
RECENT CASES

CONSTITUTIONAL LAW — FIRST AMENDMENT — EN BANC
THIRD CIRCUIT STRIKES DOWN FEDERAL STATUTE PROHIBIT-
ING THE INTERSTATE SALE OF DEPICTIONS OF ANIMAL CRU-
ELTY. — *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (en
banc).

The First Amendment generally prevents the government from prohibiting speech based on “disapproval of the ideas expressed.”¹ For this reason, the Supreme Court has declared that “[c]ontent-based regulations are presumptively invalid” and has identified only a few categorical exclusions to the general presumption.² The Court last declared a category of speech to be unprotected in 1982, when it held that the First Amendment does not protect child pornography.³ However, in response to a challenge to 18 U.S.C. § 48, a statute prohibiting the interstate sale of depictions of animal cruelty, the government has sought judicial recognition of a new category of unprotected speech. Recently, in *United States v. Stevens*,⁴ the Third Circuit held that § 48 violates the First Amendment’s Free Speech Clause.⁵ Instead of following the general approach toward identifying categorical exceptions outlined by the Supreme Court in *Chaplinsky v. New Hampshire*,⁶ the Third Circuit derived a test from the reasons the Supreme Court listed when recognizing the child pornography exception in *New York v. Ferber*,⁷ reasons that were specific to the child pornography context and did not constitute a general test. This approach is inconsistent with the Supreme Court’s First Amendment jurisprudence and sets a precedent that constricts courts’ ability to recognize new categories of unprotected speech.

During an investigation, federal and Pennsylvania law enforcement officers learned that Robert Stevens had been advertising videotapes of pit bulls training to hunt hogs and participating in dog fights.⁸ The officers bought three of the videotapes to form a basis for an indict-

¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

² *Id.* at 382–83; *see also, e.g., New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (incitement); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity).

³ *See United States v. Stevens*, 533 F.3d 218, 224 (3d Cir. 2008) (en banc) (citing *Ferber*, 458 U.S. 747).

⁴ 533 F.3d 218.

⁵ *Id.* at 220.

⁶ 315 U.S. 568 (1942).

⁷ 458 U.S. 747.

⁸ *Stevens*, 533 F.3d at 220–21. One tape also showed a “gruesome depiction” of a pit bull attacking a pig. *Id.* at 221.

ment. The three videotapes included introductions, narration, and commentary by Stevens. The officers executed a search warrant for Stevens's residence and found several copies of the three videotapes along with other dogfighting merchandise.⁹

A federal grand jury indicted Stevens, charging him with three counts of "knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce for commercial gain, in violation of 18 U.S.C. § 48."¹⁰ Stevens filed a motion to dismiss the indictment, arguing that § 48 infringes upon free speech rights guaranteed by the First Amendment.¹¹ The district court denied Stevens's motion, and the case went to trial.¹² The jury found Stevens guilty on all three counts, and Stevens appealed.¹³

The Third Circuit, sitting en banc, vacated the conviction.¹⁴ Writing for the majority, Judge Smith held that § 48 violates the First Amendment's protection of free speech.¹⁵ The government conceded that depictions of animal cruelty do not fall into one of the established categories of unprotected speech.¹⁶ Judge Smith disagreed with the government's stance that the *Chaplinsky* balancing test — which "weighs the government interest in restricting the speech against the value of the speech" — was the appropriate method of determining whether a new category should be identified.¹⁷ The court suggested that *Chaplinsky* had been "marginalized" and chose not to apply its approach.¹⁸ Judge Smith asserted that, of the established categories, "only *Ferber* is even remotely similar" to the speech prohibited by the statute.¹⁹ Although Judge Smith observed that the "reasoning that supports *Ferber* has never been used to create whole categories of unprotected speech outside of the child pornography context,"²⁰ he reasoned that the "only possible way to conclude that § 48 regulates unprotected speech is through an analogy to the *Ferber* rationale."²¹

⁹ *Id.* at 221.

¹⁰ *Id.* at 220.

¹¹ *Id.* at 221.

¹² *Id.* The district court upheld the statute's constitutionality in an oral ruling. Adam Liptak, *First Amendment Claim in Cockfight Suit*, N.Y. TIMES, July 11, 2007, at A13.

¹³ *Stevens*, 533 F.3d at 221.

¹⁴ *Id.* at 220.

¹⁵ *Id.* Judge Smith was joined by Chief Judge Scirica and Judges Sloviter, McKee, Rendell, Barry, Ambro, Chagares, Jordan, and Hardiman.

¹⁶ *Id.* at 224.

¹⁷ *Id.* at 224 n.6 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

¹⁸ *Id.* (quoting James L. Swanson, *Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment*: Virginia v. Black, 2002–2003 CATO SUP. CT. REV. 81, 90) (internal quotation mark omitted).

¹⁹ *Id.* at 224.

²⁰ *Id.* at 225.

²¹ *Id.* at 224 n.6.

Thus, he proceeded to analyze § 48 by analogy to the five reasons underlying the child pornography exception in *Ferber*.²²

The Third Circuit determined that *Ferber*'s "reasoning does not translate well to the animal cruelty realm."²³ Addressing the first reason listed in *Ferber* — that the "State has a 'compelling' interest in 'safeguarding the physical and psychological well-being of a minor'"²⁴ — the court found that "preventing cruelty to animals" was not a sufficiently compelling government interest, in part because recognized compelling interests have always "related to the well-being of human beings, not animals."²⁵ Likewise, the second *Ferber* reason — that child pornography is "intrinsically related to the sexual abuse of children"²⁶ — did not apply to the context of depictions of animal cruelty because, unlike child pornography, depictions of animal cruelty do not continue to harm the animals.²⁷ The third reason in the *Ferber* Court's rationale — that prohibiting distribution of child pornography would decrease production²⁸ — received little weight because Judge Smith determined that this theory, in the context of the animal cruelty statute, lacked empirical evidence.²⁹ The fourth reason — that the value of the speech is "exceedingly modest, if not *de minimis*"³⁰ — also did not apply to § 48 because the *Stevens* court refused to allow § 48's exceptions clause to "constitutionalize" the statute.³¹ Without explicitly discussing the fifth reason — that "[b]anning full categories of speech is an accepted approach in First Amendment law"³² — Judge Smith concluded that the "attempted analogy to *Ferber* fails because of the inherent differences between children and animals."³³

²² *Id.* at 226–32. The court nonetheless indicated that the analysis would include a *Chaplinsky* inquiry, *see id.* at 224 n.6, because the *Ferber* Court's list of reasons included a compelling government interest and the low value of child pornography, *see New York v. Ferber*, 458 U.S. 747, 756–57, 762–63 (1982).

²³ *Stevens*, 533 F.3d at 226.

²⁴ *Id.* at 225 (quoting Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 938 n.77 (2001) (quoting *Ferber*, 458 U.S. at 756–57)). The Third Circuit indicated that this factor is the most important of the five *Ferber* factors because "under *Ferber*, if the Government's interest is not compelling, then this type of statute necessarily violates the First Amendment." *Id.* at 226.

²⁵ *Id.* at 226–27. The court asserted that "[p]reventing 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." *Id.* at 228.

²⁶ *Id.* at 230 (quoting *Ferber*, 458 U.S. at 759) (internal quotation marks omitted).

²⁷ *Id.* (observing that "children can be harmed simply by knowing that their images are available or by seeing the images themselves, [but] animals are not capable of such awareness").

²⁸ *Id.*

²⁹ *Id.* (citing *Bartnicki v. Vopper*, 532 U.S. 514, 531 n.17 (2001)).

³⁰ *Id.* at 231 (quoting *Ferber*, 458 U.S. at 762).

³¹ *Id.* Section 48(b) contains an exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b) (2006).

³² *Stevens*, 533 F.3d at 225 (quoting Adler, *supra* note 24, at 938 n.77 (citing *Ferber*, 458 U.S. at 763–64)); *see also id.* at 231 n.11.

³³ *Id.* at 232.

Because the court found that § 48 regulated protected speech, it declared that the statute was subject to strict scrutiny.³⁴ Noting that a Supreme Court majority “has never sustained a regulation that was strictly scrutinized for content discrimination reasons,”³⁵ the Third Circuit ruled that § 48 did not survive strict scrutiny because it did not serve a compelling government interest, was “not narrowly tailored to achieve such an interest,” and did not “provide the least restrictive means to achieve that interest.”³⁶

Judge Cowen dissented.³⁷ Using both the two-pronged *Chaplinsky* approach and the *Ferber* factors, he concluded that § 48 was not an unconstitutional infringement on free speech.³⁸ After conducting the two-part “threshold inquiry” from *Chaplinsky* by finding that the government’s interest outweighed any value of the prohibited speech,³⁹ Judge Cowen addressed the *Ferber* factors.⁴⁰ He asserted that the speech at issue was intrinsically related to the underlying crime of animal cruelty in part because the depiction could not take place without the illegal activity.⁴¹ Judge Cowen also noted evidence of a “thriving market for . . . depictions of animal cruelty.”⁴² He concluded that depictions of animal cruelty have the same “essential attributes of unprotected speech identified generally in *Chaplinsky* and of child pornography as discussed in *Ferber*.”⁴³

³⁴ *Id.*

³⁵ *Id.* (quoting Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1365 n.63 (2006)) (internal quotation mark omitted). *But see* *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (“[W]e reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case.”).

³⁶ *Stevens*, 533 F.3d at 232. In a footnote, the court suggested that § 48 might be unconstitutionally overbroad because it could be read to include a “wide variety of ostensibly technical violations like hunting and fishing.” *Id.* at 235 n.16. However, the court rested its decision solely on strict scrutiny grounds, asserting that voiding a statute on overbreadth grounds should be a “last resort.” *Id.* at 236 n.16 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)) (internal quotation mark omitted).

³⁷ Judges Fuentes and Fisher joined Judge Cowen’s dissent.

³⁸ *Stevens*, 533 F.3d at 236 (Cowen, J., dissenting).

³⁹ After surveying legislation protecting animals dating back to 1641, Judge Cowen found that the government’s interest with regard to § 48 was compelling. *Id.* at 238–42. Judge Cowen also found that the depictions of animal cruelty prohibited by § 48 have “little or no social value.” *Id.* at 242.

⁴⁰ *Id.* at 243.

⁴¹ *Id.* at 244. Judge Cowen also asserted that while the animals do not suffer continuing psychological harm, in order to participate in the depicted dogfights they are often subjected to a lifetime of emotional and physical abuse. *Id.* at 244–45 (citing Brief for the Humane Society of the United States as Amicus Curiae at 2–3, *Stevens*, 533 F.3d 218 (No. 05-2497)).

⁴² *Id.* at 246.

⁴³ *See id.* at 247. Judge Cowen also concluded that § 48 was not unconstitutionally overbroad or vague. *Id.* at 249.

In deciding not to identify a new category of unprotected speech to fit the speech prohibited by § 48, the Third Circuit unduly relied on an analogy to *Ferber*. While a comparison to *Ferber* is useful to show that depictions of animal cruelty do not fit into the most similar established category, the *Ferber* factors do not constitute a test for determining whether a new category of unprotected speech should be recognized. When identifying new categories of unprotected speech, the Supreme Court has relied on the *Chaplinsky* approach, using the approach to justify its decisions with rationales that apply only to the specific circumstances typically associated with the speech in question. By refusing to follow the *Chaplinsky* approach and instead applying the *Ferber* factors, Judge Smith's opinion laid down a precedent that is inconsistent with the Supreme Court's First Amendment jurisprudence and makes the identification of new categories of unprotected speech nearly impossible.

The Supreme Court has not explicitly laid out a test for determining when a new category of unprotected speech should be identified,⁴⁴ but it provided a framework for the inquiry in *Chaplinsky*.⁴⁵ In *Chaplinsky*, the Court noted that it had allowed content-based restrictions on speech in a few limited categories, which 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."⁴⁶ In later cases, the Supreme Court generally has begun its analysis with a determination of "whether the restricted speech is of only 'low' first amendment value, and thus deserving of only limited constitutional protection."⁴⁷ If the Court concludes that the speech is of little value, it then "employs a form of categorical balancing, through which it defines the precise circumstances in which the speech may be re-

⁴⁴ See *id.* at 224 n.6 (majority opinion); see also Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of "Definitional Balancing" as a Methodology for Determining the "Visible Boundaries of the First Amendment,"* 39 AKRON L. REV. 483, 484–85 (2006) (indicating that the Supreme Court has not made clear what methodology it uses to determine which categories of speech are unprotected by the First Amendment); cf. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1786 (2004) ("[I]f there exists a single theory that can explain the First Amendment's coverage, it has not yet been found.").

⁴⁵ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992); S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1181–82 (2000). The *Stevens* court supported its suggestion that the *Chaplinsky* approach has been marginalized with an article that argues that the fighting words exception identified in *Chaplinsky*, but not the approach used to identify that exception, has been marginalized. See *supra* note 18 and accompanying text.

⁴⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁴⁷ Stone, *supra* note 45, at 194.

stricted.”⁴⁸ By following this framework, the Court has “articulated quite different standards for different classes of low value speech.”⁴⁹

When identifying each of these categories, the Supreme Court followed the *Chaplinsky* approach and ultimately established a new standard, tailored to the content of the speech at issue.⁵⁰ For instance, when carving out the exception for incitement, the Court focused on whether the words create a “clear and present danger.”⁵¹ The Court relied on the *Chaplinsky* reasoning that society’s interest in preserving order “outweigh[s] the interest of protecting the freedom of speech when the speech incites imminent lawlessness,”⁵² making the likelihood of harm integral to its reasoning.⁵³ In identifying the obscenity exception, the Court again relied on a category-specific analysis.⁵⁴ In this context, the Court focused solely on obscenity’s complete lack of value due to its appeal to the “prurient interest,”⁵⁵ rejecting the argument that, in order to receive unprotected status, obscene materials also needed to create a “clear and present danger of antisocial conduct.”⁵⁶

⁴⁸ *Id.* at 195. This categorical balancing “involves striking a balance between competing speech and governmental regulatory interests, based on First Amendment values, and the creation of rules that can be applied in subsequent cases.” Deutsch, *supra* note 44, at 485 (citing Melville B. Nimmer, *The Right to Speak Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942 & n.24, 944–45, 948–50 (1968)). While the Supreme Court has never explicitly endorsed this approach, Professor Nimmer found the application of categorical balancing “implicit in the Court’s decisions.” *Id.* at 484–85 (citing Nimmer, *supra*, at 943, 949).

⁴⁹ Stone, *supra* note 45, at 195.

⁵⁰ See Malloy & Krotoszynski, *supra* note 45, at 1181 (“Rather than adopting an absolute approach to defining the limits of constitutionally protected speech, courts instead have adopted a series of category-based balancing tests.”).

⁵¹ *Schenck v. United States*, 249 U.S. 47, 52 (1919). The Court revised this standard in a later case, holding that the State can only prohibit such speech if it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

⁵² Malloy & Krotoszynski, *supra* note 45, at 1186 n.91 (citing *Brandenburg*, 395 U.S. at 447–49).

⁵³ *United States v. Williams*, 128 S. Ct. 1830, 1855 (2008) (“*Brandenburg* unmistakably insists that any limit on speech be grounded in a realistic, factual assessment of harm.”).

⁵⁴ See *Roth v. United States*, 354 U.S. 476, 484 (1957). The *Chaplinsky* Court “assumed that obscenity was among [the categories of unprotected speech],” but the Court did not officially exclude obscenity from protection until *Roth*. KEITH WERHAN, FREEDOM OF SPEECH 99 (2004). The Court later refined the test, confining the obscenity exception to works that “portray sexual conduct in a patently offensive way” and, “taken as a whole, [lack] serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

⁵⁵ *Roth*, 354 U.S. at 487; see also WERHAN, *supra* note 54, at 99–100. While Professor Werhan asserts that the Court’s approach to obscenity “seemed inconsistent with the categorization method the Court had outlined in *Chaplinsky*,” *id.*, the Court’s reasoning was a context-specific application of *Chaplinsky* because speech with absolutely no value cannot outweigh another interest.

⁵⁶ *Roth*, 354 U.S. at 486.

In *Ferber*, the Court again rejected aspects of its prior standards that did not analogize well to the type of speech at issue and cited more category-specific factors. Unlike in the obscenity cases, when identifying the unprotected child pornography category, the Court did not require that courts consider whether the material, as a whole, appeals to prurient interest or portrays sexual conduct in a patently offensive manner.⁵⁷ The Court relied on the *Chaplinsky* approach, finding that there was a compelling government interest and that the speech at issue was of little social value, but the Court cited factors other than those used in the obscenity context in support of its decision.⁵⁸ Instead of focusing on the value of the speech as with obscenity, the Court focused on the “grievous crime from which [child pornography] stems.”⁵⁹

These cases indicate that the *Ferber* reasons are specific to child pornography and were not intended as a general test for identifying new categorical exceptions to the First Amendment.⁶⁰ Instead, courts should apply *Chaplinsky* in a manner tailored to the specific type of speech at issue. If the reasons listed in *Ferber* did constitute a general five-factor test, obscenity, an established category that is similar to child pornography, would likely fail the test. While courts can analogize to the *Ferber* Court’s reasoning, that reasoning is too category-specific to be strictly applied. In particular, the second *Ferber* reason — that the harm to the child from participating in child pornography is exacerbated by its distribution⁶¹ — “has collapsed the ‘speech/action’ distinction that occupies a central role in First Amendment law.”⁶² This reason seems to require that the underlying

⁵⁷ *New York v. Ferber*, 458 U.S. 747, 764 (1982).

⁵⁸ In particular, the Court focused on the harm done to children in the production of child pornography, *id.* at 756–64, and the idea that prohibiting distribution will decrease production. *Ferber*, 458 U.S. at 761.

⁵⁹ Adler, *supra* note 24, at 939.

⁶⁰ The *Ferber* Court’s language also indicates that it did not intend its reasons to constitute a five-factor test that could be generalized to other contexts. For example, the third reason supporting the *Ferber* decision was that the “advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production” of child pornography. *Ferber*, 458 U.S. at 761. This language does not support the identification of a general factor; it is worded as a category-specific reason for identifying the child pornography exception. The fifth reason, that categories of speech can be recognized as outside of First Amendment protection, *id.* at 763, cannot even be considered a factor that can be applied as part of a test. See *Stevens*, 533 F.3d at 231 n.11 (noting that the fifth reason is discussed throughout the opinion instead of attempting to specifically apply it); *id.* at 243–44 (Cowen, J., dissenting) (considering only the first four *Ferber* reasons as relevant factors).

⁶¹ *Ferber*, 458 U.S. at 759 & n.10.

⁶² Adler, *supra* note 24, at 970. Professor Adler argues that, with its identification of the child pornography category, the Court has “validated a renegade vision of how speech works” that has been “rejected in every other First Amendment context,” *id.*, because the Court has conflated “(1)

act be a crime and that the speech create an ongoing harm to the victim of the underlying act.⁶³ However, the reason does not translate well to areas outside of child pornography because the *Ferber* Court grounded its holding in concern for children, and the Court has not found that, absent this concern, other governmental interests would suffice to satisfy the *Ferber* standard.⁶⁴ Thus, obscenity would likely fail a *Ferber* test because the production of obscenity cannot be said to create an ongoing harm that would reach the level of the harm to children in the child pornography context.⁶⁵ Instead of attempting to apply the second *Ferber* reason to depictions of animal cruelty, the *Stevens* court should have limited its analogy to *Ferber* to the Court's application of *Chaplinsky* and its general approach of looking at category-specific reasons.⁶⁶

The Third Circuit's overreliance on the category-specific *Ferber* reasons instead of on the general approach outlined in *Chaplinsky* misapplied the Supreme Court's First Amendment jurisprudence. While the *Stevens* court might not have ruled differently if it had applied *Chaplinsky*, its reasoning will lead to the inappropriate application of category-specific tests outside of the narrow circumstances for which they were designed. While there is a presumption against content-based restrictions, the Supreme Court has ruled that exceptions should occasionally be made, based on the guidelines laid out in *Chaplinsky*.⁶⁷ Keeping in mind the presumption, courts should follow the Supreme Court's general approach when identifying new categories of unprotected speech instead of strictly applying a test that is specific to a different context.

the molestation of a child that occurs in the production of a picture; (2) the picture itself; and (3) the effect of the picture on its viewers," *id.* at 981.

⁶³ See *id.*; see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002) (holding that in contrast to the speech in *Ferber*, which "itself is the record of sexual abuse, . . . speech that records no crime and creates no victims by its production" does not fall within the child pornography exception).

⁶⁴ See *Ashcroft*, 535 U.S. at 250 (finding that because "[v]irtual child pornography is not 'intrinsically related' to the sexual abuse of children" and instead at most involves adults who resemble minors, it is not outside First Amendment protection (quoting *Ferber*, 458 U.S. at 759) (emphasis added)).

⁶⁵ Cf. *Stevens*, 533 F.3d at 228 ("Preventing cruelty to animals . . . simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm.").

⁶⁶ For instance, the *Stevens* court could reasonably have looked at how the *Ferber* Court analyzed whether the government had a compelling interest. Because depictions of animal cruelty are analogous to child pornography in the context of the third *Ferber* reason — providing an economic motive for the underlying act — the *Stevens* court could also reasonably have applied the category-specific, third *Ferber* reason instead of making its own determination that this rationale lacked empirical evidence in the animal cruelty context.

⁶⁷ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).