The "Strong Medicine" of the Overbreadth Doctrine: When Statutory Exceptions Are No More than a Placebo

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I. INTRODUCTION

In *United States v. Stevens*, the Supreme Court refused to consider depictions of animal cruelty as a form of speech outside of First Amendment protection.[1] Consequently, the Court struck down the federal statute criminalizing such depictions as overbroad.[2] *Stevens* is largely cited to demonstrate the Supreme Court's reluctance to create a new category of speech that is outside of First Amendment protection.[3] However, *Stevens* demonstrates another important proposition in First Amendment jurisprudence—that a statutory exception modeled after the *Miller v. California* obscenity standard is not a dependable way to protect a nonobscenity statute.[4]

Legislatures whose regulations are likely to be challenged on free speech grounds sometimes include statutory exceptions as a way to limit the scope of the regulation and avoid constitutional invalidation from the "strong medicine"[5] of the overbreadth doctrine. Often, statutory exceptions borrow language from the obscenity standard formulated in *Miller*. The *Miller* exceptions clause prevents a statute from criminalizing behavior that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.[6] The *Stevens* holding significantly undermines the usefulness of the *Miller* statutory exceptions in nonobscenity statutes and calls into question the constitutionality of existing statutes using these statutory exceptions.

Part II of this Note will discuss the use and prevalence of statutory exceptions modeled after the *Miller* obscenity test. Part III of this Note will

1. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).
2. *Id.* at 1592.
3. *See, e.g.*, Brown v. Entm't Merchs. Ass'n., 131 S. Ct. 2729, 2734 (2011).
4. *Stevens*, 130 S. Ct. at 1590.
5. New York v. Ferber, 458 U.S. 747, 769 (1982).
6. United States v. Miller, 413 U.S. 15, 24 (1973).

review the role of the overbreadth doctrine in First Amendment jurisprudence. Part IV of this Note will examine the reasoning and implications of the Supreme Court's ruling in *Stevens*. Finally, Part V of the Note will explore the possibility that, in light of recent Supreme Court action, statutes that borrow from the exceptions clause in the *Miller* standard may be at risk of invalidation. Therefore, legislatures should consider modifying some existing statutes and not using the *Miller* exceptions clause in new legislation.

II. THE *MILLER* OBSCENITY STANDARD AND STATUTORY EXCEPTIONS

A. Overview

The Supreme Court has a storied history of struggling to formulate a proper definition of obscenity.[7] Most notoriously, Justice Stewart, in a concurrence, had the following comments on this process: "perhaps I could never succeed in intelligibly [defining obscenity] . . . . But I know it when I see it . . . ."[8] Eventually, the Court formulated the present-day obscenity standard in *Miller v. California*.

In *Miller*, California convicted the defendant of obscenity for mailing unsolicited brochures that contained descriptive printed material and pictures of men and women engaged in a variety of sexual activities.[9] In a previous decision, the Court recognized that obscene materials are not protected by the First Amendment,[10] but the Court struggled to formulate a proper definition for obscenity. By declaring obscenity a special category of speech outside of First Amendment protection, the Court allows obscenity statutes to be scrutinized with a rational basis standard of review.[11] In contrast, protected categories of speech are reviewed with a strict scrutiny standard.[12] Under the rational basis standard, the regulatory scheme must be reasonably related to a legitimate state interest to enhance the general welfare of its population.[13] In *Miller*, the Court finally

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7. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Redrup v. New York, 386 U.S. 767 (1967); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

8. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

9. 413 U.S. at 16–18.

10. *See Roth*, 354 U.S. at 476.

11. George L. Blum, Annotation, *Obscenity Prosecutions: Statutory Exemption Based on Dissemination to Persons or Entities Having Scientific, Educational, or Similar Justification for Possession of Such Materials*, 13 A.L.R. 5th 567 (1993).

12. *Id.*

13. *Id.*

developed an obscenity standard immune from First Amendment invalidation.

The Court in *Miller* held that the following elements must be satisfied for a statute to constitutionally regulate obscenity:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[14]

This Note primarily focuses on the last element of the *Miller* standard, which will be referred to as the exceptions clause. As discussed in the next section of this Note, legislatures occasionally borrow the language from this exceptions clause and adapt it to statutes regulating other categories of speech besides obscenity, especially in circumstances where the category of speech has not been judicially declared to be outside of First Amendment protection. By borrowing from the Supreme Court-endorsed standard for obscenity, legislatures attempt to both increase legitimacy and protect their regulation of speech.

B. Nonobscenity Contexts

Understandably, the *Miller* standard's exceptions clause is adopted most frequently by legislatures regulating obscenity. However, in limited situations, legislatures have also adopted the clause in nonobscenity contexts. As *Stevens* demonstrates, Congress adopted the exceptions clause for a statute that criminalizes depictions of animal cruelty.[15]

Another context in which legislatures have adopted the obscenity standard's exceptions clause is in statutes regulating the depictions of violence in video games and movies.[16] In fact, the Supreme Court recently invalidated a California statute regulating the depictions of violence in *Brown v. Entertainment Merchants Association*.[17] Similar to the statute in *Stevens*, the California legislature included an exceptions clause[18] modeled after the obscenity standard.[19] Other than depictions of violence, there are

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14. *Miller*, 413 U.S. at 24 (citations and internal quotation marks omitted).

15. United States v. Stevens, 130 S. Ct. 1577 (2010).

16. *See* CAL. CIV. CODE § 1746.1 (Deering 2010) (prohibiting the sale or rental of violent video games to minors); COLO. REV. STAT. § 18-7-601 (2010) (prohibiting the sale or rental of violent movies to minors); MICH. COMP. LAWS SERV. § 722.691 (LexisNexis 2011) (prohibiting the sale or rental of violent video games to minors).

17. Brown v. Entm't Merchs. Ass'n., 131 S. Ct. 2729 (2011).

18. In the majority opinion, Justice Scalia refers to the exceptions clause as a "saving clause." *Id.* at 5.

19. *Id.* at 1.

statutes and municipal ordinances that target behavior more comparable to obscenity by regulating prurient interests.[20] But, arguably, these statutes and ordinances may not target behavior that rises to the level of obscenity, especially since they do not adopt the entire obscenity standard, even though they model the *Miller* obscenity standard and contain an exceptions element.[21]

Although these statutes and ordinances apply to three general areas of regulation outside of obscenity—depictions of animal cruelty, depictions of violence, and adult entertainment—it is likely that future legislative bodies will find new targets of speech for regulation that they believe is of low value and undeserving of First Amendment protection. In *Stevens*, Justice Roberts even noted, "[w]e need not foreclose the future recognition of such additional categories [of unprotected speech]."[22] Thus, the majority in *Stevens* left open the possibility for the creation of new categories of unprotected speech. Admittedly, this possibility is more difficult based on the majority's stipulation that any future categories be "*historically unprotected*, but have not yet been specifically identified or discussed as such in our case law."[23] Still, legislative bodies will most likely attempt to increase the number of unprotected categories of speech with the rise of new legislative agendas, and may even use an exceptions clause to narrow the scope of the statute.

III. THE OVERBREADTH DOCTRINE IN FIRST AMENDMENT JURISPRUDENCE

If a law is overinclusively drafted, a party whose conduct is within the statute's intended proscription still benefits with an overbreadth challenge by effectively asserting the rights of other hypothetical persons whose protected activity falls within the sweep of the statute.[24] Normally, a party seeking to challenge a statute's constitutionality must demonstrate that his or her personal rights were violated in order to have standing. However, the overbreadth doctrine is a "narrow exception to [the] general [standing]

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20. Prurient interests are interests "[c]haracterized by or arousing inordinate or unusual sexual desire." BLACK'S LAW DICTIONARY 1347 (9th ed. 2009).

21. *See, e.g.*, LARIMER COUNTY, COLO., LARIMER COUNTY CODE OF ORDINANCES § 14-82 (2010) (regulating nudity in places of entertainment); WALTON COUNTY, FLA., WALTON COUNTY CODE OF ORDINANCES § 7-27 (2009) (regulating adult entertainment enterprises and establishments); VA. CODE ANN. § 4.1-226 (2010) (regulating the suspension or revocation of alcohol licenses).

22. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).

23. *Id.* (emphasis added).

24. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 847 (1970).

rule" because "an overly broad law may deter constitutionally protected speech . . . ."[25] In more colorful language, the overbreadth doctrine has been described as "strong medicine . . . a potion that generally should be administered only as a last resort."[26]

Two purposes have been suggested for the overbreadth doctrine. First, overbroad laws can chill constitutionally protected speech. The overbreadth doctrine prevents the chilling of constitutionally protected speech by creating a distinct exception to the standing requirement, which, in effect, allows any litigant willing to challenge an allegedly overbroad statute to bring suit.[27] Second, the overbreadth doctrine encourages legislatures to be aware of free speech issues when drafting legislation because the statute will be especially vulnerable to constitutional challenges.[28] The threat of a court invalidating a statute as overbroad incentivizes the legislatures to narrowly tailor their statutes.

According to the Supreme Court, the overbreadth doctrine was first recognized in the 1940 case of *Thornhill v. Alabama*.[29] Thus, the doctrine is relatively new to American jurisprudence. Interestingly, the overbreadth doctrine can be applied to both statutes that regulate categories of speech *receiving* First Amendment protection[30] and categories of speech *outside* First Amendment protection.[31] Many scholars embrace the overbreadth doctrine and advocate using the doctrine beyond the First Amendment context.[32]

By applying the overbreadth doctrine, a court considers the constitutionality of a statute on its face.[33] In order for an overbreadth challenge to succeed, the "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[34] Substantial overbreadth is not satisfied merely because a litigant can point to one or a few hypothetical fact patterns under which application of the statute would be unconstitutional.[35] Moreover, to determine whether

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25. *Stevens,* 130 S. Ct. at 1593 (Alito, J., dissenting).

26. *Id.* (citing United States v. Williams, 553 U.S. 285, 293 (2008)) (internal quotation marks omitted).

27. Luke Meier, *A Broad Attack on Overbreadth*, 40 VAL. U. L. REV. 113, 116 (2005).

28. *Id.*

29. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984); *see also* Thornhill v. Alabama, 310 U.S. 88 (1940).

30. *See Stevens*, 130 S. Ct. 1577.

31. *See* Gooding v. Wilson, 405 U.S. 518 (1972) (applying the overbreadth doctrine to a statute regulating fighting words).

32. Meier, *supra* note 27, at 114.

33. *Id.* at 129.

34. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

35. Meier, *supra* note 27, at 131.

a statute is overbroad, courts should "consider a statute's application to real-world conduct, not fanciful hypotheticals," and the "claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists."[36] "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."[37]

IV. IMPACT OF *UNITED STATES V. STEVENS*

In this section, this Note examines the recent Supreme Court case *United States v. Stevens* in a significant amount of detail. This section examines *Stevens* so closely for two reasons—*Stevens* has important implications for both protected category of speech analysis and also the First Amendment overbreadth doctrine. The legal reasoning of the Third Circuit's opinion in *Stevens* demonstrated the traditional reasoning that courts use to analyze constitutional arguments advocating for the creation of a new unprotected category of speech. However, the Supreme Court's opinion in *Stevens* reshaped the traditional analysis for similar future claims.[38] The Third Circuit's analysis in *Stevens* is no longer the proper method to assess arguments for a new category of unprotected First Amendment speech. The Supreme Court decided the *Stevens* case in a highly unusual manner by limiting existing precedent, and then invalidating Congress's statute as overbroad.[39] The potential implications of *Stevens* cannot be fully appreciated without a detailed review of the case.

A. Background

The *Stevens* Court considered the constitutionality of 18 U.S.C. § 48 ("Section 48"), which prohibited the interstate sale and distribution of depictions of animal cruelty.[40] The law was enacted to address the

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36. United States v. Stevens, 130 S. Ct. 1577, 1594 (2010) (Alito, J., dissenting) (quoting Virginia v. Hicks, 539 U.S. 113, 122 (2003)) (italics omitted).

37. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

38. As demonstrated by *Brown v. Entertainment Merchants Association*, the traditional strict scrutiny analysis for content-based restrictions of speech is still viable and likely used in future First Amendment challenges. *See* Brown v. Entm't Merchs. Ass'n., 131 S. Ct. 2729 (2011). Nevertheless, *Stevens* may indicate that statutory overbreadth is an alternative to strict scrutiny review for some First Amendment challenges.

39. In a footnote, the *Brown* majority doubted Justice Alito's assertion that *Stevens* did not apply strict scrutiny. *Id.* at 4 n.1. However, this Note agrees with Justice Alito, and the *Stevens* opinion clearly supports the assertion that the Court did not apply strict scrutiny review in *Stevens*. *See Stevens*, 130 S. Ct. at 1592.

40. Emma Ricaurte, Note, *Son of Sam and Dog of Sam: Regulating Depictions of Animal Cruelty Through the use of Criminal Anti-Profit Statutes*, 16 ANIMAL L. 171, 183

proliferation of animal "crush videos" on the Internet; however, individuals were also prosecuted for possessing, creating, or selling other depictions of animal cruelty.[41] An animal crush video is "a film in which a female, typically in a dominatrix manner, is seen crushing a small animal with her bare feet or high-heeled shoes."[42] There is evidence that Section 48 successfully weakened the crush video market.[43]

Section 48 has three elements. First, someone must knowingly create, sell, or possess a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain.[44] Second, the statute has an exceptions clause that exempts from regulation any depiction of animal cruelty which has "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[45] Finally, the statute has a definition section that defines animal cruelty and also requires the animal cruelty to depict illegal conduct under the federal or state law in the location where the creation, sale, or possession of the depiction of animal cruelty occurs.[46]

In *Stevens*, the defendant was charged with distributing two videos of pit bulls engaged in dogfighting and another video that depicted a pit bull attacking a domestic pig in an instructional video on how to use pit bulls to catch wild animals.[47] One of the dogfighting videos showed footage from the 1960s and 1970s, while the other showed recent footage of dogfighting in Japan, where dogfighting is still legal.[48] Stevens also ran a business called "Dogs of Velvet and Steel" and a website.[49] Stevens advertised the videos in the *Sporting Dog Journal*, which is an underground periodical that posts results for illegal dogfighting matches.[50] It is unclear from the legislative history whether depictions of dogfighting were intended to be covered by Section 48.[51]

After being convicted of violating Section 48, Stevens appealed to the Third Circuit. Stevens argued that Section 48 is an unconstitutional

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(2009).

41. *See id.*

42. *Id.* at 173.

43. *The Supreme Court – Leading Cases*, 124 HARV. L. REV. 179, 239 (2010) [hereinafter *Leading Cases*].

44. *Stevens*, 130 S. Ct. at 1582.

45. *Id.* at 1582–83.

46. *Id.* at 1582.

47. Ricaurte, *supra* note 40, at 184.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 185.

infringement of his free speech rights guaranteed by the First Amendment.[52] The government argued that the Third Circuit should recognize depictions of animal cruelty as a new category of unprotected speech.[53]

The Third Circuit's analysis can be described as a two-step process. First, the Third Circuit applied the five factors enumerated in *New York v. Ferber*[54] to assess whether there is sufficient justification to categorically exclude depictions of animal cruelty from First Amendment protection. After finding the categorical exclusion unjustified, the Third Circuit applied strict scrutiny analysis to Section 48 because the statute was a content-based restriction on speech. The statute failed strict scrutiny.[55]

In *Ferber*, the Supreme Court held that child pornography is a category of speech that is unprotected by the First Amendment, and legislatures can ban the sale of this material.[56] The Court balanced the following five factors to find that governmental regulation outweighs First Amendment protection: (1) the prevention of child sexual exploitation is an extremely important governmental interest; (2) the distribution of child pornography is intrinsically related to the child's sexual abuse; (3) the economic incentive to sell child pornography encourages its production and is integral to the sexual abuse; (4) the value from using real children in pornographic images is *de minimus*; and (5) holding child pornography categorically outside the First Amendment is not inconsistent with precedent.[57]

The Court engages in definitional balancing in *Ferber*, "which involves striking a balance between a 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."[58] In *Stevens*, the Third Circuit applied the definitional balancing standard of *Ferber*.[59] The Third Circuit in *Stevens* found that "there was an insufficient link between the interests of preventing animal cruelty and the Section 48 prohibition . . . ."[60] Simply put, protecting animals does not rise to the same level of importance to a well-functioning society as protecting children.[61]

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52. United States v. Stevens, 533 F.3d 218, 220 (3d Cir. 2008).
53. *Id.*
54. 458 U.S. 747, 756–64 (1982).
55. *Stevens*, 533 F.3d at 232–35.
56. 458 U.S. at 765.
57. *Leading Cases*, *supra* note 43, at 244–45.
58. *Id.* at 245 (footnote and internal quotation marks omitted).
59. *See* United States v. Stevens, 533 F.3d 218, 226 (3d Cir. 2008).
60. *Leading Cases*, *supra* note 43, at 241.
61. *Id.*

Therefore, the Third Circuit reviewed the statute with strict scrutiny because it was a content-based restriction on speech. The Third Circuit held that the statute failed strict scrutiny because depictions of animal cruelty lack a compelling state interest and the statute was not narrowly tailored.[62] The Third Circuit also mentioned in a footnote that the statute may be constitutionally overbroad, but that this analysis is unnecessary since the overbreadth doctrine "should be used sparingly and only as a last resort."[63]

B. Supreme Court Review

Although the majority in *Stevens* affirmed the Third Circuit's holding, the Court's reasoning was unexpectedly different. Like the Third Circuit opinion, the majority rejected the government's argument that Section 48 is a class of speech outside the protection of the First Amendment. However, the Court significantly narrowed the scope of *Ferber* by finding definitional balancing inappropriate for determining categories of speech outside First Amendment protection. In particular, "[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."[64] *Ferber* is merely a special case because "child pornography is 'intrinsically related' to the underlying child sexual abuse."[65] Therefore, the analysis in *Ferber* was limited to its facts, and the First Amendment no longer allows a definitional balancing standard to determine new categories of unprotected speech.

After rejecting depictions of animal cruelty for treatment as an unprotected category of speech, the Court facially analyzed Section 48. Rather than subjecting the statute to strict scrutiny review like the Third Circuit, the Court found that Section 48 was unconstitutionally overbroad.[66] In doing so, the Court examined the statute for "proof . . . that

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62. United States v. Stevens, 533 F.3d 218, 223 (3d Cir. 2008).

63. *Id.* (internal quotation marks and citations omitted).

64. United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

65. *Leading Cases*, *supra* note 43, at 242 (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)).

66. Although animal welfare activists largely condemn the Court's ruling as a significant blow to animal welfare by not finding depictions of animal cruelty unprotected from the First Amendment, the Court's analysis may actually be less damaging than it appears. In particular, the Court could have simply followed the Third Circuit's reasoning and held that depictions of animal cruelty are protected by the First Amendment *and* fail strict scrutiny review. By invalidating the statute as overbroad, however, the Court avoided the question of whether regulating animal cruelty is a compelling government interest. A Supreme Court ruling that animal cruelty is not a compelling government interest could conceivably have implications outside of the First Amendment context. Instead, the Court

a law has a 'substantial number' of unconstitutional applications . . . ."[67] The Court noted that the prosecution's use of the statute could conceivably target depictions of hunting, slaughter for food, docking of cow tails, and cockfighting, which are all legal activities in at least one United States jurisdiction.[68]

C. The Rejection of Statutory Exceptions

During the Supreme Court's analysis of Section 48 for overbreadth, the Court rejected the statute's exceptions clause as "requir[ing] an unrealistically broad reading . . . ."[69] The statute exempted "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value" from criminalization.[70] This statutory language is largely drawn from the Court's "opinion in *Miller v. California*, which excepted from its definition of obscenity any material with serious literary, artistic, political, or scientific value."[71] In *Stevens*, the Court flatly rejected the contention that statutory exceptions modeled after the obscenity standard can be used as a "general precondition to protecting *other* types of speech in the first place."[72]

The Court also noted that "[t]here is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban."[73] As an example, the Court points to the inability of the statute to distinguish between depictions of hunting and Spanish bullfights from depictions of Japanese dogfights, the former was not intended to be targeted by Section 48.[74] The Court also responds to the dissent's suggestion that hunting depictions have serious value and qualify for the exceptions clause in ways that dogfights presumably do not. The Court explains that the analysis requires looking at

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left open the possibility for Congress to modify Section 48, which Congress did in 2010. *See* 18 U.S.C. § 48 (2000 & Supp. 2010).

67. *Leading Cases*, *supra* note 43, at 242 (quoting *Stevens*, 130 S. Ct. at 1587).

68. *Stevens*, 130 S. Ct. at 1588–90.

69. *Id.* at 1590.

70. *Id.* (internal quotation marks and citation omitted).

71. *Id.* at 1591 (citations omitted).

72. *Id.* The Court recently echoed this position in *Brown v. Entertainment Merchants Association*. 131 S. Ct. 2729 (2011). The California statute regulated minors' access to violent video games and mimicked a New York statute upheld by the Court in *Ginsberg v. New York* that protected minors from accessing obscene materials. *Id.* at 2735. Unlike *Stevens*, however, the Court invalidated the video game statute with traditional strict scrutiny review for being a content-based restriction on speech. *Id.* at 2738.

73. *Stevens*, 130 S. Ct. at 1590.

74. *Id.*

"the value of the *depictions*, not of the underlying activity."[75] Thus, the majority implies that the depictions do not have the same serious value as the activity itself, and would not be rescued by the exceptions clause of Section 48.

D. Justice Alito's Dissent

In his dissent, Justice Alito disagreed with the majority's application of the overbreadth doctrine. Rather, Alito would have remanded the case to the Court of Appeals to decide whether the videos that Stevens actually sold were constitutionally protected as opposed to the majority's facial invalidation of the statute.[76] Furthermore, Alito said that even if he agreed to apply the overbreadth doctrine, he disagreed with the majority's conclusion that the statute "bans a substantial quantity of protected speech."[77] Alito emphasized that the overbreadth doctrine's "generally preferred procedure . . . [is one of] last resort."[78] Moreover, the overbreadth must "be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep"[79] by considering the statute's "application to real-world conduct, not fanciful hypotheticals."[80]

Alito rejected the majority's hypotheticals of protected speech that are allegedly covered by Section 48.[81] He individually analyzed each hypothetical and provided explanations for why the hypotheticals qualify for the statute's exceptions clause.[82] Specifically, he rejected the majority's contention that hunting, animal slaughter, and tail docking are covered by the statute because the statute expressly targets "animal cruelty" and also has the exceptions clause.[83] Alito mentioned,

> [T]hat hunting has "scientific" value in that it promotes conservation, "historical" value in that it provides a link to past times when hunting played a critical role in daily life, and "educational" value in that it furthers the understanding and appreciation of nature in our country's past and instills valuable character traits.[84]

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75. *Id.*
76. *Id.* at 1593.
77. *Id.*
78. *Id.* at 1594.
79. *Id.* (emphasis omitted).
80. *Id.*
81. *Id.* at 1594–97.
82. *Id.*
83. *Id.*
84. *Id.* at 1596.

Besides, even if there are a few isolated applications for hunting that fall outside the exceptions clause, those "would hardly show that Section 48 bans a substantial amount of protected speech."[85]

Moreover, there was nothing in the record to suggest that anyone has ever sold or possessed for sale a depiction of the slaughtering or docking of dairy cows' tails.[86] Alito also says Section 48 is not overbroad because it requires the depictions to be of animal cruelty as defined by state or federal law.[87] Even if cockfighting was covered by the statute, "this veritable sliver of unconstitutionality would not be enough to justify striking down § 48 *in toto*."[88] After rejecting the majority's constitutional overbreadth holding, Alito applied the *Ferber* balancing analysis to crush videos and depictions of brutal animal fights, and concluded that these categories should be unprotected under the First Amendment, similar to child pornography.[89]

E. Congress's Response to Stevens

Interestingly, the *Stevens* majority said, "[w]e . . . need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional."[90] Although the Supreme Court's invalidation of Section 48 drew the ire from animal rights and welfare supporters,[91] the Court could have certainly taken the impact of their opinion further by making it impossible to criminalize depictions of animal cruelty. Instead, the Court leaves the opportunity for Congress to modify the statute in a manner consistent with the Constitution.

Congress accepted this opportunity and modified Section 48 in several significant ways. First, Congress narrowed the reach of the statute by altering the language to only criminalize animal crush videos, instead of criminalizing more general depictions of animal cruelty.[92] In addition to adding more specific language, Congress narrowed the statute to *obscene* animal crush videos.[93] Congress also removed the exceptions clause from the statute, and expressly listed the hypotheticals posed by the majority in

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85. *Id.*
86. *Id.* at 1597.
87. *Id.* at 1595.
88. *Id.* at 1597.
89. *Id.* at 1601.
90. *Id.* at 1592.
91. *See, e.g.*, Stanley Fish, *The First Amendment and Kittens*, N.Y. TIMES, April 26, 2010, http://opinionator.blogs.nytimes.com/2010/04/26/the-first-amendment-and-kittens/#more-47485; Simon, *United States v. Stevens*, STUBBORN FACTS, (April 26, 2010, 9:59 PM), http://stubbornfacts.us/law/united_states_v_stevens.
92. 18 U.S.C. § 48(a) (2000 & Supp. 2010).
93. § 48(a)(2).

Stevens as exceptions.[94] For instance, Congress exempted hunting, trapping, fishing, the slaughter of animals for food, and "customary and normal veterinary or agricultural husbandry practices . . . ."[95] Congress's final modification was to enhance the punishment for violating the statute to possible imprisonment for not more than seven years.[96]

V. THE IMPORTANCE OF THE EXCEPTIONS CLAUSE

The majority's decision to invalidate the statute on overbreadth grounds despite the presence of the exceptions clause raises interesting concerns about the effectiveness of an exceptions clause to protect against statutory overbreadth, especially when used outside of the obscenity context. The rest of this Note will explore the impact of the *Stevens*' overbreadth analysis on *Miller* exceptions clauses, and suggest concerns that legislative bodies should be aware of when drafting future legislation or protecting existing statutes that advocate for new categories of unprotected speech.

A. Relevance

Before discussing the constitutional weight the exceptions clauses have as a narrowing function, an important consideration, regardless of the legal issue presented, is whether discussing or resolving the issue is actually of any practical importance. Discussion of this issue is important for several reasons. First, if a legislature plans to expressly advocate for a new category of unprotected speech by creating regulations modeled after the *Miller* obscenity standard, the Supreme Court's analysis in *Stevens* may raise serious concerns for an overbreadth challenge to their statute. A successful overbreadth challenge effectively invalidates a test case before arguing the merits of a new unprotected category of speech.

Second, *Stevens* presents an instance in Supreme Court jurisprudence where the overbreadth doctrine was not used as "a last resort,"[97] but instead

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94. Congress's changes to Section 48 present an interesting issue. Congress not only addressed the Supreme Court's overbreadth concerns by exempting the hypotheticals posed by the Court, but Congress also added an obscenity requirement to the statute. An interesting debate would be whether Congress really needed to enhance the exceptions clause with specific exceptions after already adding an obscenity requirement to the statute. The Court already recognizes the obscenity standard as constitutional, and it seems that the very act of adding this requirement should narrowly tailor the statute enough to prevent overbreadth invalidation of the statute. In effect, the new version of Section 48 is simply an obscenity statute that focuses on the narrow area of animal crush videos. Arguably, the new version of Section 48 is overly cautious and the obscenity element would be sufficient.

95. § 48(e)(1)(A).

96. § 48(d).

97. United States v. Stevens, 130 S. Ct. 1577, 1593 (2010) (quoting L.A. Police Dept.

was possibly a strategic remedy to avoid traditional First Amendment analysis of categories of speech. Although speculative, *Stevens* could pave the way for more frequent usage of the overbreadth doctrine, and legislatures need to be aware of this possibility when drafting regulations. In particular, lower courts may consider the overbreadth treatment of Section 48 in *Stevens* as the Supreme Court's willingness to expand usage of the overbreadth doctrine beyond a remedy of last resort. Since overbreadth challenges are an important exception to standing, the Court's treatment may encourage more overbreadth lawsuits in the future.[98]

Finally, there are some existing statutes, although limited in number, which could presently be at risk for invalidation because the statutes are outside the obscenity context yet borrow language from the obscenity standard. The exceptions clause may be unable to rescue these statutes from future overbreadth challenges. The Court's treatment accentuates the value of narrowly drafting legislation that affects First Amendment rights.

B. The Exceptions Clause's Failure to Protect from Overbreadth

The practical effect of the holding in *Miller* has been for legislatures criminalizing obscenity to adopt the *Miller* standard verbatim into their statutory scheme.[99] By adopting the *Miller* standard, these states are protecting their obscenity statutes from all grounds of constitutional invalidation, including overbreadth. However, in *Stevens*, the Court refused to allow the exceptions clause's language in *Miller* to prevent overbreadth in the context of a statute regulating depictions of animal cruelty.

The holdings of *Miller* and *Stevens* raise an interesting conflict. Simply put, why does the Supreme Court dismiss the importance of the exceptions clause in the overbreadth analysis of *Stevens*, but allow it to be an essential element of the obscenity standard? Certainly, the exceptions clause's narrowing function could have been ignored in *Stevens* if the Court engaged in traditional strict scrutiny analysis and held that Section 48 fails strict scrutiny.

But instead, by applying overbreadth analysis, the Court examines whether the statute's language is precise enough to satisfy constitutional scrutiny. The "overbreadth of a statute must not only be real, but

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v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999)) (internal quotation marks omitted).

98. As a practical matter, an argument relying solely on overbreadth seems less convincing without an actual defendant whose behavior resulted in prosecution under the statute, especially when the defendant's behavior seems outside the original intent of the statute.

99. *See, e.g.*, ALA. CODE § 13A-12-200.1(17) (2010); FLA. STAT. § 847.001(10) (2010); IDAHO CODE ANN. § 18-4101(A) (2011); LA. REV. STAT. ANN. § 14:106(A)(3)(b) (2010).

substantial as well, judged in relation to the statute's plainly legitimate sweep."[100] The Court held that the statute is overbroad because other protected speech will hypothetically fall within the statute's scope regardless of whether depictions of animal cruelty are protected. Although the overbreadth doctrine is used as a last resort to invalidate a statute, the Court in *Stevens* seemed to ignore this principle and invalidated the statute as overbroad regardless.

It is true, as Justice Roberts notes, that the Court has never officially sanctioned the *Miller* exceptions clause for use outside of obscenity. But, that explanation does not satisfactorily explain why the language of the exceptions clause carries less significance for narrowly tailoring Section 48 than the language does in an obscenity statute. Therefore, this Note proposes several possible explanations that could explain why the exceptions clause's language in the obscenity context is protected from overbreadth invalidation, but the language is insufficient to protect Section 48.

1. Differences in Statutory Subject Matters

One suggestion is that there are fundamental differences in statutory subject matters—obscenity versus depictions of animal cruelty—that affect the strength of the exceptions clause's narrowing function. The majority's analysis in *Stevens* seems to support this suggestion. In other words, the exceptions clause is less successful at protecting from overbreadth in depictions of animal cruelty because the statute is inherently more likely to regulate legitimate activity outside the scope of the statute. Thus, a more specific exceptions clause is required to protect the statute from overbreadth invalidation.

Supporting this suggestion, the majority in *Stevens* listed several hypothetical forms of speech covered by the statute irrespective of the exceptions clause, and declared that the statute was not narrowly tailored enough to make distinctions between speech intended for regulation, like dogfighting, and speech not intended for regulation, like bullfighting.[101] Although Justice Alito was the lone dissenter in *Stevens*, he posed many compelling responses to counter almost all of the Court's hypotheticals demonstrating Section 48's overbreadth—Alito's most convincing point being that many of the Court's hypotheticals easily qualify for Section 48's exceptions clause.[102] By accepting Alito's criticisms as plausible, there must be other explanations for the Court's dismissal of the exceptions

100. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

101. *Stevens*, 130 S. Ct. at 1590.

102. *See supra* text accompanying notes 76–89.

clause that are not stated in the opinion, rather than just a simple difference in statutory subject matter.

2. The Limited Narrowing Function of the Exceptions Clause

One possible explanation for the failure of the exceptions clause to protect against overbreadth may simply be that this Note places too much weight on the narrowing function of the exceptions clause—both in the obscenity and the depictions of animal cruelty contexts. Instead, the other elements of the obscenity standard, in conjunction with the exceptions clause, narrowly tailor it enough to protect from overbreadth. This may explain why the majority felt the need to state that *Miller* did not determine that the exceptions clause "could be used as a general precondition to protecting *other* types of speech in the first place."[103] For this explanation to be logical in the overbreadth context, the other elements of the *Miller* obscenity standard must have a greater narrowing function than the other elements of the animal cruelty statute. By comparing the language of the obscenity standard with Section 48, this explanation is not entirely convincing.

The *Miller* obscenity standard is comprised of the following three components: (1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) whether the work taken as a whole lacks serious literary, artistic, political, or scientific value.[104]

The elements of Section 48 can be summarized into the following three components: (1) someone must knowingly create, possess, or sell a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain; (2) depictions that have serious religious, political, scientific, educational, journalistic, historical, or artistic value are exempted from criminalization; and (3) a definition section that defines depictions of animal cruelty as including "a living animal [that] is intentionally maimed, mutilated, tortured, wounded, or killed, if that conduct violates federal or state law where the creation, sale, or possession takes place."[105] A comparison between the obscenity standard and Section 48 demonstrates that, although the components have subject-matter differences, both, at least, facially seem narrowly tailored to approximately the same degree.

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103. *Stevens*, 130 S. Ct. at 1591.

104. 413 U.S. at 24.

105. *Stevens,*130 S. Ct. at 1582–83 (citations and internal quotation marks omitted).

The first element of Section 48 does not really narrow the statute's reach except that it provides both a jurisdictional basis for the federal government to legislate and also a mens rea requirement.[106] However, the next component of Section 48, the exceptions clause, does narrow the scope of the statute. In fact, the exceptions clause of Section 48 is more narrowly tailored than the obscenity standard in this regard because it includes additional exceptions by exempting material with religious, educational, journalistic, and historical value.

The only exception not included in Section 48 but included in the obscenity standard is "serious literary . . . value."[107] Arguably, this exception is substantively covered with the journalistic and artistic value exceptions in Section 48. Therefore, Section 48 seems more narrowly tailored than the obscenity standard because it exempts more behavior from regulation. Furthermore, the exempted categories in both standards are equally as ambiguous by not listing explicit definitions or examples for the categories.[108] The only possible explanation for the exceptions clause having a greater narrowing function in the obscenity standard than in Section 48 is that the obscenity standard expressly asks courts to consider the work "taken as a whole," while Section 48 lacks this language.[109] However, the Court in *Stevens* never acknowledged this difference between the two exceptions clauses.[110]

Outside of the obscenity and Section 48's exceptions clauses, the other components of Section 48 and the obscenity standard are facially tailored to approximately the same degree. The third element of the animal cruelty statute expressly defines depictions of animal cruelty, which basically serves the same function as the first and second elements of the obscenity standard by defining the targeted behavior. The behavior targeted in the obscenity standard is patently offensive "sexual conduct specifically defined by the applicable state law"[111] that an average person applying community standards would find the work, taken as a whole, to "appeal[] to the prurient interest."[112] Section 48 is slightly broader than the obscenity standard because it allows depictions of animal cruelty to be defined by either federal law or state law where the creation, sale, or possession of the videos takes place. Conceivably, the federal government has at least a

106. *Id.* at 1582.

107. *Id.* at 1591 (quoting Miller v. California, 413 U.S. 15, 24 (1973)).

108. *See* Miller v. California, 413 U.S. 15, 24 (1973); *see also Stevens*, 130 S. Ct. at 1583.

109. *Miller*, 413 U.S. at 24; *Stevens*, 130 S. Ct. at 1583.

110. *See id.*

111. *Miller*, 413 U.S. at 24.

112. *Id.*

couple of choices of law to apply and could shop around for animal cruelty definitions that are more favorable to the prosecution's case. Conversely, the obscenity standard only allows the court to use the definition of sexual conduct defined by "applicable state law."[113] In this respect, Section 48 is not as narrowly tailored as the obscenity standard. Nonetheless, Section 48 is still dependent on the facts of the offense, specifically the number of jurisdictions involved, which restrains the government's complete discretion to forum shop for a favorable definition in both the standards.

Furthermore, the obscenity standard has the amorphous requirement of "applying contemporary community standards"[114] to determine whether the work "appeals to the prurient interest."[115] This standard is not any clearer than the express language in Section 48, which describes depictions of animal cruelty as "a living animal [that] is intentionally maimed, mutilated, tortured, wounded, or killed."[116] While the obscenity standard and Section 48 are not identical in many important respects, a facial examination of their components demonstrates that Section 48 appears to be as narrowly tailored as the obscenity standard.

3. The Exceptions Clause is Meaningless

A third explanation for the Court's rejection of the exceptions clause in Section 48, although unlikely, is that the narrowing function of *Miller* standard's exceptions clause is insignificant in *both* the obscenity context and also in any other context in which it is used. Simply put, the exceptions clause is too general to significantly narrow the statute. If this is the case, then the logical step would be to drop the exceptions clause altogether from the obscenity standard, which has not happened.

4. Different Standards of Overbreadth Analysis

A fourth possibility is that the Court is applying overbreadth analysis to protected categories of speech more severely than unprotected categories of speech. In other words, the Court was more critical in the facial challenge of Section 48 because the Court found that Section 48 targets protected speech. Since obscenity is an unprotected category of speech, the Court is likely to be more favorable toward the statute and not find it overbroad. This explanation, if true, has serious repercussions for First Amendment overbreadth challenges in the future. For First Amendment cases, it would be strategic for individuals challenging unprotected

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113. *Id.* at 40 (citations omitted).
114. *Id.* at 24.
115. *Id.*
116. *Stevens*, 130 S. Ct. at 1582.

categories of speech always to argue statutory overbreadth if the Court is willing to apply overbreadth with more scrutiny and not as a last resort.

5. Strategic Judicial Behavior

A final possibility was that the Supreme Court wanted to invalidate Section 48, but wanted to avoid doing so with strict scrutiny review. Put differently, "a void for overbreadth holding is often taken to be perhaps laudable but wholly result-oriented handiwork of a Court acting 'as if it had a roving commission' to find and cure unconstitutionality."[117] By analyzing with strict scrutiny, the majority may have to decide whether animal cruelty is a compelling government interest.[118] The overbreadth doctrine was a convenient remedy to invalidate the statute without finding that animal cruelty fails strict scrutiny review for not being a compelling government interest.[119]

Judge Posner calls this type of judicial decision making the "strategic theory of judicial behavior," which is also referred to as the positive political theory of law.[120] This explanation "hypothesizes that judges do not always vote as they would if they did not have to worry about the reactions to their votes of other judges . . . ."[121] The strategic theory is a goal-oriented theory of judicial motivation that may explain the *Stevens* decision.

Justice Roberts previously stated that he has a strong preference for unanimity in Supreme Court opinions,[122] and although *Stevens* was one Justice short of that goal, it is plausible that the overbreadth analysis was a strategic decision to enhance the number of Justices to sign on to the majority opinion.[123] The application of strict scrutiny review to the animal cruelty statute could provoke more disagreement among the Justices than simply invalidating the statute as overbroad.

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117. *The First Amendment Overbreadth Doctrine*, *supra* note 24, at 846.

118. Although strict scrutiny is a tough standard to satisfy, it is not an insurmountable standard and some restrictions on speech survive strict scrutiny review. Brown v. Entm't Merchs. Ass'n., 131 S. Ct. 2729 (2011) (Breyer, J., dissenting).

119. Of course, the Court is still able to find the statute fails strict scrutiny review for not being narrowly tailored or the least restrictive means for achieving the statute's interest.

120. RICHARD POSNER, HOW JUDGES THINK 29 (2008).

121. *Id.*

122. *See* Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 17, 2010, *available at* http://www.nytimes.com/2010/11/18/us/18rulings.html.

123. This explanation operates under a presumption that the Justices are political actors and that their decision making is influenced by more than just application of legal principles. Some influences could include strategic bargaining and political considerations.

C. Usefulness of the Exceptions Clause

As the discussion in the previous section demonstrates, it is difficult to decipher exactly why the statutory exceptions in Section 48 failed to protect the statute from overbreadth, unless one accepts the validity of the majority's overbroad hypotheticals in its entirety—and even then, it seems unusual that the majority applied the overbreadth doctrine instead of traditional strict scrutiny analysis. As presented in the previous section, there may be several alternative explanations to explain the application of overbreadth analysis, but there is no clear answer. However, there is a clear message from *Stevens*—the usefulness of the *Miller* exceptions clause is diminished outside of the obscenity context. This message was reinforced in *Brown v. Entertainment Merchants Association*.[124] Therefore, an important consideration is whether legislatures should even bother modeling future exceptions clauses after the obscenity standard.

If advocating for a new category of unprotected speech, exceptions clauses should still be used, but the clauses should be more specific than the obscenity standard's clause. Exceptions clauses are an important technique to limit the scope of a statute. *Stevens* indicates that legislatures must extend their thinking beyond applying a general exceptions clause like *Miller*, and instead anticipate examples of speech that a court may advance as inappropriately regulated by the statute. The *Stevens* decision enforces the importance for legislatures to develop highly specific exceptions clauses, along with other tactics, to narrowly tailor statutes that may affect First Amendment rights. By doing so, legislative bodies can effectively ensure that their arguments for a new unprotected category of speech are viewed on the merits, and not avoided by a court applying the overbreadth doctrine. Further, "clear guidelines formulated by a responsible policymaking body are more persuasive of governmental interest in intervention than the situational judgment of an administrator or enforcement agent acting perhaps with narrow regulatory aims."[125] A narrowly written statute bolsters the argument in support of the government's infringement on speech.

From a normative perspective, drafting exceptions clauses with more specific language than the *Miller* standard should be a priority regardless of a court's review. Exceptions clauses are important for fair and precise laws, and precise laws are easier to follow for the public. For law enforcement, precise laws are easier to enforce. Narrowly tailored laws limit the discretion and potential corruption of overzealous or improperly-motivated

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124. *See* Brown v. Entm't Merchs. Ass'n., 131 S. Ct. 2729, 2761–71 (2011) (Breyer, J., dissenting).

125. *The First Amendment Overbreadth Doctrine*, *supra* note 24, at 857–58.

law enforcement. The First Amendment is often lauded as the most important protection under the United States Constitution,[126] so clear regulations are especially important in this sensitive area of the law.

VI. CONCLUSION

In conclusion, the majority opinion in *United States v. Stevens* may pose serious ramifications for current and future legislatures that advocate for a new category of unprotected speech. However, as this Note suggests, *Stevens*'s impact extends beyond the Supreme Court's reluctance to create new categories of unprotected speech.

The Supreme Court's use of overbreadth analysis in *Stevens* undermines the importance of an exceptions clause modeled after the *Miller* obscenity standard when it is used in a nonobscenity statute. Future legislatures that advocate for new unprotected categories of speech should be wary of adopting the exceptions clause from the *Miller* obscenity standard. Instead, legislatures should narrowly tailor their statutes with more precise language that will prevent a court from creating hypotheticals to suggest that the statute is overbroad. By doing so, legislatures will avoid being prescribed the "strong medicine" of overbreadth and force courts to examine the merits of arguments advocating for a new category of unprotected speech.

126. The fact that the Supreme Court allows an overbreadth challenge as a unique exception to standing demonstrates the high level of respect for the First Amendment. "[T]his departure from the normal method of judging the constitutionality of statutes [] find[s] justification in the favored status of rights to expression and association in the constitutional scheme." *Id.* at 852.