AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**United States v. Stevens, 559 U.S. 460** (2010)

*In 1999, Congress made it a federal criminal offense to knowingly create, sell or possess a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, with “animal cruelty” defined as the intentional wounding, torturing or killing a living animal, while carving out an exception for depictions with serious political, educational or artistic value. Because the underlying acts of animal cruelty can be difficult to prosecute, the ban on the sale of such videos was intended to subvert the market for such animal cruelty and allow prosecutions further in the distribution chain.*

*Robert Stevens ran a business selling videos of dogfights and other animal fights. At least some of the events depicted in the videos were themselves legal. Stevens was convicted in federal district court of violating the 1999 statute. A divided circuit court vacated that conviction, holding that the videos were protected by the First Amendment. In an 8-1 decision, the U.S. Supreme Court affirmed that circuit court ruling.*

*Congress responded to the Court’s decision by passing the Animal Crush Video Prohibition Act of 2010, which made it a federal criminal offense to knowingly create or sell an animal crush video. An animal crush video is defined as an obscene image or video recording depicting actual conduct in which living animals are intentionally subjected to serious bodily injury and excepted videos depicting normal veterinary or agricultural husbandry practices, the slaughter of animals for food, or hunting, trapping or fishing.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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“From 1791 to the present,” however, the First Amendment has “permitted restrictions upon the content of speech in a few limited areas,” and has never “include[d] a freedom to disregard these traditional limitations.” 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.” *Chaplinsky v. United States* (1942).

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As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. . . .

The Government contends that “historical evidence” about the reach of the First Amendment is not “a necessary prerequisite for regulation today,” and that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress’s “‘legislative judgment that … depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection,’” and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.” *Marbury v. Madison* (1803).

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often described historically unprotected categories of speech as being “‘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.’” . . .

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When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *New York v.* Ferber (1982), for example, we classified child pornography as such a category. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was de minimis. But our decision did not rest on this “balance of competing interests” alone. We made clear that Ferber presented a special case: The 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.” As we noted, “‘[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.’” Ferber thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding. . . .

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In the First Amendment context, however, this Court recognizes “a second type of facial challenge,” whereby a law may be invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Washington State Grange v. Washington State Republican Party* (2008). Stevens argues that §48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government’s entire defense of §48 rests on interpreting the statute as narrowly limited to specific types of “extreme” material. . . .

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We read §48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute’s ban on a “depiction of animal cruelty” nowhere requires that the depicted conduct be cruel. That text applies to “any … depiction” in which “a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.” “[M]aimed, mutilated, [and] tortured” convey cruelty, but “wounded” or “killed” do not suggest any such limitation.

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In the District of Columbia, for example, all hunting is unlawful. Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, and hunting television programs, videos, and Web sites are equally popular. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, §48(a) extends to any magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation’s Capital.

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Quite apart from the requirement of “serious” value in §48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. . . . The National Rifle Association agrees that “much of the content of hunting media … is merely recreational in nature.” The Government offers no principled explanation why these depictions of hunting or depictions of Spanish bullfights would be inherently valuable while those of Japanese dogfights are not. The dissent contends that hunting depictions must have serious value because hunting has serious value, in a way that dogfights presumably do not. But §48(b) addresses the value of the depictions, not of the underlying activity. There is simply no adequate reading of the exceptions clause that results in the statute’s banning only the depictions the Government would like to ban.

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*Affirmed*.

JUSTICE ALITO, dissenting.

. . . . The Court of Appeals—incorrectly, in my view—declined to decide whether §48 is unconstitutional as applied to respondent’s videos and instead reached out to hold that the statute is facially invalid. Today’s decision does not endorse the Court of Appeals’ reasoning, but it nevertheless strikes down §48 using what has been aptly termed the “strong medicine” of the overbreadth doctrine. . . .

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The “strong medicine” of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court. . . .

I see no reason to depart here from the generally preferred procedure of considering the question of overbreadth only as a last resort. . . .

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. . . I would hold that §48 does not apply to depictions of hunting. First, because §48 targets depictions of “animal cruelty,” I would interpret that term to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, not to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. Virtually all state laws prohibiting animal cruelty either expressly define the term “animal” to exclude wildlife or else specifically exempt lawful hunting activities, so the statutory prohibition set forth in §48(a) may reasonably be interpreted not to reach most if not all hunting depictions.

. . . . [I]t is widely thought that hunting has “scientific” value in that it promotes conservation, “historical” value in that it provides a link to past times when hunting played a critical role in daily life, and “educational” value in that it furthers the understanding and appreciation of nature and our country’s past and instills valuable character traits. And if hunting itself is widely thought to serve these values, then it takes but a small additional step to conclude that depictions of hunting make a non-trivial contribution to the exchange of ideas. Accordingly, I would hold that hunting depictions fall comfortably within the exception set out in §48(b).

I do not have the slightest doubt that Congress, in enacting §48, had no intention of restricting the creation, sale, or possession of depictions of hunting. Proponents of the law made this point clearly. . . .

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As the Court of Appeals recognized, “the primary conduct that Congress sought to address through its passage [of §48] was the creation, sale, or possession of ‘crush videos.’” . . .

It is undisputed that the conduct depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty. But before the enactment of §48, the underlying conduct depicted in crush videos was nearly impossible to prosecute. These videos, which “often appeal to persons with a very specific sexual fetish,” were made in secret, generally without a live audience, and “the faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction.” Thus, law enforcement authorities often were not able to identify the parties responsible for the torture.

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The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.

The most relevant of our prior decisions is Ferber, which concerned child pornography. The Court there held that child pornography is not protected speech, and I believe that Ferber’s reasoning dictates a similar conclusion here.

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Application of the Ferber framework also supports the constitutionality of §48 as applied to depictions of brutal animal fights. . . .

First, such depictions, like crush videos, record the actual commission of a crime involving deadly violence. Dogfights are illegal in every State and the District of Columbia. . . .

Second, Congress had an ample basis for concluding that the crimes depicted in these videos cannot be effectively controlled without targeting the videos. Like crush videos and child pornography, dogfight videos are very often produced as part of a “low-profile, clandestine industry,” and “the need to market the resulting products requires a visible apparatus of distribution.” *Ferber*. . . .

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Third, depictions of dogfights that fall within §48’s reach have by definition no appreciable social value. As noted, §48(b) exempts depictions having any appreciable social value, and thus the mere inclusion of a depiction of a live fight in a larger work that aims at communicating an idea or a message with a modicum of social value would not run afoul of the statute.

Finally, the harm caused by the underlying criminal acts greatly outweighs any trifling value that the depictions might be thought to possess. . . .

In sum, §48 may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. Thus, the statute has a substantial core of constitutionally permissible applications. . . .