consideration, they may find a way to do so, but it will not be the law that compels this result. Before assuming office, judges take an oath to uphold the Constitution — it will be a sad day for liberty and law if we can no longer take seriously any judge who means it.

D. Freedom of Speech and Expression

1. Categorical Exclusions. — In the wake of World War I, one author argued that the First Amendment's boundary line "can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing . . . of two very important social interests, in public safety and in the search for truth."[1] The backdrop has shifted from wartime propaganda, but the question of what constitutes protected speech is still alive today. Last Term, in *United States v. Stevens*,[2] the Supreme Court invalidated a statute criminalizing depictions of extreme animal cruelty, finding that the speech was protected by the First Amendment and the law was substantially overbroad. By rejecting the government's proposed balancing test as "startling and dangerous,"[3] *Stevens* redefined how courts delineate categories of unprotected speech, making it harder to account for both social harms and First Amendment values in changing contemporary contexts.

Stevens invalidated 18 U.S.C. § 48,[4] which was enacted in 1999 in an effort to stifle the interstate market in crush videos.[5] Crush videos appeal to a distinct sexual fetish by depicting women, usually in stiletto heels, slowly crushing to death small animals such as cats, mice, or monkeys.[6] Animal cruelty is illegal in all fifty states and the District of Columbia;[7] § 48 criminalized the sale and possession of depictions of animal cruelty, not the underlying acts themselves.[8] Congress found that a statute targeting sale and possession was necessary because it is often impossible to prosecute production of such images,[9] and there is evidence that § 48 successfully weakened the market in crush videos.[10]

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[1] Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 959–60 (1919).

[2] 130 S. Ct. 1577 (2010).

[3] *Id.* at 1585.

[4] 18 U.S.C. § 48 (2006).

[5] *See* H.R. REP. NO. 106-397, at 2 (1999).

[6] *Id.* at 2–3.

[7] *See Stevens*, 130 S. Ct. at 1583 (citing Brief for the United States at 25 n.7, *Stevens*, 130 S. Ct. 1577 (No. 08-769), 2009 WL 1615365, at *25 n.7).

[8] *See id.* at 1582.

[9] *See* H.R. REP. NO. 106-397, at 3 (noting that laws targeting production are often ineffective because crush videos do not reveal the producers' or participants' identities).

[10] *See Stevens*, 130 S. Ct. at 1598 (Alito, J., dissenting) ("[B]y 2007, sponsors of § 48 declared the crush video industry dead. Even overseas Websites shut down in the wake of § 48. Now, after the Third Circuit's decision [facially invalidating the statute], crush videos are already back

The Act went beyond crush videos, however, criminalizing the creation, sale, and possession of depictions of animal cruelty with intent to place the depictions in the commercial market,[11] except where the depictions had "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[12] It encompassed audio or visual depictions of live animals being "intentionally maimed, mutilated, tortured, wounded, or killed" if that conduct was illegal under federal or state law where the creation, sale, or possession occurred.[13]

In March 2004, Robert Stevens was indicted under § 48 on three counts of knowingly selling depictions of animal cruelty with intent to place them in interstate commerce for commercial gain.[14] The case marked the first time a § 48 prosecution had proceeded to trial[15] and involved videos that law enforcement officers had purchased through Stevens's business, "Dogs of Velvet and Steel."[16] Two of the videos contained footage of illegal pit bull fights; the third involved pit bulls being trained to attack other animals, including a scene with "a gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig."[17] The district court denied Stevens's claim that § 48 was an unconstitutional restriction of free expression, holding that the depictions regulated under § 48 are categorically outside First Amendment protection.[18] Stevens was convicted of all three counts after a jury trial.[19]

The Third Circuit heard the appeal en banc and vacated Stevens's conviction.[20] The court held § 48 to be facially unconstitutional, rejecting the district court's assessment that depictions of animal cruelty are categorically outside the First Amendment.[21] Legislative history

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online." (quoting Brief of Amicus Curiae the Humane Society of the United States in Support of Petitioner at 5, *Stevens*, 130 S. Ct. 1577 (No. 08-769), 2009 WL 106673, at *5) (second alteration in original) (internal quotation marks omitted)).

11 18 U.S.C. § 48(a) (2006).

12 *Id.* § 48(b).

13 *Id.* § 48(c)(1).

14 United States v. Stevens, 533 F.3d 218, 220 (3d Cir. 2008) (en banc).

15 *See id.* at 221.

16 *See Stevens*, 130 S. Ct. at 1583; *Stevens*, 533 F.3d at 220–21. Dogfighting is illegal under federal law, in all fifty states, and in the District of Columbia. *See Stevens*, 130 S. Ct. at 1583. Stevens cast the videos as documentaries with footage from dogfights in Japan, where such fights are allegedly legal, and from American dogfights in the 1960s and '70s. Stevens disputed the government's claim that dogfights were illegal in the United States at that time. *Id.* at 1583 & n.2. Although the Supreme Court did not mention Stevens's history in the field, Stevens advertised the videos in "an underground publication featuring articles on illegal dogfighting." *Stevens*, 533 F.3d at 221.

17 *Stevens*, 533 F.3d at 221.

18 *See Stevens*, 130 S. Ct. at 1583.

19 *Id.*

20 *Stevens*, 533 F.3d at 220. Judge Smith delivered the opinion of the court. He was joined in his opinion by Chief Judge Scirica and Judges Sloviter, McKee, Rendell, Barry, Ambro, Smith, Chagares, Jordan, and Hardiman.

21 *See id.* at 220, 232.

showed that the government's primary interest in enacting § 48 was to regulate the treatment of animals, and the government conceded that § 48 was a content-based speech exclusion.[22] The Third Circuit first refused to expand the "extremely narrow class of speech" categorically unprotected by the First Amendment to include depictions of animal cruelty.[23] The court determined that the category of speech most analogous to the speech regulated by § 48 is child pornography,[24] which the Supreme Court held to be unprotected speech in *New York v. Ferber*.[25] Examining the five factors *Ferber* used to justify this categorical exclusion, the court found that depictions of animal cruelty do not share the same compelling justifications for regulation as child pornography.[26] It found that there was an insufficient link between the interest of preventing animal cruelty and the § 48 prohibition, and noted that, unlike protecting children, protecting animals is not crucial to a well-functioning society.[27] Viewing § 48 as a content-based speech restriction, the court next found that it failed strict scrutiny because it lacked a compelling state interest and was not narrowly tailored.[28] The court stated in a footnote that § 48 "might also be unconstitutionally overbroad,"[29] but declined to rule on this ground because voiding for overbreadth "should be used 'sparingly and only as a last resort.'"[30]

Judge Cowen wrote for a three-judge dissent.[31] The dissent first noted that Congress may restrict a certain category of speech when its social value "is so minimal as to be plainly outweighed by the Government's compelling interest in its regulation."[32] Second, the dissent would have found that depictions of animal cruelty satisfy the factors the *Ferber* Court used to proscribe child pornography as a category of speech.[33] The dissent also examined and rejected Stevens's arguments that § 48 was overbroad and unconstitutionally vague.[34]

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[22] *See id.* at 222 (citing H.R. REP. NO. 106-397, at 3–5 (1999)).

[23] *Id.* at 224.

[24] *Id.*

[25] 458 U.S. 747 (1982).

[26] *See Stevens*, 533 F.3d at 224–33. Further discussion of the *Ferber* factors, *see Ferber*, 458 U.S. at 756–64, will follow.

[27] *Stevens*, 533 F.3d at 227–28. The court also noted that the Supreme Court has not viewed protecting animals as a compelling state interest in other contexts, such as free exercise claims. *See id.* at 226–27.

[28] *Id.* at 232.

[29] *Id.* at 235 n.16.

[30] *Id.* at 236 n.16 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

[31] Judges Fuentes and Fisher joined in the dissent.

[32] *Stevens*, 533 F.3d at 236 (Cowen, J., dissenting).

[33] *See id.* at 237.

[34] *See id.* at 247–49.

The Supreme Court affirmed. Writing for the Court,[35] Chief Justice Roberts rejected the government's primary argument that the depictions targeted by § 48 represent a class of speech outside the First Amendment. Historically, the range of such categories has been narrow,[36] and the Court repudiated the government's argument that First Amendment protection for a category of speech depends on balancing the value of the speech against its societal costs.[37] The Court characterized the government's balancing analysis as "a free-floating test for First Amendment coverage" that was both "startling and dangerous."[38] It emphasized that balancing tests are inappropriate in this context because "[t]he 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."[39] Conceding that prior cases sometimes described the process of defining unprotected categories in balancing terms, the Court also emphasized that "such descriptions are just that — descriptive. They do not set forth a test that may be applied as a general matter . . . ."[40] The Court distinguished *Ferber* as a "special case," not primarily because child pornography's value is de minimis or protecting children from sexual exploitation is a compelling interest, but because child pornography is "intrinsically related" to the underlying child sexual abuse.[41] While the Court noted that there may still be unidentified categories of unprotected speech, it flatly rejected the government's "highly manipulable balancing test as a means of identifying them," and "decline[d] to carve out from the First Amendment any novel exception for § 48."[42]

The Court next analyzed Stevens's facial challenge. When the Court conducts an overbreadth analysis in the First Amendment context, the standard for a successful facial challenge requires proof only that a law has a "substantial number" of unconstitutional applications, not that there is no set of facts under which it would be valid.[43] The Court read § 48 as "a criminal prohibition of alarming breadth"[44] because it required the underlying conduct to be only illegal, not neces-

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[35] Chief Justice Roberts was joined in the opinion by Justices Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, and Sotomayor.

[36] *See Stevens*, 130 S. Ct. at 1584.

[37] *See id.* at 1585.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 1586.

[41] *Id.* (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)) (internal quotation marks omitted).

[42] *Id.*

[43] *Id.* at 1587 (quoting Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 n.6 (2008)).

[44] *Id.* at 1588.

sarily cruel, and because § 48's prohibitions could apply to depictions of conduct illegal in only one jurisdiction, such as hunting in the District of Columbia.[45] The exceptions clause was insufficient to salvage the statute because it exempted only material with "serious" social value in certain enumerated categories such as political, educational, or artistic merit.[46] This clause was drawn from the Court's obscenity jurisprudence in *Miller v. California*,[47] but the Court was unwilling to extend *Miller* beyond obscenity because *Miller* "did not . . . determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place."[48] The Court did not reach the question whether a statute limited to depictions of the most extreme forms of animal cruelty, like crush videos, would be constitutional, but held § 48 facially invalid and substantially overbroad.[49]

Justice Alito, the sole dissenter, criticized the Court for a decision that "has the practical effect of legalizing the sale of [crush] videos and is thus likely to spur a resumption of their production."[50] To avoid the "strong medicine" of voiding for overbreadth, Justice Alito would have vacated for the Third Circuit to decide on remand if Stevens's specific videos were protected.[51] Justice Alito noted that overbreadth should be approached in terms of "real-world conduct, not fanciful hypotheticals."[52] He considered the canon of construing statutes to avoid constitutional violations sufficient to find that § 48 did not apply to hunting magazines or to most of the Court's other examples because § 48 could be read reasonably to apply to only illegal acts of animal cruelty, "not to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty."[53] Alternatively, Justice Alito would have found that § 48's exceptions clause covered the Court's examples of constitutionally protected speech.[54] He argued that § 48 is a necessary prosecutorial tool to stop violent criminal conduct like producing crush videos,[55] and emphasized the similarity between § 48 and *Ferber*'s child pornography rule: although protecting children from sexual abuse is a more compelling interest than preventing animal cruelty, depictions targeted by § 48, like child pornography,

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[45] *See id.* at 1588–90.
[46] *Id.* at 1590.
[47] 413 U.S. 15 (1973).
[48] *Stevens*, 130 S. Ct. at 1591.
[49] *See id.* at 1592.
[50] *Id.* (Alito, J., dissenting).
[51] *Id.* at 1593 (quoting United States v. Williams, 128 S. Ct. 1830, 1838 (2008)) (internal quotation marks omitted).
[52] *Id.* at 1594.
[53] *Id.* at 1595.
[54] *See id.* at 1595–96.
[55] *Id.* at 1598.

have low speech value and necessarily involve criminal conduct.[56] Applying *Ferber*, he would have held that crush videos and brutal dogfights — "two broad real-world categories of expression covered by the statute" — are unprotected, and that § 48 was not overbroad.[57]

The Court's refusal to view animal cruelty depictions as a new category of unprotected speech is not necessarily problematic, but its methodology signals a concerning shift from *Ferber*'s categorical balancing. *Stevens*'s nearly unanimous opinion reduced a multifactored balancing test to an inquiry into the criminality of the underlying conduct. This approach cannot distinguish between speech categories with similar connections to criminal activity yet different social impacts. As a result, striking the balance between social harm and First Amendment values requires ad hoc strict scrutiny judgments, which may create increased uncertainty in free speech jurisprudence.

Understanding *Ferber* shows how *Stevens* altered the framework for delineating unprotected speech categories, because every opinion — majorities and dissents of the Supreme Court and Third Circuit — either followed or distinguished *Ferber* as the most analogous case to animal cruelty depictions.[58] Extending *Ferber* was also the government's primary argument: instead of asking the Court to rule on strict scrutiny analysis or another narrower ground, the government argued that depictions of illegal animal cruelty, like child pornography, "lack expressive value" and are categorically outside the First Amendment.[59]

Ferber established child pornography as an unprotected speech category by upholding a New York statute that prohibited distributing materials depicting sexual performances by minors.[60] It noted that designating unprotected categories is justified when "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."[61] The Court found that five factors favored the child pornography restriction: (1) preventing child sexual exploitation is an extremely important government interest; (2) distributing child pornography is intrinsically related to child sexual abuse; (3) the economic incentive to sell child

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[56] *See id.* at 1599–1600.

[57] *Id.* at 1601–02.

[58] *See id.* at 1586 (majority opinion); *id.* at 1599–1602 (Alito, J., dissenting); United States v. Stevens, 533 F.3d 218, 224–32 (3d Cir. 2008) (en banc); *id.* at 236–37 (Cowen, J., dissenting).

[59] Brief for the United States, *supra* note 7, at 10. The Court first outlined the process of classifying categories of speech as wholly outside First Amendment protection in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where it noted that "certain well-defined and narrowly limited classes of speech . . . 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." *Id.* at 571–72.

[60] New York v. Ferber, 458 U.S. 747, 764 (1982).

[61] *Id.* at 763–64.

pornography spurs continued production and is thus integral to the abuse; (4) the value from using real children in pornographic images is de minimis; and (5) holding child pornography categorically outside First Amendment protections is not inconsistent with precedent.[62] *Ferber* concluded that "the balance of competing interests is clearly struck" in favor of regulation,[63] indicating that the Court viewed its analysis as an exercise in balancing. In the three decades since, *Ferber* has been consistently viewed as a balancing case.[64]

Ferber is an example of definitional balancing, which "involves striking a balance between the category of speech at issue and the government's interest in regulation, based on First Amendment values, for the purpose of creating rules that can be applied in later cases."[65] Professor Melville Nimmer described definitional balancing as an alternative to First Amendment absolutism and ad hoc balancing.[66] While ad hoc balancing weighs competing interests on a case-by-case basis to determine what speech warrants constitutional protection,[67] Nimmer argues that definitional balancing is preferable because, by determining if the speech values at stake generally outweigh the government's interest in regulation, it creates predictable rules for later cases.[68]

As *Ferber*'s balancing rhetoric suggests, some type of definitional balancing has, in fact, characterized the Court's free speech jurisprudence.[69] While definitional balancing could be conceived as cost-benefit analysis that weighs speech rights against regulatory interests, the Court's balancing is often more nuanced: it recognizes competing speech and government interests, but uses First Amendment principles

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[62] *See id.* at 756–64.

[63] *Id.* at 764.

[64] *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946 (1987) (describing *Ferber* as a case where "the Court places the interests on a set of scales and rules the way the scales tip"); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1536–37 (1992) (stating *Ferber* balanced the value of child pornography against its harms); Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 671 (2002) (describing *Ferber* as a case that makes explicit the Court's general balancing approach).

[65] 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, 536 (2006).

[66] Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942 (1968).

[67] *See id.* at 938–39.

[68] *See id.* at 944–45.

[69] *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 353 n.242 (1997); Heyman, *supra* note 64, at 671.

to strike the balance.[70] *Chaplinsky v. New Hampshire*,[71] for example, stated that speech in these categories is "no essential part of any exposition of ideas" and is of "slight social value as a step to truth."[72] By accounting for First Amendment interests behind speech categories, definitional balancing can respect speech values and provide enough predictability in the law to avoid chilling speech unnecessarily.[73]

Stevens did more than refuse to recognize a new category of unprotected speech; it also narrowed *Ferber* through a two-part shift from definitional balancing. First, *Stevens* made history the touchstone for recognizing categorical exceptions, then took a narrow view of relevant historical prohibitions. The Court emphasized that neither history nor tradition supports placing § 48 depictions outside First Amendment protections because categorical exclusions only encompass a "few limited areas"[74] that have been "long familiar to the bar."[75] Although it noted that animal cruelty laws date from the colonial era,[76] the Court was "unaware of any similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment."[77] This approach is strikingly different from *Ferber*, which neither examined the historical pedigree of child pornography statutes nor distinguished child pornography laws from laws against the underlying abuse. Rather, child pornography laws were relatively new at the time: child pornography "ha[d] become a serious national problem" in "recent years," and state and federal laws were crafted in response to the new threat.[78] *Stevens* thus introduced a new emphasis on historical vintage for the precise prohibition at issue.

Second, *Stevens* reduced *Ferber*'s rationale to the connection between prohibited speech and the underlying criminal conduct it portrays. *Stevens* acknowledged that earlier categorical cases spoke in balancing terms, but it emphasized for the first time that balancing or

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[70] *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 393–96 (2009); Deutsch, *supra* note 65, at 497–98.

[71] 315 U.S. 568 (1942).

[72] *Id.* at 572.

[73] *See* Nimmer, *supra* note 66, at 942–45.

[74] *Stevens*, 130 S. Ct. at 1584 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)) (internal quotation mark omitted). In addition to child pornography, these limited categories include incitement, *see* Dennis v. United States, 341 U.S. 494, 544–46 (1951) (Frankfurter, J., concurring in the judgment), obscenity, *see* Miller v. California, 413 U.S. 15, 23 (1973), false statements of fact, *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974), and "fighting words," *see Chaplinsky*, 315 U.S. at 571–72.

[75] *Stevens*, 130 S. Ct. at 1584 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment)) (internal quotation mark omitted).

[76] *See id.* at 1585.

[77] *Id.*

[78] New York v. Ferber, 458 U.S. 747, 749 (1982). The *Ferber* statute itself was enacted just five years before the case came before the Court. *See id.* at 750.

cost-benefit analysis is inappropriate to identify new categories of unprotected speech,[79] and explained *Ferber* as a special case because the child pornography market is "intrinsically related" to the underlying abuse.[80] According to *Stevens*, *Ferber* did not affirm a new exception to the First Amendment, but was a special example of the historically unprotected category of speech integral to the commission of a crime.[81]

This reading is more redefinition than clarification. The intrinsic connection between child sexual exploitation and the child pornography market encompasses only the second and third *Ferber* factors. *Stevens* excises the first and fourth factors — the compelling interest in protecting children and minimal social value of using real children in pornographic images — and ignores the fifth factor aligning *Ferber* with past cases based on "the balance of competing interests."[82] These omissions represent a changed emphasis from prior cases discussing *Ferber*,[83] and a doctrinal shift away from definitional balancing.

This redefinition of *Ferber* is troubling because it does not explain the different outcome for each case. *Stevens*'s analysis ends after stating the "special case" of *Ferber*.[84] It does not explain why the markets in dogfight and crush videos are not intrinsically related to the underlying crimes of dogfighting and torturing small animals. As Justice Alito noted, it appears that the acts in crush videos are "committed for

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[79] *See Stevens*, 130 S. Ct. at 1586.

[80] *Id.* (quoting *Ferber*, 458 U.S. at 759) (internal quotation marks omitted).

[81] *See id.* (citing *Ferber*, 458 U.S. at 761–62). *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), established this historical category. Picketing, the speech act in *Giboney*, was one of several coordinated activities by the appellants constituting "a single and integrated course of conduct" violating Missouri law. *Id.* at 498. The connection between distributing child pornography and the underlying sexual abuse is more attenuated, especially as producers and distributors are often unconnected. Moreover, subsequent cases indicate that *Ferber* was concerned with more than the proximate connection between speech and criminal conduct. *Osborne v. Ohio*, 495 U.S. 103 (1990), held that possessing child pornography is unprotected speech. When distinguishing an earlier case holding that adult obscenity possession is protected, the Court emphasized that the state's interest in restricting child pornography was greater than its interest in restricting adult obscenity. *Id.* at 110–11. This language characterized *Ferber* as a balancing case, especially as the connection to the underlying crime was identical in both possession cases. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), invalidated a law targeting virtual child pornography because it did not contain an exception for works of serious value. While it noted that there is no underlying crime for virtual pornography as real children are not used in production, the Court also repeated *Osborne*'s emphasis on the state interest in banning child pornography, not simply the criminal connection rationale. *See id.* at 249–50.

[82] *See Ferber*, 458 U.S. at 763–64.

[83] While *Free Speech Coalition* and *Osborne* talked about the intrinsic connection between child pornography and child exploitation, they also echoed *Ferber*'s balancing rhetoric. *See Free Speech Coalition*, 535 U.S. at 254 (noting the need to strike a balance when child pornography uses real children); *Osborne*, 495 U.S. at 108 (quoting *Ferber*'s de minimis social value rationale and emphasizing the important state interests behind the *Osborne* statute). These cases may present the market connection as *Ferber*'s strongest argument, but *Stevens* recharacterizes it as *Ferber*'s only argument.

[84] *See Stevens*, 130 S. Ct. at 1586.

the sole purpose of creating the videos" for commercial gain.[85] If this is true, the economic motive behind crush videos is more than just an integral part of production as it is for child pornography — it is the crime's entire motivation. There is also a similar connection to the underlying crime for both categories: one case is integrally linked to the abuse of real children,[86] the other to illegal animal abuse.[87] Two readily apparent distinctions are that society regards harm to children as more serious than harm to animals and that some speech depicting animal cruelty might have more social value than child pornography. Yet the Court did not raise these distinctions, or any others.

The most likely explanation for *Stevens*'s failure to distinguish animal cruelty depictions from child pornography is that there is little basis to do so under the post-*Stevens* framework. Stronger state interests in protecting children as opposed to animals and greater social value for § 48 speech are the sort of factors that definitional balancing would consider — in fact, they are *Ferber*'s first and fourth factors. Yet with its insistence that the First Amendment does not permit categorical balancing, *Stevens* removes the factors that would allow the Court to distinguish cases where the connection to an underlying crime is similar but the government interests and speech values differ.

The sparse analytic distinction between child pornography and § 48 depictions suggests that the Court may have relied on additional, unarticulated factors to determine *Ferber*'s boundaries. By removing the factors characteristic of definitional balancing while distinguishing similar types of speech, this new standard decreases transparency and makes it harder to predict what speech will fall within a protected category — precisely the type of ad hoc balancing concerns that definitional balancing seeks to avoid.[88] The Court's distancing from definitional balancing seems more problematic because it was unnecessary to resolve the case: as the second half of *Stevens* holds that § 48 was substantially overbroad,[89] the Court could have invalidated the statute on that narrower ground alone. While definitional balancing may sometimes approximate a cost-benefit calculus instead of the more speech-protective method of weighing First Amendment values, it provides a clearer standard than case-by-case strict scrutiny analyses and can offer protection from judicial encroachment on expressive

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[85] *Id.* at 1599 (Alito, J., dissenting).

[86] *See id.* at 1586 (majority opinion); *Ferber*, 458 U.S. at 759.

[87] *See, e.g.*, Cheryl Hanna & Pamela Vesilind, *Preview of* United States v. Stevens*: Animal Law, Obscenity, and the Limits of Government Censorship*, 4 CHARLESTON L. REV. 59, 72 (2009) (arguing that the market connection analogy for child pornography applies to crush videos and other depictions targeted by § 48).

[88] *See* Nimmer, *supra* note 66, at 939.

[89] *See Stevens*, 130 S. Ct. at 1592.

rights while accounting for societal harms from certain categories of speech.[90] Instead, the Court's recharacterization of *Ferber* requires more case-by-case judgments and provides fewer doctrinal tools to distinguish speech closely analogous to previously recognized unprotected categories. In its effort to avoid "free-wheeling" and "highly manipulable" standards, the Court may have ushered in an era of more ad hoc judgments and less predictability in a world of recurrent tension between free speech and other social goods.

2. Freedom of Expressive Association. — The federal courts have long since rejected the proposition — famously voiced by Justice Holmes[1] — that the government may, without exception, condition the receipt of benefits such as state funding or employment on the relinquishment of constitutional rights. Despite the attractive simplicity of Justice Holmes's position that the power to withhold a benefit in full implies the power to grant it on any condition, later jurists have recognized that permitting the government to condition benefits on the surrender of constitutional rights would allow it to buy up rights, increasing state power over citizens in ways that the Constitution ought to preclude.[2] This shift in understanding marked the birth of the doctrine of unconstitutional conditions.[3] In keeping with this insight, the Supreme Court ruled in *Rosenberger v. Rector & Visitors of University of Virginia*[4] that although a public university need not provide funding for student organizations, if it chooses to do so it may not condition the funding on the students' surrendering their right to express any viewpoint they wish.[5] Last Term, in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*[6] (*CLS*), the Court held that a public law school may require student organizations to adhere to an "all-comers" policy — obliging them to yield their right under *Boy Scouts of America v. Dale*[7] to exclude would-be members who disagree with their ideology — as a condition

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[90] *See* Nimmer, *supra* note 66, at 939–45.

[1] *See, e.g.*, McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."); Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895).

[2] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.").

[3] *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

[4] 515 U.S. 819 (1995).

[5] *Id.* at 829, 835; *see also* Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169 (1972).

[6] 130 S. Ct. 2971 (2010).

[7] 530 U.S. 640, 648 (2000) (holding that a private expressive association has a free speech right to exclude individuals who disagree with the group's ideology).