CASENOTE

CONSTITUTIONAL LAW -- FREEDOM OF EXPRESSION -- STATUTE CRIMINALIZING CREATION, SALE, AND POSSESSION OF DEPICTIONS OF ANIMAL CRUELTY WAS SUBSTANTIALLY OVERBROAD AND FACIALLY INVALID AS A VIOLATION OF FIRST AMENDMENT PROTECTION OF SPEECH

I. FACTS

In 1999, Congress enacted 18 U.S.C. § 48 to criminalize the commercial creation, sale, or possession of depictions of animal cruelty.[1] Depictions of animal cruelty are considered those in which an animal is severely maimed, mutilated, tortured,

[1] 18 U.S.C. § 48 (2006) states:

(a) CREATION, SALE, OR POSSESSION.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

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

(c) DEFINITIONS.—In this section—

(1) 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, or killed, if such conduct is illegal under Federal law or the law of the State in which creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, 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 Marina Islands, and any other commonwealth, territory, or possession of the United States.

wounded, or killed by intentional acts.[2] The statute provides exceptions for depictions that have some form of serious religious, political, scientific, or artistic value.[3] The primary legislative purpose of § 48 was to prohibit sales of "crush videos" in the interstate market.[4]

Robert J. Stevens operated a business jointly with an associated website, which sold videos depicting pit bulls engaged in dogfights and attacking other animals.[5] A federal grand jury indicted Stevens on three counts of violating § 48, and Stevens subsequently moved to dismiss on the grounds that the statute was facially invalid as applied under the First Amendment.[6] The United States District Court for the Western District of Pennsylvania denied the motion, and at trial Stevens was convicted on all three counts.[7]

On appeal, the United States Court of Appeals for the Third Circuit reversed the decision of the district court and vacated Stevens's conviction.[8] The Court declared § 48 facially unconstitutional, holding that the statute regulated speech protected by

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[2] *Id.* § 48(c)(1).

[3] *Id.* § 48(b).

[4] United States v. Stevens, 130 S. Ct. 1577, 1583 (2010) (internal citations omitted). "Crush videos" depict the intentional torture and killing of helpless animals, such as cats, dogs, monkeys, and hamsters, by women using their feet to slowly crush the animals to death. *Id.* The videos are meant to appeal to persons with deviant sexual fetishes who are sexually aroused or excited by such content. *Id.* Statutes enacted in all 50 states typically prohibit such videos, but the nondisclosure of participants' identities impedes prosecution of the underlying conduct. *Id.*

[5] *Id.* at 1583. Stevens' business, "Dogs of Velvet and Steel," sold videos such as "Japan Pit Fights" and "Pick-A-Winna: A Pit Bull Documentary," which include footage of dogfights from Japan, as well as footage of dogfights that took place in the United States during the 1960s and 70s. *Id.* Another video, "Catch Dogs and Country Living," depicts the hunting of wild boars with pit bulls, along with "gruesome" footage of a pit bull attacking a domestic farm pig. *Id.*

[6] *Id.*

[7] *Id.* The District Court held that the First Amendment did not protect the depictions in the videos, and § 48 was not substantially overbroad due to the exceptions clause which sufficiently narrowed the statute to constitutional applications. *Id.* The jury convicted Stevens of all counts and the District Court sentenced him to three concurrent sentences of thirty-seven months in prison and three years of supervised release. *Id.*

[8] United States v. Stevens, 533 F.3d 218, 235 (3d Cir. 2008) (en banc), *aff'd* 130 S. Ct. 1577 (2010). Over a three-judge dissent, the Third Circuit vacated Stevens's conviction, declaring § 48 an unconstitutionally "impermissible infringement on free speech." *Id.*

the First Amendment and could not survive evaluation under strict scrutiny.[9] The Supreme Court granted certiorari and held: affirmed.[10] Where a statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty is substantially overbroad, the statute is facially invalid as a violation of the First Amendment protection of speech. [11]

II. RELATED LAW

A. Unprotected Speech Jurisprudence

The First Amendment of the United States Constitution ensures that "Congress shall make no law . . . abridging the freedom of speech."[12] Generally, governmental restriction of expressions based on the message, idea, subject matter, or content therein is invalid.[13] As such, the Government bears the burden of proving that such restrictions are not "presumptively invalid."[14] However, since its inception until the present, the First Amendment has allowed restrictions upon speech in certain limited areas.[15] The permissible restrictions are based upon "historical and traditional categories" long observed in Supreme Court jurisprudence.[16] Such restrictions, as applied to obscene materials, may not extend to portions of unprotected

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[9] *Id.* at 224, 232-35. The Third Circuit declined to include depictions of animal cruelty as a form of unprotected speech. *Id.* The Court found that § 48 could not survive strict scrutiny due to the lack of a compelling government interest and an absence of narrow tailoring to prevent animal cruelty through the least restrictive means necessary. *Id.*

[10] *Stevens*, 130 S. Ct. at 1584, 1592.

[11] *Id.* at 1592.

[12] U.S. CONST. amend. I.

[13] Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (internal citations omitted).

[14] United States v. Playboy Entm't Group, 529 U.S. 803, 817 (2000) (internal citations omitted).

[15] R.A.V. v. St. Paul, 505 U.S. 377, 382-83 (1992).

[16] *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring). Such restrictions are among "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. New Hampshire, 315 U.S. 568, 571-72 (1942).

speech which contain some form of "serious literary, artistic, political, or scientific value."[17]

The Court last created a new form of unprotected speech over two and a half decades ago.[18] In *Ferber*, the Court upheld a New York statute criminalizing the promotion and distribution of sexual performances by children under the age of sixteen, referencing five factors in categorizing child pornography as a new form of unprotected speech.[19] First, the Court found that the State had a "compelling" interest in "safeguarding the physical and psychological well-being of a minor."[20] Second, the Court reasoned that child pornography was "intrinsically related to the sexual abuse of children."[21] The third factor considered that in order to halt the production of child pornography,

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[17] Miller v. California, 413 U.S. 15, 36-37 (1973) (holding that obscene material is unprotected by the First Amendment and such material may be regulated if the average person applying community standards would find the material appeals to a prurient interest in sexual conduct, which the material depicts or describes in a patently offensive way, and the work as a whole lacks serious literary, artistic, political or scientific value).

[18] New York v. Ferber, 458 U.S. 747 (1982). In *Ferber*, the defendant was arrested and indicted under New York criminal statutes, N.Y. Penal Law sections 263.10 and 263.15, for selling films depicting two young boys masturbating. *Id.* at 752. Ferber was acquitted of the two counts under section 263.10 of "promoting an obscene sexual performance," but convicted of violating section 263.15, which lacked the requirement of proof that the distributed child pornography was obscene. *Id.* The New York Court of Appeals reversed, holding that section 263.15 violated the First Amendment because it was underinclusive by failing to prohibit the distribution of depictions of children in other dangerous activities as well as those involving sexual activities; the statute was also overbroad for prohibiting "the distribution of materials produced outside the State, as well as materials . . . which deal with adolescent sex in a realistic but nonobscene manner." *Id.* at 752-53 (internal citations omitted).

[19] *Id.* at 756. The Court held that child pornography is not protected speech under the First Amendment, provided that the conduct prohibited is sufficiently defined by state law. *Id.*

[20] *Id.* at 756-57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)). The Court noted its precedent in upholding laws "aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* The Court acknowledged that the protection of minors from sexual exploitation and abuse was a highly important governmental interest, evidenced by the passage of laws prohibiting child pornography in "virtually all of the States and the United States" and the legislative judgment that "such use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Id.* at 757-58.

[21] *Id.* at 759. The Court noted that the prohibition against distribution of child pornography was required in order to effectively prevent the sexual exploitation of children. *Id.*

the channels of distribution must be effectively closed.[22] The fourth factor in *Ferber* requires that the value of the prohibited speech be "exceedingly modest, if not *de minimis*."[23] Fifth, the Court found that declaring an entire category of speech unprotected was an acceptable and appropriate approach under First Amendment law.[24] As such, child pornography was not entitled to First Amendment protection, so long as the prohibited conduct was "adequately defined by the applicable state law, as written or authoritatively construed."[25]

B. Overbreadth Doctrine in the First Amendment Context

Although an expression may fall outside the protection of the First Amendment, the speaker may have a claim that the legislation is facially invalid as an overbroad and substantial regulation of speech.[26] The circumstances giving rise to a facial challenge of a statute must be "carefully tied" to "the scope of the First Amendment overbreadth doctrine."[27] The use of the overbreadth doctrine in declaring a statute facially invalid is

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[22] *Id.* at 761. The Court stated that "[t]he 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." *Id.* The Court noted that immunity granted by the constitutional freedom of speech is rarely extended to speech or writing used "in violation of valid criminal statutes." *Id.* (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). The Court also referenced reports that stated that the selling of child pornography assured that children would continue to be abused by its production. *Id.* at 762 n.13.

[23] *Id.* at 762 (emphasis in original). In *Ferber*, the Court found that depictions of children engaged in lewd behavior or sexual acts would usually not attain importance or necessity in literary performances or scientific or educational works. *Id.*

[24] *Id.* at 763-64. The *Ferber* Court noted that "it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Id.* The Court stated that the balance of the competing interests favored finding the child pornography materials outside the scope of First Amendment protection. *Id.*

[25] *Id.* at 764. The Court required that the "category of 'sexual conduct' proscribed must also be suitably limited and described." *Id.*

[26] *Id.* at 770 (quoting Broadrick v. Okla., 413 U.S. 601, 615 (1973)). Ferber held that New York Penal Law section 263.15 was not substantially overbroad as its "legitimate reach dwarfs its arguably impermissible applications." *Id.* at 773.

[27] *Id.* at 769. The Court requires that overbreadth of the statute involved be "substantial" because of the consequences of "striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment." *Id.*

employed by the Court as "manifestly, strong medicine," and only under limited circumstances.[28] A statute may not be held invalid if challenged according to the mere possibility that impermissible applications of the statute may exist.[29] A statute of broad authority has the potential to "chill" the protected speech of others, but that potential may be abated with the "declining reach of the regulation."[30]

In *United States v. Williams*, the Court explained the steps used to determine a statute's validity under the First Amendment overbreadth analysis.[31] The doctrine must be employed to maintain "a balance between competing social costs" when invalidating laws containing constitutional applications, such that the "statute's overbreadth must be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[32] The overbreadth analysis begins by construing the actual text of the statute.[33] The Court will then examine whether the statute as construed entails the criminalization of a substantial amount of protected expressions.[34]

III. UNITED STATES V. STEVENS

A. Majority Opinion

In *Stevens*, the Court addressed whether a statute criminalizing the "commercial creation, sale, or possession of certain

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[28] *Id.* "[W]e have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then only as a last resort." *Id.*

[29] *Id.* at 772 (quoting *Broadrick*, 413 U.S. at 630).

[30] *Id.*

[31] United States v. Williams, 553 U.S. 285, 293 (2008). In *Williams*, the defendant was charged with possession and pandering of child pornography under two separate Florida statutes. *Id.* The defendant challenged the constitutionality of the pandering conviction on grounds that the statute was overly broad under the First Amendment. *Id.* at 288. The Court held that, as construed, the statute at issue did not prohibit a "substantial amount of protected speech nor criminalize" a substantial amount of expressive activity. *Id.* at 297-99.

[32] *Id.* at 292 (emphasis in original).

[33] *Id.* at 293 ("[I]t is impossible to determine whether a statue reaches too far without first knowing what the statute covers.").

[34] *Id.* at 297. In *Williams*, the Court maintained that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *Id.* (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973)).

depictions of animal cruelty" was inconsistent with the guarantee of freedom of speech found within the First Amendment.[35]

The Court began its analysis by acknowledging its disagreement with the Government's proposition that depictions of animal cruelty are forms of speech unprotected by the First Amendment.[36] The Court explained that while it has often described historically unprotected forms of speech as being based upon a balancing of interests in which the value of the speech is substantially outweighed by societal concerns, such descriptions are not meant to establish ad hoc tests to classify speech according to its lack of redeeming value or based upon a cost-benefit analysis.[37] Thus, the Court's precedent does not grant the unlimited authority to declare new categories of speech unprotected by the First Amendment.[38] The Court declined then to make depictions of animal cruelty an unprotected category of speech based upon any historical evidence of unprotected status.[39]

The Court proceeded to determine the validity of 18 U.S.C. § 48 under the freedom of speech guaranteed by the First Amendment.[40] The Court recognized that since the case presented a facial challenge in the First Amendment context, the constitutionality of the statute would depend upon the breadth of its construction.[41] The Court began by construing the statute to "create a criminal prohibition of alarming breadth."[42] The Court reasoned that the statute did not require the actual de-

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[35] United States v. Stevens, 130 S. Ct. 1577, 1582 (2010).

[36] *Id.* at 1584-85.

[37] *Id.* at 1585-86.

[38] *Id.* at 1586. The Court acknowledged that there may exist some categories of historically unprotected speech, but such forms have not been identified or discussed in case law, and no evidence exists to conclude that "depictions of animal cruelty" are included among them. *Id.* The Court did not have to "foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them." *Id.*

[39] *Id.*

[40] *Id.* at 1586-87.

[41] *Id.* at 1587.

[42] *Id.* at 1587-88

picted conduct to be cruel in the prohibited "depictions of animal cruelty."[43]

The Court further reasoned that the statute's application could create a situation in which lawful depictions may violate § 48 if the depictions enter states where such conduct is unlawful.[44] According to the Court, the lack of consensus regarding what forms of conduct constitute animal cruelty, along with regulations unrelated to cruelty, create an untenable expansion of the scope of § 48.[45] The Court related the expanded scope of § 48 to hunting, examining how the differences in hunting laws allow jurisdictions that ban or place restrictions on hunting to "export its law to the rest of the country," making otherwise lawful depictions of hunting illegal if sold within that jurisdiction.[46] The Court also examined the wide array of agricultural laws and regulations through which the States apply different standards to livestock slaughter under different circumstances.[47] According to the Court, lawful depictions of these images may otherwise be illegal under § 48 if disseminated in a state that prohibits the use of the particular practices.[48]

The Court examined the exceptions clause of § 48, rejecting the Government's argument that the exemptions for depictions containing "serious religious, political, scientific, educational, journalistic, historical, or artistic value" sufficiently narrowed the scope of § 48.[49] The Court found the Government's reading of the exceptions clause to be "unrealistically broad" and an insufficient means of narrowing the scope of the statute.[50] The

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[43] *Id.* The Court stated that the statute's language on maiming, mutilating, and torturing convey cruelty, but wounding or killing "do not suggest any such limitation." *Id.*

[44] *Id.* at 1589.

[45] *Id.*

[46] *Id.* As an example, the Court referenced Washington, D.C, where all forms of hunting are illegal. Therefore, under the statute at issue, "depictions in which a living animal is intentionally killed," such as those displayed in popular hunting magazines and television programs, would be illegal if sold within the District. *Id.*

[47] *Id.* The Court compared, for example, a Florida statute which excludes poultry from humane slaughter requirements and a California statue which does not do so for some poultry. *Id.*

[48] *Id.* at 1590.

[49] *Id.*

[50] *Id.*

Court interpreted the language of the exceptions clause requiring "serious value" to mean just that, rather than "anything that is not 'scant.'"[51] The Court could not construe the exceptions clause of § 48 in a manner that would result in the selective banning of depictions as intended by the Government.[52] Moreover, the Court reasoned that although the language of the exceptions clause was drawn from an earlier decision by the Court, the requirement of "serious value" was not intended as a "general precondition" for protection of other forms of speech.[53]

The Court resisted the Government's contention that it would exercise restraint in prosecuting only those offenses under § 48 involving "extreme" cruelty.[54] Such assurance, the Court reasoned, served as "implicit acknowledgment of the potential constitutional problems" associated with a plain meaning of the statute's original language.[55] The Court noted that construction of § 48 as proffered by the Government required legislative revision, rather than judicial reinterpretation.[56]

In its conclusion, the Court rejected the Government's arguments that § 48 regulated crush videos and depictions of animal fights, which are "intrinsically related to criminal conduct," and that the ban is "narrowly tailored" to prevent such conduct.[57] The Court maintained that the arguments were not extended to depictions of activities protected by the First Amendment but otherwise prohibited under § 48.[58] The Court did not decide the constitutionality of any future statute that might be more narrowly tailored.[59] Therefore, the Court held that § 48 was substantially overbroad and thus invalid under the First Amendment.[60]

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[51] *Id.* The Court stated that "the text says 'serious' value, and 'serious' should be taken seriously." *Id.*

[52] *Id.*

[53] *Id.* at 1591.

[54] *Id.* ("This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint."); *see supra* note 4 and accompanying text.

[55] *Stevens*, 130 S. Ct. at 1591.

[56] *Id.* at 1592.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

B. Dissenting Opinion

Justice Alito began by taking issue with the Court's approach in applying the overbreadth doctrine to invalidate § 48 as unconstitutional.[61] Instead, Justice Alito argued that the Court should vacate the Court of Appeals decision and remand with instructions to determine the constitutionality of the videos sold by Stevens.[62] The dissent argued that the overbreadth doctrine is only to be applied as a last resort, and states that the doctrine was improperly applied in the present case.[63]

In limiting construction "to avoid constitutional problems," the dissent concluded that § 48 is not applicable to depictions of lawful hunting, and the majority strained in finding otherwise.[64] The dissent reached this conclusion by interpreting the term "animal cruelty" referenced in § 48 to apply to those forms of cruelty defined in state laws, which generally exclude wildlife from definitions of animal cruelty and make exemptions for hunting activities.[65] Also, Justice Alito contended that hunting has historically "serve[d] many important values," and the legislative intent of § 48 did not include "restricting the creation, sale, or possession of depictions of hunting."[66] According to the dissent, if § 48 did apply to "the sale or possession of depictions of hunting in a few unusual situations," the application of § 48 to such instances would not constitute a substantial ban of protected speech.[67]

The dissent also argued that § 48 cannot be construed as overly broad in application to such depictions as "methods of slaughter and the docking of the tails of dairy cows."[68] Such

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[61] *Id.* at 1592-93 (Alito, J., dissenting).

[62] *Id.* at 1593.

[63] *Id.* at 1594; *see supra* notes 27-29 and accompanying text.

[64] *Id.* at 1596.

[65] *Id.* at 1595.

[66] *Id.* at 1595-96. Justice Alito would find hunting depictions exempted under § 48(b) for their "serious, (*i.e.* not 'trifling') 'scientific,' 'educational,' or 'historical' value." *Id.* The dissent referenced several legislative and executive materials in support of this proposition. *Id.* at 1596.

[67] *Id.* The dissent mentioned examples from the majority opinion's reasoning that § 48 applied to hunting, such as "the sale in Oregon of a depiction of hunting with a crossbow in Virginia or the sale in Washington State of the hunting of a sharp-tailed grouse in Idaho." *Id.*

[68] *Id.* at 1596-98

depictions do not constitute the "animal cruelty" § 48 sought to proscribe or as defined under pertinent state law.[69] The dissent also pointed out that there is no record of such depictions ever being used in a manner that does not possess some form of "educational or journalistic value."[70]

Justice Alito noted that the primary legislative purpose of § 48 was to prohibit the "creation, sale, or possession of crush videos."[71] Accordingly, the First Amendment does not protect the criminal conduct Congress sought to prohibit through § 48.[72] The dissent analyzed the statute's application to crush videos as well as videos depicting dog fights, finding that the videos contain conduct considered criminal in every state and the District of Columbia, such acts could not "be prevented without targeting the conduct prohibited by § 48," and any "minimal value" contained in the depictions is "vastly outweigh[ed]" by the harm caused by the conduct.[73] The government had a valid and compelling interest in protecting animals from "the torture depicted in crush videos," as well as preventing the cruelty associated with organized dogfights.[74] The dissent argued that application of the principles in *Ferber* leads to the conclusion that neither crush videos nor dogfighting videos merit First Amendment protection.[75]

In conclusion, the dissent reasoned that § 48 involved a "substantial core of constitutionally permissible applications."[76] Likewise, the statute did not ban a "substantial amount" of speech protected under the First Amendment.[77] Therefore, the dissent concluded that § 48 is not substantially overbroad and thus is not "facially unconstitutional under the overbreadth doctrine."[78]

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[69] *Id.* at 1597.
[70] *Id.*
[71] *Id.* at 1598.
[72] *Id.* at 1598-99; *see supra* note 22.
[73] *Id.* at 1599-1602; *see supra* notes 18-21 and accompanying text.
[74] *Id.* at 1600, 1602.
[75] *Id.* at 1602; *see supra* notes 18-25 and accompanying text.
[76] *Id.* at 1602.
[77] *Id.*
[78] *Id.* "[R]espondent has not met his burden of demonstrating that any impermissible applications of the statute are 'substantial' in relation to its 'plainly legitimate sweep.'" *Id.*

IV. DISCUSSION

The Supreme Court, in deciding *United States v. Stevens*, examined earlier precedent concerning the exclusion of entire categories of speech from First Amendment protection.[79] Rather than declare "depictions of animal cruelty" an entirely new unprotected category, the Court decided that 18 U.S.C. § 48 was substantially overbroad and thus facially invalid.[80]

The Court declined to allow their previous decisions to be construed as granting broad authority to classify forms of speech as categorically unprotected.[81] The Court resisted extending the principles established in *Ferber* as creating a general balancing test of interests to alone categorize speech as unprotected.[82] In doing so, the Court made clear that the *Ferber* analysis applied specifically to child pornographic materials.[83] The Court thus left unclear the precise standard to be applied in determining what constitutes categorically unprotected speech, seemingly grounding the analysis in historically recognized forms of unprotected speech, as applied on a case-by-case basis.[84] The Court might have created a clearer standard to categorize speech to avoid future complications.[85]

The overbreadth doctrine is usually applied as a last resort for evaluating facial challenges to a statute under the First Amendment.[86] The Court instead construed the statute as impermissibly overbroad, rather than decide the constitutionality of the videos as presented.[87]

The Court's decision may be construed as applying a less stringent standard in determining the substantiality of a statute's overreach.[88] This standard in conjunction with the Court's broader application of the overbreadth doctrine may re-

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[79] *See supra* notes 15-18, 37-38 and accompanying text.
[80] *See supra* notes 39, 58 and accompanying text.
[81] *See supra* notes 37-38 and accompanying text.
[82] *See supra* notes 16-25, 37, 75 and accompanying text.
[83] *See supra* note 37 and accompanying text.
[84] *See supra* notes 16, 37-39 and accompanying text.
[85] *See supra* notes 16, 37 and accompanying text.
[86] *See supra* notes 28, 63 and accompanying text.
[87] *See supra* notes 60, 62 and accompanying text.
[88] *See supra* notes 27-29, 63 and accompanying text.

sult in more frequent facial challenges in the First Amendment context.[89]

The decision may be seen as an important addition to the Court's precedent of protecting the constitutional guarantee of freedom of expression.[90] The Court did not address whether a statute prohibiting only crush videos or depictions of extreme animal cruelty might survive a constitutional challenge, but the Court would possibly uphold any statute of this nature that is narrowly tailored to serve a compelling government interest.[91]

V. CONCLUSION

In *United States v. Stevens*, the Supreme Court held that a federal statute that criminalized the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad and thus facially invalid under the First Amendment. Through its decision, the Court maintained the heavy burden required to categorically exclude a form of speech from First Amendment protection, although the precise standard for making such a determination remains unclear. The Court's broad application of the requirement of substantiality in overbreadth challenges creates the possibility that a greater number of statutes may be struck down as invalid in the First Amendment context.

Alan Baker

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[89] *See supra* notes 27-29, 76-78 and accompanying text.

[90] *See supra* notes 13-14 and accompanying text.

[91] *See supra* notes 59, 74 and accompanying text. Congress recently introduced legislation "narrowly tailored" to criminalize the commercial activity involved in the production of crush videos. *See* Bill Mears, *Senators Introduce Law to Ban "Crush" Videos of Animal Cruelty*, Sept. 28, 2010, http://www.cnn.com/2010/US/09/27/animal.cruelty.videos/ index.html?eref=mrss_igoogle_cnn.