SUPREME COURT AVOIDS CRUSHING THE FIRST AMENDMENT: WHY THE DECISION IN *UNITED STATES V. STEVENS* WAS IMPORTANT FOR THE PRESERVATION OF FIRST AMENDMENT RIGHTS

INTRODUCTION

The United States Supreme Court often grants free speech protections to the types of speech that society deems unworthy of rights. Whether the Court is extending protection to hate speech advocates,[1] allowing pornographers to have less-restricted access to cable viewers,[2] or permitting Internet sites the freedom to publish virtual child pornography,[3] the Supreme Court has constantly faced criticism for preserving the First Amendment. The recent decision in *United States v. Stevens*,[4] invalidating a law prohibiting depictions of animal cruelty, will prove no different. Crusaders for animal rights are bound to blame the Supreme Court for setting back their cause. However, as this Comment demonstrates, the Supreme Court is not to blame. This Comment argues that the Supreme Court made the right decision in invalidating the statute on animal crush videos (§ 48),[5] and that the responsibility of halting the crusade against crush videos and animal cruelty should be placed on the statute itself.

Part I of this Comment examines the First Amendment, the circumstances leading to the enactment of § 48, and the case law that shaped the Court's interpretation of § 48. Part II summarizes the facts, procedural history, and opinions of *Stevens*. Part III commends the Supreme Court's decision to protect First Amendment rights and argues that it was Congress's failure to draft a proper statute that caused § 48 to fail judicial review. Finally, this Comment concludes that the Supreme Court's strict defense of the First Amendment is crucial to the preservation of the right to free speech.

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1. *See* Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969) (per curiam) (holding that the speech of a Ku Klux Klan member advocating violence toward minority groups constituted protected speech under the First Amendment).

2. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 806–07 (2000) (holding that requiring cable operators to scramble sexually explicit channels violated the First Amendment).

3. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 239–40 (2002) (finding that lack of a concrete connection between virtual child pornography and child abuse enabled virtual child pornography to enjoy First Amendment protections).

4. 130 S. Ct. 1577 (2010).

5. 18 U.S.C. § 48 (2006).

I. BACKGROUND

A. Freedom of Speech

The right to free speech is enshrined in the First Amendment's prohibition that "Congress shall make no law . . . abridging the freedom of speech."[6] The prerogative derived from this right, to freely express one's opinions, ideas, and criticisms, is often credited as the cornerstone to democracy and individual liberty in the United States.[7] However, free speech protections have not always been observed with such reverence.

Between the enactment of the First Amendment in 1791 and the beginning of the twentieth century, the concept of "free speech" did not pose a great barrier to government restriction.[8] For instance, it was not until 1845 that an explicit First Amendment challenge concerning free speech was entertained by the Supreme Court.[9] In the subsequent decades, the Court's opinions concerning the First Amendment right to free speech were, at best, "hostile" to speech interests.[10] By the turn of the nineteenth century the Court opined that government self-preservation justified regulation of speech in *United States ex rel. Turner v. Williams*.[11] The *Turner* Court upheld a statute preventing immigration into the United States, reasoning that certain political beliefs professed by immigrants may threaten the government.[12] The dangerous rationale of the *Turner* decision led the Court to validate "shockingly repressive" statutes during the 1920s.[13] Among its decisions during this era, the Court criminalized speech in support of socialism,[14] illegalized criticism

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6. U.S. CONST. amend. I.

7. Vickie S. Byrd, Reno v. ACLU*—A Lesson in Juridical Impropriety*, 42 HOW. L.J. 365, 365 (1999) ("[T]he First Amendment's guarantee to freedom of speech is the cornerstone of individual liberty and democracy."); *see also* Bridges v. California, 314 U.S. 252, 270 (1941) ("For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."); Stromberg v. California, 283 U.S. 359, 369 (1931) (describing the First Amendment as "a fundamental principle of our constitutional system").

8. Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791–1930*, 35 EMORY L.J. 59, 89 (1986) ("[T]he Supreme Court during its first full century of operation . . . read the first amendment as a restatement of the English common law . . . which allowed government regulation of many areas of speech.").

9. *Id.* at 70; *see* Permoli v. City of New Orleans, 44 U.S. 589 (3 How.) (1845) (holding that the First Amendment did not apply to the States).

10. Hunter, *supra* note 8, at 127 ("[F]rom 1791 to 1930 . . . [t]he Court's opinions were sketchy and usually hostile to the speech interests that were asserted."). Before twentieth century case law concerning freedom of speech, the Court often placed the interests of the postal service above that of the First Amendment. *See Ex parte* Rapier, 143 U.S. 110, 134–35 (1892) (holding that congressional discretion to withhold lottery tickets from the mail did not infringe on the freedom of communication); *Ex parte* Jackson, 96 U.S. 727, 733 (1877) (holding that the exclusion of magazines and newspapers from the postal system was constitutional).

11. 194 U.S. 279, 284, 290 (1904).

12. *Id.* at 290.

13. Daniel Hildebrand, *Free Speech and Constitutional Transformation*, 10 CONST. COMMENTARY 133, 134 (1993).

14. Debs v. United States, 249 U.S. 211, 212, 216–17 (1919).

of American war efforts,[15] and held a newspaper in contempt for criticizing a local court.[16]

However, the Court changed its stance on free speech in 1931 with its decision that the display of a red flag symbolizing opposition to government constituted "free political discussion . . . essential to the security of the Republic."[17] Free speech, rediscovered as "a fundamental principle of our constitutional system,"[18] finally gained a foundation for the constitutional value it holds today.[19] While free speech continued to face difficult challenges throughout the twentieth century, such as overcoming the Smith Act[20] and advancing protestor's rights during the Vietnam War,[21] the hard-fought victories of the past have established extensive constitutional protections to contemporary speech.

Today, the First Amendment prohibits the government from restricting the content, message, or idea expressed within speech.[22] Expression need not be of any serious value to enjoy the shield of the First Amendment,[23] and regulations as to the time, manner, and location of speech must survive a "narrowly tailored" test to be deemed constitutional.[24] The First Amendment provides the strongest protections against content-based restrictions on speech, making such regulations presumptively invalid.[25]

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15. *Id.*
16. Toledo Newspaper Co. v. United States, 247 U.S. 402, 412, 420–21 (1918).
17. Stromberg v. California, 283 U.S. 359, 369 (1931).
18. *Id.*
19. *See* Hunter, *supra* note 8, at 137.
20. *See* Yates v. United States, 354 U.S. 298, 318–21 (1957) (ruling that the conviction of several Communist Parity leaders for advocating the overthrow of the American government was unconstitutional because advocacy of "evil ideas" was protected by the First Amendment so long as the advocacy was not coupled with an effort to instigate action designed to achieve governmental overthrow).
21. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that in absence of demonstration of any facts which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities, or any showing that disturbances or disorders on school premises in fact occurred when students wore black armbands on their sleeves to exhibit their disapproval of Vietnam hostilities, regulation prohibiting wearing armbands and providing for suspension of any student refusing to remove armbands was an unconstitutional denial of students' right of expression of opinion).
22. Ashcroft v. ACLU, 535 U.S. 564, 573 (2002). "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (quoting Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 65 (1983)) (alteration in original).
23. United States v. Stevens, 130 S. Ct. 1577, 1590 (2010) (describing how most speech protected by the First Amendment does not fall within a category of serious value).
24. Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 38 (2003) (discussing the standards for content-neutral speech regulations).
25. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

B. Presumptively Invalid Statutes

Statutes that regulate the content of speech are presumptively invalid[26] and the government bears the burden of rebutting this presumption.[27] The government may refute this presumption by demonstrating that the content-based restrictive statute can survive a strict scrutiny test or that the content under restriction belongs to a category of speech that does not warrant First Amendment protection.[28] The strict scrutiny test requires the government to establish that: (1) a statute prohibiting speech content seeks to achieve a compelling state interest; (2) the statute is narrowly tailored to achieve that interest; and (3) the means chosen to achieve that interest are the least restrictive means available.[29] Since the test's inception the Supreme Court has invalidated every statute subjected to strict scrutiny based on the content-based speech restrictions, proving strict scrutiny to be a nearly impassible test.[30]

The government may also overcome a presumption of invalidity by showing that a content-based restriction proscribes speech outside the realm of First Amendment protections.[31] Categories of unprotected speech share two common characteristics: (1) they have traditional roots in United States history as being beyond free speech safeguards, and (2) they are narrowly defined classes of speech.[32] Obscenity, defamation, fighting words, fraud, incitement to illegal action, and speech integral to criminal conduct are all beyond the purviews of free speech.[33] These groups of speech have never been afforded protection,[34] have faced prohibition since the founding of the United States,[35] or have historic foundations in Supreme Court decisions as early as the 1920s.[36] In addition, these classes of speech are specifically defined and narrowly construed.[37] For example, obscenity has a long legal history in America as being un-

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26. *Stevens*, 130 S. Ct. at 1584 (quoting *City of St. Paul*, 505 U.S. at 382).

27. *Stevens*, 130 S. Ct. at 1580 ("Government bears the burden to rebut that presumption.").

28. *See* United States v. Stevens, 533 F.3d 218, 232 (3d Cir. 2008), *aff'd*, 130 S. Ct. 1577 (2010).

29. *See id.* (describing how § 48 fails the strict scrutiny test).

30. Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1365 (2006) ("In the twenty cases . . . where a majority of the Court has applied a strict scrutiny standard for reasons of [speech] content discrimination, it has found every one to be unconstitutional.").

31. *City of St. Paul*, 505 U.S. at 382–83.

32. *Stevens*, 130 S. Ct. at 1584.

33. *Id.* (listing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as unprotected speech); *see also* United States v. Stevens, 533 F.3d 218, 233–34 (3d Cir. 2008) (listing fighting words as unprotected speech), *aff'd*, 130 S. Ct. 1577 (2010).

34. *Cf.* Va. Bd. of Pharmacy v. Va. Citizens Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech . . . has never been protected for its own sake.").

35. *See* Roth v. United States, 354 U.S. 476, 482–83 (1957) (pointing out that 10 states had statutes prohibiting libel at the time the Constitution was ratified; that obscenity had been prohibited as early as 1712).

36. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (referring to a case in the 1920s which instructed that advocacy of violent acts, without more, did not warrant First Amendment protection).

37. *Stevens*, 130 S. Ct. at 1584.

protected by the First Amendment and it proscribes very specific speech-content.[38] Moreover, even though child pornography has a relatively new legal history of being beyond First Amendment protection, its content-based proscriptions are grounded in age-old doctrine and it also proscribes a particularly narrow category of speech.[39]

1. *Miller v. California*[40]

Early in American history, obscenity defined a wide class of speech including depictions of violence.[41] Now, under *Miller v. California*, obscenity extends only to a narrow category of content involving prurient interests and illegal sexual conduct.[42] In *Miller*, the Court addressed the issue of whether sexually explicit material distributed through the mail constituted obscenity.[43] Deciding that the publications were obscene, the Court defined obscenity as either depictions that, when taken as a whole, violate prurient interests according to contemporary community standards, or as depictions of patently offensive sexual acts that violate specific state laws.[44] However, the *Miller* Court went on to narrow the definition by including an exceptions clause affording First Amendment protections to sexual deceptions having serious literary, artistic, political, or scientific value.[45] As a result, obscenity forbids only a very specific class of speech.

2. *New York v. Ferber*[46]

In 1982, the Supreme Court declared a new narrowly defined category of unprotected speech with its decision in *New York v. Ferber*.[47] The *Ferber* Court was faced with a statute that prohibited all depictions of child pornography, even those that did not rise to the level of obscenity.[48] Unable to prohibit the speech as obscene because the Court recognized that some child pornography may have literary, artistic, political or scientific value,[49] the *Ferber* Court determined that child pornography

38. Miller v. California, 413 U.S. 15, 18, 24 (1973).
39. New York v. Ferber, 458 U.S. 747, 760–65 (1982).
40. 413 U.S. 15 (1973).
41. Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107, 176–77 (1994).
42. *See* Winters v. New York, 333 U.S. 507, 508, 519 (1948) (holding that violent criminal reports do not appeal to prurient interests and are not considered obscene); *see also* 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, 191–92 (2009).
43. *See Miller*, 413 U.S. at 18.
44. *Id.* at 24.
45. *Id.*
46. 458 U.S. 747 (1982).
47. *See id.* at 764–65.
48. *Id.* at 749 (referring to a New York criminal statute that prohibits people from knowingly promoting sexual performances by children under age sixteen).
49. *Id.* at 760–61 (explaining that child pornography need not be 'patently offensive' in order to physically and psychologically harm the children involved, and whether the work has serious

was an entirely unprotected class of speech under the First Amendment despite its lack of a historical foundation as unprotected speech.[50]

The Court reasoned that even if some value could be derived from using children in pornographic productions, it was so minimal as to be de minimus.[51] Moreover, the Court viewed the production of child pornography as constituting child abuse, finding a compelling state interest in protecting children from abuse.[52] Ultimately, the Court decided that prohibiting the distribution of child pornography was an effective way to control the production of child pornography.[53] While child pornography had no history of being beyond First Amendment protection, this reasoning employed by the Court entrenched child pornography in a historical category of unprotected speech—speech integral to criminal conduct.[54]

Child pornography's role as an integral component to the criminal conduct of child abuse enabled the Supreme Court to characterize it as a category of proscribed speech.[55] However, the Court limited the governmental restrictions on child pornography to visual depictions of sexual conduct involving children under a specific age.[56] Additionally, the visual depictions had to be specific, involving live performances or visual reproductions of live performances concerning the sexual conduct of children.[57] The Court crafted child pornography's exception to the First Amendment as a very narrow category of unprotected speech, demonstrated with the Court's decision that virtual child pornography was within the confines of free speech.[58]

C. Overbreadth Doctrine

Even if a law regulating speech content passes the strict scrutiny test or regulates an unprotected category of speech, it may still be rendered

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literary, artistic, political or scientific value is irrelevant to the children who are harmed in the making of child pornography).

50. *See id.* at 763–64.

51. *Id.* at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.").

52. *Id.* at 756–57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'").

53. *Ferber*, 458 U.S. at 760 ("[T]he only practical method of law enforcement [of child pornography laws] may be to dry up the market for this material . . . .").

54. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("It has rarely been suggested that . . . freedom for speech . . . extends its immunity to speech . . . used as an integral part of conduct in violation of a valid criminal statute.").

55. Ricaurte, *supra* note 42, at 189 (describing how child pornography is intrinsically related to child abuse).

56. *See Ferber*, 458 U.S. at 764 & n.17 (leaving to the states the authority to define at what age a person is considered a child, and providing that under federal law, the age is under sixteen years).

57. *Id.* at 764–65.

58. *See* Ashcroft v. ACLU, 535 U.S. 564, 573 (2002).

unconstitutional where the scope of the law is too broad.[59] As described in *United States v. Williams*,[60] the overbreadth doctrine seeks to invalidate statutes that, while permissibly proscribing unprotected speech, also restrict speech protected under the First Amendment.[61] The overbreadth doctrine invalidates a law when a substantial number of its applications are unconstitutional in relation "to the statute's plainly legitimate sweep."[62] In order to make this determination, the Court must ascertain not only that speech the statute is *actually* designed to restrict, but those other types of speech the statute may *potentially* restrict.[63]

The Court utilizes the doctrine when a challenger claims that a statute is facially invalid.[64] Typically when asserting a facial challenge, a challenger must show that the statute is unconstitutional in all circumstances.[65] In the context of overbreadth, however, the challenger need only show that a substantial number of the statute's applications are unconstitutional.[66] In effect, the doctrine allows a party to challenge a statute that violates the rights of others without necessarily having to show infringement on the party's own rights.[67]

Precedent suggests that the overbreadth analysis ought to be undertaken only after determining the validity of a statute as applied to the challenging party.[68] This coincides with typical constitutional proceedings because courts prefer to exercise judicial restraint, addressing specific questions as opposed to determining expansive constitutional issues.[69] However, the analysis the Court employs in evaluating a content-based restrictive statute depends on the manner in which the parties involved present the issue to the Court.[70]

D. Prohibiting Depictions of Animal Cruelty

Depictions of animal cruelty have no historical foundation in America as being unlawful; however, cruelty against animals has long been

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59. Chen, *supra* note 24, at 39–40 (describing an overbreadth analysis as being concerned with the scope of a regulation as opposed to whether the law regulates content).

60. 553 U.S. 285 (2008).

61. *See id.* at 292.

62. *Id.* at 292–93.

63. United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (quoting *Williams*, 533 U.S. at 293) ("[T]he first step in overbreadth analysis is to construe the challenged statute . . . .").

64. *Stevens*, 130 S. Ct. at 1586–87 ("Stevens challenged § 48 on its face . . . . [T]his Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad . . . .").

65. United States v. Salerno, 481 U.S. 739, 745 (1987).

66. *Williams*, 533 U.S. at 292.

67. *Stevens*, 130 S. Ct. at 1593 (Alito, J., dissenting).

68. *Id.* at 1593–94 (quoting Bd. of Trs. v. Fox, 492 U.S. 469, 484–485 (1989)) ("[I]t is not the usual judicial practice . . . to proceed to an overbreadth issue . . . before it is determined that the statute would be valid as applied.").

69. Chen, *supra* note 24, at 43–45.

70. *Stevens*, 130 S. Ct. at 1587 ("As the parties have presented the issue . . . the constitutionality [of the statute] hinges on how broadly it is construed.").

considered illegal in the United States.[71] Dating back to the mid-1600s, laws enacted by various states made criminal offenses out of beating, maliciously killing, or torturing animals.[72] Today, every state maintains laws governing animal cruelty, including prohibitions against dogfighting and cockfighting, and the majority of states provide felony penalties for certain animal cruelty offenses.[73]

Current animal cruelty laws are ineffective against a particular type of animal cruelty found in crush videos.[74] Crush videos usually entail a small animal, a kitten or hamster, constrained to the floor of a room.[75] Unable to escape, the animal is then horrifically tortured by a woman, who crushes the animal to death with her feet while wearing high heeled shoes.[76] This type of animal cruelty is hard to prosecute and prevent due to the camera angle used to capture the cruelty.[77] The video typically portrays only a knee-down frame of the woman mutilating the animal, keeping her and the producer's identities secret.[78] In addition, the limited angle of the shot makes it difficult to determine where such videos are produced, allowing any producers who have been identified to successfully challenge a court's jurisdiction.[79]

Congress enacted 18 U.S.C. § 48 with the purpose of impeding crush video animal cruelty.[80] The language of the statute criminalized the creation, sale, or possession of depictions of animal cruelty[81] when illegal federally or within the state where the creation, sale or possession occurs, regardless of whether the animal cruelty took place in that state.[82] However, because of the difficulty in stopping crush video production, § 48 was primarily aimed at preventing the distribution of crush videos.[83] By prohibiting depictions of animal cruelty § 48 enabled the government to pursue distributors of crush videos.[84] Congress's intent in targeting

71. *See* Ricaurte, *supra* note 42, at 176–77 (describing one of the earliest animal cruelty laws dating back to 1641 in Massachusetts).

72. *Id.* at 177.

73. *Id.* ("Forty-three of the states make certain acts of animal cruelty a felony.").

74. *Stevens*, 130 S. Ct. at 1583 ("[C]rush videos rarely disclose participants' identities, inhibiting prosecution of the underlying conduct.").

75. *Id.*

76. *Id.*

77. *Id.*

78. *See* Michael Reynolds, Note, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 344 (2009).

79. *Id.* (describing how it is impossible to discern the location or date of production from the video content alone).

80. *See Stevens*, 130 S. Ct. at 1583 ("The legislative background of § 48 focused primarily on the interstate market for 'crush videos.'").

81. 18 U.S.C. § 48(a).

82. *See* § 48(c).

83. Reynolds, *supra* note 78, at 344 ("The bill was introduced . . . to combat the distribution of 'crush videos' . . . .").

84. *See Stevens*, 130 S. Ct. at 1598 (Alito, J., dissenting).

distributors was to dry up the market for crush videos[85] in order to discourage production and in turn help end the associated animal cruelty.[86]

However, Congress drafted § 48 to encompass far more than crush video content. The Statute defines depictions of animal cruelty as "any visual or auditory depiction . . . in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed."[87] Additionally, § 48 contains limited exceptions for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[88] While enabling authorities to pursue and prevent a variety of animal cruelty, the statute's broad scope beyond crush videos exposed it to judicial review. Moreover, since § 48 proscribes speech content, the statute's restrictions are presumptively invalid.[89]

II. *UNITED STATES V. STEVENS*

Following its enactment in 1999, § 48 went unchallenged in court until Robert J. Stevens was indicted under the statute in 2004.[90] Stevens was not charged for violating the main aim of § 48 by having created, possessed, or depicted crush videos.[91] Rather, he was responsible for distributing videos of a different type of animal cruelty—dog fighting.[92] Stevens' challenge of § 48 as being facially invalid would lead to six years of subsequent litigation resulting in the Supreme Court's opinion that § 48 was too broad of a restriction on speech.[93]

A. Facts

Dogfighting is outlawed as a form of animal cruelty in all fifty states and the District of Columbia, and "has been restricted by federal law since 1976."[94] In the spring of 2003, federal investigators and Pennsylvania law enforcement agents discovered that Robert J. Stevens had been advertising dogfight videos and other merchandise in an underground publication.[95] The investigators uncovered that Stevens' business, "Dogs of Velvet and Steel," maintained a website through which videos of dogfighting were sold.[96] Based on this information, law enforcement

85. *Id.* ("Congress concluded that the only effective way of stopping the underling criminal conduct was to prohibit the commercial exploitation of the videos . . . .").

86. *Id.* at 1600 ("[T]he criminal acts shown in crush videos cannot be prevented without targeting the . . . creation, sale, and possession for sale of depictions of animal torture . . . .").

87. § 48(c).

88. § 48(b).

89. *Stevens*, 130 S. Ct. at 1584.

90. Reynolds, *supra* note 78, at 345 (noting that the first prosecution to come to trail under § 48 was Stevens' indictment in 2004).

91. *Stevens*, 130 S. Ct. at 1590.

92. *Id.*

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

94. *Id.* at 1583 (describing how dogfighting is illegal in the United States).

95. United States v. Stevens, 533 F.3d 218, 220–21 (3d Cir. 2008), *aff'd*, 130 S. Ct. 1577 (2010).

96. *Stevens*, 130 S. Ct. at 1583.

officers purchased three videos from the website and discovered depictions of gruesome dogfights upon review.[97]

On April 23, 2003 the investigators executed a search warrant for Stevens' Virginia residence and found several copies of the three dog fighting videos.[98] The supply of videos, coupled with the advertisements and distribution network on his website, formed the basis for the government's multiple indictments against Stevens.[99]

B. Procedural History

On March 2, 2004, a grand jury 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."[100] Stevens moved to dismiss his indictments asserting that § 48 was facially invalid under the First Amendment.[101] The District Court for the Western District of Pennsylvania denied Stevens' motion to dismiss, finding that the depictions subject to § 48 were "categorically unprotected by the First Amendment."[102] The District Court upheld the constitutionality of § 48 based on the statute's exceptions clause.[103] According to the District Court, the clause narrowed the content-based restrictions of § 48 to speech that had no "serious" value, avoiding overly broad limitations on speech.[104] The jury found Stevens guilty on all counts,[105] and he was consequently sentenced to thirty-seven months imprisonment, followed by three years of supervised release.[106]

On appeal, the Third Circuit, sitting *en banc*, declared § 48 facially invalid and vacated Stevens' conviction on the grounds that § 48 did not create a new category of unprotected speech.[107] The court of appeals reasoned that to circumvent the free speech protection afforded by the First Amendment, § 48 had to achieve a compelling state interest similar to the statute in *Ferber*.[108] The Third Circuit held that § 48's purpose, to protect animals against cruelty, was not a compelling state interest.[109]

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97. *Stevens*, 553 F.3d at 221 (describing the videos to include dogfights in the United States and Japan, and an instructional hunting video displaying horrific images of pit bulls attacking wild pigs).

98. *Id.* (highlighting that the law enforcement agents found "other dogfighting merchandise" as well).

99. *See id.*

100. *Id.*

101. *Stevens*, 130 S. Ct. at 1583.

102. *Id.*

103. *Id.*; *see also* 18 U.S.C. § 48(b) (2006) (permitting any depictions of animal cruelty that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value").

104. *See Stevens*, 130 S. Ct. at 1582–83.

105. *Id.* at 1583.

106. *Id.*

107. United States v. Stevens, 533 F.3d 218, 232 (3d Cir. 2008) ("In sum, the speech restricted by 18 U.S.C. § 48 is protected by the First Amendment."), *aff'd*, 130 S. Ct. 1577 (2010).

108. *See id.*

109. *Id.* at 226–28.

Moreover, the Third Circuit discussed the history of categories of unprotected speech, pointing to the absence of any precedent suggesting that a statute restricting free speech in order to protect animals constituted a compelling interest.[110] The Third Circuit was critical of the link between § 48's restriction of depictions of animal cruelty and prevention of animal cruelty altogether.[111] The disconnect between § 48's restriction on all depictions of animal cruelty and its alleged purpose of preventing crush video animal cruelty further convinced the Third Circuit that it did not serve a compelling state interest.[112]

Finding that § 48 did not create a new category of unprotected speech, the Third Circuit evaluated the statute under a strict scrutiny analysis.[113] Having determined that § 48 did not contain a compelling state interest, the court held that § 48 was not tailored narrowly enough to survive strict scrutiny.[114] First, § 48 was underinclusive because it prohibited depictions of animal cruelty only for interstate commercial use, yet did nothing to prevent intrastate sale and use.[115] Second, § 48 was overinclusive because it made selling a depiction of a legal activity in one state illegal in another state based on variances in state law.[116] As a result, and because of the lack of a compelling state interest and the lack of narrowly tailored means of preventing animal cruelty, the Third Circuit found § 48 to be facially invalid.[117]

C. The United States Supreme Court Opinion

The United States Supreme Court affirmed the judgment of the Third Circuit, but relied on the reasoning that § 48 was too broad.[118] The Court based its opinion on the fact that § 48 had the potential to proscribe speech well beyond crush videos.[119] Invalid under the overbreadth doctrine, the Court felt no need to address whether or not crush videos could

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110. *Id.* at 227–28 ("Nothing in these cases suggests that a statute that restricts an individual's free speech rights in favor of protecting an animal is compelling.").

111. *Id.* at 228–29 ("While this justification is plausible for crush videos, it is meaningless when evaluating § 48 as written. By its terms, the statute applies without regard to whether the identities of individuals in a depiction, or the location of a depiction's production, are obscured.").

112. *Id.* ("Preventing cruelty to animals . . . simply does not implicate interests of the same magnitude as protecting children . . . .").

113. *Id.* at 232 ("Because the speech encompassed by § 48 does not qualify as unprotected speech, it must survive a heightened form of scrutiny.").

114. *Id.* at 233–34 ("The Supreme Court routinely strikes down content-based restrictions on speech on the narrow tailoring/least restrictive means prong of strict scrutiny.").

115. *Id.* at 233.

116. *Id.* at 233–34 ("If the government interest is to prevent acts of animal cruelty, the statute's criminalization of depictions that were legal in the geographic region where they were produced makes § 48 overinclusive.").

117. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

118. *Id.* at 1592 (holding that § 48 is "substantially overbroad, and therefore invalid under the First Amendment.").

119. *Id.* at 1590 (explaining that most hunting videos could likely fall within the confines of § 48's restrictions).

ever constitute a class of speech unworthy of First Amendment protection.[120]

1. Depictions of Animal Cruelty Are Protected Speech

Like the Third Circuit, the Supreme Court was unwilling to categorize depictions of animal cruelty as unprotected speech.[121] The Court reasoned that only historically unprotected speech, or speech restrictions grounded in previously recognized categories of unprotected speech, warranted unprotected categorization.[122] The government offered only a value balance test, weighing the social costs of depicting animal cruelty against the social benefits, and the Court reasoned that the government had not done enough to establish depictions of animal cruelty as a new category of unprotected speech.[123]

The Court contrasted the government's argument with the holding in *Ferber* to demonstrate that a new category of unprotected speech requires more than a balancing of competing interests.[124] *Ferber* declared child pornography categorically unprotected speech by demonstrating that the market for child pornography was an integral part of the production of such materials, which were illegal.[125] By showing an intrinsic relationship between child pornography and child abuse, the Court grounded the holding in *Ferber* with the integral part of criminal conduct doctrine,[126] a previously-recognized category of unprotected speech.[127]

2. 18 U.S.C. § 48's Overly Broad Restriction on Speech

Subjecting § 48 to First Amendment analysis, the Court utilized the overbreadth doctrine to determine the statute's constitutionality.[128] Stevens asserted a general claim challenging the constitutionality of § 48, rather than challenging the applicability of the statute to his case,[129] and the government had similarly construed Stevens' claim as a general chal-

120. *Id*. at 1592.

121. *Id.* at 1586 (noting that "depictions of animal cruelty" does not constitute a new category of unprotected speech).

122. *Id.* at 1585–86 (holding that animal cruelty is not a new category of unprotected speech because the Court is "unaware of any similar tradition excluding *depictions* of animal cruelty from the freedom of speech") (internal quotation marks omitted).

123. *Id.* at 1585 ("[F]ree speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

124. *Id.* at 1586 ("When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.").

125. *Id.* (highlighting that the decision in *Ferber* did not rest solely on the balance of competing interests, those of protecting children against the value of child pornography to society).

126. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("It rarely has been suggested that . . . freedom [of] speech . . . extends its immunity to speech . . . used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.").

127. *Stevens*, 130 S. Ct. at 1586 ("*Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech . . . .").

128. *Id.* at 1587 & n.3.

129. *Id.* ("Whether or not [an overbreadth analysis is premature], here no as-applied claim has been preserved.").

lenge to § 48.[130] Therefore, the Court determined that the overbreadth analysis was warranted by the parties' presentation of the case.

Relying on the test from *United States v. Williams*, the Court construed § 48 widely to determine the full reach of the statute.[131] Reviewing the text of the statute, the Court determined that it did not require the depicted conduct to be cruel,[132] and while requiring that the depicted conduct be illegal under the state's laws, illegality did not equate to cruelty.[133] Moreover, the Court reasoned that depicted conduct may be illegal in one state but legal in another.[134] The differences in law from state to state concerned the Court that confusion as to the legality of depictions might vary depending on jurisdiction.[135]

The Court neglected to extend the canon of *noscitur a sociis* in order to resolve the discrepancies of cruelty because the phrase "wounded . . . or killed" contained little ambiguity.[136] The Court pointed out that the words should retain their normal meaning and they do not include cruelty or a degree of cruelty in their definition.[137] Additionally, the Court gave extensive examples of hunting laws and agricultural regulations that vary from state to state to demonstrate how broad § 48 could be interpreted, making conduct illegal in jurisdictions where such conduct is not considered cruel.[138]

Unlike the district court, the Supreme Court did not find that the exceptions clause[139] narrowed § 48 enough to save it from invalidation.[140] For one, § 48(b) required any depiction of animal cruelty worthy of exemption to have serious value in one of the named categories of exempted speech.[141] The Court explained that most speech protected by the First Amendment did not have serious value in education, science, journalism, or any other category included in the exemption clause.[142] Accordingly, the Court held that § 48(b) did little to limit the statute.[143] In

130. *Id.* at 1587 n.3 (highlighting that the Government did not construe Stevens' briefs as adequately developing a separated attack on a defined subset of the statute's applications).

131. *Id.* at 1587–88.

132. *Id.* at 1588 (noting that nothing about wounding or killing requires cruelty).

133. *Id.* (highlighting how the humane killing of endangered species is illegal but may not constitute cruelty).

134. *Id.*

135. *Id.* at 1588–89 ("A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful.").

136. *Id.* at 1588 (alteration in original) (highlighting that the cannon of *noscitur a sociis* is appropriate only when terms are ambiguous).

137. *Id.*

138. *Id.* at 1589–90.

139. 18 U.S.C. § 48(b) (2006) (permitting any depictions of animal cruelty that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value").

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

141. *Id.* at 1590.

142. *Id.* ("Most speech does not [fall into one of the enumerated categories].").

143. *Id.* ("There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban.").

addition, the Court rejected the idea that since the exceptions clause was drafted after *Miller*,[144] it sufficiently narrowed § 48.[145] The Court reasoned that *Miller* applies only to obscenity speech and not speech in general.[146]

In response, the government declared that § 48, while broad, would not be enforced to the detriment of the First Amendment and § 48 would only be used combat wanton animal cruelty.[147] The Court thought the idea of executive discretion in the application of § 48 was a merit-less argument.[148] The Court argued that it would not uphold an unconstitutional statute merely based on the government's promise to use it responsibly.[149] Moreover, the Court hesitated to construe the statutory language to avoid serious constitutional doubts because of fears of legislative infringement.[150]

D. Justice Alito's Dissent

The sole dissenter, Justice Alito, contended that the Court should not have utilized the overbreadth doctrine.[151] Instead, Justice Alito argued for an as-applied analysis of § 48 to Stevens' dogfighting videos.[152] The dissent suggested that such an analysis would render § 48 constitutional when applied to dogfighting videos rather than in addition to the unusual hunting or agricultural situations suggested by the majority.[153] Justice Alito further argued that § 48 was also valid under the overbreadth analysis.[154] Reiterating *Williams*, Justice Alito focused on the substantiality of a statute's breadth relative to its plainly legitimate sweep.[155] Since the suggested hunting and agricultural practices that the majority relied on to construe the statute as overly broad were rare situa-

144. Miller v. California, 413 U.S. 15, 34 (1973) (noting that obscene speech with serious value in scientific, political, or artistic realms would be deemed protected speech).

145. *Stevens*, 130 S. Ct. at 1591 (noting the Government's contention that the exception clause is sufficient to avoid First Amendment objection because it was drafted after the *Miller* decision).

146. *Id.* ("We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place.").

147. *Id.*

148. *Id.* ("This prosecution [of Stevens] is itself evidence of the danger in putting faith in government representations of prosecutorial restraint.").

149. *Id.*

150. *Id.* at 1592 ("We will not rewrite a . . . law to conform it to constitutional requirements . . . for doing so would constitute a serious invasion of the legislative domain . . . .") (first alteration in original) (citations omitted) (internal quotation marks omitted).

151. *Id.* at 1594 (Alito, J., dissenting).

152. *Id.* at 1593 & n.1 ("A party seeking to challenge the constitutionality of a statute generally must show that the statute violates the party's own rights.").

153. *Id.* at 1602 ("[Section] 48 may validly be applied to . . . dogfighting videos. . . . Moreover . . . the record does not show that § 48, properly interpreted, bans a substantial amount of protected speech in absolute terms.").

154. *Id.*

155. *See id.* at 1594 ("In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals.").

tions, Alito argued that they did not constitute a substantial amount of protected speech.[156]

Next, Justice Alito looked to *Ferber* to argue for the addition of crush videos and dogfighting videos to the realm of unprotected speech.[157] Comparing the case to the child pornography in *Ferber*, Justice Alito reasoned that crush videos and dogfighting videos followed the same logical course to unprotected status.[158] Justice Alito highlighted the *Ferber* Court's focus on the integral relationship between child pornography and child abuse, the lack of effective prevention of child abuse without prohibiting child pornography distribution, and the value of child pornography being de minimus.[159] While Justice Alito noted that the prevention of child abuse was more important than the prevention of animal cruelty, he claimed that crush and dogfighting videos could be classified as unprotected speech because each of these *Ferber* factors applied to these videos.[160]

III. ANALYSIS

The Supreme Court's choice to invalidate § 48 was not only the correct decision, but it was also important for the preservation of First Amendment rights. Rather than trying to reconstruct a statute that had thus far proven useful for government authorities, the Court recognized the overbreadth of § 48 and its potential to restrict protected speech. By forcing Congress to redraft a narrow statute proscribing only crush video content, the Court foreclosed on any opportunity, however slight, for the government to abuse § 48 and infringe on speech worthy of First Amendment protections. In light of the hard fought history of free speech rights, any opportunity to encroach on the First Amendment should be countered, and by invalidating § 48 the *Stevens* Court has assured that rescissions of free speech will not easily happen.

A. Proper Decision by the Supreme Court

The issue in *Stevens* encompassed far more than whether depictions of crushing animals to death deserved unprotected status under the First Amendment.[161] The Supreme Court was presented with the question whether "depictions of animal cruelty, as a class, are categorically unpro-

156. *Id.* at 1595–97 (criticizing hypotheticals involving illegal crossbow hunting, depicting humane slaughter of cows, and other acts that happen to be illegal for reasons that have "nothing to do with the prevention of animal cruelty").

157. *Id.* at 1598–99, 1601–02.

158. *Id.* (arguing that crush video creation is a crime, the acts within the video cannot be prevented without targeting the distribution of the videos, and the harm caused by the videos adds little value, if any, to society).

159. *Id.* at 1599–1600 (highlighting that in *Ferber*, the production of the work, not its content, was the target of the statute).

160. *See id.* at 1599–1602 ("[P]reventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos.").

161. *See id.* at 1582, 1584 (majority opinion).

tected."[162] This wide range of content-based restricted speech was justified by the government on the ground that this 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."[163]

While the government's reasoning has been reiterated throughout First Amendment case law,[164] it has never been classified as a test in determining whether a certain type of speech deserves protection under the First Amendment.[165] Rather, this idiom has served as a description of speech already determined to be without protection.[166] The *Stevens* Court rightfully declined to recognize the use of the government's reasoning as a test, thereby declining to empower the government beyond permissible means.

As a test, the government would have had the power to censor a speaker by balancing the value of expression against the indefinable standards of both order and morality.[167] Determinations of social value would no doubt vary due to the subjectivity of such a test, and any measure devised to establish when the benefits of speech outweighed order and morality would be arbitrary.[168] The *Stevens* Court's determination reminds us that the purpose behind the First Amendment is to prevent arbitrary governmental restrictions on speech when speech is classified as "not worth [First Amendment protections]."[169]

1. Neglecting to Recognize a New Category of Unprotected Speech

Balancing speech against order and morality may enable the government to utilize helpful laws, but the First Amendment cannot be circumvented at the connivance of the government statutes that has thus far proved useful.[170]

Notwithstanding apparent faults in a balancing test, some scholars argue that a categorical weighing of speech value against social harms is

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162. *Id.* at 1584.

163. *Id.* at 1585 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)).

164. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 358–59 (2003); *City of St. Paul*, 505 U.S. at 383; Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

165. *Stevens*, 130 S. Ct. at 1585–86 (distinguishing between descriptions of historically protected speech and historically unprotected speech).

166. *See, e.g.*, *Chaplinsky*, 315 U.S. at 571–72 ("It has been well *observed* that such utterances [unprotected by the First Amendment] are . . . 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.") (emphasis added).

167. *See Stevens*, 130 S. Ct. at 1585–86 (suggesting that, under a cost benefit analysis test, free speech could be proscribed when the cost of protecting it "tilts in a statute's favor").

168. *See id.*

169. *Id.* at 1585 ("Our Constitution forecloses any attempt to revise [the First Amendment guarantee to free speech] simply on the basis that some speech is not worth it.").

170. *See id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)) ("The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'").

the preferable method of distinguishing between protected and unprotected speech.[171] For example, it is argued that applying a balancing test consisting of the factors articulated in Ferber would increase transparency and provide a more predictable outcome when determining whether speech fell within the protections of the First Amendment.[172] While a balancing test might resort to an arbitrary cost-benefit calculation, it would provide a clearer standard for litigators than the case-by-case adjudication centered on strict scrutiny or the comparisons to existing unprotected categories of speech.[173] Admittedly, a balancing test would empower the Court to differentiate between free speech and recognized unprotected speech with greater ease.[174] However, recognizing a simple balancing test as a measure of the protected status of speech has dangerous consequences.[175] While such a test might work to easily discern depictions of animal cruelty or even crush videos as unprotected speech, the general nature of a balancing test would enable future litigants to argue for its applicability in other realms of free speech contests.[176] Recognizing a "highly manipulable"[177] balancing test in order to assure predictability in free speech litigation would lead to a deterioration of the hard fought and rigid restrictions on governmental censorship central to American notions of liberty.[178] Therefore, the *Stevens* Court appropriately rejected a free speech balancing test presented by the government under the veil of animal cruelty.

In addition to its balancing test, the government attempted to proscribe depictions of animal cruelty as categorically unprotected speech by pointing to the long history associated with the prohibition of animal cruelty in the United States.[179] While categories of unprotected speech in

171. *The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 239, 248 (2010) [hereinafter *Leading Cases*].

172. *Id.* at 248–49 (explaining that the *Ferber* factors provided a clear framework for a balancing test; that this test was preferable to the *Stevens* Court's redefinition of *Ferber* as anchored in historical unprotected speech; and that the balance test provides a clearer standard than case-by-case analyses of speech contests).

173. *Id.* ("While definitional balancing may sometimes approximate a cost-benefit calculus instead of the more speech-protective method of weighing First Amendment values, it provides a clearer standard than case-by-case strict scrutiny analyses . . . .").

174. *Id.* ("[T]he Court's recharacterization of *Ferber* [away from the balancing test] . . . provides fewer doctrinal tools to distinguish speech closely analogous to previously recognized unprotected categories.").

175. United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (describing a balancing test as "startling and dangerous").

176. *See id.* at 1586 ("[A balancing test] do[es] not set forth a test that may be applied as a general matter . . . .").

177. *Id.*

178. 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, 353 (2009); *see also* Hunter, *supra* note 8, at 70, 87–89, 127 (describing the long history of government restriction on speech during early American history).

179. *Stevens*, 130 S. Ct. at 1585 (highlighting that animal cruelty laws have existed since colonial times in the United States).

the United States have historical foundations,[180] the Supreme Court correctly distinguished between historically illegal conduct and illegal depictions, finding that illegal conduct did not make the depictions of such conduct illegal.[181] Illegalizing speech because of the illegality of the conduct displayed in the speech would open a flood gate of issues concerning the depiction of illegal conduct, best demonstrated by speech meant to entertain, such as films depicting murder.[182] Without any information establishing that *depictions* of animal cruelty have a history of being illegal in the United States,[183] the Supreme Court rightly decided to keep depictions of animal cruelty as protected speech.

Although the *Stevens* Court failed to grant depictions of animal cruelty unprotected status, it did not specifically rule that crush video content or dogfighting video content will always be protected speech.[184] Rather, the *Stevens* Court noted that it was "not foreclos[ing on] the future recognition of such additional categories [of unprotected speech]."[185] The dissent provided a substantial framework for future litigators and prosecutors to establish crush video and dogfighting video content as unprotected categories of speech, in accordance with the *Ferber* decision.[186] While the government tried to employ the *Ferber* rationale to § 48 as a whole, it failed to demonstrate any intrinsic criminal relationship between animal abuse and depictions of animal cruelty beyond crush videos and dogfighting videos.[187] As a result, the majority did not evaluate crush videos apart from § 48 according to *Ferber*.[188] The majority's scant dismissal of the government's attempt to entrench § 48 in prior doctrine,[189] coupled with the Court's acknowledgement that other types of speech may become proscribed,[190] suggests that crush videos by themselves may one day be classified as unprotected speech.

The Court made the right move staying within its judicial realm instead of wildly interpreting § 48 to proscribe crush and dogfighting videos. Interpreting § 48 in such a way would have allowed the Court to infringe upon the legislative duties of Congress[191] which specifically

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180. *Id.*

181. *Id.* ("[W]e are unaware of any similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' . . . .").

182. *Id.* at 1590 (highlighting that hunting videos for pure entertainment purposes would be considered illegal for not having "serious" value).

183. *Id.* at 1585.

184. *See id.* at 1585–86.

185. *Id.* at 1586.

186. *See id.* at 1599–1602 (Alito, J., dissenting).

187. *Id.* at 1592 (majority opinion).

188. *Id.*

189. *Id.* (discussing the failure of the government to establish that the obscenity or intrinsic criminal relationship categories of unprotected speech extend to other areas of speech proscribed by § 48 other than crush and dogfighting videos).

190. *Id.* at 1586.

191. *Id.* (quoting United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 479 n.26 (1995)) ("[F]or doing so would constitute a 'serious invasion of the legislative domain.'").

drafted § 48 to apply to content other than just crush videos.[192] Moreover, the Court should not be inclined to take up the responsibility entrusted to executive prosecutors when they fail to provide any defense to § 48 beyond crush and dogfighting videos.[193]

2. Overbreadth Analysis

While the overbreadth analysis was appropriate because of the facial challenge to the content-based First Amendment restrictions imposed by § 48,[194] the use of the doctrine before considering the constitutionality of § 48 as applied to Stevens is contentious.[195] However, the Court's divergence from general practices[196] was warranted because of the nature of the statute's restriction and the way the issue was presented to the court.

First, § 48 restricted the type of speech that most appropriately warrants an overbreadth analysis. Pure speech challenges warrant evaluation under the overbreadth doctrine more so than other expressive concerns under the First Amendment.[197] Prohibiting depictions of animal cruelty restricts pure speech; therefore, § 48 was more deserving of an overbreadth analysis than cases involving the prohibition of expressive political conduct[198] or strict regulation of commercial speech.[199]

Overbroad analyses have typically been prefaced by as-applied analyses where the challenger brings a broad challenge along with an as-applied challenge.[200] In *Board of Trustees v. Fox*,[201] the overbreadth analysis was considered after the challengers brought a specific claim regarding their commercial speech in addition to a claim asserting a broad non-commercial restriction on speech.[202] In *Broadrick v. Okla-*

192. 18 U.S.C. § 48(a) (2006) (including all depictions of animal cruelty).

193. *See Stevens*, 130 S. Ct. at 1591–92 ("[T]he Government makes no effort to defend the constitutionality of § 48 as applied beyond crush videos and depictions of animal fighting.").

194. *Id.* at 1587 n.3 (arguing that an overbreadth analysis was appropriate because an as-applied challenge had not been preserved).

195. *Id.* at 1593 (Alito, J., dissenting) ("[O]verbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied . . . .").

196. Bd. of Trs. v. Fox, 492 U.S. 469, 484–85 (1989) ("It is not the usual judicial practice . . . to proceed to an overbreadth issue . . . before it is determined that the statute would be valid as applied.").

197. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[O]verbreadth adjudication . . . attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct . . . .").

198. *Id.* at 616–18 (reviewing a statute that prohibits political expressive conduct under the overbreadth doctrine).

199. *Fox*, 492 U.S. at 483–85 (discussing the applicability of the overbreadth doctrine to commercial speech).

200. *Id.* at 484–85 ("It is not the usual judicial practice, however, 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.").

201. 492 U.S. 469 (1989).

202. *Id.* at 483–86 (declining to determine if the statute was overbroad because a proper as-applied analysis had yet to be completed).

homa,[203] the overbreadth analysis was considered after the challengers had conceded that the statute in question was valid when applied to them.[204] Unlike these prior cases constructing the precedent, Stevens did not bring a claim against the statute as it applied to him, nor did he stipulate that it would be valid as applied to him.[205]

Despite the fact that courts typically prefer to conduct as-applied analysis prior to an overbreadth analysis no precedent suggests that the Court has to conduct an as-applied analysis prior to engaging in an overbroad analysis.[206] As-applied analyses are merely encouraged where they would increase judicial ease and efficiency.[207] Since the Court assumed that § 48 was valid as-applied to the content at issue in *Stevens*, it properly continued with an overbreadth analysis, and thereby effectuated efficient justice by preventing future litigation concerning the same issues.[208]

The Court's interpretation of § 48 as overbroad was proper for several reasons. First, a non-literal interpretation of statutory text creates opportunities for congressional lethargies.[209] Such a practice is dangerous for any realm of law, but especially in respect to the sacred nature of the First Amendment,[210] this cannot be encouraged. The Court's refusal to recognize *noscitur a sociis* or other canons of construction[211] was therefore appropriate.

Second, the Court's sweeping interpretation of § 48 to encompass unusual hunting practices and agricultural regulations[212] was necessary to satisfy the requirements of the overbreadth doctrine as described in *Williams*.[213] Furthermore, the majority of content subjected to § 48 restric-

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203. 413 U.S. 601 (1973).

204. *Id.* at 612–18 (considering the overbreadth doctrine, and holding the statute not overbroad).

205. United States v. Stevens, 130 S. Ct. 1577, 1587 n.3 (2010) ("The sentence in Steven's appellate brief mentioning his unrelated sufficiency-of-the-evidence challenge hardly developed a First Amendment as-applied claim.").

206. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008) (discussing the Court's hesitancy in applying the "strong medicine" of overbreadth analyses); *see also Fox*, 492 U.S. at 484 (noting that courts do not find it "generally desirable" to consider an overbreadth analysis prior to an as-applied analysis); *Broadrick*, 413 U.S. at 613 (discussing how the overbreadth analysis has historically been employed "sparingly" by the Court).

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

208. *Stevens*, 130 S. Ct. at 1594 (Alito, J., dissenting) ("[T]he Court tacitly assumes for the sake of argument that § 48 is valid as applied to [crush video and deadly animal fight] depictions . . . .").

209. *Id.* at 1592 (majority opinion) ("[To] 'rewrite a . . . law to conform it to constitutional requirements' . . . would . . . sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" (first alteration in original) (citations omitted)).

210. Kinsella, *supra* note 178, at 353 ("Americans generally believe free speech is a national right central to notions of liberty.").

211. *Stevens*, 130 S. Ct. at 1588, 1592 (declining to consider alternate canons of construction).

212. *Id.* at 1596 (Alito, J., dissenting) (discussing hunting methods involving a crossbow, hunting rare birds, and agricultural practices such as docking the tails of dairy cows).

213. *Id.* at 1587 (majority opinion) (quoting United States v. Williams, 553 U.S. 285, 293(2008)) ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.").

tions were regular hunting practices from videos or magazines which,[214] as the Court correctly argued, overwhelmingly outnumbered depictions of animal cruelty in the commercial market.[215] The purpose of the overbreadth analysis, to preserve free speech at the expense of allowing some impermissible forms of speech,[216] was properly carried out by the *Stevens* Court's invalidation of § 48.

B. Congressional Drafting

The invalidation of § 48 should be attributed to Congress rather than to the Supreme Court because the statute was bound to infringe upon the First Amendment from its enactment.[217] Rather than constrain § 48 to only crush video content, Congress acted against minority concerns and drafted a sweeping law with substantial breadth.[218] Since § 48's invalidation, Congress has constructed a new law to combat crush videos,[219] and this time Congress did what it should have done in the first place: create a narrow law that both prevents crush videos and respects the First Amendment.

1. Inherent Faults of 18 U.S.C. § 48

Worries about the constitutionality of § 48 were abundant during the House debate on § 48 as a bill.[220] House Representative Robert Scott, of Virginia, highlighted constitutional concerns by declaring that the bill restricted speech content, and that because § 48 did not wholly qualify as obscenity it would be subjected to strict scrutiny review.[221] Relying on the same case law as the Third Circuit did in its *Stevens* decision,[222] Representative Scott informed the House that § 48 would likely fail the strict scrutiny test because animal rights were not compelling enough to supersede human constitutional rights.[223] Representative Ron Paul, of Texas, also expressed concern regarding the statute's constitutional inadequacy, arguing that the proposed statute was broadly written and that animal

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214. *See, e.g.*, *id.* at 1596 (Alito, J., dissenting) (discussing the predominantly tolerant views regarding hunting and listing activities commonly perceived to be normal, such as fishing).

215. *Id.* at 1589 (majority opinion) ("The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude.").

216. *Id.* at 1587 (recognizing that the focus of the overbreadth doctrine hinges on the substantiality of unconstitutional applications when compared to the legitimate sweep of the statute).

217. Reynolds, *supra* note 78, at 345 ("Possible First Amendment troubles were pointed out immediately by opponents of the bill [that would become § 48].").

218. *See, e.g.*, 145 CONG. REC. H10268 (daily ed. Oct. 19, 1999) (statement of Rep. Robert Scott).

219. 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.

220. *See, e.g.*, 145 CONG. REC. H10268 (daily ed. Oct. 19, 1999) (statement of Rep. Robert Scott).

221. *Id.*

222. United States v. Stevens, 553 F.3d 218, 226 (3d Cir. 2008), *aff'd*, 130 S. Ct. 1577 (2010).

223. 145 CONG. REC. H10268.

cruelty was not well defined.[224] He went on to point out that regardless of the intention of the statute—preventing crush video animal cruelty—the broad drafting of the statute provided an opportunity for misinterpretation of the law.[225]

Proponents of the bill seemed less concerned with constitutional problems and more concerned with preventing crush video animal cruelty.[226] Some legislators assured protestors that § 48 would pass constitutional muster, pointing to the exceptions clause as properly narrowing the statute.[227] In fact, one legislator went so far as to say that § 48 would "only prevent the interstate trafficking of videos that feature people crushing small animals to death with their feet."[228]

Although § 48 passed in Congress with overwhelming support, worries about § 48's unconstitutionality were so well noticed that President Bill Clinton issued a signed statement addressing the matter.[229] President Clinton acknowledged congressional apprehensions that, if applied in certain contexts, § 48 would violate the First Amendment.[230] In an effort to prevent unconstitutional applications, President Clinton ordered prosecutions to be limited to depictions of wanton cruelty to animals designed to appeal to prurient interests in sex.[231] The President's efforts, as well as congressional assurances that § 48 would apply only to crush videos, proved fruitless, as § 48's first prosecution to reach trial concerned dogfighting.[232]

2. Alternatives Under the Son of Sam Laws

As demonstrated by the result in *Stevens*, Congress should have drafted § 48 differently. One recommendation is that an attempt at a new restriction on crush videos should be enacted under the Son of Sam laws.[233] These laws prevent criminals from utilizing free speech to collect profit by depicting the conduct of their previously-committed crimes.[234] Some argue that a statute enacted under the Son of Sam laws would be narrower, and thus more likely subjected to a lower level of

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224. 145 CONG. REC. H10270 (daily ed. Oct. 19, 1999) (statement of Rep. Ron Paul).

225. *Id.*

226. *Id.* at H10271–73.

227. *Id.* at H10267 (statement of Rep. Bill McCollum) ("These exceptions would ensure that an entertainment program . . . or a news documentary . . . would not violate the new statute.").

228. *Id.* at H10268 (statement of Rep. Lamar Smith).

229. *Presidential Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty*, 35 WKLY. COMP. PRES. DOC. 2557 (Dec. 9, 1999).

230. *Id.* at 2557–58.

231. *Id.* at 2558.

232. Reynolds, *supra* note 78, at 345 (noting that the first prosecution to come to trail under § 48 was Stevens' indictment in 2004).

233. Ricaurte, *supra* note 42, at 195 (arguing that Son of Sam laws may be constitutionally applied to depictions of animal cruelty).

234. *Id.* ("Son of Sam, or criminal anti-profit laws, are based on the general principle that criminals should not profit from their crimes. The laws typically seek to prevent criminals from profiting based on their notoriety from previously committed crimes." (footnote omitted)).

judicial scrutiny, because speech infringements would have to relate specifically to crush videos.[235]

However, such a law would be ineffective in the crush video context. The primary reason for the enactment of § 48 was the difficulty in apprehending and convicting the producers of crush videos.[236] Any Son of Sam law looking to prohibit the distribution of crush videos could apply only to persons convicted or accused of the animal cruelty crime conducted in the crush video.[237] While narrowing the speech restriction to survive judicial scrutiny, a crush video Son of Sam law would give prosecutors an impassible obstacle: having to prove that the detained distributor is the producer of the crush video. As a result, such a statute would do little to prevent the production and distribution of crush videos.

3. An Improved Crush Video Statute

Rather than a broad prohibition on animal cruelty depictions or an ineffective Son of Sam law concerning crush videos, Congress has now created an effective crush video statute that will prove constitutional. On December 9th, 2010, President Barack Obama signed into law a narrowly drafted crush video statute,[238] designed to solely prohibit the creation and distribution of animal crush videos.[239] Crush videos are now described as "any photograph, motion-picture film, video or digital recording, or electronic image that depicts actual conduct [of one] or more non-human mammals, birds, reptiles, or amphibians [being] intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury."[240] Moreover, the new statute excludes agricultural husbandry, animal slaughter for food purposes, and hunting and fishing depictions from criminality.[241] The specific focus of the new statute addresses the weight of the Supreme Court's overbreadth analysis in *Stevens*, the substantiality of the market of hunting and agricultural videos as against crush videos.[242] Additionally, the well-defined description of animals precludes the new statute from reaching other forms of protected

235. *Id.* at 199 (arguing that a Son of Sam law relating to depictions of animal cruelty "would apply to a narrower category of speech," be less underinclusive and overinclusive restrictions on speech, and would face a lower level of scrutiny because of the content-neutral restriction imposed on speech).

236. United States v. Stevens, 130 S. Ct. 1577, 1583 (2010) ("[C]rush videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct.").

237. Ricaurte, *supra* note 42, at 202 (admitting that third parties, not involved in the animal abuse, could still sell depictions of the dog fighting and animal cruelty videos).

238. Mears, *supra* note 219.

239. 156 CONG. REC. S8202 (daily ed. Nov. 19, 2010).

240. *Id.* at S8203.

241. *Id.*

242. United States v. Stevens, 130 S. Ct. 1577, 1589 (2010) ("The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude.").

speech, such as insect extermination advertisements.[243] The new statute's narrow applicability will likely survive an overbreadth analysis since its potential reach extends only to crush videos.[244]

While addressing a properly narrow scope of speech, the new statute prohibits content-based speech and must survive strict scrutiny or qualify as unprotected speech to survive judicial review.[245] The new statute will likely face difficulty passing a strict scrutiny analysis. The Supreme Court's focus on the overbreadth doctrine in *Stevens* provides little insight, but the prior Third Circuit decision may.[246]

Survival of strict scrutiny under the First Amendment is dependent upon a finding that the statute at issue aims to achieve a compelling state interest with the least restrictive means possible.[247] The Third Circuit determined that protecting animals did not amount to a compelling state interest.[248] However, this determination was made in regards to the broad range of cruelties encompassed in § 48 and not specifically regarding crush videos.[249] Moreover, the only Supreme Court decision considering the matter argues that animal interests do not supersede the rights guaranteed by the Free Exercise Clause.[250] While this instruction does not rule out the chance that crush animal cruelty may constitute a compelling state interest when weighed against free speech, the bleak history of content-based speech restrictions surviving strict scrutiny suggests that, if subjected to strict scrutiny, the new statute would fail.[251]

Despite this drawback, the new statute prohibits speech that falls outside the protections of the First Amendment since by definition animal crush videos must be obscene in order to be criminalized.[252] Following the directions of the *Stevens* Court, Congress grounded this new crush video statute in obscenity, a narrowly defined and historically unprotected category of speech.[253] While obscenity determinations are de-

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243. *Compare* 156 CONG. REC. S8203 (daily ed. Nov. 19, 2010), *with* 145 CONG. REC. H10269 (daily ed. Oct. 19, 1999) (statement of Rep. Paul).

244. 156 CONG. REC. S8203.

245. *Id.*

246. *See* Kinsella, *supra* note 178, at 374–75 (highlighting that the Third Circuit found that § 48 did not satisfy the compelling interest prong of a strict scrutiny analysis).

247. *See id.* at 372–73; *see also* United States v. Stevens, 533 F.3d 218, 232 (2008), *aff'd*, 130 S. Ct. 1577 (2010) (discussing the presumptive invalidity of content-based restrictive statutes, which must pass strict scrutiny by showing a compelling state interest and a narrow tailoring to achieve that interest to survive a facial challenge).

248. Kinsella, *supra* note 178, at 372 (arguing that the Third Circuit was incorrect when finding that preventing animal cruelty was not a compelling interest).

249. *Id.* at 369–70.

250. *Id.* at 375 ("The [Supreme] Court recognized a compelling government interest in preventing animal cruelty, but ultimately determined the legislature's actual motive was to suppress religion.").

251. 156 CONG. REC. S8202–03 (daily ed. Nov. 19, 2010).

252. *Id.* at S8203 (statement of Sen. Leahy) (defining animal crush videos as obscene depictions).

253. *Id.*

pendent upon "contemporary community standards,"[254] the statute will likely prove effective because the specific prurient sexual nature and patently offensive content of crush videos will likely violate nearly all contemporary community standards.[255]

In addition, the new specific crush video statute may also be grounded in another category of unprotected speech: speech integral to criminal conduct. Commentators suggest that if the government can demonstrate that the animal abuse taking place in crush videos is created only for the purpose of making the videos, then the videos can be classified as integral to criminal conduct.[256] The Court's declination to evaluate crush videos as integral to criminal conduct centered on the inadequacy of the government's argument as to § 48 as a whole, not on whether evidence substantiated a connection between animal abuse and crush videos.[257] The Court's reservation of such an analysis leaves open the path for crush video content to be intrinsically tied to animal abuse, and the *Stevens* dissent provides clear instructions on how to navigate that path.[258] The only hindrance noted by the *Stevens* dissent is the fact that preserving the rights of humans is much more important that preserving the rights of animals.[259]

CONCLUSION

The Supreme Court will face criticism for striking down a law described by Justice Alito as an entirely valuable statute meant to prevent the horrific acts of animal cruelty portrayed in crush videos.[260] Evidence suggests that 18 U.S.C. § 48 effectually combated the crush video industry, and that after the Third Circuit's invalidation of § 48, the crush video market was reborn.[261] However, § 48 was written and executed to effect a

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254. Miller v. California, 413 U.S. 15, 24 (1973).

255. *See* 156 CONG. REC. S8203 (daily ed. Nov. 19, 2010) (statement of Sen. Leahy) ("Indeed, these animal crush videos . . . can be banned consistent with the Supreme Court's obscenity jurisprudence.").

256. Nadine Strossen, United States v. Stevens*: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 67 CATO SUP. CT. REV. 68, 102 (2010) ("If the government could support this contention through empirical evidence, that could be enough to encompass crush videos within the historic, traditional First Amendment exception for expression that is an integral aspect of criminal conduct." (footnote omitted)).

257. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) ("We need not foreclose the future recognition of such additional categories [of unprotected speech] . . . .").

258. *Id.* at 1599–1602 (Alito, J., dissenting).

259. *Id.* at 1600 ([P]reventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos."); *see also* Julie China, *Animal Welfare vs. Free Speech*, 57-Jun FED. LAW. 4 (2010) ("[T]he time is not ripe . . . to recognize a new unprotected category of speech that extends protections to animals, because animals . . . are still considered personal property under the law.").

260. *Stevens*, 130 S. Ct. at 1592 (Alito, J., dissenting) ("The Court strikes down . . . a valuable statute . . . that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty . . . .").

261. *Id.* at 1598 ("[A]fter the Third Circuit's decision [facially invalidating the statute], crush videos are already back online." (second alteration in original)).

broader category of speech than just crush video content.[262] This overbreadth caused § 48 to fail.

Long standing principles embodied in our constitution demand that Congress, not the Supreme Court, draft the law.[263] Interpreting § 48 contra to the clear language of the statute would infringe upon this principle and discourage Congress to write clear laws altogether.[264] Such practices would endanger more than just the rights of animals; it would threaten the notion of American liberty in its entirety. The Supreme Court's decision forced Congress to do what it should have done over ten years ago—draft a narrowly defined statute that specifically prevents crush video creation and distribution.[265] This new statute should have the same effect on the crush video industry as the invalidated § 48,[266] and it avoids threatening other realms of speech that clearly enjoy First Amendment protections.[267]

The United States Government should not be able to restrict a large portion of speech on the basis that some smaller portion of speech is grotesque.[268] Moreover, the First Amendment protects citizens against the government; it does not allow the government to choose at its will which speech it will censor.[269] These hard fought ideas necessitate the preservation of the First Amendment's integrity against the evils § 48 sought to prevent. The Supreme Court made the right decision in *Stevens*.

Matthew Broderick[*]

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262. *Id.* at 1591 (majority opinion) (noting that §48 "presumptively extends to many forms of speech").

263. U.S. CONST. art. I, § 1 ("All legislative Powers . . . shall be vested in a Congress of the United States . . . .").

264. *Stevens*, 130 S. Ct. at 1592 (arguing that to interpret § 48 narrowly would equate to rewriting it, and doing so would encourage Congress to write broad laws).

265. 156 CONG. REC. S8203 (daily ed. Nov. 19, 2010).

266. *Stevens*, 130 S. Ct. at 1598 ("[A]fter the Third Circuit's decision [facially invalidating the statute], crush videos are already back online." (second alteration in original)).

267. 156 CONG. REC. S8203 (daily ed. Nov. 19, 2010) (statement of Sen. Leahy).

268. Broadrick v. Oklahoma, 413 U.S. 610, 612 (1973) ("[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . because of the possible inhibitory effects of overly broad statutes.").

269. *Stevens*, 130 S. Ct. at 1591 (arguing that the First Amendment does not leave us at the mercy of noblesse oblige).

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