ASHCROFT V. FREE SPEECH COALITION: CAN WE ROAST THE PIG WITHOUT BURNING DOWN THE HOUSE IN REGULATING "VIRTUAL" CHILD PORNOGRAPHY?†

*If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.**

—Justice Oliver Wendell Holmes

I. INTRODUCTION

The First Amendment's[1] guarantee of free speech is not limitless.[2] The Supreme Court has carved out a number of categories of expression that do not receive its protection.[3] Child pornography is one of these

† Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

Respondent's Brief at 3, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795) (quoting ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 411 n. 74 (1986)). The Commission concluded that "legislators should not pass child pornography legislation designed to burn the house to roast the pig." *Id. See also* Butler v. Michigan, 352 U.S. 380, 383 (1957).

"Child pornography" is defined as: "material depicting a person under the age of 18 engaged in sexual activity." BLACK'S LAW DICTIONARY 1181 (7th ed. 1999). "Sexual activity" is defined as: "sexual intercourse" or "physical sexual activity that does not necessarily culminate in intercourse." *Id.* at 1379.

* United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

1. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." *Id.*

2. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (recognizing that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem").

3. *Id. See also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561-66 (1980) (holding that false or misleading commercial speech is without First Amendment protection); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding that speech aimed at producing imminent lawless action is not protected); Roth v. United States, 354 U.S. 476 (1957) (holding that obscenity is not protected speech); Beauharnais v. Illinois, 343 U.S. 250 (1952) (holding that a libelous publication does not receive constitutional protection.). *See also* ALEXANDER LINDEY AND MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS 1-378 (2d ed. 2002) (discussing the background and development of the regulation of speech based on a publication's content).

categories of expression that fall outside the protection of the Constitution and may be lawfully prohibited.[4] Despite its prohibited status the creation and distribution of child pornography continues to be a growing national problem.[5] The adverse effect it has on society is without doubt.[6]

Accordingly, the United States Congress has made repeated attempts to better enable law enforcement to strike at child pornography distribution networks.[7] In 1996, Congress took the next step by passing the Child Pornography Prevention Act of 1996 (CPPA).[8] The CPPA ex-

4. New York v. Ferber, 458 U.S. 747 (1982) (holding that child pornography is not entitled to First Amendment protection regardless of whether it is obscene under the *Miller* test). The *Miller* test requires that the government prove that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary artistic, political, or scientific value. Miller v. California, 413 U.S. 15, 24 (1973). *See* Sandra Zunker Brown, Note, *Supreme Court Review: First Amendment – Nonobscene Child Pornography and its Categorical Exclusion from Constitutional Protection:* New York v. Ferber, 73 J. CRIM. L. & CRIMINOLOGY 1337 (1983). The note discusses the Court's holding in *Ferber*, and criticizes the Court's decision to create a new category of speech that is exempted from First Amendment protection. *Id.*

5. *See* Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before Senate Comm. on the Judiciary, 104th Cong. 16 (1996) (prepared testimony of Kevin DiGregory, Deputy Assistant Attorney General, Dep't of Justice). The testimony demonstrated that there were more child pornography cases in 1995 than in any previous year. *Id.* S. REP. NO. 104-358, at 12 (1996) (stating that child pornography is estimated to be an $8 to $10 billion a year business as well as the third biggest money maker for organized crime).

6. *Ferber*, 458 U.S. at 758 n.9 (quoting S.REP.NO. 95-438, at 5 (1977), U.S. Code Cong. & Admin. News 1978, p. 42) ("The use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole."). The Court held that a state has a compelling interest in safeguarding the physical and psychological well-being of a minor because "a democratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens." *Id.* at 757. The Court went on to write that "legislative judgement, as well as the judgement found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Id.* at 758.

7. *See, e.g.*, Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (codified as amended at 18 U.S.C. §§ 2251-2253 (1977)). This law prohibited the production of any visual depiction of a minor under the age of sixteen engaging in sexually explicit conduct with knowledge that the depiction was or would be transported in interstate commerce. *Id.* Children Protection Act of 1984, Pub.L. No. 98-292, 98 Stat. 204 (codified as amended in 18 U.S.C. §§ 2251-2253 (1984)). This law raised the prohibited age to eighteen and eliminated the requirement that the material be produced for sale. *Id. See also* Am. Library Ass'n. v. Barr, 956 F.2d 1178, 1181-85 (D.C. Cir.1992) (discussing the history of national anti-child pornography legislation).

8. Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 18 U.S.C.). The sections of the Child Pornography Prevention Act at issue in *Ashcroft v. Free Speech Coalition* are codified in 18 U.S.C § 2256 which reads:

Definitions for chapter

For the purposes of this chapter, the term –

(8) "child pornography" means any visual depiction, including any photograph,

panded the definition of child pornography to include "virtual" child pornography.[9] It also expanded the definition to include material that is pandered as child pornography.[10] Several states have enacted similar statues aimed at prohibiting these types of child pornography.[11] Congress pointed to the negative secondary effects of "virtual" child pornography as justification for its prohibition.[12] Unfortunately, this expansion

> film, video, picture, or computer or computer-generated image or picture, whether made or produce by electronic, mechanical, or other means, of sexually explicit conduct, where –
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> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
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> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
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> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct;
>
> . . .

18 U.S.C. § 2256 (1996).

9. 18 U.S.C. § 2256(8)(B). The use of the phrase "appears to be" is directly aimed at "virtual" child pornography that is created without the use of any actual children. *Id.* Congress in its findings stated that "new photographic and computer imaging technologies make it possible to produce . . . visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. § 2251 (Supp. V 1999) (Finding 5).

10. 18 U.S.C. § 2256(8)(D); *see Free Speech*, 535 U.S. at 256 (stating that "even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie"). The Court also points out that the legislative findings do not include any "evils" posed by images simply pandered as child pornography. *Id. See supra* note 7 and accompanying text. "Pandering" is defined as "[t]he act or offense of selling or distributing textual or visual material (such as magazines or videotapes) openly advertised to appeal to the recipient's sexual interest." BLACK'S LAW DICTIONARY 1135 (7th ed. 1999).

11. *See* MINN. STAT. ANN. § 617.246(f)(iii) (2001) (defining pornographic work as a visual depiction which "is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct"); MO. ANN. STAT. § 573.035 (2003) (prohibiting depictions that "portrays what appears to be a minor as a participant or observer of sexual conduct"); DEL. CODE ANN. tit. 11 § 1103(e) (2000) (defining child as "any individual who is intended by the defendant to appear to be 14 years of age or less"); ARIZ. REV. STAT. ANN. § 13-3555 (2000) (prohibiting persons involved in sexual conduct "to masquerade as a minor," as well as prohibiting the production and distribution of depictions "whose text, title or visual representation depicts a participant in any exploitative exhibition or sexual conduct as a minor even though any such participant is an adult"). England and Canada have changed their child pornography laws to include depictions that appear to be children. *See* Protection of Children Act, 1978, § 7(8), amended by Criminal Justice and Public Order Act, 1994, § 84(3)(c)(8)(Eng.); Criminal Code, R.S.C., ch. C-46, § 163.1(1)(a)(I)(2003)(Can.).

12. *See* 18 U.S.C. 2251 (Supp. V 1999) (Finding 8). The finding states that:

> The effect of visual depictions of child sexual activity on a child molester or pedophile

of the definition of child pornography runs afoul of the First Amendment guarantee of freedom of speech.[13]

In *Ashcroft v. Free Speech Coalition*, the U.S. Supreme Court considered the constitutional validity of the portion of the CPPA that expanded the definition of child pornography to include images created using no actual children.[14] In striking down the statute, the Supreme Court held that the "appears to be"[15] and "conveys the impression"[16] sections of the CPPA were unconstitutional infringements upon the First Amendment.[17]

This Note will explore the struggle in the area of child pornography between the state's legitimate interest in the protection of children and the First Amendment's guarantee of free speech.[18] Part II provides a brief history of the free speech doctrine as related to the area of child pornography prevention.[19] Part III discusses the circuit split, as well as the facts, procedural history, and the holding of the Supreme Court.[20] Finally, Part IV will examine the effect of the Court's interpretation of the statute as unconstitutional, explain why the decision was correct, and

> using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer. . . .

Id.

13. *See* U.S. CONST. amend. I; *supra* note 1 and accompanying text; *Free Speech*, 535 U.S. at 234 (holding the CPPA unconstitutional on First Amendment grounds); Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439 (1997). Professor Burke argues that the states' objectives in suppressing virtual child pornography are not sufficiently compelling nor narrowly tailored to withstand a First Amendment challenge. *Id*. Burke points out that "virtual pornography may encourage, promote, persuade, or influence pedophiles to engage in illegal activity with children . . . but the conduct is neither sufficiently imminent nor impelling to constitute incitement." *Id.* at 461. *See also* Gary Geating, *Free Speech Coalition v. Reno*, 13 BERKLEY TECH L.J. 389 (1998) (arguing that the CPPA bans an entire category of speech which should not be done unless the material is obscene). *But see* Bill Sanford, *"Virtually" a Minor: Resolving the Potential Loophole in the Texas Child Pornography Statute*, 33 ST. MARY'S L.J. 549 (2002) (arguing that the power to regulate criminal activity resides with the states regardless of the Supreme Court's handling of the CPPA).

14. *Free Speech*, 535 U.S. 234. *See* Sue Ann Mota, *The U.S. Supreme Court Addresses the CPPA and COPA in* Ashcroft v. Free Speech Coalition *and* Ashcroft v. American Civil Liberties Union, 55 FED. COMM. L.J. 85 (2002) (discussing the two cases and their holdings).

15. 18 U.S.C. § 2256(8)(B); *see supra* note 8 and accompanying text.

16. 18 U.S.C. § 2256(8)(D); *see supra* note 8 and accompanying text.

17. *Free Speech*, 535 U.S. at 258 ("The First Amendment requires a more precise restriction. For this reason, § 2256(8)(D) is substantially overbroad and in violation of the First Amendment.").

18. *See* Sections II-IV.

19. *See infra* notes 21-79 and accompanying text.

20. *See infra* notes 79-116 and accompanying text.

look at Congress' recent efforts at new legislation to replace the CPPA.[21]

II. BACKGROUND

A. Regulations on Speech: Content-Neutral v. Content-Based

1. Content-Neutral Restrictions

The First Amendment's guarantee of free speech is not absolute and in certain circumstances may be limited through content-neutral or content-based restrictions.[22] Content-neutral restrictions allow lawmakers to legitimately limit speech based on the secondary effects that the speech may have.[23] Often in the form of "time, place, and manner restrictions," these laws are not concerned with the subject matter of the speech, but rather they serve a purpose unrelated to the content of the speech.[24] The objectives of such statutes can be justified without reference to the restricted speech's content, and the restrictions are subsequently deemed to

21. *See infra* notes 129-229 and accompanying text.

22. *See Chaplinsky*, 315 U.S. at 571-72; *supra* notes 1-3 and accompanying text. *See also*, Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five Step Analytical Framework*, 29 SW. U. L. REV. 223, 226-234 (2000) (describing a five step analytical framework for free speech claims including the difference between content-based and content-neutral restrictions and the tests to apply to each).

23. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989). To determine whether a regulation is content neutral, "the principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 791. If the regulation serves a purpose unrelated to the content of the expression then it is deemed neutral even if it has an incidental effect on some speech but not others. *Id. See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (upholding an ordinance which prohibited adult motion picture theatres within 1,000 feet of residential zones, churches, parks, or schools on basis that regulation was content-neutral because it was aimed at the secondary effects of such theatres on the surrounding community).

24. *See Ward*, 491 U.S. at 791. The Court in *Ward* stated, "the government may impose reasonable restriction on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id. See also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). Stone points out that the Supreme Court in analyzing content-neutral restrictions has "articulated at least seven seemingly distinct standards of review." *Id.* at 48-49 These can be compiled into three distinct catagories: deferential, intermediate, and strict review. *Id.* at 49-50. Under the deferential standard of review the Court does not seriously examine the substantiality of the governmental interest or the alternative means that could be used and therefore "invariably upholds the challenged restriction." *Id.* at 50-51. Under the intermediate standard of review the Court looks seriously at the governmental interest and the alternative means and upholds the restriction only if the interest is compelling and any less restrictive alternative would seriously undermine the interest. *Id.* at 52-53. In applying the strict review of a content-neutral restriction the Court looks closely at the interest and alternatives and upholds it only if the interest is compelling and the restriction is necessary to achieve the interest. *Id.* at 53.

be content-neutral.[25] Such regulations are valid under the First Amendment if they advance an important governmental interest unrelated to the suppression of speech and do not burden substantially more speech than necessary to further those interests.[26]

2. Content-Based Restrictions

In contrast to content-neutral regulations, content-based regulations specifically target the substance of a particular form of speech for regulation.[27] Such restrictions seek to prohibit the particular words, ideas, or messages of a speaker, and therefore are subject to strict scrutiny.[28] To survive a constitutional challenge, a content-based restriction must be necessary to serve a compelling state interest and must be narrowly drawn to achieve that end.[29]

B. The Regulation of Child Pornography

1. Legislative Attempts to Eliminate Child Pornography Prior to the CPPA

a. The Protection of Children Against Exploitation Act of 1977

Congress' first attempt to deal with the problem of child pornography came in the form of the Children Against Exploitation Act of 1977.[30] The statute made illegal the use of children under the age of six-

25. *See Renton*, 475 U.S. at 48.

26. *See* Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180 (1997) (upholding a content-neutral regulation requiring broadcast companies to carry local stations on their systems).

27. "Content-based restriction" is often defined as "[a] restraint on the substance of a particular type of speech." BLACK'S LAW DICTIONARY 314 (7th ed. 1999).

28. *See* Cohen v. California, 403 U.S. 15 (1971) (holding that punishment for the expression "Fuck the Draft" was impermissible content-based regulation of free expression); *see also* Shana Weiss, Note, *A Penny for Your Thought: Revisiting* Commonwealth v. Power, 17 LOY. L.A. ENT. L. REV. 201, 224 (1996) (stating that the desire of government "[t]o shape public opinion by targeting and burdening disfavored speakers . . . [i]s flatly contrary to constitutional values, and that is why content-based restrictions always trigger strict scrutiny").

29. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (holding that the First Amendment was not violated when a rival union was denied access to teachers' mailboxes).

30. Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-2253). The Act was passed by Congress pursuant to its findings that child pornography had become a highly organized multimillion-dollar industry that exploited thousands of children. *See* S. REP. NO. 95-438, at 5 (1977). For a discussion of the history of legislative treatment of child pornography see generally Burke, *supra* note 13, at 449-452; Sarah Sternberg, Note, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antithesis*, 69 FORDHAM L. REV. 2783, 2795-

teen in the production of sexually explicit material to be distributed in interstate commerce.[31] The legislation did not address the mere trading of child pornography, but rather only regulated its commercial sale.[32] Also, the material had to be obscene in order to be criminalized under the statute.[33]

b. The Child Protection Act of 1984

Congress again addressed the issue of child pornography in 1984 with the passage of the Child Protection Act.[34] The Act was passed partially in response to the ineffectiveness of the previous legislation, which produced only one conviction under the production prohibition.[35] The 1984 Act raised the protected age limit from sixteen to eighteen years of age as well as eliminating the requirement that the material be obscene before its production could be found to be criminal.[36] Also, under this act, the material need not be created or distributed for the purpose of a commercial transaction.[37]

c. The Child Sexual Abuse and Pornography Act of 1986

The next piece of legislation came in 1986 when Congress prohib-

2798 (2001); Wade T. Anderson, Comment, *Criminalizing "Virtual" Child Pornography under the Child Pornography Act: Is it Really What it "Appears to Be?"* 35 U. RICH. L. REV. 393, 396-98 (2001).

31. 18 U.S.C. § 2251 (1991).

32. *Id.* The Act also extended the Mann Act to the interstate transportation of juvenile males and females for the primary purpose of prostitution, as well as adding a number of prohibited sexual acts under the statute. *Id. See* White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1994)); *see also* Burke, *supra* note 13, at 449.

33. Pub. L. No. 95-225, 92 Stat. 7. For a piece of material to be obscene it must be determined that: (1) the average person, applying contemporary community standards would find that the work, taken as a whole appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the work taken as a whole lacks serious literary, artistic, political, or scientific value. *See* Miller v. California, 413 U.S. 15, 24 (1973); Roth v. United States, 354 U.S. 476, 489 (1957).

34. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251-2253).

35. *See* ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 596-98, at 604 (1986). The Attorney General's Report called for tough federal enforcement of the child pornography law. *Id.* at 77-79. *See also*, Burke, *supra* note 13, at 449.

36. Child Protection Act of 1984 § 4. The elimination of the requirement that the material be obscene was facilitated by the Supreme Court's holding in *Ferber* that child pornography was not protected speech. *See* New York v. Ferber, 458 U.S. 747 (1982).

37. *See* United States v. Anderson, 803 F.2d 903, 906 (7th Cir. 1986) (stating that Congress intended coverage under the Child Protection Act to individuals who distributed materials without commercial motive); United States v. Smith, 795 F.2d 841, 846 (9th Cir. 1986) (holding that Congress did not intend to exempt from the statute those who did not distribute).

ited advertisements for child pornography in the Child Sexual Abuse and Pornography Act of 1986.[38] In the same term, the Congress also passed legislation subjecting pornographers to personal liability for injuries inflicted upon the child models.[39]

d. The Child Protection and Obscenity Enforcement Act of 1988

Congress first addressed the connection between child pornography and emerging computer technology in the Child Protection and Obscenity Enforcement Act of 1988.[40] With this statute Congress prohibited the use of computers to transport, distribute, or receive child pornography.[41]

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38. Pub. L. No. 99-628, 100 Stat. 3510 (codified as amended in scattered sections of 18 U.S.C.) (banning advertisements of child pornography) reads:

> (c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering –
>
> (A) to receive, exchange, buy, produce, display, distribute, or reproduce any visual depiction, if the production of such a visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or
>
> (B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct; shall be punished as provided under subsection (d).

Id.

39. Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783 (codified as amended at 18 U.S.C.S § 2255 (1994 Supp. IV 1998)). Which reads:

> Section 2255. Civil Remedy for personal injuries
>
> (a) Any minor who is a victim of a violation of section . . . 2251 [or] . . . 2252 . . . of this title and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee. Any minor as described in the preceding sentence shall be deemed to have sustained damages of not less than $50,000 in value.

Id.

40. Pub. L. No. 100-690, 102 Stat. 4486 (1988) (codified as amended at 18 U.S.C.S § 2252 (1991 & Supp. 2003)). *See* John C. Scheller, Note, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 1009-1011 (1994).

41. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4486. Which reads in pertinent part:

> (a) Sexual Exploitation of Children – Paragraph (2) of subsection 2251(c) of title 18, United States Code, is amended by inserting "by any means including by computer" after "interstate or foreign commerce" both places it appears.
>
> (b) Material Involving Sexual Exploitation of Children – Subsection 2252(a) of title 18, United States Code, is amended by inserting "by any means including by computer" after "interstate or foreign commerce" each place it appears.

Id.

2. Judicial Treatment of Child Pornography

a. *New York v. Ferber*[42]

In 1982, the Supreme Court first dealt directly with the issue of child pornography in The case of *New York v. Ferber*.[43] In *Ferber*, a bookstore owner was convicted under a New York statute which prohibited the promotion of a sexual performance by a child under the age of sixteen.[44] The defendant was charged after he sold, to an undercover police officer, two films depicting boys masturbating.[45] The statute lacked any requirement that the prohibited material be obscene.[46] The Appellate Division of the New York Supreme Court affirmed the conviction, which was subsequently reversed by the New York Court of Appeals on the ground that the statute violated the First Amendment because it was overbroad.[47] The United States Supreme Court granted certiorari to resolve the issue of whether material depicting children engaged in sexually explicit conduct can be prohibited regardless of whether the material

42. New York v. Ferber, 458 U.S. 747 (1982).

43. *Id.*

44. *Id.* at 752. Passed in 1977 by the New York Legislature, Article 263 of the Penal Law read:

> A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance . . . A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

N.Y. Penal Law, Art. 263 (Mckinney 1980); *See Ferber*, 458 U.S. at 750.

45. *Ferber*, 458 U.S. at 751-52. The defendant, Paul Ferber, owned a bookstore that specialized in the sale of sexually oriented products. *Id.*

46. *See generally* N.Y. Penal Law § 263; *see also Ferber*, 458 U.S. at 749 n.2. At the time of the decision in *Ferber*, 19 other states had laws prohibiting child pornography regardless of whether the material was obscene. *Id.*

47. *See* New York v. Ferber, 74 A.D.2d 558 (N.Y. App. Div. 1980) (affirming the convictions without opinion); New York v. Ferber, 422 N.E.2d 523 (N.Y. 1981) (reversing the trial court conviction and holding the statute violated the First Amendment, *rev'd* by New York v. Ferber, 458 U.S. 747 (1982)). The court of appeals stated that:

> On its face the statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a non-obscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose. In short the statute would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.

Ferber, 422 N.E.2d at 678.

is obscene.[48]

The Supreme Court, in a unanimous decision, upheld the constitutionality of the New York statute.[49] The Court held that the advertising and selling of child pornography was not entitled to First Amendment protection, regardless of whether the material was obscene.[50] The Court articulated five reasons why states are "entitled to greater leeway in the regulation of pornographic depictions of children."[51] First, the state has a compelling interest in safeguarding the well-being of children.[52] Second, the Court recognized that the distribution of child pornography furthers the exploitation and abuse of children by creating a permanent record of the abuse.[53] Third, the advertising and selling of child pornography encourages the market and creates an economic motive for its production.[54] Fourth, the Court pointed to the social value of such material as being "exceedingly modest, if not *de minimis*."[55] Finally, the

48. *See* New York v. Ferber, 454 U.S. 1052 (1981) (granting certiorari on the single issue of whether: "to prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene").

49. New York v. Ferber, 458 U.S. 747 (1982).

50. *Id.* at 764.

51. *Id.* at 756.

52. *Ferber*, 458 U.S. at 756-58 (quoting *Globe Newspaper Co. v. Supreme Court of the United States*, 457 U.S. 596, 607 (1982)). The Court relies on its prior case decisions in which "legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* at 757; *see* FCC v. Pacific Found., 438 U.S. 726 (1978) (holding that the state's interest in protecting children justified special treatment of indecent broadcasting received by adults as well as children); Ginsburg v. New York, 390 U.S. 629, 637-43 (1968) (upholding a law protecting children from exposure to nonobscene literature); Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (upholding a statute prohibiting the use of a child to distribute literature on the street).

53. *Ferber*, 458 U.S. at 759-61. The Court also recognizes that the only way to effectively control the production of material that requires the sexual exploitation of children is to close the distribution network. *Id. See* David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981). Shouvlin states that:

> [Pornography] poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

Id. at 545.

54. *Ferber*, 458 U.S. at 761-762. The Court noted that the First Amendment implications of a statute outlawing the advertisement and selling of child pornography are no greater than other laws prohibiting the employment of children in the making of such material. *Id.* at 762.

55. *Id.* at 762-763. It is doubtful that such depictions of children would often constitute an important and necessary part of a literary performance or educational work. *Id*. The Court suggested that persons wishing to explore such a theme for the purpose of a literary or artistic work could simply use someone over the statutory age who appears younger. *Id*. at 763. The minimal

Court recognized that the preclusion of child pornography from First Amendment protection was consistent with its earlier precedent.[56] The Court thus created a new and distinct category of speech that was outside the protection of the First Amendment.[57]

b. *Osborne v. Ohio*[58]

In 1990, the Supreme Court took up the issue of whether a state could prohibit the mere possession of child pornography in the case of *Osborne v. Ohio*.[59] Petitioner Osborne had been convicted under an Ohio statute which forbid the possession of child pornography.[60] The Supreme Court of Ohio affirmed the conviction, and the U.S. Supreme Court granted certiorari to resolve the dispute.[61] In a six-to-three deci-

value of such speech has been explored in numerous writings. *See e.g.*, Belinda Tiosavlijevic, *A Field Day for Child Pornographers and Pedophiles if the Ninth Circuit Gets its Way: Striking Down the Constitutional and Necessary Child Pornography Prevention Act of 1996*, 42 S. TEX. L. REV. 545, 556-58 (2001); Kelly Guglielmi, Comment, *Virtual Child Pornography as a New Category of Unprotected Speech*, 9 COMMLAW CONSPECTUS 207, 215-17 (2001). *But see* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 961-69 (2001) (explaining the ramifications that an expanded definition of child pornography can have on valuable speech).

56. *Ferber*, 458 U.S. at 763-64. "It is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no case-by-case adjudication is required." *Id.* *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976) (holding that the determination of whether speech is protected by the First Amendment often depends on its content); N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (placing libelous publications outside the First Amendment except when public officials are the target); *see also supra* notes 1-2.

57. *Id.* at 765-66.

58. Osborne v. Ohio, 495 U.S. 103 (1990).

59. *Id.*

60. Ohio Rev. Code Ann. § 2907.323(A)(3), providing that:

> (A) No person shall do any of the following:
>
> (3) Possess or view any material or performance that shows a minor who is not the person's child or ward in the state of nudity, unless one of the following applies:
>
> (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.
>
> (b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."

Id.

61. *See* State v. Young, 525 N.E.2d 1363 (Ohio 1988) (rejecting the contention that the First amendment prohibits the states from proscribing the possession of child pornography by individuals).

sion, the U.S. Supreme Court held that the state could constitutionally forbid the possession of child pornography.[62]

The Court relied on three justifications put forth by Ohio in support of the prohibition.[63] First, the state wished to attack the production of child pornography by decreasing the demand for the material.[64] Second, the Court reiterated that the victims of child pornography continue to suffer through the continued existence of the material depicting them.[65] Third, the State wanted to limit the amount of material that pedophiles could use to seduce other children.[66] By forcing the destruction of child pornography the state could most effectively limit its availability for such purposes.[67] By accepting this last justification, the Court expanded its focus beyond just those children who are involved in the production of child pornography by recognizing the harm that can occur to other children who are not the subject of the material.[68]

c. *United States v. X-Citement Video, Inc.*[69]

In *United States v. X-Citement Video, Inc.*, a video store retailer was convicted under the Protection Against Sexual Exploitation Act of 1977[70] for selling pornographic videotapes which included an underage actress.[71] The Ninth Circuit Court of Appeals reversed the conviction, holding that the statute was facially unconstitutional.[72] The court pointed to the lack of a scienter requirement in striking down the statute.[73] The Supreme Court, however, reversed the decision of the court of appeals and reinstated the conviction.[74]

The Court held that the statute should be read to contain a scienter

62. *Osborne*, 495 U.S. 103 Justice White wrote the opinion for the Court, joined by Rehnquist, C.J., and Blackmun, O'Connor, Scalia, and Kennedy, JJ. *Id.* Justice Brennan write for the dissent and argued that the statute was overbroad and unconstitutional. *Id.* at 126 (Brennan, J., dissenting). Relying on the Court's previous decision, the dissent stated that the possession of child pornography could not be criminalized. *Id.*

63. *Id.* at 108-11.

64. *Osborne*, 495 U.S. at 111.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See Osborne*, 495 U.S. at 111.

69. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).

70. *See supra* note 30 and accompanying text.

71. *Id.* at 66. *See* Protection of Children Against Exploitation Act of 1977, discussed *supra* notes 30-33.

72. *Osborne*, 495 U.S. at 66-67.

73. *See id.*

74. *See X-Citement Video*, 513 U.S. at 66.

requirement based on four articulated reasons.[75] First, to hold otherwise would allow the statute to punish distributors who did not even know that the film was pornographic.[76] Second, where a criminal statute does not explicitly contain a scienter requirement, the Court will generally interpret it to include one.[77] Third, there is no legislative history to preclude the interpretation of the statute to include the requirement.[78] Finally, prior case law suggests that a statute regulating child pornography that lacks a scienter requirement would likely raise constitutional problems.[79] In reading the scienter requirement into the statute the Court avoided the question of whether a statute completely devoid of one would be constitutional.[80] Lower courts have subsequently interpreted the statute to require only knowledge of the general nature of the materials and not knowledge of their illegality.[81]

III. STATEMENT OF THE CASE

A. Statement of Facts

The Free Speech Coalition ("Coalition") operates as a California trade association of businesses involved in the production of adult-oriented materials.[82] The association provides nationwide assistance to filmmakers, producers, distributors, wholesalers, retailers, and Internet providers in the protection of their First Amendment rights against censorship.[83] The more than six hundred businesses represented are in some aspect involved in the production, distribution, sale, and presentation of non-obscene adult materials.[84] According to the Coalition, its members did not use any minors in its sexually explicit depictions.[85] The other

75. *Id.* A "scienter" requirement is defined as "a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission." BLACK'S LAW DICTIONARY 1347 (7th ed. 1999).

76. *See X-Citement Video*, 514 U.S. at 68-69.

77. *See id.* at 70.

78. *See id.* at 73-78.

79. *See id.* at 78.

80. *See X-Citement Video*, 514 U.S. at 70; *see also* Andrea I. Mason, Note, *Virtual Children Actual Harm*: Free Speech Coalition v. Reno, 69 U. CIN. L. REV. 693, 699-701 (2001).

81. *See, e.g.*, United States v. Schmeltzer, 20 F.3d 610 (5th Cir. 1994); United States v. Cochran, 17 F.3d 56, 59 (3d Cir. 1994); United States v. Knox, 32 F.3d 733, 753-54 (3d Cir. 1994); United States v. Long, 831 F. Supp. 582, 585-86 (W.D. Ky. 1993).

82. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 243 (2002).

83. *See* Respondent's Brief at n.7, Aschroft v. Free Speech Coalition, 535 U.S. 234 (2002)(No. 00-795).

84. *Id.*

85. *Free Speech*, 535 U.S. at 243.

parties involved include a publisher of a book advocating nudism as a lifestyle,[86] a well-known artist,[87] and a professional photographer.[88]

B. Procedural History

Fearing that some of its work may fall within the CPPA's new definition of child pornography, the Coalition, Bold Type, Inc., Jim Gingerich, and Ron Raffaelli brought a pre-enforcement challenge to certain provisions of the CPPA.[89] The plaintiffs filed suit in the United States District Court for the Northern District of California seeking declaratory and injunctive relief; claiming that the provisions of the CPPA at issue were vague, overbroad, and constituted impermissible content-specific prior restraints on speech.[90]

Plaintiffs and defendants[91] filed motions for summary judgement.[92] The court first determined that the Plaintiffs' allegations were sufficient to establish standing for their claims.[93] The court then found the CPPA

86. *Id.* The company, Bold Face, Inc., published the book titled "California's Nude Beaches," which was aimed at the education and expression of the philosophy of nudism. *See* Respondent's Brief at n.7, *Free Speech* (No. 00-795).

87. *Free Speech*, 535 U.S. at 243; Jim Gingerich is a New York based artist who paintings include large scale nudes. *See* Respondent's Brief at n.7, *Free Speech* (No. 00-795).

88. *Free Speech*, 535 U.S. at 243; Ron Raffaelli, a well-known photographer specializing in erotic photography, has published four books in that area. *See* Respondent's Brief at n.7, *Free Speech* (No. 00-795).

89. A pre-enforcement challenge is permitted where there has been an actual injury claimed, without the plaintiffs having been charged under the statute in question and typically involves the chilling effect that the statute has had on constitutionally protected expression. *See* Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988) (holding that harm resulting from speech regulation to establish standing may be one of self-censorship); Valley Forge Christian College v. Am.'s United for Sep. of Church and State, Inc., 454 U.S. 464, 472 (1982) (holding that to establish standing the plaintiff must have suffered an actual or threatened injury as a result of the putatively illegal conduct of the defendant); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1129 (9th Cir. 1996) (holding that a chilling effect of speech is a sufficient basis to establish standing in overbreadth and facial challenges to government actions involving free speech).

90. *See Free Speech*, 535 U.S. at 243. The complaint asserted that the "appears to be" and "conveys the impression" provisions of the CPPA: (1) prohibit the expression in violation of the First Amendment; (2) contain overbroad and vague language in violation of the Fifth Amendment's Due Process Clause; and (3) unduly chill constitutionally-protected speech in violation of the First Amendment. *See* Petitioner's Application at 50a, *Free Speech*, 535 U.S. 234 (2002) (No. 00-795).

91. The named defendant in the district court was Janet Reno, who was at the time the Attorney General of the United States. Free Speech Coalition v. Reno, 25 Media L. Rep. (BNA) 2305 (N.D. Cal. 1997). In the Supreme Court case, John Ashcroft, current Attorney General of the United States, was the named defendant. *Free Speech*, 535 U.S. 234.

92. *Free Speech*, 25 Media L. Rep. (BNA) at 2305.

93. *Id.* Plaintiffs claimed an actual injury in that they had discontinued the production, distribution, and possession of the certain materials which, although not falling within the definition under the statute, plaintiffs feared would subject them to prosecution under the CPPA. *Id.* at 2307. Defendants challenged standing, claiming that plaintiffs had not suffered an actual or threatened

to be constitutional as written and granted the Defendants' motion for judgement on the pleadings.[94]

Following the district court's granting of summary judgement, the Coalition appealed to the Ninth Circuit Court of Appeals.[95] The Ninth Circuit reversed the decision of the lower court finding the statute to be unconstitutional for overbreadth and vagueness.[96] Petitioners moved for a rehearing and a rehearing *en banc*, both of which were denied.[97] The United States Supreme Court granted certiorari[98] in order to resolve a split among the First,[99] Fourth,[100] Fifth,[101] and Eleventh[102] Circuits.[103]

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injury resulting from the conduct of the defendants; however, the trial court found sufficient allegations to establish standing. *Id.* at 2306-2307.

94. *Free Speech*, 25 Media L. Rep. (BNA) at 2310. The court found the disputed sections of the CPPA to be "content-neutral regulations" passed to "prevent the secondary effects of the child pornography industry." *Id.* at 2307. The court then applied a compelling government interest standard and found that the CPPA "clearly advances important and compelling government interests" and "burdens no more speech than necessary in order to protect children from the harms of child pornography." *Id.* at 2308.

95. Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999) (holding that the CPPA is invalid on its face).

96. *Id.*

97. *See* Free Speech Coalition v. Reno, 220 F.3d 1113 (9th Cir. 2000). The petition for rehearing *en banc* was denied over the dissent of three judges. *Id.*

98. Eric Holder v. Free Speech Coalition, 531 U.S. 1124 (2001).

99. *See* United States v. Hilton, 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 538 U.S. 844 (1999) (No. 98-9647) (reversing the district court's holding that the CPPA's definition of child pornography is so overbroad, in violation of the First Amendment, or so vague, in violation of Due Process). The court concluded that the CPPA does not pose substantial problems of overbreadth to justify its abridgment. *Id.* at 71-74. Likewise, the court determined that the "appears to be a minor" standard is an objective one and is not impermissibly vague. *Id.* at 75-77.

100. *See* United States v. Mento, 231 F.3d 912 (4th Cir. 2000) (holding the CPPA constitutional and extending the holding in *Ferber* to include virtual child pornography). The court in this case, decided after the Ninth Circuit had struck down CPPA in *Free Speech*, disagreed with that ruling and upheld the constitutionality of the CPPA. *Id.* at 919. The Fourth Court determined that there was "not a substantial difference between child pornography in the traditional sense and child pornography where the minor is 'virtual.'" *Id.* Agreeing with the First and Eleventh Circuits, the Fourth Court held that the language of the statute was neither impermissibly overbroad nor vague. *Id.* at 917.

101. *See* United States v. Fox, 248 F.3d 394 (5th Cir. 2001) (affirming the conviction of the defendant under the CPPA). The court in *Fox* reviewed the CPPA under strict scrutiny and held that the government's interest in the protection of children was compelling and the statute was the least restrictive means of furthering that interest. *Id.* at 402-04. The court pointed to the prosecutorial necessity of the "appears to be" language and the nearly identical nature of the harms generated by both "real" and "virtual" child pornography in deciding that the statute could not be improved while still achieving the government's compelling interest. *Id.* at 403. The court rejected the contention that the statute is overbroad and vague holding that it doesn't criminalize an "intolerable range of constitutionally protected conduct," and is not "so subjective as to fail to put reasonable persons on notice of what it is that the statute prohibits." *Id.* at 404-07.

102. *See* United States v. Acheson, 195 F.3d 645 (11th Cir. 1999) (upholding defendant's conviction under the CPPA). The defendant, Acheson, was arrested and pled guilty to possession of

C. Holding

The United States Supreme Court, in an opinion authored by Justice Kennedy,[104] affirmed the decision of the appellate court.[105] The Court found both the "appears to be" and "conveys the impression" sections of the CPPA to be substantially overbroad in violation of the First Amendment.[106] First, the Court recognized that the CPPA bans images that are not obscene.[107] Secondly, the Court pointed out that "prohibiting child pornography that does not harm an actual child," is not supported by the Court's previous holding in *New York v. Ferber*.[108] The Court then refused to recognize "virtual" child pornography as an additional category of unprotected speech.[109] The majority rejected the interests asserted by

child pornography in violation of the CPPA, however, he reserved the right to appeal the constitutionality of the Act. *Id.* at 648. Analyzing the claim as a facial challenge to the constitutionality of the CPPA, the court held that the defendant did not meet the burden of "proving the law could never be constitutionally applied." *Id.* at 650. The court rejected defendant's overbreadth claim stating that "the CPPA's overbreadth is minimal when viewed in light of its plainly legitimate sweep." *Id.* at 650 The scienter requirements and the affirmative defense found in the statute undermine the possibility of overbreadth. *Id.* at 650-52. Furthermore, the contested provisions of the CPPA define the criminal conduct with enough specificity to ensure that it is not impermissibly vague. *Id.* at 652.

103. *See generally* Alison R. Gladowsky, Note, *Has the Computer Revolution Placed our Children in Danger? A Closer Look at the Child Pornography Prevention Act of 1996*, 8 CARDOZO WOMEN'S L.J. 21, 27-33 (2001) (overview of the decisions in these Circuit court cases).

104. *Free Speech*, 535 U.S. at 234. Justice Kennedy was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* Justice Thomas filed a concurring opinion. *Id.* Justice O'Connor filed an opinion concurring in part and dissenting in part, in which Chief Justice Rehnquist and Justice Scalia joined as to Part II. Chief Justice Rehnquist filed a dissenting opinion, in which Justice Scalia joined except for the paragraph discussing legislative history. *Id.*

105. *Free Speech*, 535 U.S. 234, *aff'g* 198 F.3d 1083 (9th Cir. 1999).

106. *Free Speech*, 535 U.S. 234. The Court pointed out that CPPA, § 2256(8)(B), prohibits speech "[d]espite its serious literary, artistic, political, or scientific value." *Id.* at 246. The themes of teenage sexual activity and the sexual abuse of children have appeared in art, literature, and movies regularly throughout history. *Id.* The Court mentioned films such as "Traffic" and "American Beauty" as contemporary examples of were such themes are explored. *Id.* If these works were to contain one graphic depiction of sexual activity within the statutory definition, then the possessor would be subject to punishment without inquiring into the work's redeeming value. *Id.* at 247-48. The CPPA § 2256(8)(D) also bans a substantial amount of protected speech. *Free Speech*, 535 U.S. 234.

107. *Id.* at 243. The Court assumed that the apparent age of a person engaged in sexual conduct would be relevant to the determination of whether that depiction offends community standards under the *Miller* test. *Id.* A sexual depiction of a young person may be obscene where the same depiction involving an adult would not; however the CPPA does not proscribe obscenity, but rather attempts to create a new category of prohibited speech. *Id.*

108. New York v. Ferber, 458 U.S. 747 (1982). In contrast to *Ferber*, the CPPA bans speech which "records no crime and creates no victims by its production." *Free Speech*, 535 U.S. at 250. Unlike *Ferber*, there is no intrinsic relation between the sexual abuse of children and the virtual child pornography banned by the CPPA. *Id.*

109. *Id.* at 256-57. The Court recognized that it would be necessary to create an additional category of unprotected speech in order to uphold the CPPA. *Id.* at 245. *See* Free Speech Coalition

the government to justify the prohibition in the CPPA.[110]

D. Concurrence

Justice Thomas' concurring opinion recognized the problems that evolving technology may pose in enforcing the prohibition of actual child pornography.[111] He found the government's assertion that actual child pornographers may escape conviction to be their most persuasive argument.[112] However, the concurrence concludes that this interest is

v. Reno, 198 F.3d 1083 (9th Cir. 1999) (Ferguson, J., dissenting). Justice Ferguson suggests that virtual child pornography should be a new category of speech which falls outside the protection of the First Amendment. *Id.* at 1098. He argues that the state has a compelling interest in protecting children who are not actually pictured in the pornographic image. *Id.* at 1099. Furthermore, he points out that virtual child pornography is "of slight social value and constitutes no essential part of the exposition of ideas." *Id.* at 1101. *See* Guglielmi, *supra* note 55 (arguing that virtual child pornography should be placed with actual child pornography outside the protection of the First Amendment). The comment contends that virtual child pornography should be a considered a new category of unprotected speech. *Id.* at 222-223. The negative effect of virtual child pornography on society, according to the comment, outweighs its low social value, justifying it placement outside the First Amendment. *Id.* at 214-221.

110. *Free Speech*, 535 U.S. at 250-58. The government first argued that the CPPA is valid because virtual pornography is used by pedophiles to seduce real children. *Id*. at 250; *see also* Petitioner's Brief at 17, *Free Speech* (No. 00-795). The Court rejected this argument pointing out that there are many innocent things, such as candy or video games, which might be used for this purpose, however, we would not prohibit their use for this reason. *Free Speech*, 535 U.S. at 250. Speech may not be completely silenced solely to attempt to protect children from it. *Id.*; *see* Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115 (1989). Next the Court found insufficient the argument that virtual child pornography whets the appetites of pedophiles. *Free Speech*, 535 U.S. at 253. The Court stated that the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Id. See also* Stanley v. Georgia, 394 U.S. 557 (1969); Hess v. Indiana, 414 U.S. 105 (1973). The Court pointed out that the government had not shown a sufficient connection between the speech, which may encourage thoughts, and any resulting child abuse. *Free Speech*, 535 U.S. at 253. The Court also rejected the government's argument that the prohibition of virtual images is necessary to accomplish their objective of eliminating the market for actual child pornography. *Id.* Finally, the Court refused to accept the government's argument that virtual images make the prosecution of actual child pornography too difficult. *Id.* at 254. The Court stated, "the Government may not suppress lawful speech as a means to suppress unlawful speech." *Id.*

111. *Free Speech*, 535 U.S. at 259 (Thomas, J., dissenting in part). Justice Thomas pointed out that "if technological advances thwart prosecution of 'unlawful speech,' the Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made through the abuse of real children." *Id.* at 259-60. He also pointed out that there may be ways to construct a narrowly tailored prohibition outside of simply providing a more complete affirmative defense in the statute. *Id*. at 260.

112. *Id.* at 260. Justice Thomas recognized that "persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer-generated." *Id. See* Petitioner's Brief at 23-24, *Free Speech* (No. 00-795) (arguing that because computers can make it virtually impossible to determine if actual children were used in the creation of child pornography, the government will be unable to meet its burden of proving that an actual child was used). *See also* S. REP. NO. 104-358, at 20 (1996); Guglielmi, *supra* note 55, at 218-221.

too speculative to support the broad prohibition of the CPPA.[113]

E. Dissent

In dissent, Justice O'Connor agreed with the majority's decision not to exclude "youthful-adult and virtual child pornography from the protection of the First Amendment," as well as their decision to strike down the "conveys the impression" section of the CPPA.[114] However, she disagreed with the majority's holding that the CPPA's ban on virtual pornography is overbroad.[115] The opinion relies on the government's compelling interest in protecting our nation's children, and found the statute to be narrowly tailored.[116]

Chief Justice Rehnquist, in dissent, would have reversed the Court of appeals judgement and upheld the CPPA in its entirety.[117] He opined that the CPPA could be limited so as to not reach any material, other than images virtually indistinguishable from actual children, that was not unprotected prior to its enactment.[118]

Guglielmi argues that the slight value of virtual child pornography is dwarfed by the harm experienced by victims of child abuse, and therefore the drastic prohibition of virtual child pornography is justified. *Id.* at 219. The ability of government to outlaw child pornography to assist law enforcement has been endorsed by the Court in previous decisions. *Id.* at 220; *see also* Adam J. Wasserman, Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 269-271 (1998) (arguing that new technology allows child pornographers to escape conviction creating a compelling interest for its prohibition). Before the enactment of the CPPA, child pornographers could argue that the images were virtual and not actual child pornography therefore creating reasonable doubt in the jury. *Id.*

113. *Free Speech*, 535 U.S. at 259. The government asserts that the defense is raised by the defendants, but does not show any case were a "computer generated images" defense has led to an acquittal. *Id. See* Petitioner's Brief at 37, *Free Speech* (No. 00-795). Justice Thomas stated that "this speculative interest cannot support the broad reach of the CPPA." *Id.*

114. *Id.* at 261-62.

115. *Free Speech*, 535 U.S. at 260-67 (O'Connor, J., dissenting). Justice O'Connor points out that "reading the statute only to bar images that are virtually indistinguishable from actual children would not only assure that the ban on virtual-child pornography is narrowly tailored, but would also assuage any fears that the 'appears to be . . . of a minor' language is vague." *Id.* at 265. The respondents have not demonstrated the CPPA forbids a substantial amount of valuable or harmless speech, which is required to mount a successful facial challenge. *Id.* at 265; *see* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

116. *See Free Speech*, 535 U.S. at 261; New York v. Ferber, 458 U.S. 747, 756-57 (1982).

117. *Free Speech*, 535 U.S. at 273.

118. *Id.* at 269. Properly read, Justice Rehnquist believes that the CPPA only reaches the sort of "hard core pornography that we found without protection in *Ferber*." *Id.* (internal citations omitted).

IV. ANALYSIS

In *Ashcroft v. Free Speech Coalition*, the United States Supreme Court struck down the CPPA as overbroad due to its suppression of a substantial amount of protected speech.[119] In doing so the holding rejected the idea that a new category of speech, "virtual" child pornography, should be added to the list of unprotected classes of speech.[120] Reaction to the decision of the Court was swift and strong.[121] Many lawmakers and commentators criticized the Court's decision to strike down the statute, characterizing it as a win for pedophiles.[122] Immediately after the decision was handed down, Attorney General John Ashcroft held a press conference to condemn the Supreme Court's decision.[123] It is clear that the issue of virtual child pornography is not yet settled in the minds of many.[124] The following section will discuss the

119. *Id.* at 256. ("The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.").

120. *See id.* ("In sum, § 2256(8)(B) covers material beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment."). Many commentators had suggested that "virtual child pornography" fits within the current prohibition of child pornography or alternatively that it should be a separate category of unprotected speech. *See* Guglielmi, *supra* note 55 and accompanying text; Mason, *supra* note 80, at 714. ("The regulation of virtual child pornography is consistent with two propositions advance by the Supreme Court in both *Ferber* and *Osborne*."); David B. Johnson, Comment, *Why the Possession of Computer-Generated Child Pornography can be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 327-30 (1994) (arguing that "computer-generated child pornography deserves no First Amendment protection because the state has a compelling interest in protecting children, and prohibiting the possession of computer-generated child pornography directly advances that interest").

121. *See* Robert S. Greenberger, *High Court Strikes Down Ban on "Virtual" Child Pornography*, WALL ST. J., April 17, 2002, at A4, *available at* WL 2002 WL-WSJ 3391924. The article reports that "Conservatives outside the court were outraged" and states that the American Civil Liberties Union "applauded what it called the court's 'forceful defense of First Amendment principles.'" *Id. See also* Jim Burns, *Strong Reaction to High Court Ruling on Child Pornography*, *at* http://www.aclj.org/news/pornography/020417_strong_rxn.asp (last visited Febuary 4, 2002) (acknowledging the negative reactions of various groups and individuals to the Supreme Court's decision).

122. *See* Burns, *supra* note 121 ("Rep. Mark Foley (R-Fla.), chairman of the Congressional Missing and Exploited Children's Caucus said the 'High Court sided with pedophiles over children.'"). *See also* U.S. Supreme Court Decision is a Clear and Present Danger to Our Children, 148 CONG. REC. H1344-07 (statement of Mr. Lampson) ("The Supreme Court sent a terrible message, one that is terrible to send to the pornographic community that this behavior is okay.").

123. *See* Michael Landau, *The First Amendment and Virtual Child Pornography, available at* http://www.gigalaw.com/articles/2002-all/landau-2002-07-all.html (last visited Feb. 4, 2002). The Attorney General criticized the decision stating that the prosecution of those who produce and possess child pornography had been made "immeasurably more difficult." *See id. Supreme Court Strikes Down Ban on "Virtual Child Porn" at* http://www.cnn.com/2002/LAW/04/16/scotus.virtual.child.porn/ (last visited Feb. 4, 2002).

124. As discussed later in Section IV, new legislation was proposed almost immediately fol-

effect of the Court's decision and whether it is consistent with their precedent in the area of First Amendment and child pornography law.[125] This Note will then explore other methods by which the legislature and the courts may deal with the problems presented by virtual child pornography[126] and finally it will look at the constitutionality of the most recent attempts by Congress to ban virtual child pornography after the decision in *Free Speech*.[127]

A. The Effect and Consistency of the Court's Decision

1. Child Pornography vs. "Virtual" Child Pornography: An Important Distinction

The Supreme Court's holding in *Ashcroft v. Free Speech Coalition* refused to place "virtual" child pornography in the same category as traditional child pornography.[128] Relying on their decision in *Ferber*, they distinguished the two cases based on the harms involved in their production. In doing so they reinforced the important distinction between the two categories: the harm to actual children to or from production.[129]

Virtual child pornography stems from a person's imagination and uses computer technology to produce it.[130] It is neither the product nor

lowing the Court's decision, which lawmakers hoped would deal with the issue of virtual child pornography within the parameters of the Court's holding. *See* Child Obscenity and Pornography Prevention Act of 2002, H.R. 4623, 107th Cong. (2d Sess. 2002); *see also Legislators Fight Ruling Allowing Virtual Child Porn*, *at* http://www.usatoday.com/news/washington/2002/05/01/child-porn.htm (outlining the new bill); Landau, *supra* note 123.

125. *See infra* notes 128-183 and accompanying text.

126. *See infra* notes 184-210 and accompanying text.

127. *See infra* notes 211-229 and accompanying text.

128. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 248-51 (2002) ("In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production.").

129. *Free Speech*, 535 U.S. at 251. The Court pointed to the fact that the decision in *Ferber* itself "not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding." *Id. See* New York v. Ferber, 458 U.S. 747, 763 (1982). *Ferber* does not support any statute eliminating the distinction between "virtual" and traditional child pornography. *Free Speech*, 535 U.S. at 250; *see Ferber*, 458 U.S. 747; Samantha Friel, Note, *Porn By Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer-Generated Child Pornography*, 32 VAL. U. L. REV. 207, 241 (1997) ("[T]he category of speech that the Court created in Ferber is a deliberately narrow one consisting only of 'works that visually depict sexual conduct by children below a specified age.'") (internal citations omitted). The note also points out that "virtual child pornography does not fall within this narrow definition" and is not subject to the same regulations. *Id*.

130. *See* Burke, *supra* note 13, at 440. Professor Burke points out that "no longer are children needed in the production of child pornography." *Id*. Techniques such as "morphing" allow pictures of adults to be altered to look like the image of a child. *Id. See also* Lydia W. Lee, Note, *Child*

the documentation of sexual abuse since no actual child is used in its production.[131] The creation of traditional child pornography, on the other hand, involves the abuse and sexual exploitation of actual children.[132] The negative effects of these materials on the children involved in its creation are beyond doubt, and for that reason the Court has properly placed it outside First Amendment protection.[133] The preclusion of traditional child pornography was focused primarily on its production, not the content of the material.[134] Without this cognizable harm to actual children in its production, the Court was correct in distinguishing between "virtual" and traditional child pornography.[135]

With no actual child harmed in its production, it is a distinct possi-

Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality, 8 S. CAL. INTERDISC. L.J. 639, 642-48 (1999). The note discusses the emerging computer technology that has made it possible to produce realistic images of child pornography without the use of an actual child. *Id.*; Aimee G. Hamoy, Comment, *The Constitutionality of Virtual Child Pornography: Why Reality and Fantasy are Still Different Under the First Amendment*, 12 SETON HALL CONST. L.J. 471, 502 (2002) ("Technological advances allow users to create images solely from one's imagination that do not require the use of a real child or necessarily result in harm to a real child.").

131. *Id. See supra* note 130 and accompanying text. *See also* Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 354 (1997) (pointing out that the proposed law prohibiting virtual child pornography "has been criticized by legal scholars such as Alan Dershowitz for attempting to 'criminalize the imaginations and virtual realities of our citizens'").

132. *See Ferber*, 458 U.S. at 758-61. The Court stated that, "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Id. See also Protection of Children Against Sexual Exploitation: Hearings before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 130 (1977) (discussing the harms to the victims of child pornography).

133. *Ferber*, 458 U.S. at 747. *See supra* notes 42-57 and accompanying text. *But see* Brown, *supra* note 4, at 1351-62. Brown states that the categorical ban on child pornography was "unprecedented, unpersuasive, and shocking in its disregard for the interests underlying our commitment to free expression." *Id.* at 1352. She also argues that "[i]n certain circumstances, a realistic depiction of children's sexuality may be necessary to communicate certain emotions or concepts, and in such circumstances, the Court's ruling in *Ferber* has effectively suppressed such communication." *Id*. at 1359-60.

134. *See Ferber*, 358 U.S. at 761; *see also Free Speech*, 535 U.S. at 248. Explaining the rationale of upholding the law in *Ferber* the Court points out that "the production of the work, not its content, was the target of the statute." *Id. See also* Burke, *supra* note 13, at 460. ("It is altogether possible that the Ferber Court created child pornography as a separate category of unprotected expression precisely because criminal conduct – child molestation and abuse – was intricately involved in creating the expression."); Sternberg, *supra* note 30, at 2810-11 (pointing out that that the Court's holding in *Ferber* was based on the legislature's need to protect "actual children from the harms associated with posing for child pornography").

135. *See Free Speech*, 535 U.S. at 248-50; *see also* Hamoy, *supra* note 130, at 503-04. "The categorization of virtual child pornography as child pornography based solely on the type of visual depiction misses the mark." Hamoy, *supra* note 130, at 503-504. One cannot ignore the emphasis on harm to actual children in its production as it was the key reason for the Court's decision in *Ferber. Id.*

bility that the "virtual" images will help to reduce the harms associated with traditional child pornography.[136] If "virtual" child pornography was not criminal, producers of traditional child pornography may very well choose this legal alternative as opposed to facing serious criminal liability.[137] The Court in *Free Speech* acknowledged this possibility in response to the government's contention that the prohibition of "virtual" child pornography was necessary in order to meet its objective of eliminating the traditional child pornography market.[138] As the Court stated: "The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[139] Some commentators doubt this proposition and contend that pornographers will continue to use actual children; however, the increasing affordability of computer technology which can be used to create "virtual" images could likely lead them to choose to use this legal alternative.[140]

136. *See* Burke, *supra* note 13, at 464. ("Viewing virtual child Pornography may produce the opposite effect and alleviate the desire to pursue actual children."). The "harms associated with traditional child pornography" referred to here are those that stem from the production of child pornography as recognized in *Ferber*. *See Ferber*, 458 U.S. at 757-58. This is not a reference to the potential harms to children not involved in the production of child pornography that were put forth by the government to justify the prohibition on "virtual" child pornography. *See Free Speech*, 535 U.S. at 251-56 (Section III); *see also* Petitioner's Brief, *Free Speech* (No. 00-795) (discussing the potential harm to third children not involved in the production).

137. *See Free Speech*, 535 U.S. at 254; Danielle Cisneros, *"Virtual Child" Pornography on the Internet: A "Virtual" Victim?*, 2002 DUKE L. & TECH. REV. 19 (2002). Danielle Cisneros argues that the availability of "virtual" images may force child pornographers to "think twice about exploiting real children since there would be a legal and victimless alternative." Cisneros, *supra*. She also points out that the prohibition of "virtual" child pornography may spur the market for traditional child pornography if the penalties are the same but the cost of "virtual" images is greater. *Id*. *See also* Samatha L. Friel, *supra* note 129, at 224-25. The note points out that "virtual child pornography may soon take the place of those materials which require the sexual abuse of real children for their production." *Id*. If it is protected by the First Amendment, pornographers "will have an incentive to refrain from abusing real children to continue their business." *Id*. "[S]ociety might even benefit if a curious dabbler in pedophilia is allowed to vent his or her desire on a computer screen instead of ruining a child's life for a sexual experience." *Id.*

138. *Free Speech*, 535 U.S. at 253-55. *See* Petitioner's Brief at 24, *Free Speech* (No. 00-795) (stating that "[b]y prohibiting dissemination and possession of computer-generated images, the CPPA helps to stamp out the market for child pornography involving real children").

139. *Free Speech*, 535 U.S. at 254.

140. Senator Orrin Hatch (R-Utah) stated:

> The computer equipment and expertise required to produce such high-tech kiddie porn is readily available to almost any individual. All a pornographer . . . needs is a personal computer with a few inexpensive and easy to use accessories, such as a scanner. . . image editing and morphing software costing as little as $50 to $100, all available at virtually any computer store or available through mail-order computer catalogs.

2. The Court's Unwillingness to Expand the Categorical Approach

Once the Court recognized the distinction between virtual and traditional child pornography, they then had to choose whether to create a new category of unprotected speech to encompass the latter.[141] Some have argued that, although not fitting within the *Ferber* category of unprotected speech, virtual child pornography should join child pornography, obscenity, defamation, etc., as a separate category of speech unprotected by the First Amendment.[142] The *Free Speech* Court declined to take such a broad step.[143] Its decision is consistent with the Court's overall reluctance to expand the categorical approach in First Amendment cases.[144]

Hearing on S.1237 Child Pornography Prevention Act of 1995 Before the Senate Judiciary Comm., 104th Cong. 870 (1996) (Statement of Orrin Hatch, U.S. Senator); *see also* Vincent Lodato, Note, *Computer-Generated Child Pornography – Exposing Prejudice in our First Amendment Jurisprudence?*, 28 SETON HALL L. REV. 1328, 1329 (1998). The note points out that computer technology has advanced rapidly to the point where "users can create realistic, three-dimensional animated images of humans that are merely figments of the user's imagination without even scanning photographs of actual people." Lodato, *supra*, at 1330. He also adds that experts believe that within a few years indistinguishable computer images will be possible and that "the requisite software and hardware will soon be inexpensive enough to be used on personal home computers." *Id. But see* Guglielmi, *supra* note 55 (arguing that the proposition that allowing virtual child pornography will reduce the number of abused children is flawed). Guglielmi points out that the argument is not supported by any studies showing that the technology will reduce the number of children used to produce traditional child pornography. Guglielmi, *supra* note 55. He also claims that no studies show that "a pedophile actually will be satisfied if he knows the image is not of a real child." *Id. See also* Wendy L. Pursel, Comment, *Computer-Generated Child Pornography: A Legal Alternative?*, 22 SEATTLE U. L. REV. 643, 660-61 (1998) ("Some argue that allowing computer-generated child pornography would insulate children from abuse, as they would no longer be necessary to pornography's production. However this result, although optimistic, is not likely . . . instead the incidence of child pornography would likely increase due to technology's eradication of criminal liability.").

141. *See Free Speech*, 535 U.S. at 245-46.

142. Free Speech Coalition v. Reno, 198 F.3d 1083, 1101 (9th Cir. 1998) (Ferguson, J. dissenting). Judge Ferguson argues that virtual child pornography should be evaluated under a balancing approach similar to that used in *Ferber* and *Osborne*. *Id.* After weighing the government's interests "against the limited value of such material . . . virtual child pornography should join the ranks of real child pornography as a class outside the protection of the First Amendment." *Id. See* Guglielmi, *supra* note 55, at 215. Guglielmi recognizes "[t]hat virtual child pornography does not fit into the category of unprotected speech outlined in *Ferber*" but argues that due to recent technological advances, "[v]irtual child pornography, however, may be a new category of unprotected speech." Guglielmi, *supra* note 55, at 215. Gugliemi then balances the low value of virtual child pornography against its harms to society. *Id.* at 215-20; *see also* Wasserman, *supra* note 112,at 274-78; Anderson, *supra* note 30, at 413-21.

143. *Free Speech*, 535 U.S. at 246. Responding to Judge Ferguson's suggestion that a new category be created, the Court stated that, "It would be necessary for us to take this step to uphold the statute." *Id.* The Court explained why virtual child pornography doesn't fit within existing categories and then applied strict scrutiny to clearly reject the idea of creating a new category of unprotected speech. *Id.* at 248-57.

144. *See* Harvard Law Review, *Leading Cases, I. Constitutional Law, D. Freedom of Expres-*

After creating a number of categories of speech that were precluded from First Amendment protection the Supreme Court has set about a course of narrowing their scope.[145] Libel, a category of expression first declared unconstitutional in 1952, has been narrowed by subsequent decisions.[146] Obscenity, first declared unprotected in *Roth v. United States*, has had its definition whittled to the current formulation found in *Miller v. California*.[147] Likewise, the "fighting words" doctrine has suffered from severe limitation since its formulation in *Chaplinsky v. New Hampshire* in 1942.[148] Even commercial speech, which the Court originally

sion, 116 HARV. L. REV. 262, 269-72 (2002) ("The Court's construction of the CPPA is yet another indication of its increasing distrust of categorical, value-based exclusions from First Amendment protection."). The decision is consistent with the larger trend of the Court in resisting to judge the "importance or moral quality of the speech at issue." *Id.* at 270.

145. *See infra* notes 146-49. *See also* O'Neill, *supra* note 22, at 251-265. Professor O'Neill revisits the Court's use of the "categorical" approach and discusses each category that has been created by the Court. *Id.*

146. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); *see supra* note 3. The Supreme Court has narrowed the holding in subsequent decisions. *See* N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (limiting the availability of libel claims brought by public officials). The Court recognized the "erroneous statement" must receive protection if "the freedoms of expression are to have the breathing space that they need . . . to survive." *Id.* at 271-72; *see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that private individuals must establish a level of fault, negligence or greater, and public officials must establish actual malice); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (limiting the rule in *Gertz*).

147. Roth v. United States, 354 U.S. 476, 489 (1957); Miller v. California, 413 U.S. 15, 24 (1973); *see supra* notes 3, 4. The Court in *Roth* defined obscenity as "material which deals with sex in a manner appealing to prurient interests." *Roth*, 354 U.S. at 487. The test articulated by the Court was that obscenity would be found if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489. The Court refined the test of obscenity in *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General*, by requiring that each element of the *Roth* test be established independently and that the work be utterly without redeeming social value, which severely limited the scope of *Roth*. 383 U.S. 413 (1966). In *Miller* the Court crafted an entirely new test consisting of three parts: (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 the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24. *See* P. Heath Brockwell, Comment, *Grappling With* Miller v. California*: The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131 (1994) (discussing the evolution of the standards and tests for obscenity used by the Supreme Court). The comment suggests that the *Miller* test should be replaced with a "conduct-based approach" similar to that used by the Court in *Ferber*. *Id.* at 139-40.

148. Chaplinsky v. New Hampshire, 315, U.S. 568, 572 (1942) (holding that "fighting words" are not protected the First Amendment). The Court defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* The defendant in *Chaplinsky* had called a city marshal a "God damned racketeer" and a "damned Fascist" which the Court deemed fighting words. *Id.* at 568-69. The Court under similar facts has since refused to uphold convictions based on fighting words. *See* Brown v. Oklahoma, 408 U.S. 914 (1972) (refusing to uphold the conviction of a defendant who called police officers "mother fucking fascist pig

deemed outside the protection of the First Amendment, has since seen its category narrowed and almost eliminated.[149] It should not come as a great surprise then that the Court in *Free Speech* narrowly defined the category of child pornography to include only those materials that are produced with actual children.

The ban on child pornography had been the last categorical exclusion left relatively unscathed since its creation.[150] It appears that the Court has become less willing to place value judgments on speech and instead is favoring broad inclusion with very rigid and narrow exceptions to the First Amendment.[151] Some Justices have even hinted that the categorical approach should be abandoned altogether.[152] While this is unlikely to happen, the Court has sent another strong signal that they are increasingly unwilling to exclude speech due to its content, even when dealing with such a disturbing subject-matter.[153]

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cops"); Cohen v. California, 403 U.S. 15, 26 (1971) (refusing to uphold the conviction of a man charged with disturbing the peace for wearing a jacket on which "Fuck the Draft" had been written). *See also* Jeremy C. Martin, *Deconstructing "Constructive Threats": Classification and Analysis of Threatening Speech After Watts and Planned Parenthood*, 31 ST. MARY'S L.J. 751, 758-61 (2000) (discussing "the Court's protective attitude toward speech of a dissenting or offensive nature").

149. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that the government can restrain "purely commercial advertising" without violating the First Amendment), *overruled by* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Court has since changed its course by affording some First Amendment protection to purely commercial speech. *See Va. State Bd. of Pharmacy*, 425 U.S. at 762 (holding that commercial speech is not so removed from any "exposition of ideas" and from "truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of Government" that it lacks all First Amendment protection); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (requiring courts to apply a four part test in commercial speech cases).

150. See the discussion of *Ferber, supra* notes 42-57 and accompanying text. Although limited by its very terms to that which "visually depict(s) sexual conduct by children below a specific age," the decision has been interpreted broadly by many. *See, e.g.*, United States v. Hilton, 167 F.3d 61, 70 (1st Cir. 1999) (relying on the "greater leeway" given to government in *Ferber* to uphold the CPPA). The *Ferber* decision has only been subjected to limitation in *X-Citement Video*. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994). The Court in *X-Citement Video* arguably required that there be a scienter requirement included in a child pornography case. *Id.* at 66. In that case, however, the Court read in the scienter requirement and choose not to directly confront whether one was required. *Id. See supra* notes 69-81. *See also* Harvard Law Review, *supra* note 144, at 269 ("[T]he Court qualified significantly what could have previously been considered a broad categorical exception to the First Amendment.").

151. *See id.* at 269-70; *supra* notes 146-50.

152. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 426 (1992) (Stevens, J., concurring in the judgment) (suggesting problems with the categorical approach). Justice Stevens stated that he has "reservations about the 'categorical approach' to the First Amendment." *Id. See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83-85 (1973) (Brennan, J., dissenting) (suggesting that the categorical approach as to obscenity be abandoned altogether).

153. *See supra* notes 146-50. *See also* David L. Hudson, *Reflecting on the Virtual Child Porn Decision*, 36 J. MARSHALL L. REV. 211, 219 (2002) (pointing out that "[t]he Supreme Court showed that it could conduct an impressive First Amendment inquiry despite the heat of public criticism").

3. The CPPA Under Strict Scrutiny: What's Compelling?

The Supreme Court's refusal to place "virtual" child pornography within the category created in *Ferber*, or in the alternative to create a new category of unprotected expression, doomed the CPPA to the near impossible task of surviving strict scrutiny.[154] In their attempt to put forth a compelling interest the government offered a number of possible justifications for the ban.[155] However, the Court properly recognized that the asserted interests could not justify the broad suppression of speech found in the CPPA.[156]

a. Why the Incitement Argument Could Not Work

The government proposed that "virtual" child pornography whets the appetites of pedophiles thereby encouraging them to engage in the illegal conduct of child molestation.[157] Congress relied on this idea in passing the CPPA, finding that images created without real children need to be prevented because they "[inflame] the desires of child molesters, pedophiles, and child pornographers."[158] This idea, that virtual

While the categorical approach appears to have gained disfavor there are still proponents who wish to create new or broader categories of unprotected speech. *See Free Speech v. Reno*, 198 F.3d at 1101; Jeremy C. Martin, *supra* note 148, at 790-95. (suggesting "constructive threats" as a new category of unprotected speech); Gugliemi, *supra* note 55, at 214; Pursel, *supra* note 140, at 654-55 (discussing the creation of a new category in *Ferber* and stating that "[i]f, within only the last twenty years, the Supreme Court has chiseled out another unprotected category of speech using its notions of desirable social policy, then it is likely that social policy may dictate further, undiscovered areas against which the Court will again wield its pickax").

154. Under strict scrutiny, a blanket suppression of an entire category of speech, or content-based, restriction is not valid unless it is: (1) narrowly tailored and (2) serves a compelling governmental interest. *See* Boos v. Barry, 485 U.S. 312, 321 (1988); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

155. *See Free Speech*, 535 U.S. at 250-58; *supra* note 110; Petitioner's Brief at 33-40, *Free Speech* (No. 00-795). *See generally* Johnson, *supra* note 120, at 327-28; Tiosavlijevic, *supra* note 55, at 560-65; Gladowsky, *supra* note 103, at 266-74.

156. *See Free Speech*, 535 U.S. at 256 ("The reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment."). *But see* Rikki Solowey, Comment, *A Question of Equivalence: Expanding the Definition of Child Pornography to Encompass "Virtual" Computer-Generated Images*, 4 TUL. J. TECH. & INTELL. PROP. 161 (2002) (arguing that the state has a strong interest in preventing actual harm to children, destroying the market, and reducing secondary effects in the regulation of virtual child pornography).

157. *Free Speech*, 535 U.S. at 253; Petitioner's Brief at 31, *Free Speech* (No. 00-795). The government conceded that the interest in suppressing the images "[d]epend[ed] on the effects such images have on pedophiles, and the regulation of speech because of its potential to incite unlawful conduct." *Id.* While recognizing that this type of justification ordinarily raises "serious First Amendment concerns," the government argued that "[t]he First Amendment does not preclude Congress from taking account of the effects that child pornography has on pedophiles." *Id.*

158. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(10)(B), 110 Stat.

child pornography can be banned due to its ability to incite pedophiles' desires to molest, totally ignores First Amendment precedent.[159]

Speech may be suppressed when it is of such a nature as to produce imminent lawless action and is likely to cause such action.[160] There must, however, be a direct connection between the speech and the unlawful act.[161] The mere proposition that a particular form of speech could lead to an unlawful act cannot sustain a ban on the speech.[162] As the Court noted, "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[163] Under the theory proposed by the government, any portrayal of violence in movies, music, video games, or on the Internet could be banned due to the possibility that such portrayals may tend to encourage an act of violence in someone who was predisposed to such behavior.[164] While the idea may have

3009. Congress found that this inflammation of pedophilic desires leads to an increase in "the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials." *Id.*

159. *See Free Speech*, 535 U.S. at 256; *Brandenburg*, 395 U.S. at 447 (holding that the government may suppress inciting speech when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Hess*, 414 U.S. at 108 (holding that speech cannot be prohibited because it increases the chance of an unlawful act being committed at an indefinite time in the future). *See also* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 138-40 (1992) (discussing justifications for the banning of certain speech). Professor Massey points out that the rationale for leaving child pornography as well as other types of speech, such as defamation, unprotected is based on the fact that "the speech inflicts a quite particularized and individualized injury by its very utterance." *Id.* "The thrust of the Court's rationale is not that the harm of child pornography is a more generalized one inflicted on viewers, or even the class of all children, but that it is imposed on identifiable individuals." *Id.*

160. *Brandenburg*, 395 U.S. at 447. For a discussion of the topics surrounding incitement speech see Benjamin Means, *Criminal Speech and the First Amendment*, 86 MARQ. L. REV. 501 (2002) (discussing the distinction between speech and crime).

161. *See Brandenburg*, 395 U.S. at 447; *supra* note 159 and accompanying text; Burke, *supra* note 13, at 464. Professor Burke points out that that fact that pedophiles become aroused by child pornography does not translate into sexual abuse. *Id*. "While pornography may play a greater role in the life of a pedophile . . . that fact does not support the conclusion that pedophiles will act on their desires." *Id.* Although a strong correlation between the "consumption of pornography and the perpetration of sexual crimes against children" may be shown, that does not automatically make it a causal relationship. *Id.* The link between the portrayal and the act is "too tenuous a link under First Amendment jurisprudence." *Id.* at 465. *See also* Friel, *supra* note 129, at 249-55 (stating that "without a clear causal link between expression and the violent behavior of the listeners and viewers, the regulation of the unpopular speech falls outside the government's domain").

162. *See Hess*, 414 U.S. at 108; Clay Calvert, *The "Enticing Images" Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 595 (2000) (suggesting that the courts must be cautious before adopting any rule allowing speech to be squelched because of its allegedly seductive or enticing effects).

163. *Free Speech*, 535 U.S. at 256.

164. It would logically follow that if one may ban virtual child pornography due to its effect on the viewer, then one would have strong precedent for banning violent depictions or speech in any

some logical force, it cannot support the suppression of speech unless a strong and direct connection between the speech and action can be established.[165] Otherwise, we risk allowing the legislators to regulate thoughts and ideas.[166] The Court recognized this risk and properly held that the asserted interest could not justify the ban on "virtual" child pornography.[167]

medium due to its possible effect of stimulating the viewer to act violently. Many commentators have discussed this idea in the criminal and civil context. *See* Means, *supra* note 160, at 537-38 (discussing a case involving Oliver Stone's movie "Natural Born Killers" and analyzing the First Amendment implications of imposing liability for copycat cases); Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5 (2002) (advocating the expansion of the incitement doctrine when it comes to the internet and hate speech); John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425 (2002) (discussing speech on the internet and the possibility of it qualifying as incitement speech); Vivien Toomey Montz, *Recent Incitement Claims Against Publishers and Filmmakers: Restraints on First Amendment Rights or Proper Limits on Violent Speech?*, 1 VA. SPORTS & ENT. L.J. 171 (2002) (discussing the regulation of violence in film and television); Lisa Kimmel, Comment, *Media Violence: Different Times Call for Different Measures*, 10 U. MIAMI BUS. L. REV. 687 (2002) (discussing the *Brandenburg* test and media violence in the tort liability context).

165. No such direct connection has been established between computer-generated child pornography and sexual abuse. *See Free Speech*, 535 U.S. at 253. The Court stated: "The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse." *Id. See also* Hamoy, *supra* note 130, at 509 ("At the time the CPPA was passed no factual studies 'concerning the link between computer-generated child pornography and subsequent abuse of children' existed."); Lodato, *supra* note 140, at 1357 ("The causal link between the proposition that those who view child pornography will ultimately abuse a child is too attenuated."); Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. MARSHALL J. COMPUTER & INFO. L. 483, 490 (1996) (recognizing the lack of evidence of the connection). The Court's language suggests that if a strong, direct connection could be shown then perhaps a prohibition on the speech would be possible. *Free Speech*, 535 U.S. at 253. In order to establish this connection, empirical research would need to be conducted and as such, a research privilege for the viewing of child pornography may be necessary in order to more fully understand the effect of child pornography on the viewer. The need for a research privilege to more fully understand child pornography has been suggested by commentators. *See, e.g.*, Clay Calvert, *Opening Up an Academic Privilege and Shutting Down Child Modeling Sites: Revising Child Pornography Laws in the United States*, 107 DICK. L. REV. 253, 258-72 (2002) (arguing the need for a academic research privilege in order to more fully understand it, and better define it).

166. *See* Stanley v. Georgia, 394 U.S. 557, 566 (1969) (stating that legislators "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts"). As Professor Burke states, "Virtual child pornography, which is not obscene, is nothing more than an imaginative idea." Burke, *supra* note 13, at 460. *But see* Ronald K.L. Collins and David M. Skover, *Changing Images of the State: The Pornographic State*, 107 HARV. L. REV. 1374 (1994) (suggesting that government indifference to the lure of pornography will "reinscribe" the First Amendment beyond all recognition).

167. *Free Speech*, 535 U.S. at 252-53.

b. Why the Seduction Argument Failed

One of the government's most powerful arguments was that virtual child pornography could be used by pedophiles to seduce other children and therefore it is necessary to ban such material.[168] Unfortunately, it is likely that in the hands of pedophiles, virtual child pornography could and would be used for this purpose.[169] This presented the troubling problem of whether such material could be banned due to the fact that some very disturbed individuals would misuse it to commit a crime.[170] The Court recognized that such a rationale could subject many innocent materials to prohibition and refused to uphold the CPPA on this basis.[171]

The idea of banning virtual child pornography due to the possible use of it as a seduction tool does not lack precedent.[172] Proponents of this as a justification for blanket suppression point to the Court's opinion in *Osborne v. Ohio*, which recognized this indirect harm as one justification for banning private possession of child pornography. The Court in *Osborne* relied on the justifications, already set forth in *Ferber*, of preventing the exploitation of children, destroying the market for child pornography, and preventing the survival of a permanent record of abuse.[173] They also recognized the possible use of child pornography as a seduc-

168. *See id* at 250-51; Petitioner's Brief at 33-37, *Free Speech* (No. 00-795).

169. *See* FINAL REPORT ON THE ATT'Y GEN'S COMMISSION ON PORNOGRAPHY 406, 649 (1986) (describing the seduction process including showing the child the pornographic material; convincing them that explicit sex is desirable; persuading them that other children are sexually active; the child becomes desensitized, lowering their inhibitions; sexual activity takes place and photographs or film are taken; and finally this material is used on other children); S. Rep. No. 104-358, at 2 (finding that virtual child pornography like traditional child pornography could be used to seduce a child who is unable to distinguish between them). *See also* Burke, *supra* note 13, at 466. Professor Burke suggests that it is possible that computer-generated child pornography may actually be more effective than traditional child pornography. *Id.* She suggests that virtual child pornography can be produced to the needs of the seducer and thus may be more effective. *Id. But see* Adelman, *supra* note 165, at 490-91. Adelman points out that reliance on the Attorney General's Final Report may be misplaced since "the Final Report's discussion of child pornography demonstrates that the use of sexually explicit photos or films of children to lure other children played a relatively small part in the Commission's view of the overall problem." *Id.* He also states that "there is an extremely weak empirical showing that computer-generated child pornography will be used to induce participation by children in sexual conduct." *Id.*

170. *See Free Speech*, 535 U.S. at 250-51.

171. *See id.* at 250-53.

172. *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (citing the prohibition of the use of child pornography to seduce children as a valid state interest supporting a law prohibiting its possession). One author argues that "[t]he Supreme Court, the Congress, and the Justice Department all have recognized" that child pornography is used as a seduction tool and the Court has deemed it a "[v]alid reason to outlaw child pornography." Guglielmi, *supra* note 55 at 218.

173. *Osborne*, 495 U.S. at 109-11.

tion tool by pedophiles as another harm.[174] The Court weighed all these factors and concluded that private possession could be prohibited.[175] However, the possibility that virtual child pornography could be used as a seduction tool by pedophiles cannot alone justify its prohibition.[176] Virtual child pornography does not sexually exploit children in its creation nor does it create a permanent record of abuse.[177] Without these additional factors, *Osborne* could provide little support for the prohibition.[178]

The Court also recognized that innocent materials, "such as cartoons, video games, and candy," could be used for "immoral purposes."[179] While virtual child pornography can hardly be deemed "innocent," it is considered protected speech that cannot be banned due to a criminal's misuse of it.[180] The problem lies with the person who would use such material for a criminal purpose and not necessarily with the material itself.[181] To prohibit an entire realm of speech due to a criminal misuse of the material by some would improperly infringe on the rights of law-abiding adults.[182] The Court recognized this dilemma and cor-

174. *Id.* at 111.

175. *Id.* ("Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography.").

176. The Court in *Osborne* weighed all the factors together in coming to their conclusion, so it cannot be said that this interest alone could justify a blanket ban. *See id. See also* Sternberg, *supra* note 30, at 2811-12 ("While computer-generated child pornography that does not require the use of actual children for its creation can still be used by pedophiles as a tool of seduction, this factor alone is not sufficient to overcome the First Amendment.").

177. *See supra* note 130 and accompanying text.

178. *See* Lodato, *supra* note 140, at 1360 ("The material's potential for illegal use alone should not remove it from the protective shield of the First Amendment."); Sternberg, *supra* note 30, at 2811-12. The other factors relied on in *Osborne*, such as the exploitation of children in its production and the creation of a permanent record of abuse, are not present for virtual child pornography, which causes the "[s]cales to tip in a different direction than under the facts of *Osborne*." *Id. But see* Lee, *supra* note 130, at 652-53 (suggesting that the prohibition is consistent with *Osborne*); Anderson, *supra* note 30, at 417 (stating that "[t]he Osborne Court endorsed the legitimacy of the effort to protect children other than those depicted in the images").

179. *Free Speech*, 535 U.S. at 250-51.

180. *See id.* The Court stated that the "[t]he evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question." *Id.* Despite its disgusting subject it is not the speech itself that is wrong but instead it is the pedophile's criminal act that is wrong. For a discussion of the breakdown of the speech/action distinction see generally Adler, *supra* note 55.

181. *See Free Speech*, 535 U.S. at 253-54.

182. *See* Lodato, *supra* note 140, at 1359-61. "Even though protecting children from sexual abuse is a compelling governmental interest, prohibiting the creation and possession of computer-generated child pornography is not the least restrictive means of achieving that objective." *Id.* Congress would need to provide empirical evidence that the prohibited material's only purpose is to seduce children. *Id.* States can use other equally and less restrictive means such as laws prohibiting distribution of material to minors or pursuing graphic depictions under obscenity laws. *Id.*

rectly found that it could not sustain the CPPA on this basis.[183]

c. Strengthening the Affirmative Defense: Could it Have Saved the CPPA?

The government also asserted as an interest that the prosecution of child pornographers would become more difficult or impossible due to the similarity between virtual and traditional child pornography.[184] The Court quickly dismissed this justification, stating that such a proposition "turns the First Amendment upside down."[185] The government tried to save the CPPA by reading it as a burden shifting statute rather than a ban on speech.[186] The Court avoided answering the question of whether an affirmative defense could save the statute by stating that as drafted it was incomplete.[187] This leaves open the question of "whether the Government could impose this burden on a speaker."[188]

The Court pointed out that the affirmative defense found in the CPPA would allow a conviction where it could be proven that no actual child was used.[189] Specifically, the Court stated that "the affirmative defense provides no protection to persons who produce speech by using computer imaging" or other means not involving the sexual exploitation of children.[190] One possibility is that the addition of a more complete affirmative defense for virtual child pornography could cure the statute's overbreadth and bring it in line with the First Amendment.[191] One

183. *Free Speech*, 535 U.S. at 252-53. ("This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.").

184. *See Free Speech*, 535 U.S. at 254-55; Petitioner's Brief at 23-24, *Free Speech* (No. 00-795) (because computers can alter sexually explicit depictions so as to make it "'virtually impossible' to identify individuals, or to determine if the offending material was produced using children . . . Congress was concerned that the government would be unable to meet its burden of proving that a pornographic image is of a real child.").

185. *Free Speech*, 535 U.S. at 255. The Court explained that "[t]he argument, in essence, is that protected speech may be banned as a means to ban unprotected speech." *Id.*

186. *Id.*

187. *Id.* at 256 ("Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms.").

188. *See id.* at 256-57.

189. *See id.*

190. *Free Speech*, 535 U.S. at 256.

191. *See* Sternberg, *supra* note 30, at 2815-16. The note suggests the addition to section 2252A(e) of the CPPA to read as follows:

> (e) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), (4), or (5) of subsection (a) that –
>
> (i) the alleged child pornography was produced wholly without the use of actual children;
>
> (ii) the alleged child pornography was advertised, promoted, presented, described,

commentator has even suggested that the defendant already bears the burden of proving that no actual child was used in the production of child pornography.[192] The addition of a more complete affirmative defense would narrow the breadth of a ban on virtual child pornography.[193] Whether that can save the statute is questionable at best.[194]

The government contended that it would have a near impossible task of proving beyond a reasonable doubt that the material was in fact created using actual children.[195] Shifting the burden of proof creates a similar problem because the defendant would have no easier time proving that the images are computer-generated than the prosecutor would in proving they are not.[196] Under such a burden shifting approach, a number of persons who have committed no crime may be left to suffer the

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or distributed so as to convey the impression that it was produced wholly without the use of actual children; and

(iii) no identifiable child is depicted in the alleged child pornography.

Id. See also Friel, *supra* note 129, at 261. The note proposes a rebuttable presumption that any material depicting a child in a way covered under the statute would be "presumed to be child pornography for purposes of this Section." *Id.* The defendant would have the burden of rebutting the presumption by "clear and convincing evidence." *Id.*

192. *See* Lodato, *supra* note 140, at 1351-54. Relying on reasoning in two circuit court cases, the note contends that the defendant, not the government, bears the burden of proving that the child pornography was produced without the use of an actual child. *Id. See* United States v. Nolan, 818 F.2d 1015 (1st Cir. 1987) (upholding the defendant's conviction for receiving child pornography). The defendant argued that the government must prove that the photographs at issue were not wax figures, mannequins, or composite representations created by computer. *Id.* at 1016. The court refused to place such a burden on the prosecution and held that the jury need only be convinced that the images were created with actual children. *Id.* at 1018-19. *See also* United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995) (holding that the jury, applying their instructions, could have decided to believe defendant's assertion that the images were computer-generated).

193. A more complete defense would almost certainly be able to be effectively used by some defendants who could prove that they only possessed virtual child pornography which would eliminate a portion of the overbreadth of the statute. *See* Sternberg, *supra* note 30, at 2818-19; Friel, *supra* note 129, at 260 ("It would allow reasonable freedom of thought and expression . . . .").

194. Shifting the burden to the defendant to prove his/her innocence in a criminal case raises serious constitutional questions. *See Free Speech*, 535 U.S. at 254-55.

195. *See Free Speech*, 535 U.S. at 254-55; Petitioner's Brief at 23-24, *Free Speech* (No. 00-795).

196. *See id.* ("If the evidentiary burden is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor."); Lee, *supra* note 130, at 678-79 ("[B]ecause proving that no actual minor was involved in the production of child pornography is virtually impossible, especially if the criminal defendant downloaded the pictures from cyberspace, he or she will argue that this alternative denies him or her due process."). *But see* Sternberg, *supra* note 30, at 2820-21 ("Proving that no actual child was used in the production of a particular piece of child pornography could be difficult, especially where the defendant downloaded the images from the internet."). The note concludes, however, that there are sufficient ways a defendant can show that materials are virtual such as: the defendant showing his skill in manipulating such images; labeling of files to indicate they are virtual; showing that the material was obtained from certain web sites that carry only virtual material. *Id.* at 2821.

consequences as if they had, in direct violation of their First Amendment rights.[197] It is likely that the Supreme Court will have to eventually decide whether this approach can survive constitutional scrutiny and in doing so they should ensure that they do not to place an insurmountable burden on the defendant.[198]

B. Using Pre-Existing Obscenity Law to Regulate Virtual Child Pornography

The possible indirect harms that virtual child pornography presents, such as the use of it as a seduction tool, are frightening to say the least.[199] While these indirect harms are not sufficient to ban the entire category of speech, the government may be able to attack the most graphic depictions by other means.[200] As an alternative to the blanket ban found in the CPPA, prosecutors should be able to pursue much of the material through existing obscenity laws.[201]

The government, in arguing to uphold the CPPA, claimed that it, like the statute upheld in *Ferber*, was aimed primarily at hard-core depictions of child pornography.[202] Although obscenity law rarely applies to sexually explicit pornography that portrays adults, when children are

197. *See Free Speech*, 535 U.S. at 255 ("An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on the pain of a felony conviction, that his conduct falls within the affirmative defense . . . [t]he evidentiary burden is not trivial.").

198. Although ultimately avoiding the issue, the majority opinion seems skeptical of an affirmative defense that would shift the burden. *Id.* However, Justice Thomas' concurring opinion suggests that if the prosecution is unable to effectively attack "unlawful speech" the Government's interest may become compelling enough to warrant either an affirmative defense that shifts the burden or some other method that is narrowly tailored to serve that purpose. *See id*. at 259-60. (Thomas, J., concurring in the judgment).

199. *See* Tiosavlijevic, *supra* note 55, at 562 ("Statistics show that eighty-seven percent of convicted girl molesters and seventy-seven percent of boy molesters admit to using pornography in the commission of their crimes."); Daniel S. Armagh, *Virtual Child Pornography: Criminal Conduct or Protected Speech?*, 23 CARDOZO L. REV. 1993, 2005 (2002) (stating that data gathered by one agency "conclusively establishes that individuals involved with child pornography are likely to molest children").

200. *See Free Speech*, 535 U.S. 234, and *infra* notes 201-210.

201. *See* Miller v. California, 413 U.S. 15, 24 (1973). *See also supra* note 4 and accompanying text.

202. *See* Petitioner's Brief at 43-44, *Free Speech* (No. 00-795). The government argues that:

> The reasoning applied in *Ferber* is equally applicable here. Like the statute at issue in *Ferber*, the CPPA is aimed at "hard core" child pornography, depictions that involve "sexual intercourse," or "lascivious exhibition of the genitals or pubic area."

Id. (internal citations omitted). *See also* Gugliemi, *supra* note 55, at 222 ("The appropriate scope of virtual child pornography that is outside the First Amendment's protection should include only images that visually depict either a child engaged in sexual conduct or a lewd exhibition of a child's genitals.").

portrayed in such a manner it could likely garner a different result.[203] By using the standards set down in *Miller v. California*, the government should be able to prosecute the producer of hard core depictions of child pornography even if such portrayals are virtual.[204] A depiction of a child, particularly a young one, performing a sexual act or a lewd exhibition of their genitals would most likely never be found to have serious literary, scientific, or artistic value.[205] A jury may very well find that this type of hard-core child pornography, when taken as a whole, appeals to the prurient interest.[206] It is arguably material that plays no part in the public debate due to the fact that it is only viewed by pedophiles.[207] Such a strategy is most likely to succeed when the materials at issue involve explicit sex acts and contain virtual depictions of very young children.[208] When the materials involve pictures of older children, closer to the age of majority, the case would become more difficult if not impossible.[209] This solution would not allow all "virtual" child pornography to be prohibited; however, it could serve the purpose of prosecuting the producers of hard-core virtual child pornography and thus would limit the overall market including those images that are the most disturbing.[210]

203. Applying the strict standards of *Miller*, very little adult pornography qualifies as obscenity.

204. *See* Hamoy, *supra* note 130, at 512 ("It is likely that material depicting particularly young children, especially if they are engaged in hard core sex acts, will result in a conviction under the *Miller* test."); Karen Weiss, Note, *"But She Was Only a Child. That Is Obscene!" The Unconstitutionality of Past and Present Attempts to Ban Virtual Child Pornography and the Obscenity Alternative*, 70 GEO. WASH. L. REV. 228, 256 (2002) ("[t]he government may prosecute a substantial amount of virtual child pornography under existing obscenity law.").

205. As the Court in *Ferber* stated: "We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important or necessary part of a literary performance or scientific or educational work." New York v. Ferber, 458 U.S. 747, 762-63 (1982). As one commentator points out: "This quote comments on the visual depiction, and does not depend on whether real children are used. Thus it is equally applicable to virtual child pornography as it is to pornography using real children." Weiss, *supra* note 204, at 250.

206. *See Miller*, 413 U.S. at 24-25; Weiss, *supra* note 204, at 250.

207. *See id.* ("[S]exually explicit depictions of children portray behavior that is abnormal and deplorable and 'exists primarily for the consumption of pedophiles.' Thus like other depictions that qualify as obscenity, child pornography, whether virtual or real, often is not susceptible to counter-speech and cannot successfully contribute to the marketplace of ideas.") (internal citations omitted).

208. *See id.* at 255-56; Burke, *supra* note 13, at 459. ("*Miller* will not suppress all child pornography, be it virtual or real.").

209. *See* Hamoy, *supra* note 130, at 513. The comment also points out that under the Supreme Court's decision in *Stanley v. Georgia*, at home possession of obscene materials cannot be banned. *Id.* Stanley v. Georgia, 394, U.S. 557 (1969).

210. The government could also continue to attack this disturbing problem in other ways: through existing laws that prohibit the distribution of pornographic materials to minors and through the vigilant prosecution of those violating child abuse laws. *See id.* at 256-57.

C. New Legislation to Deal With Virtual Child Pornography: Can It Survive Judicial Scrutiny?

Given the strong reaction by lawmakers to the Supreme Court's decision, it is not surprising that new legislation, including a proposed constitutional amendment, was introduced in both houses of Congress shortly after the decision.[211] The new proposals attempt to address child pornography without violating the First Amendment.[212] Whether these new laws can pass constitutional scrutiny is questionable at best.[213]

On August 30, 2002, Congressman Lamar Smith (R-TX) introduced the Child Obscenity and Pornography Prevention Act of 2002 (COPPA) into the House of Representatives.[214] The bill moved rapidly through the Judiciary Committee and was passed by the House on June 25, 2002, by an overwhelming majority.[215] It was received in the Senate and referred to the Senate Committee on the Judiciary.[216] The COPPA amends the CPPA by changing the definition of child pornography from any depiction that "is or appears to be, of a minor engaging in sexually explicit conduct"[217] to "computer image or computer-generated image that is, or appears virtually indistinguishable from that of a minor engaging in sexually explicit conduct."[218]

Congress appeared to be specifically addressing the concern by the Court that the CPPA would have made youthful-looking adult pornography illegal as well as depictions by adults of youth sexuality in film and art.[219] The language "virtually indistinguishable" seems to have been lifted directly from Justice O'Connor's concurring opinion in which she

211. *See* H.R.J. Res. 106, 107th Cong. (2002) (proposing a constitutional amendment); Child Obscenity Pornography Prevention Act of 2002, H.R. 4623, 107th Cong. (2002) (amending the CPPA and criminalizing virtual child pornography); Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 107th Cong. (2003) (creating an affirmative defense shifting the burden of proof to the defendant).

212. *See supra* note 211 and accompanying text.

213. Not all parts of these proposed laws are problematic, however certain portions of them do not follow the Court's holding in *Free Speech*.

214. H.R. Doc. No. 4623 (2002).

215. *See* Bill Summary & Status for the 107th Congress, H.R. 4623 available at http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR04623:@@@L&summ2=m& (last visited Feb. 12, 2003). The vote was 413-8. *Id.*

216. S. Doc. No. 2511 (2002).

217. 18 U.S.C § 2256(8)(B)(1998).

218. H.R. Doc. No. 4623, § 2(a) (2002) ("Section 2256(8)(B) of title 18, United States Code, is amended to read as follows: '(B) such visual depiction is a computer image or computer generated image that is, or appears virtually indistinguishable from, that of a minor engaging in sexually explicit conduct.").

219. *See Free Speech*, 535 U.S. at 246-48 (discussing works with artistic value that were prohibited by the CPPA).

agreed with the majority that the CPPA's ban on youthful looking adult pornography was overbroad.[220] The problem with this piece of legislation is that it ignores the Supreme Court's holding that "virtual" child pornography is protected speech.[221] When no actual child is used in the production, the material falls outside of the category created in *Ferber* and the Court found none of the government's justifications compelling enough to uphold a ban on "virtual" child pornography.[222] One commentator called this bill an attempt at a "quick fix" and doubts its constitutionality.[223] By merely changing the wording of the statute, Congress has done nothing to change the effect: a ban on protected speech.[224]

On July 17, 2002, in addition to the COPPA, a constitutional amendment concerning child pornography was proposed by Joint Resolution.[225] The proposed amendment seeks to strip any form of virtual child pornography of constitutional protection.[226] The idea is somewhat puzzling however, since such an amendment would be in direct conflict with the First Amendment's guarantee of free speech.[227] The proposed amendment makes any child pornography, including virtual, subject to

220. *See Id.* at 260-62 (O'Connor, J., concurring in the judgment). *See also supra* notes 114-115 and accompanying text.

221. *See Free Speech*, 535 U.S. at 256-58 ("§ 2256(8)(B) covers material beyond the categories recognized in *Ferber* and *Miller* and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment.").

222. *See id.*

223. *See* Landau, *supra* note 123. "If the main concern [of] the Supreme Court . . . [in the] *Ferber* case, was the protection of children from participating in sexual activities that are being filmed, then it should not matter whether the computer-generated images look like cartoons or are 'virtually indistinguishable from' minors." *Id.*

224. *See* Cisneros, *supra* note 137, at 10. "The new bills maintain the prohibition of "virtual child" pornography even though the Supreme Court has indicated it is protected expression." *Id. See also* Weiss, *supra* note 204, at 244 ("[T]he COPPA largely fails to rectify the constitutional infirmities ultimately leading to the demise of the CPPA."). The new bill does strengthen the affirmative defense which may help save it from constitutional infirmity, however, the majority in *Free Speech*, expressed reservations about the burden shifting approach used by the bill. *See* H.R. 4623; *Free Speech*, 535 U.S. at 256-58.

225. H.R.J. Res. 106, 107 (2002). which reads:

> Section 1. Neither the Constitution nor any State constitution shall be construed to protect child pornography, defined as visual depictions by any technological means of minor persons, whether actual or virtual, engaged in explicit sexual activity.
>
> Section 2. The Congress shall have the power to enforce this article by appropriate legislation

Id.

226. *See id.*

227. While the First Amendment guarantees free speech, this bill would effectively make illegal that which is already illegal, child pornography, as well as a category that the Court just held was protected speech, virtual child pornography. *See* U.S. Const. amend. I; *Free Speech*, 535 U.S. at 234. It would create a contradiction between two amendments of the Constitution.

regulation not withstanding its content or possible artistic value.[228] It is essentially an attempt to ingrain the overbreadth of the CPPA into the Constitution and should not be tolerated.[229]

V. CONCLUSION

In dealing with child pornography, the most important consideration is the protection of the children who are victimized by its creation. This very concern led the Supreme Court to exclude child pornography from the protective shelter of the First Amendment. In doing so the Court has allowed law enforcement to strike at the producers of child pornography who would abuse children in its creation. Now technological advances have allowed for the creation of virtual child pornography, which is produced without the use of actual children. The CPPA sought to treat this new material the same as it would traditional child pornography. The Court in *Free Speech* properly held that the law banned a significant amount of protected speech and that the government could not justify such an extension. This decision is consistent with the Court's reluctance to expand the categories of unprotected speech or to make value-based judgments of speech.

As reviled and disturbing as it may be, virtual child pornography is clearly distinguishable from traditional child pornography. It harms no child in its production and possibly even creates a legal alternative to traditional child pornography. The justifications set forth by the government were insufficient to uphold the CPPA. While possible negative secondary effects of virtual child pornography are frightening, they could not support a blanket ban on an entire category of speech. A material's potential for bad use is not sufficient to ban it completely.

Many depictions of virtual child pornography can be dealt with through existing obscenity laws and laws prohibiting the dissemination of such material to minors. However, as law makers continue to attempt to address the problems associated with "virtual" child pornography, they should be careful that they do not repeat the problems of the CPPA. Unfortunately, the proposals to replace the CPPA are nothing more than a rewording and cannot survive constitutional scrutiny.

Ryan P. Kennedy

228. H.R.J. Res. 106, § 1. *See supra* note 225 and accompanying text.

229. *See* Cisneros, *supra* note 137, at 12-13 ("The proposed amendment is so broad that it would encompass much of the entertainment industry."). The proposed amendment, like the CPPA, allows for a ban on youthful-looking adult pornography and would affect any number of movies dealing with depictions of "minors" engaged in sexual activity. *Id.*