

# *United States v. Stevens:* Restricting Two Major Rationales for Content-Based Speech Restrictions

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## **Introduction**

In *United States v. Stevens*,<sup>1</sup> the Court continued a trend—one that has largely united the justices in recent decades—of contracting government power to enforce content-based regulations of expression, even when those regulations receive overwhelming support from elected officials<sup>2</sup> and the general public, and even when the expression conveys ideas or depicts actions that most people consider offensive or wrongful.<sup>3</sup> Content-based speech regulations pose

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<sup>1</sup> 559 U.S. —, 130 S. Ct. 1577 (2010).

<sup>2</sup> The statute that the Court struck down in *Stevens*, 18 U.S.C. § 48, was passed in the Senate by unanimous consent and in the House of Representatives by a vote of 372–42. H.R. 1887, 106th Cong. (1999). See Bill Summary & Status, 106th Congress (1999–2000), H.R. 1887, Major Congressional Actions, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR01887:@@R>; Office of the Clerk, House of Representatives, Final Vote Results for Roll Call 514 (October 19, 1999), available at <http://clerk.house.gov/evs/1999/roll514.xml>.

<sup>3</sup> The Court has struck down restrictions on burning the U.S. flag, see *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); burning a Ku Klux Klan-style cross, see *Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); photographs or films that appear to depict children engaging in sexual conduct (but do not in fact portray actual minors), see *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002); and advertising for tobacco products that is aimed at minors, see *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

the greatest danger to the core value underlying the First Amendment: the right of individuals to make their own choices about what ideas to express, receive, and believe, free of governmental limitations or manipulation.<sup>4</sup> Nonetheless, the Court has not categorically pronounced all content-based speech regulations automatically unconstitutional,<sup>5</sup> thus leaving the door open for those who continue to seek to regulate certain forms of controversial expression.

Congress stepped through this door in 1999 by enacting 18 U.S.C. § 48, which criminalized the commercial creation, sale, or possession of certain depictions of treatment of animals that is illegal in some U.S. jurisdictions.<sup>6</sup> In *Stevens*, the Supreme Court shut the door on

<sup>4</sup> As the Court has explained, in contrast with content-neutral regulations of the “time, place, and manner” of expression—for example, noise control regulations in residential neighborhoods—regulations that target the content of expression “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>5</sup> Justice Anthony Kennedy has advocated this position concerning any expression that is not within one of the traditional categorical exclusions from the First Amendment that the Court has recognized, such as for obscenity or defamation. For all content-based regulations of protected expression, Justice Kennedy has maintained that strict scrutiny is inappropriate; in his view, such regulations should be per se unconstitutional. See *Republican Party of Minn. v. White*, 536 U.S. 765, 792–93 (2002) (Kennedy, J., concurring); *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.* 502 U.S. 105, 124 (1991) (Kennedy, J., concurring).

<sup>6</sup> The statute’s title, as well as its legislative history, is aimed at depictions of “animal cruelty,” but it actually sweeps more broadly, encompassing images of animal treatment that is illegal for any reason, even if there is no cruelty (a term that does not appear in the key statutory language). The statute reads in full:

Section 48. Depiction of animal cruelty

(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) EXCEPTIONS. – 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) the term “depiction of animal cruelty” means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding,

*Restricting Two Major Rationales for Content-Based Speech Restrictions*

Section 48, which it struck down on facial overbreadth grounds.<sup>7</sup> Moreover, the Court came close to shutting the door on two major supporting rationales that have consistently been advanced by advocates of not only Section 48 but also other content-based regulations. The Court did this by reinterpreting two of its past rulings that did countenance content-based regulations, upon which proponents of such regulations routinely rely (as did the government in *Stevens*): *Chaplinsky v. New Hampshire*<sup>8</sup> and *New York v. Ferber*.<sup>9</sup>

*Chaplinsky* laid out criteria for excluding certain content-based categories of expression from First Amendment protection.<sup>10</sup> *Ferber* upheld a statute criminalizing child pornography—images recording sexual conduct by children—principally on a “drying-up-the-market” rationale, thereby allowing the government to pursue the unusually important goal of preventing child sexual abuse by criminalizing the resulting images and reducing the economic incentive to engage in the abuse.<sup>11</sup> In *Stevens*, the Court significantly recast both *Chaplinsky* and *Ferber* in ways that substantially rein in their precedential force as foundations for further inroads into the cardinal rule against content regulations.

The government’s primary argument in *Stevens* was that the Court may expand the set of content-based speech categories that it deems wholly excluded from First Amendment protection whenever it concludes, under *Chaplinsky*’s general balancing test, that the expression is “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”<sup>12</sup> In addition, the government argued that *Ferber*’s drying-up-the-market rationale also justified Section 48.<sup>13</sup>

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or killing took place in the State; and

(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. 18 U.S.C. § 48 (2006).

<sup>7</sup> 130 S. Ct. at 1588.

<sup>8</sup> 315 U.S. 568 (1942).

<sup>9</sup> 458 U.S. 747 (1982).

<sup>10</sup> *Chaplinsky*, 315 U.S. at 571–72.

<sup>11</sup> *Ferber*, 458 U.S. at 759–60.

<sup>12</sup> *Stevens*, 130 S. Ct. at 1585 (quoting *Chaplinsky*, 315 U.S. at 571–72).

<sup>13</sup> Reply Brief for the United States at 5, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769).

Although the Court itself has rarely, if ever, actually accepted either of these rationales for expanding the range of permitted content-based speech regulations—the “*Chaplinsky* rationale”<sup>14</sup> or the “*Ferber* rationale”<sup>15</sup>—both rationales are regularly cited by Congress and other lawmakers in enacting censorial laws. Lower court judges have also accepted them, as illustrated by the statute at issue in *Stevens*. Both rationales were stressed in Section 48’s legislative history, in support of the conclusion that Section 48 was constitutional.<sup>16</sup> In the *Stevens* litigation, one or both rationales were accepted by the federal district court judge,<sup>17</sup> who rejected Stevens’s First Amendment challenge to Section 48, as well as by three Third Circuit judges<sup>18</sup> and Justice Samuel Alito.<sup>19</sup> Indeed, the Supreme Court’s *Stevens* opinion acknowledged that the government’s arguments were grounded in language that the Court had set out in *Chaplinsky* and repeatedly reiterated, including in *Ferber*.<sup>20</sup> Therefore, the Court

<sup>14</sup> The Court has rarely, if ever, actually sanctioned a new categorical First Amendment exception beyond the longstanding, traditional exceptions such as the ones that *Chaplinsky* itself listed, e.g., obscenity, defamation, and “fighting words.” Before the Supreme Court’s decision in *Stevens*, conventional wisdom had viewed the Court’s 1982 decision in *Ferber* as classifying child pornography as a new category of constitutionally unprotected expression. However, the Court’s *Stevens* opinion, as explained below, recasts *Ferber* as one specific instance of a prior, longstanding categorical exception for expression that is “an integral part of conduct in violation of a valid criminal statute.” *Stevens*, 130 S. Ct. at 1586 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). See also *Free Speech Coal.*, 535 U.S. 246 (declaring that virtual child pornography is not “an additional category of unprotected speech”); *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (stating that there is no “separate juridical category” for expression involving the U.S. flag).

<sup>15</sup> See *Free Speech Coal.*, 535 U.S. at 254 (rejecting the drying-up-the-market rationale as a sufficient justification for outlawing “virtual child pornography,” which is produced without using actual children, and distinguishing *Ferber*); *Bartnicki v. Vopper*, 532 U.S. 514, 529–31 & n.13 (2001) (rejecting the drying-up-the-market rationale as a sufficient justification for punishing the publication of illegally intercepted mobile phone conversations, where the media publishers did not participate in the illegal interception, and distinguishing *Ferber*).

<sup>16</sup> H.R. Rep. No. 106–397, at 4–5 (1999) (Conf. Rep.).

<sup>17</sup> See *Stevens*, 130 S. Ct. at 1583 (describing the district court’s decision, which is unreported).

<sup>18</sup> See *United States v. Stevens*, 533 F.3d 218, 236–37 (3d Cir. 2008) (Cowen, J., dissenting).

<sup>19</sup> See *Stevens*, 130 S. Ct. at 1599–1602 (Alito, J., dissenting).

<sup>20</sup> *Id.* at 1585–86 (majority opinion).

## *Restricting Two Major Rationales for Content-Based Speech Restrictions*

seized on the opportunity that the *Stevens* case presented to check the most far-ranging, speech-suppressive implications of both *Chaplinsky* and *Ferber*.

Part I of this article provides an overall analysis of Section 48 and the *Stevens* litigation. Part II summarizes the importance of the general prohibition on content-based speech regulations, and the two major types of exceptions to that prohibition that the Court has condoned, as illustrated by *Chaplinsky* and *Ferber*. Parts III and IV explore the two most important general issues the *Stevens* case presented: the appropriate limits on these two major exceptions to the ban on content regulation. Part III notes a counterintuitive aspect of *Stevens*'s tightened criteria for recognizing a categorical exclusion from the First Amendment: by insisting that any such exclusion is not new but simply the explicit identification of historically unprotected speech—whose implicit exclusion is deeply rooted in history and tradition—the Court actually increases free speech protection. Typically, however—or at least stereotypically—anchoring the scope of constitutional rights, including freedom of speech, in history and tradition has had the opposite effect; it has restricted protection of these rights. Finally, Part V applies *Stevens*'s sharply limited criteria for permissible content-based regulations to two narrower potential alternatives to Section 48, which would target only the two specific types of depictions that were the primary concern of Section 48's proponents: "crush" and dogfighting videos. It concludes that the government might be able to submit evidence justifying restrictions on crush videos under *Stevens*'s tightened First Amendment standards but the evidence that was introduced in *Stevens* itself suggest that the government would have a hard time restricting dogfighting videos.<sup>21</sup>

### **I. Analysis of Section 48 and the *Stevens* Decision**

The Supreme Court rejected the government's primary argument: that the depictions targeted by Section 48 should be added to the few content-based categories of expression that the Court has held

<sup>21</sup> The government and other proponents of Section 48 sometimes focused specifically on dogfighting videos, and sometimes on videos (or other depictions) of animal fighting more generally. The same First Amendment analysis would apply to any of these depictions, although the pertinent empirical evidence would of course vary.

to be completely outside the First Amendment.<sup>22</sup> Once the Court determined that Section 48 outlawed protected expression—that is, expression that *prima facie* falls within the First Amendment’s protective ambit—the Court subjected Section 48 to facial overbreadth analysis and struck it down as substantially overbroad.<sup>23</sup>

In light of this holding, it is noteworthy that Section 48 outlawed a much wider range of depictions than those on which its legislative history focused. Throughout the legislative process, supporters of Section 48 stressed that they were seeking to suppress “crush videos,” which “feature the intentional torture and killing of helpless animals.”<sup>24</sup> These videos “typically show ‘mice, hamsters, and other small animals’ being crushed to death,” but “some crush videos have been made showing ‘cats, dogs, and even monkeys being tortured.’”<sup>25</sup> Crush videos often depict women slowly crushing animals to death “with their bare feet or while wearing high heeled shoes,” sometimes while “talking to the animals in a kind of dominatrix patter” over “[t]he cries and squeals of the animals, obviously in great pain.”<sup>26</sup> These videos “appeal to persons with a very specific sexual fetish.”<sup>27</sup> Accordingly, both parties in the *Stevens* litigation acknowledged that crush videos could be prosecuted under existing obscenity statutes.<sup>28</sup> Crush videos might well satisfy the Court’s three criteria for the traditional obscenity exception to the First Amendment: the material, “taken as a whole, appeal[s] to the prurient interest in sex, . . . portray[s] sexual conduct in a patently offensive way,” and “does not have serious literary, artistic, political, or scientific value.”<sup>29</sup> Although the actions depicted in crush videos are outlawed throughout the United States,<sup>30</sup> the statute’s proponents

<sup>22</sup> *Stevens*, 130 S. Ct. at 1586.

<sup>23</sup> *Id.* at 1587–89.

<sup>24</sup> H.R. Rep. No. 106–397, at 2 (1999) (Conf. Rep.).

<sup>25</sup> Brief for the United States at 17, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769).

<sup>26</sup> *Id.* at 17.

<sup>27</sup> *Id.* at 42.

<sup>28</sup> See *id.* at 42–43; See Brief for the Respondent at 50–51, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769).

<sup>29</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>30</sup> *Stevens*, 130 S. Ct. at 1599.

## *Restricting Two Major Rationales for Content-Based Speech Restrictions*

maintained that it is difficult to prosecute the participants because the videos typically do not provide any clues to their identities.<sup>31</sup>

Despite the legislative history's focus specifically on crush videos, Section 48 was written much more broadly, to encompass any depictions of specified treatment of animals that is illegal "under Federal law or the law of the State in which the creation, sale, or possession takes place," even if the conduct was perfectly legal where it occurred.<sup>32</sup> Moreover, the specified types of treatment were not limited to those that involved cruelty, but also included any illegal "wounding" or "killing."<sup>33</sup> Accordingly, the statute criminalized depictions of hunting or fishing that was legal where it took place but violated the specific regulations where the resulting image was sold or possessed—for example, because it took place on a date that was not within that jurisdiction's pertinent hunting or fishing season, or because it used a weapon that was not permitted in that jurisdiction. Recognizing the constitutional problems that this sweeping statutory language posed, and consistent with the legislative history's specific concern about crush videos, President Bill Clinton, when he signed Section 48, announced that, "to ensure that the Act does not chill protected speech," the executive branch would interpret it as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex."<sup>34</sup>

Notwithstanding the Clinton administration's limiting interpretation of Section 48, after the end of that administration, Robert J. Stevens was indicted under Section 48 because of three videos he sold that included depictions of dogfighting and fights between dogs and other animals.<sup>35</sup> The government never contended that any of these depictions was "designed to appeal to a prurient interest in sex," and the depictions were obviously not the crush videos that had been of central concern to Congress. Stevens moved to dismiss the indictment on First Amendment grounds. The district court

<sup>31</sup> See *id.* at 1598 (Alito, J., dissenting) (citing H.R. Rep. No. 106-397, at 3 (1999) (Conf. Rep.)).

<sup>32</sup> 18 U.S.C. § 48 (c)(1), *supra* at n. 6.

<sup>33</sup> *Id.*

<sup>34</sup> See Statement by President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), reprinted in 1999 U.S.C.C.A.N. 324.

<sup>35</sup> Stevens, 130 S. Ct. at 1583.

denied the motion, holding that the targeted depictions were categorically unprotected by the First Amendment. The jury convicted Stevens and the district court sentenced him to 37 months' imprisonment followed by three years of supervised release.<sup>36</sup> The *en banc* Third Circuit declared the statute facially unconstitutional and vacated Stevens's conviction.<sup>37</sup>

The Supreme Court affirmed the Third Circuit's judgment, but on different grounds. Although both the Third Circuit and the Supreme Court rejected the government's argument that the targeted depictions should be categorically unprotected by the First Amendment,<sup>38</sup> from that point on their analyses diverged. The Third Circuit concluded that Section 48 could not survive the strict scrutiny to which it was subject as a content-based regulation of protected speech.<sup>39</sup> While the Third Circuit observed in a footnote that the statute "might also be unconstitutionally overbroad," it did not resolve this issue.<sup>40</sup> In contrast, the Supreme Court did not subject Section 48 to strict scrutiny, but rather struck it down as substantially overbroad because its "presumptively impermissible applications . . . far outnumber any permissible ones."<sup>41</sup> The government could not deny that, as written, Section 48 did literally apply to many depictions beyond the only two kinds that, the government maintained, it should be construed to outlaw: crush videos and depictions of animal fighting. The government sought to defend against the facial overbreadth challenge by urging the Court to construe the statute more narrowly than it was written in several respects.

For example, although Section 48 expressly targets "depiction[s] of animal cruelty," it criminalized depictions of any "wounding" or "killing" of an animal that was illegal for any reason, even reasons having nothing to do with protecting animals against cruelty. Therefore, as mentioned above, Section 48 outlawed depictions of generally lawful activities such as hunting, fishing, slaughtering livestock,

<sup>36</sup> *Id.* Thirteen judges participated in the decision; ten joined in the majority ruling, and three dissented. See Stevens, 533 F. 3d at 236 (Cowen, J., dissenting).

<sup>37</sup> Stevens, 533 F.3d at 220.

<sup>38</sup> *Id.*; Stevens, 130 S. Ct. at 1584.

<sup>39</sup> Stevens, 533 F.3d at 232–33.

<sup>40</sup> *Id.* at 235 n.16.

<sup>41</sup> Stevens, 130 S. Ct. at 1592.



*Restricting Two Major Rationales for Content-Based Speech Restrictions*

and exterminating pests, if the particular activity depicted did not comply with regulations designed to promote various interests, such as human health and environmental concerns. In an effort to avert the resulting overbreadth, the government argued that the Court should read into the statutory language an additional requirement that there be “accompanying acts of cruelty.”<sup>42</sup>

Another aspect of Section 48 that the government urged the Court to read more narrowly than written was its exception for “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” The government apparently recognized that this exception would not necessarily shelter the hunting depictions that, it maintained, the statute did not intend to target, because such depictions would not necessarily be found to have “serious value.”<sup>43</sup> Therefore, the government asked the Court to interpret the “serious value” requirement as meaning “at least some minimal value” or value that is not “scant,” even though at trial the government had endorsed the jury instructions on point, which required value that is “significant and of great import.”<sup>44</sup> Likewise, the government asked the Court to read into Section 48 a requirement that the value of any targeted depiction must be “determined based on an assessment of the work as a whole,”<sup>45</sup> even though Section 48 refers to “any . . . depiction,” including “any photograph” or “electronic image,” and even though the government’s own expert witnesses supported their arguments that Stevens’s videos lacked sufficient value by focusing on brief segments.<sup>46</sup> In sum, as the Court concluded, the government was asking it not to construe the statute, but rather to rewrite it.<sup>47</sup>

<sup>42</sup> *Id.* at 1588.

<sup>43</sup> See Reply Brief for the United States, *supra* note 13, at 5–6 (emphasis added) (citing H.R. Rep. No. 397, at 24–5, 31 (1999) (Conf. Rep)).

<sup>44</sup> Stevens, 130 S. Ct. at 1590.

<sup>45</sup> Brief for the United States, *supra* note 25, at 26; Reply Brief for the United States, *supra* note 13, at 6.

<sup>46</sup> See Brief for the Respondent, *supra* note 28, at 8 (detailing how one of the government’s expert witnesses concluded that one of the three targeted videotapes was valueless because, in his view, a single one-minute scene in an hour-long movie was too long).

<sup>47</sup> Stevens, 130 S. Ct. at 1592.

In addition to asking the Court to correct Congress's substantially overbroad drafting through a judicial rewriting, the government also asked the Court to rely on the executive branch to achieve the same result by exercising prosecutorial discretion to enforce the statute only in cases involving depictions of "'extreme' cruelty."<sup>48</sup> This "trust us" argument flies in the face of the most fundamental constitutional principles that secure First Amendment and other constitutional freedoms against infringements, rather than relegating them to the discretion of government officials.<sup>49</sup>

Moreover, this argument is especially unpersuasive in light of the *Stevens* litigation itself. Stevens was prosecuted for selling videos that contained some footage of pit bulls engaging in dogfights, at least some of which were apparently legal where and when they occurred,<sup>50</sup> as well as attacks against other animals. Stevens maintained that he had long opposed dogfighting and that these videos were designed to educate pit bull owners and trainers about the breed's special strengths and qualities that make it well-suited for non-dogfighting activities such as hunting, tracking, and weight pulling.<sup>51</sup> At trial, several expert witnesses attested to the serious value in each of these films. Notably, one such expert was the acting vice president of the American Canine Foundation, which works to end animal cruelty.<sup>52</sup> This expert testimony highlighted several valuable aspects of the films, including their educational value for law enforcement officials who regularly work with or encounter pit bulls.<sup>53</sup> In any event, even assuming for the sake of argument that these videos could fairly be considered to comply with the government's malleable proposed criterion of depicting "extreme cruelty," they are certainly excluded by the additional limiting construction that President Clinton announced when he signed Section 48, confining it to depictions that are "designed to appeal to a prurient interest in sex."<sup>54</sup>

<sup>48</sup> *Id.* at 1581.

<sup>49</sup> See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1947).

<sup>50</sup> Stevens, 130 S. Ct. at 1583.

<sup>51</sup> See Brief for the Respondent, *supra* note 28, at 58–59.

<sup>52</sup> See American Canine Foundation home page, <http://www.americancaninefoundation.com>.

<sup>53</sup> See Brief for the Respondent, *supra* note 28, at 7.

<sup>54</sup> See Statement by President William J. Clinton upon Signing H.R. 1887, *supra* note 34.

## *Restricting Two Major Rationales for Content-Based Speech Restrictions*

The Supreme Court's sole dissenter, Justice Samuel Alito, criticized the majority for invalidating the statute on facial grounds, rather than confining its review to the statute as applied to the particular videotapes at issue.<sup>55</sup> Justice Alito then analyzed the statute as if it had actually outlawed only crush videos and videos of "brutal animal fights."<sup>56</sup> Accepting the government's proffered analogy to child pornography, Justice Alito concluded that both types of depictions should be excluded from First Amendment protection because the crimes they depict "cannot be effectively controlled without targeting the videos."<sup>57</sup>

### **II. The Importance of the General Prohibition on Content-Based Speech Regulations—and the Exceptions to That Prohibition**

The Supreme Court has stressed that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."<sup>58</sup> In recent decades, the Court has consistently held that content-based restrictions on speech are presumptively unconstitutional.<sup>59</sup> Notwithstanding this cardinal general rule, the Court has held that content-based speech restrictions are permissible in two situations. First, the Court has recognized a series of content-based categorical exceptions to First Amendment coverage, categories of expression that it has deemed wholly outside the First Amendment's scope. Once expression is held to satisfy the defining criteria for any such categorical exclusion—for example, the tripartite definition of constitutionally unprotected "obscenity"<sup>60</sup>—the First Amendment analysis ends; government is free to regulate or even prohibit such categorically unprotected expression.<sup>61</sup> Second, the Court has held that even expression that is within the First Amendment's scope—

<sup>55</sup> Stevens, 130 S. Ct. at 1593 (Alito, J., dissenting).

<sup>56</sup> *Id.* at 1601.

<sup>57</sup> *Id.*

<sup>58</sup> *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972).

<sup>59</sup> See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 932–33 (3d ed. 2006).

<sup>60</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>61</sup> See Chemerinsky, *supra* note 59, at 986. The Court has held, however, that even banning categorically unprotected expression, regulations may not discriminate on the basis of viewpoint. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

that is, it does not satisfy the criteria for any categorical exception—may still be subject to content-based regulation if the government can satisfy “strict judicial scrutiny” by showing that the regulation is “narrowly tailored” and necessary to advance a goal of “compelling” importance, such that no “less restrictive alternative” measure would suffice.<sup>62</sup>

In light of the fundamental First Amendment concerns underlying the general proscription on content-based regulations, it is important to constrain the two exceptional situations in which they are nonetheless tolerated. The Supreme Court’s *Stevens* opinion constitutes a significant step toward reining in the first such exception: categorical content-based exclusions from First Amendment protection. Specifically, the Court reformulated the passage from *Chaplinsky* that had initially described the Court’s approach to such exclusions. The *Stevens* litigation also provides support for reining in the second exception, for regulations that the government can demonstrate to satisfy strict scrutiny. In particular, the Third Circuit’s opinion, which reviewed Section 48 under strict scrutiny, rejected the government’s drying-up-the-market rationale that the Supreme Court had validated in *Ferber* in the child pornography context.<sup>63</sup> Moreover, although the Supreme Court did not engage in strict scrutiny analysis because of its substantial overbreadth holding, what it said about *Ferber* indicates that the Court will likely continue to construe that case narrowly—making it difficult to extend *Ferber*’s rationale beyond the “special case” of child sexual abuse and child pornography.<sup>64</sup>

<sup>62</sup> See Chemerinsky, *supra* note 59, at 986–87, 1005–06.

<sup>63</sup> See *United States v. Stevens*, 533 F.3d 218, 230–31 (3d Cir. 2008); see also *Stevens*, 130 S. Ct. 1577, 1583–84 (2010); but see *Stevens*, 533 F.3d at 245–46 (Cowan, J., dissenting) (“Congress could have thus reasonably concluded that targeting the distributors would be the most effective way of drying up the animal-cruelty depictions market”); *Stevens*, 130 S. Ct. at 1601–02 (Alito, J., dissenting) (“In short, because videos depicting live dogfights are essential to the success of the criminal dogfighting subculture, the commercial sale of such videos helps to fuel the market for, and thus to perpetuate the perpetration of, the criminal conduct depicted in them.”).

<sup>64</sup> See *Stevens*, 130 S. Ct. at 1586 (“We made clear that *Ferber* presented a special case.”).

### III. Putting the Lid on Content-Based Categories of Unprotected Speech

#### A. Contrast between Key Passages in *Chaplinsky* and *Stevens* Regarding Categorical First Amendment Exceptions

The U.S. government's primary argument in *Stevens* was that the depictions Section 48 outlawed should be added to the few categories of expression that the Court has held to be excluded from First Amendment protection.<sup>65</sup> The rationale for this conclusion would have warranted wide-ranging suppression of any controversial or extreme expression. The government maintained that "[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."<sup>66</sup> The Court rejected this argument in unusually strong language as "startling and dangerous."<sup>67</sup> Nonetheless, the trial court had accepted this very argument, as did the three dissenting Third Circuit judges, and the Supreme Court recognized that it was derived from a widely quoted passage in *Chaplinsky*, which first explicated the Court's approach to categorically unprotected expression.<sup>68</sup>

In the *Stevens* litigation, the government had relied on the broadest language in *Chaplinsky's* pertinent passage to support its request that the Court carve out from the First Amendment a new category of unprotected expression. In contrast, the *Stevens* Court treated that language as dicta and instead focused on narrower language in the *Chaplinsky* passage, which it integrated into an updated statement of the pertinent principles concerning categorically unprotected expression. That updated statement also drew on several of the

<sup>65</sup> See Brief for the United States, *supra* note 25, at 9–14.

<sup>66</sup> *Stevens*, 130 S. Ct. at 1585 (citing Brief for the United States, *supra* note 25, at 8).

<sup>67</sup> *Id.* The government also proffered other arguments, which the Court did not address, that were at least as deserving of this strong critique. For example, the government argued that "Section 48 furthers the substantial interest in preventing the erosion of public morality that attends" the depicted acts. Brief for the United States, *supra* note 25, at 34. Another example is the government's argument that the targeted depictions could be criminalized under an expanded concept of constitutionally unprotected obscenity, as material that is "depraved and loathsome to the senses." *Id.* at 37.

<sup>68</sup> *Stevens*, 130 S. Ct. at 1585.

Court's post-*Chaplinsky* rulings, which had sharply curtailed *Chaplinsky*'s speech-suppressive slant. The *Stevens* reformulation transforms *Chaplinsky*'s broad invitation to recognize unprotected categories of expression into strictly limited preconditions for doing so.

The pertinent, often quoted *Chaplinsky* passage reads:

There are certain *well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem*. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and 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.<sup>69</sup>

In contrast, *Stevens*'s corresponding passage draws very selectively from this *Chaplinsky* excerpt, quoting only the italicized language near its beginning, while also drawing on post-*Chaplinsky* decisions that are much more speech-protective:<sup>70</sup>

"From 1791 to the present," . . . the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," . . . These "historic and traditional categories long familiar to the bar," including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, are "*well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem*."<sup>71</sup>

Although both the *Chaplinsky* and *Stevens* passages acknowledge that there are *some* content-based categorical exceptions to First

<sup>69</sup> 315 U.S. 568, 571–72 (1942) (emphasis added).

<sup>70</sup> This central passage in *Stevens* quotes the following post-*Chaplinsky* decisions that expanded free speech protection beyond what the Court had recognized when it decided *Chaplinsky*: *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105 (1991) (Kennedy, J., concurring in judgment); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

<sup>71</sup> *Stevens*, 130 S. Ct. at 1584 (citations omitted and emphasis added).

*Restricting Two Major Rationales for Content-Based Speech Restrictions*

Amendment protection, they reflect dramatically different perspectives on the appropriate criteria for identifying those exceptions.<sup>72</sup> The *Stevens* approach is essentially backward-looking, treating the finite exceptions that had been generally accepted since the First Amendment's adoption as a closed, fixed set of all such exceptions. In contrast, *Chaplinsky* invites the very argument that the government made in *Stevens*: that the Court may now and in the future continue the process of recognizing potentially unlimited new categories of unprotected expression, beyond those with a longstanding historical pedigree, so long as the Court deems the expression at issue to fail the open-ended, subjective balancing test that the last sentence of the *Chaplinsky* passage sets out.

Accordingly, in the *Stevens* litigation, the government argued that the targeted depictions of illegal treatment of animals should constitute categorically unprotected expression because they are "no essential part of any exposition of ideas" and "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."<sup>73</sup> The *Stevens* opinion acknowledged, "[t]o be fair to the Government," that past decisions had quoted this language from *Chaplinsky* with apparent approval.<sup>74</sup>

The *Stevens* Court went on to impose an important limitation on the significance of this language, however, by stressing that it was only "descriptive," merely describing the "historically unprotected categories of speech."<sup>75</sup> The *Stevens* Court emphatically rejected any reading of this language as normative, declaring that it does "not set forth a test that may be applied as a general matter to permit

<sup>72</sup> Both *Chaplinsky* and *Stevens* list particular examples of categorically unprotected expression, and neither purports to provide a full roster. Nonetheless, it is interesting to contrast these (partial) lists. The only two categories that both cases cite are obscenity and defamation. The *Stevens* list omits several categories that *Chaplinsky* had specified as unprotected: "lewd" speech, "profane" speech, and "insulting or 'fighting' words." These omissions are consistent with post-*Chaplinsky* rulings that have effectively removed these categories from the unprotected list. Conversely, the *Stevens* listing of unprotected categories adds several others that the *Chaplinsky* roster had not included: fraud, incitement, and speech integral to criminal conduct. See *Stevens*, 130 S. Ct. at 1584.

<sup>73</sup> Brief for the United States, *supra* note 25, at 11–12.

<sup>74</sup> 130 S. Ct. at 1585.

<sup>75</sup> *Id.*

the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."<sup>76</sup>

*Stevens* did not rule out the possibility that the Court could in the future recognize a category of "historically unprotected" expression that had "not yet been specifically identified or discussed as such in our case law."<sup>77</sup> The Court *did* foreclose, however, the possibility of carving out from First Amendment protection any expression that had been protected historically. The Court flatly rejected the government's contention "that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation."<sup>78</sup> And Stevens's Supreme Court brief persuasively explained why this "historically unprotected" criterion is dictated by the First Amendment's text and purpose:

[The] focus on history and tradition is critical because it ensures that the First Amendment's shield is withheld only from those narrow categories of speech for which the Constitution itself never intended protection, but not from those forms of speech that the legislative majority just prefers not to protect. Protection against legislative hostility or constantly shifting public sentiment is, after all, the whole purpose of the First Amendment.<sup>79</sup>

As indicated by the *Stevens* passage quoted above, the Court read two phrases in the corresponding *Chaplinsky* passage as setting out essential prerequisites for any newly stated recognition of another longstanding content-based First Amendment carve-out. First, the exception must be "historic and traditional," a test that the *Stevens* Court indicated it would construe narrowly. It signaled that any such exception must extend from 1791 to the present. Moreover, the sole sentence that the Court approvingly quoted from *Chaplinsky* stated that any such exception has "never been thought to raise any Constitutional problem."<sup>80</sup> If these requirements are enforced

<sup>76</sup> *Id.* at 1586.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1585.

<sup>79</sup> Brief for the Respondent, *supra* note 28, at 15.

<sup>80</sup> Stevens, 130 S. Ct. at 1584 (quoting *Chaplinsky*, 315 U.S. at 571-72).



*Restricting Two Major Rationales for Content-Based Speech Restrictions*

strictly, it is hard to imagine any future expansion of the list of unprotected speech categories beyond those the Court has previously recognized. At the very least, this criterion would bar recognition of any admittedly new categorical exceptions to the First Amendment that various advocates have proposed: for example, for “hate speech” that expresses discriminatory views on the basis of race, religion, gender, and other personal characteristics;<sup>81</sup> or “pornography” that is “demeaning” or “degrading” to women.<sup>82</sup>

The second phrase from *Chaplinsky* that the *Stevens* Court approvingly quotes as a prerequisite for recognizing any newly identified category of historically unprotected speech refers to such First Amendment exceptions as “well-defined and narrowly limited classes of speech.”<sup>83</sup> This second prerequisite also serves as a significant check upon the Court’s recognition of new categories of unprotected speech content. It requires that any alleged historical exception for certain expression would have to be demonstrated at a narrow level of specificity, rather than at a higher level of abstraction. For example, in *Stevens* the government could not rely on the longstanding obscenity exception, as it sought to do, by describing that exception at a relatively high level of abstraction; the government described the obscenity exception as encompassing expression that “offends the sensibilities of most citizens,”<sup>84</sup> and thus includes depictions of animal cruelty. In contrast, the *Stevens* decision noted the government’s failure to produce any evidence about any historic lack of protection for the particular depictions that Section 48 sought to suppress.<sup>85</sup>

*Stevens*’s refusal to recognize any novel additions to the traditional roster of unprotected categories of expression was ratified by the Court’s subsequent decision in another free speech case during its 2009–10 term, *Holder v. Humanitarian Law Project*.<sup>86</sup> To be sure, the majority rejected the particular First Amendment claim in that case;

<sup>81</sup> See, e.g., Mari J. Matsuda, et al., *Words that Wound* (1993).

<sup>82</sup> See, e.g., Andrea Dworkin, *Pornography: Men Possessing Women* (1991); Andrea Dworkin & Catharine MacKinnon, *Pornography and Civil Rights: A New Day for Women’s Equality* (1988).

<sup>83</sup> *Stevens*, 130 S. Ct. at 1584 (quoting *Chaplinsky*, 315 U.S. at 571–72).

<sup>84</sup> Brief for the United States, *supra* note 25, at 37.

<sup>85</sup> 130 S. Ct. at 1585.

<sup>86</sup> 559 U.S.\_\_\_\_\_, 130 S. Ct. 2705 (2010).

the plaintiffs had challenged a federal statute that criminalized the “knowing” provision of “material support” to “foreign terrorist organizations” insofar as it barred them from providing training and engaging in advocacy in support of peaceful, humanitarian goals. Nonetheless, it is noteworthy that the Court did not accept the government’s suggestion that the expression at issue should be treated as categorically unprotected.<sup>87</sup> Instead, the Court subjected the statute, as applied to plaintiffs’ expression, to strict scrutiny.<sup>88</sup> Moreover, the dissenting justices expressly cited *Stevens* in stressing that plaintiffs’ expression was not “deprive[d] . . . of First Amendment protection under any traditional ‘categorical’ exception to its protection.”<sup>89</sup>

*B. Stevens’s Recharacterization of Ferber’s Child Pornography Exception, Limiting Its Potential as a Model for Future New Exceptions*

The Court’s effort in *Stevens* to limit categories of unprotected expression to the finite set that it has historically recognized is underscored by *Stevens*’s novel characterization of the child pornography exception to First Amendment protection.<sup>90</sup> That exception, which the Court initially recognized in *Ferber*, is invariably described as the Court’s most recent addition to the list of content-based categories of unprotected expression. For example, this description was used even by *Stevens*’s own Supreme Court brief<sup>91</sup> and by the Third Circuit,<sup>92</sup> although they both read *Ferber* narrowly in other respects. The *Ferber* Court’s own language was certainly consistent with this reading. For example, the Court said that it was “[r]ecognizing and classifying

<sup>87</sup> *Id.* at 2724 n.5 (“We do not consider any such argument because the Government does not develop it.”). *Stevens* would require any “developed” argument in support of this point to demonstrate that the expression was within a “well-defined and narrowly limited class of speech, the prevention and punishment of which [has] never been thought to raise any Constitutional problem.” *Stevens*, 130 S. Ct. at 1584. Accordingly, the fact that the Court did not view the government’s argument on this point in *Holder* as sufficiently “develop[ed]” is consistent with *Stevens*’s strict specification of the necessary showings to do so.

<sup>88</sup> Humanitarian Law Project, 130 S. Ct. at 2724.

<sup>89</sup> *Id.* at 2733 (Breyer, J., dissenting).

<sup>90</sup> See *Ferber*, 458 U.S. 747, 763–64 (1982).

<sup>91</sup> Brief for the Respondent, *supra* note 28, at 15–16.

<sup>92</sup> 533 F.3d 218, 224 (3d Cir. 2008).

*Restricting Two Major Rationales for Content-Based Speech Restrictions*

child pornography as a category of material outside the protection of the First Amendment."<sup>93</sup>

In contrast, the Supreme Court's *Stevens* opinion did not acknowledge that the Court had recognized child pornography as a new category of unprotected expression. To the contrary, the *Stevens* Court treated child pornography as a specific example of a longstanding more general category of unprotected expression, citing a case that had recognized this broader excluded category just five years after *Chaplinsky*. Specifically, *Stevens* assimilated child pornography to the traditionally unprotected category of "speech integral to criminal conduct," citing the 1947 case of *Giboney v. Empire Storage & Ice Co.*<sup>94</sup> The Court quoted language in *Ferber* itself, as well as its two major subsequent decisions concerning child pornography,<sup>95</sup> which stressed that "[t]he market for child pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation.'"<sup>96</sup>

Given *Stevens*'s recasting of child pornography as a newly identified example of "a previously recognized, long-established category of unprotected speech,"<sup>97</sup> rather than a newly minted category, *Ferber* has only limited capacity to serve as a springboard for judicial recognition of additional categories of unprotected expression, which is how the U.S. government and other proponents of Section 48 had invoked it. In the wake of *Stevens*, *Ferber* cannot serve as precedent for creating a new category of unprotected expression, but rather

<sup>93</sup> *Ferber*, 458 U.S. at 763. See also *id.* at 764 (referring to child pornography as "a definable class of material . . . that . . . is . . . without the protection of the First Amendment.').

<sup>94</sup> *Stevens*, 130 S. Ct. at 1585 (citing *Giboney*, 336 U.S. 490, 498 (1949)). For a critique of *Giboney*, as well as *Ferber*, see Eugene Volokh, Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones, 90 *Cornell L. Rev.* 1277, 1324-25 (2005).

<sup>95</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249-50 (2002); *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

<sup>96</sup> *Stevens*, 130 S. Ct. at 1586 (citing *Giboney*, 336 U.S. at 498). In the same vein, during the oral argument in *Stevens*, Justice Scalia twice referred to child pornography as a subspecies of the longstanding obscenity exception, thus also not acknowledging it as a distinct new category of unprotected expression. See Transcript of Oral Argument at 8-9, 21, *Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769).

<sup>97</sup> *Stevens*, 130 S. Ct. at 1586.

only for identifying a new, specific subset of a traditional, historical exception. In particular, *Stevens* stressed that child pornography was “integrally related” to the underlying crime of child sexual abuse because of the drying-up-the-market rationale. Therefore, if this rationale could be extended to other expression, one could argue that such other expression should likewise fall within the longstanding categorical exception for speech that is “an integral part of [the criminal] conduct” it depicts.<sup>98</sup>

However, the Court has consistently resisted attempts to extend the drying-up-the-market rationale beyond the specific context of child pornography.<sup>99</sup> For example, in *Bartnicki v. Vopper*,<sup>100</sup> the Court held that the First Amendment barred any penalty on media for disclosing a cell phone conversation that another party had illegally intercepted in violation of wiretapping laws. The proponents of penalizing the media argued that it was difficult to enforce direct prohibitions on wiretapping and therefore that it was necessary and appropriate to “dry up the market” for the fruits of such illegal interceptions by penalizing the media for disclosing them. The Court emphatically rejected this argument, and indicated that *Ferber’s* drying-up-the-market rationale may well be confined to the “special case” of child pornography.<sup>101</sup> The drying-up-the-market rationale

<sup>98</sup> *Id.* In *Ferber* itself, the Court explained this general rationale as follows: “The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.” 458 U.S. at 761–62. The *Ferber* Court then quoted the very passage from *Giboney* that the Supreme Court quoted in *Stevens. Id.*

<sup>99</sup> See Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 936 (2001) (child pornography “is the only place in First Amendment law where the Supreme Court has accepted the idea that we can constitutionally criminalize the depiction of a crime.”).

<sup>100</sup> 532 U.S. 514 (2001). See also *Free Speech Coal.*, 535 U.S. at 254 (rejecting the drying-up-the-market rationale as a sufficient justification for outlawing “virtual child pornography,” which is produced without using actual children); *Stanley v. Georgia*, 394 U.S. 557, 567–68 (1969) (rejecting the state’s argument that its prohibition on possessing obscenity was a necessary complement to its prohibition on distributing obscenity).

<sup>101</sup> *Stevens*, 130 S. Ct. at 1586.

## *Restricting Two Major Rationales for Content-Based Speech Restrictions*

for punishing expression that depicts or results from illegal conduct also has been criticized by individual justices<sup>102</sup> and by scholars.<sup>103</sup>

### *C. Stevens's Criteria for Identifying Categorical First Amendment*

#### *Exceptions: Comparisons and Contrasts to Other Constitutional Law Contexts*

As discussed above, the two criteria that *Stevens* endorses for identifying any category of unprotected expression are that such category is (1) grounded in history and tradition and (2) “well-defined and narrowly limited.” These two criteria also have been used by the Court in another important constitutional context: to identify rights that are sufficiently “fundamental” to be deemed implicitly protected under the Due Process Clauses of the Fifth and Fourteenth Amendments as a matter of “substantive due process.”<sup>104</sup> Somewhat ironically, the justices who have most consistently stressed these prerequisites for recognizing a new substantive due process right are the justices who generally take the narrowest view of such rights—notably, on the current Court, Justices Antonin Scalia and Clarence Thomas.<sup>105</sup> In the substantive due process context,

<sup>102</sup> See *Osborne v. Ohio*, 495 U.S. 103, 145 n.19 (1990) (Brennan, J., dissenting) (“The notion that possession of pornography may be penalized in order to facilitate a prohibition on its production . . . is not unlike a proposal that newspaper subscribers be held criminally liable for receiving the newspaper if they are aware of the publisher’s violations of child labor laws.”).

<sup>103</sup> See Volokh, *supra* note 94, at 1324–26 (criticizing *Giboney*, *Ferber*, *Osborne* and the drying-up-the-market rationale, noting that “When the New York Times publishes illegally leaked documents, or transcripts of an illegally [intercepted] conversation, it would have a strong First Amendment defense . . . even though the prospect of such publication may provide a motive for the illegal leaks or illegal interception.”). See also Adler, *supra* note 99, at 970–93 (“Child pornography law has validated a renegade vision of how speech works. It is a vision that we have rejected in every other First Amendment context. Child pornography law has collapsed the ‘speech/action’ distinction that occupies a central role in First Amendment law.”).

<sup>104</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted):

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . . Second, we have required . . . a ‘careful description’ of the asserted fundamental liberty interest.

<sup>105</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., with whom Thomas, J., and Rehnquist, C.J., join, dissenting) (“*Washington v. Glucksberg* . . . held that only fundamental rights which are ‘deeply rooted in this Nation’s history and tradition’

strictly enforcing these prerequisites for recognizing an implicit right has the effect of limiting the protection for the constitutional right at issue. In stark contrast, in the First Amendment context, strictly enforcing these same prerequisites for recognizing a categorical exemption from the right has the opposite effect: to maximize protection for the constitutional right at issue.

*Stevens's* strict reliance on history and tradition constitutes an unusual twist on such sources of constitutional interpretation even in the specific context of identifying categorical exemptions from First Amendment protection. Typically, a judge who invokes history and tradition in this context does so in support of limiting First Amendment protection.<sup>106</sup> That is exactly the purpose for which the key *Chaplinsky* passage itself invoked history and tradition: *Chaplinsky's* specific holding was to reject a First Amendment challenge to a conviction for expressing provocative religious and political opinions because of the historically enshrined “fighting words” exception to free speech.<sup>107</sup> Therefore, it is noteworthy that the *Stevens* Court turns that typical use of history and tradition on its head, and converts it into a criterion that forestalls limits on First Amendment protection.

This situation illustrates how overly simplistic it is to equate a particular approach to constitutional interpretation, such as originalism, with a particular ideology or result.<sup>108</sup> That oversimplified equation was likewise belied by another decision that the Court issued

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qualify for anything other than rational basis scrutiny under the doctrine of ‘substantive due process.’”) (citations omitted).

<sup>106</sup> See, e.g., *United States v. Williams*, 128 S. Ct. 1830 (2008) (“offers to engage in illegal transactions”); *Brandenburg*, 395 U.S. 444, 447 (1969) (per curiam) (intentional incitement of imminent illegal conduct); *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (defamation); *Roth v. United States*, 354 U.S. 476, 484–85 (1957) (obscenity).

<sup>107</sup> *Chaplinsky*, 315 U.S. at 569 (*Chaplinsky*, a member of the Jehovah’s Witnesses, said the following to a city marshal: “You are a God damned racketeer” and “a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.”).

<sup>108</sup> See generally Jeffrey Rosen, *Conservatives v. Originalism*, 19 Harv. J.L. & Pub. Pol’y 465 (1996) (arguing that certain justices who generally adhere to originalism nonetheless choose not to analyze three issues with that approach—race-conscious voting districts, gay rights, and minority set-asides—because the results conflict with their conservative political beliefs). Major constitutional law cases illustrate that the same general historical, originalist approach can well yield very different conclusions. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036–42 (2010) (concluding

during its 2009–10 term, which also illustrates the Court’s longstanding reliance on the history and tradition criterion it stressed in *Stevens* in yet another important constitutional law context. Specifically, *McDonald v. City of Chicago* invoked that established criterion for determining whether a right that is set out in the Bill of Rights (and hence directly constrains the federal government) should also be deemed to be “incorporated” into the Fourteenth Amendment—and thus also enforceable against state and local governments.<sup>109</sup> *McDonald* posed this question concerning the Second Amendment right that the Court had recognized in *District of Columbia v. Heller*,<sup>110</sup> the right to keep and bear arms in the home for the purpose of self-defense. In *McDonald*, the Court divided 5–4 along “conservative” and “liberal” lines,<sup>111</sup> with the justices who are generally considered more conservative concluding that the right at issue was enforceable against state and local governments,<sup>112</sup> and the justices considered more liberal reaching the opposite conclusion.<sup>113</sup> This alignment constitutes a reversal of the typical roles in incorporation debates.<sup>114</sup>

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that the Constitution’s Framers and ratifiers considered the individual right to bear arms “among those fundamental rights necessary to our system of ordered liberty”); see also *id.* at 3111–14 (Stevens, J., dissenting) (acknowledging that the individual right to bear arms is rooted in history and tradition, but concluding that the states’ right to restrict gun ownership is a far “older and more deeply rooted tradition”).

<sup>109</sup> 130 S. Ct. at 3036.

<sup>110</sup> 128 S.Ct. 2783 (2008).

<sup>111</sup> I put these words in quotation marks to flag how inaccurate and oversimplified they are. See, e.g., Jeffrey Rosen, So What’s the ‘Right’ Pick?, N.Y. Times, July 3, 2005, at 41.

<sup>112</sup> Justice Thomas agreed with the conclusion, supported by four other justices, that “the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment ‘fully applicable to the States.’” *McDonald*, 130 S. Ct. at 3058–59 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas also concurred in some portions of the Court’s analysis of the Fourteenth Amendment’s Due Process Clause. However, Justice Thomas rested his conclusion on the Fourteenth Amendment’s Privileges or Immunities Clause. *Id.* at 3059. The justices who squarely concluded that the right at issue should be incorporated via the Fourteenth Amendment’s Due Process Clause were Justice Alito (who authored the mixed majority/plurality opinion), Chief Justice Roberts, and Justices Scalia and Kennedy.

<sup>113</sup> Justice Stevens filed a dissenting opinion, *id.* at 3088, and Justice Breyer filed a dissenting opinion in which Justices Ginsburg and Sotomayor joined, *id.* at 3120. Indicative of the role reversal, Justice Stevens urged the Court to reverse “some 1960’s opinions,” noting that “[t]he Court has not hesitated to cut back on perceived Warren Court excesses.” *Id.* at 3095 (Stevens, J., dissenting).

<sup>114</sup> See generally Chemerinsky, *supra* note 59, at 501 (noting that the debate about incorporation “determined the reach of the Bill of Rights and the extent to which

#### IV. Confining the Drying-Up-the-Market Rationale to the Child Pornography Context

As Part III explained, in *Stevens* the Supreme Court recast its *Ferber* decision as having been squarely grounded in the longstanding categorical First Amendment exclusion of expression that is “an integral part of conduct in violation of a valid criminal statute.”<sup>115</sup> In the *Ferber* case, the particular “integral” relationship between the expressive material at issue—child pornography—and the underlying criminal conduct—sexual abuse of children—was the fact that the criminal conduct was carried out in order to generate the expressive material, thus leading to the “drying up the market” rationale. The *Ferber* opinion elaborated on that rationale as follows:

[T]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. 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.<sup>116</sup>

In *Ferber* the Court also cited three additional rationales in support of its conclusion that child pornography is beyond the First Amendment pale:<sup>117</sup>

individuals could turn to the federal courts for protection from state and local governments.”).

<sup>115</sup> *Stevens*, 130 S. Ct. at 1586.

<sup>116</sup> *Ferber*, 458 U.S. at 759–60.

<sup>117</sup> The *Ferber* Court listed various “reasons” why government is “entitled to greater leeway in the regulation of pornographic depictions of children,” 458 U.S. at 756, and it then discussed several reasons, numbering them “First” through “Fifth.” *Id.* at 756–64. However, the Court’s numbering is confusing because it does not strictly correspond to the distinct rationales that the Court proffers in support of its conclusion concerning child pornography, in several respects. Of most relevance, the Court’s discussion of what it labels its “second” reason actually addresses two distinct rationales, one of which is the “drying up the market theory,” *id.* at 759–60, which the Court also discussed under what it labeled its “third” reason, *id.* at 761–62. Moreover,



*Restricting Two Major Rationales for Content-Based Speech Restrictions*

1. The goal that the statute was designed to serve, preventing the sexual abuse of children, is of exceptionally compelling importance.<sup>118</sup>
2. Child pornography constitutes a permanent record of the sexual abuse to which the child was subject, and the child suffers continuing harm from its circulation.<sup>119</sup>
3. The targeted expression has only “exceedingly modest, if not *de minimis*” value.<sup>120</sup>

In the *Stevens* litigation, as well as in other cases, advocates of content-based regulations of expression other than child pornography have relied on the rationales the Court set out in *Ferber* in two ways. First, they cite one or more of *Ferber*’s rationales as supporting the recognition of additional categorical exclusions from the First Amendment. Second, as a fallback position, they cite one or more of these rationales as satisfying judicial strict scrutiny. Now that the Court’s *Stevens* ruling has specified two quite narrow criteria for identifying content-based categorical exclusions from free speech protection, as Part III discussed, most of the *Ferber* rationales will henceforth save a content-based speech regulation only if these rationales satisfy strict scrutiny.<sup>121</sup> This is unlikely to occur.

In *Ferber* itself, the Court did not subject the challenged statute to strict scrutiny, given the Court’s holding that child pornography, which the statute outlawed, was categorically unprotected expression. Therefore, even though the *Ferber* Court endorsed the rationales it articulated as generally supporting its conclusion that child pornography constitutes categorically unprotected expression, the Court might well find that not all these rationales are sufficiently

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the Court designates as its “fifth” reason the general proposition that its past decisions have recognized certain content-based categorical exclusions from free speech protection, *id.* at 763–64, which of course provides no logical support for the specific proposition that child pornography should constitute such an exclusion.

<sup>118</sup> *Ferber*, 458 U.S. at 756–58.

<sup>119</sup> *Id.* at 759.

<sup>120</sup> *Id.* at 762.

<sup>121</sup> Additionally, as discussed above, *Ferber*’s drying-up-the-market rationale could potentially support an argument that another category of expression should also be recognized, along with child pornography, as a specific instance of the general, historically recognized categorical exclusion for expression that is “integrally related” to illegal conduct. Accordingly, that particular *Ferber* rationale could potentially support a claim for a newly recognized categorical exclusion.

persuasive to withstand strict scrutiny when offered to support other censorial measures, including Section 48.

To be sure, the Court will always hold that protecting children's welfare—which closely corresponds to one of its *Ferber* rationales—is a goal of compelling importance. That said, the *Ferber* Court understandably accorded extraordinary importance to the more specific child protection goal it stressed, of protecting children from sexual abuse. Therefore, one could plausibly argue that any content-based regulation that was designed to promote any other goal—even any other goal concerning children's welfare—could be distinguished from *Ferber* on this basis. In *Ferber*, the Court described the specific objective of protecting children from sexual abuse as being “of surpassing importance,”<sup>122</sup> a phrase that adds a special emphasis, in contrast with the usual strict scrutiny parlance, which refers to a goal of “compelling” importance.<sup>123</sup>

The Third Circuit's opinion in *Stevens* stresses this unique aspect of *Ferber* and concludes that the *Ferber* Court was willing to accept the drying-up-the-market rationale as a sufficient justification for criminalizing depictions of criminal conduct only in that specific context,<sup>124</sup> given the particular heinousness of the crime.<sup>125</sup> Indeed, the Supreme Court itself has said that “the interests underlying child pornography prohibitions far exceed the interests justifying” an anti-obscenity law, even though obscenity is a more longstanding exception to First Amendment protection than child pornography.<sup>126</sup>

<sup>122</sup> 458 U.S. at 757.

<sup>123</sup> The *Ferber* Court also indicated that it might well be uniquely deferential to government power to regulate child pornography when it contrasted the traditional obscenity exception with its newly recognized child pornography exception; it said that “the States are entitled to greater leeway in the regulation of pornographic depictions of children.” *Id.* at 756.

<sup>124</sup> See *Stevens*, 533 F.3d at 226 (“assum[es],” for the sake of argument only, that “*Ferber* may, in limited circumstances . . . be applied to other categories of speech”).

<sup>125</sup> See *id.* at 228 (noting that in *Ferber*, “the Supreme Court went to great lengths to cabin its discussion of the depiction/act conflation because of the special role that children play in our society.”). See also *Osborne*, 495 U.S. at 108 (Brennan, J., dissenting) (attributing what he views as the Court's deviation from First Amendment principles and precedents, in upholding a law criminalizing the mere possession of child pornography, to the fact that “the Court . . . is so disquieted by the possible exploitation of children in the production of . . . pornography.”).

<sup>126</sup> *Osborne*, 495 U.S. at 108.

## *Restricting Two Major Rationales for Content-Based Speech Restrictions*

In the same vein, the Supreme Court has also distinguished child pornography from other expression, including even constitutionally unprotected obscenity, in terms of another rationale it stressed in *Ferber*: that the targeted expression has only “exceedingly modest, if not *de minimis* value.”<sup>127</sup> By definition, obscenity lacks “serious . . . value.”<sup>128</sup> Therefore, the Court’s indication that child pornography has even less “value” than obscenity<sup>129</sup> signals that the Court has relegated child pornography to a singularly outcast status in this regard. Consequently, the Court is unlikely to conclude that any other expression, other than child pornography, has such minimal value.

In sum, building on the Third Circuit’s analysis in *Stevens*, one could argue that the drying-up-the-market rationale for punishing expression in order to deter unlawful conduct should be confined *only* to the child pornography context because of two unique factors that the Supreme Court has repeatedly stressed: (1) the “surpassing importance” of protecting children from sexual abuse and (2) child pornography’s especially *de minimis* value. Some commentators have read *Ferber* and the Court’s other child pornography cases in this strictly limited fashion.<sup>130</sup>

<sup>127</sup> *Id.* (quoting *Ferber*, 458 U.S. at 759).

<sup>128</sup> *Miller v. California*, 413 U.S. 15, 22 (1973) (explaining that this is one of the three prerequisites for expression to be deemed “obscene” and hence excluded from the First Amendment).

<sup>129</sup> *Osborne* distinguished the Court’s holding in *Stanley v. Georgia*, 394 U.S. 557 (1969), in which it had struck down a statute outlawing the private possession of obscene material; in contrast, *Osborne* itself rejected a First Amendment challenge to a statute outlawing the private possession of child pornography. In support of this distinction, *Osborne* stressed that “*Stanley* was a narrow holding, . . . and, since the decision in that case, the value of permitting child pornography has been characterized as ‘exceedingly modest, if not *de minimis*.’” 495 U.S. at 108 (quoting *Ferber*).

<sup>130</sup> When the Court issued its *Ferber* decision, at least one commentary urged that its drying-up-the-market rationale, which was then a novel justification for a censorial measure, should be strictly limited to the child pornography context. See *Child Pornography and Unprotected Speech*, 96 Harv. L. Rev. 141, 148 (1982). This commentary recognized, however, that the *Ferber* opinion did not itself explicitly spell out such a limitation, thus making it a potential foundation for additional speech-suppressive measures. See *id.* at 150 (“[T]he *Ferber* opinion emerges as a sympathetic response to piteous exploitation. The decision represents the confluence of three concerns—sexually explicit speech, child welfare, and illegal conduct—and should be viewed as a narrow decision legitimized only because of that convergence. The Court’s failure to articulate any such limitation, however, leaves each of the three lines of analysis precariously susceptible to extension in future First Amendment decisions.”). See

Even if the government can show that a content-based speech regulation is designed to promote a sufficiently important purpose, it is always harder for the government to satisfy the second prong of the strict scrutiny test, which requires that the challenged measure is narrowly tailored and necessary to promote the government's goal, and that no alternative measure, less restrictive of expression, will suffice. In particular, in *Stevens* and other cases concerning different content-based speech regulations, proponents of such regulations have invoked *Ferber's* central rationale and argued that the speech regulations are necessary to promote the government's goal of deterring certain conduct, due to the difficulties of directly prosecuting the conduct itself.

Under strict scrutiny, the government cannot justify suppressing speech that depicts criminal conduct merely by asserting that it is difficult to prosecute the underlying conduct, or that prosecuting the depictions would have some additional impact in deterring the criminal conduct above and beyond direct prosecutions of such conduct.<sup>131</sup> If such assertions could justify a speech-suppressive measure, then the government could outlaw almost any depictions of any crime.<sup>132</sup> Instead, though, the Supreme Court has rejected this drying-up-the-market rationale for targeting any expression other than child pornography. If this rationale were to survive strict scrutiny, which it did not have to do in the child pornography context, the government would have to demonstrate the following supporting facts:

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also Geoffrey R. Stone, *Dog-Fighting and the First Amendment*, Huffington Post, April 25, 2010, <http://www.huffingtonpost.com/geoffrey-r-stone/dog-fighting-and-the-first-amendment> (describing as "a . . . basic principle of First Amendment doctrine" that "even though speech was produced by an unlawful act, the speech may not be restricted for that reason," and says that "child pornography is a unique exception to [this] principle" because "society has a uniquely 'compelling' interest in preventing" children from being "forced to engage in actual sexual conduct in order to produce the expression").

<sup>131</sup> In *Ferber*, the Court explained that it is difficult to enforce laws criminalizing the production of child pornography because "the production of pornographic materials is a low-profile, clandestine industry." 458 U.S. at 759–60. However, the same could be said of essentially all criminal activity.

<sup>132</sup> See *Stevens*, 533 F.3d at 230 ("Restriction of the depiction of almost any activity can work to dry up, or at least restrain, the activity's market.").

## *Restricting Two Major Rationales for Content-Based Speech Restrictions*

1. That laws criminalizing the underlying conduct are unusually difficult to enforce—that is, beyond the usual difficulties that routinely impede the enforcement of any criminal laws. Conversely, if these laws are as effective as criminal laws in general, enforcing them is a less restrictive alternative to suppressing the associated expression. Moreover, the government would have to show that it had exhausted alternative measures for increasing the effectiveness of the laws that criminalize the underlying conduct, including increasing the penalties for violating them and increasing the resources allocated to enforcing them.<sup>133</sup>

2. That the underlying criminal conduct is substantially motivated by the desire to create the depiction; in other words, if the depictions were criminalized, the underlying criminal conduct would substantially cease. Conversely, if the underlying criminal conduct would continue to a significant extent in any event, because there are other economic or non-economic incentives for engaging in it, then criminalizing the depictions would not sufficiently promote the goal of deterring the criminal conduct.

3. That the depictions do not materially aid in law enforcement efforts to suppress the underlying criminal conduct. Conversely, if the depictions did materially aid in prosecuting such conduct, outlawing them would be counterproductive. It might even fail rational basis review,<sup>134</sup> and it would certainly fail strict scrutiny.

Because the *Ferber* Court did not subject the challenged statute to strict scrutiny, it did not strictly scrutinize the drying-up-the-market rationale, even in the special context of child pornography. To the contrary, the Court applied only deferential, rational basis review. It did not demand actual empirical evidence that criminalizing child pornography was the only means by which to prevent the underlying child abuse, let alone that criminalization would be effective in preventing such abuse. Neither did the Court demand any evidence

<sup>133</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (rejecting argument that expression that results from illegal conduct should be criminalized in order to deter the illegal conduct, noting that “[i]f the sanctions that presently attach to a violation of” the statute making the conduct illegal “do not provide sufficient deterrence, perhaps those sanctions should be made more severe.”).

<sup>134</sup> See *Chemerinsky*, *supra* note 59, at 540 (explaining that under this standard, the Court will strike down a law if its challenger shows that it has no rational relationship to a legitimate government purpose).

of the ineffectiveness of the less restrictive alternative that is typically used to deter criminal conduct—namely, prosecuting those who engage in that conduct; in this context, that would mean prosecuting those who actually abuse children in producing child pornography. Instead, using classic rational basis review terminology, the *Ferber* Court asserted that the legislature was “justified in believing” that this usual approach for halting illegal conduct would not be sufficiently effective.<sup>135</sup> The Court similarly speculated that “[t]he 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.”<sup>136</sup>

Not only did the *Ferber* majority not cite any empirical evidence in support of these conclusions, but the empirical evidence it did cite actually supported a less restrictive alternative to criminalizing the expression at issue: enforcing obscenity statutes. Justice Stevens’s separate opinion in *Ferber* stressed this point. Specifically, the very congressional committee reports that the majority cited had concluded that the problem of child sexual abuse for the purpose of producing child pornography could be adequately addressed by imposing stiff penalties for violating obscenity laws, because “virtually all” child pornography satisfies the standards for constitutionally unprotected obscenity.<sup>137</sup>

In sum, the drying-up-the-market rationale might not satisfy strict scrutiny even in the unique context of child pornography. That was one reason for Justice Stevens’s conclusion that the Court should not have treated child pornography as categorically unprotected expression.<sup>138</sup> It is also one reason why the *Ferber* decision was strongly criticized by contemporary commentators.<sup>139</sup> In any event, regardless of whether or not the drying-up-the-market rationale could

<sup>135</sup> 458 U.S. at 759.

<sup>136</sup> *Id.* at 760 (emphasis added). See also Osborne, 495 U.S. at 109–10 (upholding a statute that criminalized the mere possession of child pornography under rational basis review, asserting that “[i]t is . . . surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.”).

<sup>137</sup> *Ferber*, 458 U.S. at 779 n.4 (Stevens, J., concurring in the judgment) (citing S. Rep. No. 95-438, at 13 (1977)); see also H.R. Rep. No. 95-697, at 7–8 (1977).

<sup>138</sup> *Ferber*, 458 U.S. at 778 (Stevens, J., concurring in the judgment) (“A holding that respondent may be punished for selling these two films does not require us to conclude that other users of these very same films, or that other motion pictures

*Restricting Two Major Rationales for Content-Based Speech Restrictions*

satisfy strict scrutiny in the “special case” of child pornography,<sup>140</sup> that rationale is less likely to satisfy strict scrutiny in any other context, as the Third Circuit explained in detail in its *Stevens* opinion.

The Third Circuit expressed its deep skepticism toward *Ferber*’s “conflation of the underlying act with its depiction.”<sup>141</sup> It cited NYU law professor Amy Adler’s exhaustive analysis of child pornography jurisprudence for the proposition that it “is the only place in First Amendment law where the Supreme Court has accepted the idea that we can constitutionally criminalize the depiction of a crime.”<sup>142</sup> The Third Circuit posited that in *Ferber* the Supreme Court was willing to “collapse[] the ‘speech/action’ distinction that occupies a central role in First Amendment law,”<sup>143</sup> because of the unique importance of protecting children from sexual abuse.<sup>144</sup> In contrast, even though the goal of preventing cruelty to animals is surely important, the Third Circuit concluded that neither this goal nor any other would justify criminalizing depictions in an effort to deter the underlying conduct, a type of measure that the Court has upheld only in the context of child pornography.

Strictly scrutinizing the drying-up-the-market rationale that the government invoked in support of Section 48, the Third Circuit concluded that it was not narrowly tailored to promote the government’s asserted goal of preventing cruelty to animals.<sup>145</sup> To survive strict scrutiny, the Third Circuit clarified, the government would have to show that Section 48 “prevent[s] cruelty to animals that

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containing similar scenes, are beyond the pale of constitutional protection.”). Although the Court’s judgment in *Ferber* was unanimous, the majority’s opinion only received a bare five-vote majority. See *id.* at 774 (Blackmun, J., concurring in the result); *Id.* at 775 (Brennan, J., with whom Marshall, J., joins, concurring in the judgment); *Id.* at 777 (Stevens, J., concurring in the judgment).

<sup>139</sup> See Adler, *supra* note 99, at 982 (quoting Supreme Court, 1981 Term, Child Pornography and Unprotected Speech, 96 Harv. L. Rev. 141, 148, 150 (1982)); and Frederick Schauer, Codifying the First Amendment: *New York v. Ferber*, 1982 Sup. Ct. Rev. 285, 303–04).

<sup>140</sup> Stevens, 130 S. Ct. at 1586.

<sup>141</sup> 533 F.3d 218, 226 (3d Cir. 2008).

<sup>142</sup> Adler, *supra* note 99, at 984.

<sup>143</sup> *Id.* at 970.

<sup>144</sup> Stevens, 533 F.3d at 228.

<sup>145</sup> *Id.*

state and federal statutes *directly* regulating animal cruelty under-enforce.”<sup>146</sup> As the Supreme Court has stressed, under strict scrutiny the appropriate inquiry is not whether the challenged measure advances the government’s goal to some marginal extent, but rather whether it significantly advances the government’s goal, above and beyond other, alternative measures that do not intrude on First Amendment freedoms.<sup>147</sup> This is only logical, as surely every government measure, including censorial ones, would have *some* impact in promoting the government’s goal. If these measures had no impact whatsoever, they would be struck down as irrational or arbitrary because they would fail to pass even the highly deferential standard of rational basis review.

Specifically concerning the government’s drying-up-the-market rationale for Section 48, the Third Circuit noted that the government had submitted no empirical evidence to substantiate that criminalizing depictions of the outlawed conduct was effective, let alone that it was necessary and the least restrictive alternative for significantly advancing the goal of deterring animal cruelty.<sup>148</sup> The Third Circuit acknowledged that the government made a “plausible” argument that the perpetrators of animal abuse depicted in crush videos “are very difficult to find and prosecute for those underlying acts . . . because the only person typically onscreen is the ‘actress,’ and only her legs or feet are typically shown.”<sup>149</sup> Accordingly, if the government could substantiate that argument with evidence,<sup>150</sup> a statute that outlawed crush videos might potentially survive strict

<sup>146</sup> *Id.* (emphasis added).

<sup>147</sup> See *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (explaining that under strict scrutiny, government must prove that the challenged speech regulation will alleviate the posited harm “to a material degree”).

<sup>148</sup> *Stevens*, 533 F.3d at 230–31.

<sup>149</sup> *Id.* at 229, 234.

<sup>150</sup> See *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (“The interest in . . . freedom of expression . . . outweighs any theoretical but unproven benefit of censorship.”). See also *U.S. v. Williams*, 53 U.S. 285, 324–25 & n.3 (2008) (Souter, J., dissenting) (noting that “the Government does not get a free pass whenever it claims a worthy objective for curtailing speech” and rejecting government’s claim that it is necessary to criminalize offers to sell and solicitations of virtual child pornography because of difficulty in prosecuting actual child pornography; citing extensive empirical evidence and concluding that the government “appears to be highly successful in convicting child pornographers”).



## *Restricting Two Major Rationales for Content-Based Speech Restrictions*

scrutiny. Weighing against this conclusion, though, are the two *Ferber* rationales that are arguably unique to the child pornography context, as discussed above: the “surpassing importance” of protecting children from sexual abuse and the *de minimis* value of child pornography.<sup>151</sup> Accordingly, in any other factual context, the Court might well reject the drying-up-the-market rationale, insisting instead that government must pursue “[t]he normal method of deterring unlawful conduct,” which “is to impose an appropriate punishment on the person who engages in it.”<sup>152</sup>

The Third Circuit expressed even more skepticism about the government’s drying-up-the-market rationale as a potential justification for outlawing dogfighting videos, in contrast to crush videos. Specifically, the Third Circuit questioned the government’s potential ability to produce empirical evidence that would demonstrate even the effectiveness, let alone the necessity, of outlawing dogfighting videos as a means of deterring dogfighting, for several reasons. First, the Third Circuit cited evidence that most dogfights take place before live audiences, attracting substantial numbers of spectators who pay admission fees and generate gambling revenues. In short, the evidence indicates that producing videos is not the primary economic motive for the underlying animal cruelty.<sup>153</sup> Notably, the Humane Society of the United States, a supporter of Section 48, attested to these facts.<sup>154</sup> Second, in contrast to crush videos, animal-fighting videos apparently do not routinely obscure the identity of human participants, as indicated by the videos in the *Stevens* case itself. The Third Circuit pointed out that these videos made no attempt to conceal any of the faces of the people depicted, and they also provided the names and addresses of some participants, as well as the locations of the depicted activities.<sup>155</sup> A survey of the success rates of prosecutions under laws criminalizing dogfighting and other

<sup>151</sup> *Ferber*, 458 U.S. at 757, 759.

<sup>152</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).

<sup>153</sup> *Stevens*, 533 F.3d at 230; accord *People v. Bergen*, 883 P.2d 532, 545 (Colo. Ct. App. 1994) (“[W]ithout the knowing presence of spectators, much of the ‘sport’ of the fights would be eliminated.”).

<sup>154</sup> The Humane Society of the United States, Dogfighting Fact Sheet, available at [http://www.hsus.org/hsus\\_field/animal\\_fighting\\_the\\_final\\_round/dogfighting\\_fact\\_sheet/](http://www.hsus.org/hsus_field/animal_fighting_the_final_round/dogfighting_fact_sheet/).

<sup>155</sup> *Stevens*, 533 F.3d at 234.

kinds of animal fighting concluded that they enjoy a high success rate.<sup>156</sup> Likewise, the director of the Humane Society's campaign against animal fighting pegged the success rate of federal prosecutions of dogfighting at more than 98 percent.<sup>157</sup> The government did not submit any evidence to counter these statistics.

The foregoing points that the Third Circuit cited as weighing against a drying-up-the-market justification for criminalizing dogfighting videos are bolstered by yet another one: that, because dogfighting videos do provide identifying information about the depicted animal abuse, they can be valuable aids for law enforcement officials in prosecuting and deterring those underlying abuses. The aforementioned survey of prosecution success rates for animal fighting cases concluded that "[p]rosecutors seem more willing to go forward when there is videotape evidence, and juries seem more willing to convict in such cases."<sup>158</sup> Consequently, criminalizing these depictions, far from significantly advancing the government's goal of deterring the underlying conduct, could well undermine that important goal.

<sup>156</sup> Adam Ezra Schulman, Animal-cruelty videos & free speech: some observations from data, <http://www.firstamendmentcenter.org/analysis.aspx?id=21814> (July 7, 2009) (citing an overall success rate of 90 percent for prosecutions of all types of animal fighting).

<sup>157</sup> See Joe Biddle, Vick Raises Bar on Cruelty, *The Tennessean*, July 21, 2007. The overall success rate for criminal prosecution nationwide is not a compiled statistic but one can find local prosecution rates from city council and district attorney websites. For example, the New York County District Attorney's Office boasts a conviction rate of "close to 90 percent" since 1980. New York County District Attorney's Office: History, <http://manhattanda.org/officeoverview/history.shtml> (last visited July 29, 2010). This rate is consistent with information found for New York County on the Bureau of Justice Statistics website, [http://bjs.ojp.usdoj.gov/dataonline/Search/Prosecutors/bydiscomp\\_table.cfm](http://bjs.ojp.usdoj.gov/dataonline/Search/Prosecutors/bydiscomp_table.cfm) (last visited July 29, 2010). Local prosecution success rates can also be gleaned from data in the National Survey of Prosecutors, 2001. See Carol J. DeFrances, Prosecutors in State Courts, 2001, U.S. Dep't of Justice, Bureau of Justice Statistics, NJC 193441 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc01.pdf>. Comparing these separately compiled statistics (with no clear indication of the time periods they each cover) may well be like comparing apples and oranges, but at least they indicate that the government will not be able to demonstrate the necessity of criminalizing depictions of animal cruelty merely by asserting that prosecuting animal cruelty is unusually difficult.

<sup>158</sup> Schulman, *supra* note 156.

## **V. How Would More Narrowly Drafted Statutes, Focusing Only on Crush and/or Dogfighting Videos, Fare under *Stevens's* First Amendment Analysis?**

Because Section 48's legislative history focused specifically on crush videos, and because the government's defense of Section 48 focused only on crush videos plus dogfighting videos, it is worth considering how the *Stevens* ruling would bear on any new statute that criminalized only depictions of these two specific kinds of criminal activities. Indeed, in the wake of *Stevens*, legislation along these narrower contours has been introduced in Congress.<sup>159</sup> It should also be recalled that crush videos could well be successfully prosecuted without any new statute specifically on point, as constituting constitutionally unprotected obscenity.<sup>160</sup> This part of the article will focus on other potential bases for concluding that the First Amendment would permit criminalizing the production of either crush or dogfighting videos.

After *Stevens*, neither type of video could be categorically excluded from First Amendment protection as independent, stand-alone categories of unprotected speech. That is because of the *Stevens* Court's insistence that it will recognize as categories of unprotected speech only "well-defined and narrowly limited classes of speech," which "[f]rom 1791 to the present" have been understood to be excluded from the First Amendment.<sup>161</sup> As the Court stressed in *Stevens*, no such showing could be made concerning the broadly defined depictions of illegal treatment of animals that Section 48 criminalized,<sup>162</sup> and the same is true for these two particular subsets of such depictions.

Nonetheless, the Court could potentially treat either subset of depictions the way it treated child pornography in *Stevens*: as a specific example of another, more general, historically recognized category of unprotected expression—namely, expression that is an

<sup>159</sup> See Animal Torture Prevention Act of 2010, H.R. 5337, 111th Cong., (2d Sess., as introduced May 18, 2010) (amending 18 U.S.C. Section 48); H.R. 5092, 111th Cong., (2d Sess., as introduced Apr. 21, 2010) (amending 18 U.S.C. Section 48) (focusing exclusively on "animal crush videos").

<sup>160</sup> See, e.g., Brief for the United States, *supra* note 25, at 42–43; see also Brief for the Respondent, *supra* note 28, at 50–51.

<sup>161</sup> *Stevens*, 130 S. Ct. at 1584.

<sup>162</sup> *Id.* at 1586.

integral part of illegal conduct. *Stevens* stressed that child pornography could be subsumed within this general categorical exclusion because it was “integrally related” to the underlying child abuse involved in the production process. Accordingly, proponents of criminalizing crush or dogfighting videos would have to show that these videos are also “integrally related” to the depicted animal abuse. The most persuasive showing would be that the abuse takes place solely—or at least largely—for purposes of generating the videos. In these situations, drying up the market for the depictions would completely, or almost completely, end the underlying abuse. In other words, given the necessary and direct causal connection that would then exist between the conduct and the expression, suppressing the expression would have a directly proportionate suppressive impact on the conduct.<sup>163</sup> One bill that was introduced in Congress after the Supreme Court’s *Stevens* decision incorporates this principle. It criminalizes depictions of “extreme animal cruelty” only if the cruel conduct “is committed for the primary purpose of creating the depiction.”<sup>164</sup>

Proponents of criminalizing crush videos have maintained that the animal abuse they depict takes place only for purposes of producing and selling videos, and that there is no live audience for these “performances.”<sup>165</sup> If the government could support this contention through empirical evidence,<sup>166</sup> 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.<sup>167</sup>

<sup>163</sup> Adler, *supra* note 99, at 987 (acknowledging, although highly critical of *Ferber*, that punishing the production of child pornography could be justified when it “serve[s] as an inducement to commit” the crime of child abuse, and is “not just the product of a crime of child abuse.”).

<sup>164</sup> H.R. 5337, 111th Cong. (2010).

<sup>165</sup> 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 (2010) (No. 08-769).

<sup>166</sup> See Bartnicki, 532 U.S. at 530–31 (rejecting a drying-up-the-market rationale for punishing expression that resulted from illegal conduct, and stressing that “there is no empirical evidence to support the assumption that the prohibition against” the expression would reduce the illegal conduct).

<sup>167</sup> But see Editorial, *Disgusting but Not Illegal*, N.Y. Times, Aug. 2, 2010, at A16. (reading *Stevens* as precluding any First Amendment exclusion for crush videos, and as rejecting both the child pornography analogy and the applicability of the obscenity exception to such videos).

## *Restricting Two Major Rationales for Content-Based Speech Restrictions*

In contrast, as discussed above, the evidence that was adduced in the *Stevens* litigation indicates that the parallel contention could probably not be sustained as to dogfighting videos, because dogfights are conducted for reasons other than producing and selling videos.

If either crush videos or dogfighting videos are not treated as falling within a longstanding categorical exception to free speech, then a law that criminalized either one could be upheld only if it satisfied strict scrutiny. Justice Alito's dissenting opinion in *Stevens* concludes that a statute that criminalized only crush videos and depictions of "brutal animal fights" would survive strict scrutiny because "the crimes depicted in these videos cannot be effectively controlled without targeting the videos."<sup>168</sup> For the reasons discussed above, the government could potentially demonstrate that the drying-up-the-market rationale is the least restrictive alternative for deterring the crimes that crush videos depict, but it could probably not do so concerning dogfighting videos. Moreover, as also explained above, the drying-up-the-market rationale might be strictly confined to the "special case" of child pornography,<sup>169</sup> so that deterring any criminal conduct other than sexual abuse of children would continue to depend on prosecuting that conduct, not on prosecuting any resulting expression.

### **Conclusion**

Although the Supreme Court has championed as a First Amendment "bedrock"<sup>170</sup> the principle that government may not regulate expression based on its content, the Court has condoned two major exceptions to that principle: for certain categories of expression that are deemed wholly outside the First Amendment and for any content-based regulation that can survive strict scrutiny. The 1942 case of *Chaplinsky v. New Hampshire* contains broad language suggesting that the Court can relegate new categories of expression to unprotected status based on a subjective balancing test, assessing the costs and benefits of the expression. Before its ruling in *Stevens*, the Court had repeatedly cited that language with apparent approval. The

<sup>168</sup> *Stevens*, 130 S. Ct. at 1601 (Alito, J., dissenting).

<sup>169</sup> *Id.* at 1586.

<sup>170</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

1982 case of *New York v. Ferber* suggests that expression may be outlawed when it depicts illegal conduct, even though fundamental First Amendment principles call for punishing the conduct, not the expression. In *Ferber*, though, the Court concluded that there was a sufficiently close nexus between child pornography and the child sexual abuse it portrayed to warrant punishing the expression as a means of deterring the conduct.

*Ferber's* drying-up-the-market rationale has been regularly cited by proponents of various content-based speech regulations, in support of both kinds of exceptions to the general rule against such regulations. Accordingly, in the *Stevens* litigation, proponents of the challenged ban on certain depictions of illegal treatment of animals relied on this rationale as supporting either a new categorical First Amendment exception or a conclusion that the ban satisfied strict scrutiny. In rejecting these arguments, the Supreme Court took the opportunity to reformulate the key passage in *Chaplinsky* and to recharacterize *Ferber* in ways that should strictly limit both decisions' precedential force for further content-based restrictions. Moreover, using a different approach to the issues than the Supreme Court did, the Third Circuit analyzed the weaknesses of *Ferber's* drying-up-the-market rationale, making a persuasive case that it should be strictly confined to the specific context of child pornography.

In sum, the *Stevens* litigation generated analysis and holdings that should significantly reinforce the general ban on content-based regulations of expression. This is of course a positive development for defenders of free speech, and it also has positive ramifications for defenders of animal welfare. Culpability and law enforcement resources should not be deflected from those who actually abuse animals to those who merely distribute images of abuse, especially when the images can be employed as valuable aids for identifying and prosecuting the abusers and for mobilizing public support for such prosecutions.