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Conclusion

The First Amendment is not an absolute, nor could (or should) it be. Congress regulates large areas of expression and communication—such as false and deceptive advertising, fraud, insider trading, copyright, trademarks, and perjury, among other areas (as discussed in chapter 1). Outside of such areas the Supreme Court in the twentieth century expanded First Amendment protection for a broad range of expression, except for four categories of constitutionally unprotected expression—obscenity, defamation, commercial speech, and "fighting words."

Yet the Court's categorical or definitional approach to such unprotected expression provides at best a baseline framework for analysis. The category of obscenity, for example, now applies principally to only hard-core and child pornography. And the category of "fighting words" has been rendered virtually null, while the Court has incrementally expanded First Amendment protection for commercial speech.

Beyond those categories of unprotected speech, the Court at the same time has nonetheless recognized other content-based restrictions on expression based on their context and circumstances. The Court has (as previously discussed) upheld restrictions on true threats and provocative and allegedly indecent expression on broadcast radio and television, for example, along with that of students' expression in a range of circumstances.

As technology advances and new First Amendment challenges arise, the Court may well find new categories of constitutionally unprotected expression or further content-based exceptions to its categorical approach to freedom of expression, such as regulations prohibiting the sale of violent videos to minors.

In its 2009–2010 term, for instance, the Court confronted a challenge to Congress's enactment of the Depiction of Animal Cruelty Act of 1999.[1] That law authorized a fine and imprisonment for up to five years, or both, for anyone who depicted for commercial gain a sound, electronic, or video recording of "conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." Congress, in response to animal rights and other interest groups, aimed to criminalize so-called crush videos—videos that show small animals being crushed or stamped to death. An exception was made for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

Robert J. Stevens was convicted under the statute for selling videos of dog fights and sentenced to thirty-seven months in prison. The U.S. Court of Appeals for the Third Circuit, however, reversed the lower court's decision and held that the law did not fit within any of the four categories of constitutionally unprotected expression.[2] In doing so, it rejected the position of Republican President George W. Bush's administration that the statute was constitutionally permissible under the First Amendment, and ruled instead that it was "an unconstitutional infringement on free speech rights guaranteed by the First Amendment." In an appeal of the Third Circuit's decision in *United States v. Stevens*, Democratic President Barack Obama's solicitor general, Elena Kagan, continued to press the view that, although "the depictions at issue here do not fall into any established category of unprotected speech," the statute should be upheld as within Congress's power and the appellate court's decision reversed, "because of the many harms [fighting dogs] cause: injury to the dogs themselves, injury to humans attacked by vicious dogs, increased gambling and other criminal activity, and debilitating effects on public mores."[3] The government in effect asked the Court to recognize a new category of constitutionally unprotected expression or another content-based restriction. In other words, the government

urged the Court to expand the categories of unprotected speech recognized in *Chaplinsky* and later rulings, or alternatively uphold restrictions on depictions of animal cruelty as it did with respect to child pornography in *New York v. Ferber* (1982).[4]

In a rather sweeping opinion for the Court in *United States v. Stevens* (2010),[5] Chief Justice John Roberts Jr. affirmed the appellate court's decision and struck down the federal statute. In doing so, the chief justice emphasized the historically narrow categories of constitutionally unprotected expression. In his words, and quoting from earlier decisions:

> 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. . . .
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> "From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." These "historic and traditional categories long familiar to the bar"—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."

Chief Justice Roberts proceeded to reject the government's arguments for carving out a separate category of unprotected expression for depictions of animal cruelty, based on a social costs-and-benefits analysis. More specifically, Chief Justice Roberts rejected the analogy drawn by the government between an exception for child pornography, upheld in *New York v. Ferber*, and depictions of animal cruelty, explaining that

> [w]hen 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.
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> 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.

Only Justice Samuel Alito dissented from the Court's ruling in *United States v. Stevens*, observing that

> [t]he Court strikes down in its entirety a valuable statute 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.

In sum, a solid majority in *United States v. Stevens* underscored its reluctance to expand the categories of First Amendment unprotected expression. Nonetheless, as in the past and no doubt in future cases, the Court will continue to confront the fundamental questions (stated at the outset): Why do we, as citizens no less than Congress and the Court, value freedom of expression? Is it because freedom of expression has an *instrumental* value in promoting democracy and self-governance? Is it because freedom of expression has *intrinsic*

value and is essential to individual self-expression and self-determination? Is it because, as Justice Holmes argued, the best test of truth is determined by "the marketplace of ideas"? Or is it because once expression is regulated, censored, and punished, the proverbial "slippery slope" of governmental censorship becomes wide open? Or, perhaps, is it because of all the above rationales, depending on the contexts, under what circumstances, and how harms—public and private—are weighed against First Amendment guarantees for freedom of expression?