speech). For further discussion of the inclusion of depictions of animal cruelty into already established categories of unprotected speech, see *supra* notes 326-334 and accompanying text. For further discussion of unprotected speech, see *supra* notes 136-172 and accompanying text.

438. For further discussion of the Court's analysis of unprotected speech, see *supra* notes 209-222 and accompanying text.

439. *See* Hill, *supra* note 76 (reviewing complicated overbreadth precedent). For a background of the overbreadth doctrine, see *supra* notes 73-108 and accompanying text. For a further discussion of the Court's overbreadth analysis in *Stevens*, see *supra* notes 223-252 and accompanying text. For a further discussion of the problems stemming from the Court's analysis, see *supra* notes 357-394 and accompanying text.

cations, straying from well-established boundaries of the overbreadth test.[440] The *Stevens* opinion provides little guidance to the legislature as to the level of societal consensus required to enact a statute and undermines the Court's trust of both the legislature and executive branch.[441] The decision "creates a major void in the federal government's ability to take effective action against acts of cruelty to animals undertaken for commercial purposes."[442] The reality is that animals remain personal property according to the law, and until the Court faces the realization that many, arguably a majority, of Americans consider animals vital members of their families and livelihoods, it is unlikely animals will garner necessary legal support from the highest authority in the Nation.[443] Notions about animals are rapidly changing, and "[l]aws that treat animals as 'property' are arcane and should be revised to treat animals as the living, loving, soulful beings that they are, rather than as property."[444]

Until that milestone, it seems that the Court will continue to refrain from recognizing the evil in depictions of animal cruelty and the underlying act. Criticizing the *Stevens* decision, two writers suggested, "the court has gone too far in protecting the free speech of those who would profit from films depicting wanton and malicious cruelty to animals solely for customers' entertainment."[445] It is all but inevitable that underground dogfights will become more elusive, and celebrities will continue to mistreat animals. In light of *Stevens*, one can only imagine what limits television networks will push for the sake of entertainment.[446] It is disconcerting to contemplate what the future holds for similar abhorrent acts and simi-

---

440. For a further discussion of the Court's overbreadth analysis in *Stevens*, see *supra* notes 223-252 and accompanying text. For a further discussion of Justice Alito's dissent, see *supra* notes 253-298 and accompanying text.

441. *See* Brief of International Society, *supra* note 336, at 22 ("Section 48 clearly and unambiguously identifies the legislative judgment upon which Section 48 rests . . . ."); *see also* Kinsella, *supra* note 5, at 374-75 (recognizing neglect of societal consensus despite history and well known aversion to animal cruelty). For further discussion of societal consensus, see *supra* notes 381-394 and accompanying text.

442. Brief of Washington Legal, *supra* note 333, at 12.

443. *See* China, *supra* note 30, at 4 (recognizing animals position as personal property under law); *see also* Ricaurte, *supra* note 2, at 194 (commenting on hurdles to granting animals proper rights); Francione, *supra* note 41 (proposing legal status of animals as property has "severely limited" their legal protection).

444. Francione, *supra* note 41.

445. Palmer, *supra* note 322.

446. *See* Mountain, *supra* note 204 (questioning difference between *Stevens* and acceptable family entertainment).

lar victims, whether human or animal, without a voice or speech of their own.

*Meredith L. Shafer**

---

* J.D. Candidate, May 2012, Villanova University School of Law; M.B.A. Candidate, May 2010, Villanova University School of Business; B.S., S.I. Newhouse School of Public Communications, B.S., Martin J. Whitman School of Management, Syracuse University, 2009.