

United States v. Stevens (2010)

559 U.S. 460

In 1999, Congress enacted a statute creating criminal penalties for any person who knowingly “creates, sells, or possesses certain depictions of animal cruelty.” Though animal cruelty was already criminalized by separate state and federal legislation, this act was specifically targeted to criminalize the market for “crush videos,” a type of video depicting “the torture and killing of helpless animals” and meant “to appeal to persons with a specific sexual fetish.” Attempting to comply with the Court’s Miller test, Congress included a clause in the statute that exempted material with “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”

Robert J. Stevens was convicted and sentenced to a 37-month prison sentence under the act for compiling, editing, and selling films that depicted dogfights. He was not accused of engaging in animal cruelty himself. Stevens appealed his conviction, and the Court of Appeals for the Third Circuit vacated his conviction and held the statute unconstitutional under the First Amendment. The Supreme Court granted certiorari.

Opinion of the Court: Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor.

Dissenting opinion: Alito.

Chief Justice Roberts delivered the opinion of the Court.

Congress enacted 18 U. S. C. §48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment. . . .

The Government’s primary submission is that §48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. We disagree. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union* (2002). Section 48 explicitly regulates expression based on content: The statute restricts “visual [and] auditory depiction[s],” such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, §48 is “presumptively invalid, and the Government bears the burden to rebut that presumption.” *United States v. Playboy Entertainment Group, Inc.* (2000).

“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, *Roth v. United States* (1957), defamation, *Beauharnais v. Illinois* (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), incitement, *Brandenburg v. Ohio* (1969), and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*—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. New Hampshire*, (1942).

The Government argues that “depictions of animal cruelty” should be added to the list. It contends that depictions of “illegal acts of animal cruelty” that are “made, sold, or possessed for commercial gain” necessarily “lack expressive value,” and may accordingly “be regulated as *unprotected* speech.” The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a “First Amendment Free Zone.” *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*

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, *e.g.*, The Body of Liberties §92 (Mass. Bay Colony 1641) (“No man shall exercise any Tyranny or Crueltie towards any brute Creature which are usuallie kept for man’s use”). But we are unaware of any similar tradition excluding *depictions* of animal cruelty from “the freedom of speech” codified in the First Amendment, and the Government points us to none.

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.” *R. A. V. In New York v. Ferber* (1982), we noted that within these categories of unprotected speech, “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,” because “the balance of competing interests is clearly struck.” The Government derives its proposed test from these descriptions in our precedents. But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit 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.

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 *Ferber*, 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.

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

Because we decline to carve out from the First Amendment any novel exception for §48, we review Stevens's First Amendment challenge under our existing doctrine. . . .

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.” §48(c)(1). “[M]aimed, mutilated, [and] tortured” convey cruelty, but “wounded” or “killed” do not suggest any such limitation. . . .

Our construction of §48 decides the constitutional question; the Government makes no effort to defend the constitutionality of §48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities—depictions that are presumptively protected by the First Amendment but that remain subject to the criminal sanctions of §48.

Nor does the Government seriously contest that the presumptively impermissible applications of §48 (properly construed) far outnumber any permissible ones. However “growing” and “lucrative” the markets for crush videos and dogfighting depictions might be, they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of §48. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be

constitutional. We hold only that §48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.

The judgment of the United States Court of Appeals for the Third Circuit is affirmed.

Justice Alito, dissenting.

The Court strikes down in its entirety a valuable statute, 18 U. S. C. §48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of “crush videos,” a form of depraved entertainment that has no social value. The Court’s approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under §48 for selling videos depicting dogfights. On appeal, he argued, among other things, that §48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention. 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, a potion that generally should be administered only as “a last resort.”

Instead of applying the doctrine of overbreadth, I would vacate the decision below and instruct the Court of Appeals on remand to decide whether the videos that respondent sold are constitutionally protected. If the question of overbreadth is to be decided, however, I do not think the present record supports the Court’s conclusion that §48 bans a substantial quantity of protected speech.

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.

In *Ferber*, an important factor—I would say the most important factor—was that child pornography involves the commission of a crime that inflicts severe personal injury to the “children who are made to engage in sexual conduct for commercial purposes.” The *Ferber* Court repeatedly described the production of child pornography as child “abuse,” “molestation,” or “exploitation.” As later noted in *Ashcroft v. Free Speech Coalition*, (2002), in *Ferber* “[t]he production of the work, not its content, was the target of the statute.” (*Ferber* involved “speech that itself is the record of sexual abuse”).

Second, *Ferber* emphasized the fact that these underlying crimes could not be effectively combated without targeting the distribution of child pornography. As the Court put it, “the

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.” The Court added:

“[T]here 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.... 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.”

Third, the *Ferber* Court noted that the value of child pornography “is exceedingly modest, if not *de minimis*,” and that any such value was “overwhelmingly outweigh[ed]” by “the evil to be restricted.”

All three of these characteristics are shared by §48, as applied to crush videos. First, the conduct depicted in crush videos is criminal in every State and the District of Columbia. Thus, any crush video made in this country records the actual commission of a criminal act that inflicts severe physical injury and excruciating pain and ultimately results in death. Those who record the underlying criminal acts are likely to be criminally culpable, either as aiders and abettors or conspirators. And in the tight and secretive market for these videos, some who sell the videos or possess them with the intent to make a profit may be similarly culpable. (For example, in some cases, crush videos were commissioned by purchasers who specified the details of the acts that they wanted to see performed). To the extent that §48 reaches such persons, it surely does not violate the First Amendment.

Second, the criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by §48—the creation, sale, and possession for sale of depictions of animal torture with the intention of realizing a commercial profit. The evidence presented to Congress posed a stark choice: Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record. Faced with this evidence, Congress reasonably chose to target the lucrative crush video market.

Finally, the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations. And, unlike the child pornography statute in *Ferber* or its federal counterpart, §48(b) provides an exception for depictions having any “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”

It must be acknowledged that §48 differs from a child pornography law in an important respect: preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos. It was largely for this reason that the Court of Appeals concluded that *Ferber* did not support the constitutionality of §48. (“Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm”). But while protecting children is unquestionably *more* important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos.

The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country. In *Ferber*, the Court noted that “virtually all of the States and the United States have passed legislation

proscribing the production of or otherwise combating ‘child pornography,’” and the Court declined to “second-guess [that] legislative judgment.” Here, likewise, the Court of Appeals erred in second-guessing the legislative judgment about the importance of preventing cruelty to animals.

Section 48’s ban on trafficking in crush videos also helps to enforce the criminal laws and to ensure that criminals do not profit from their crimes.

In short, *Ferber* is the case that sheds the most light on the constitutionality of Congress’ effort to halt the production of crush videos. Applying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment. . . .