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Constitutional Law - Freedom of Speech: Supreme Court Strikes down Two Provisions of the Child Pornography Prevention Act (CPPA), Leaving Virtual Child Pornography Virtually Unregulated

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CONSTITUTIONAL LAW—FREEDOM OF SPEECH: SUPREME COURT STRIKES DOWN TWO PROVISIONS OF THE CHILD PORNOGRAPHY PREVENTION ACT (CPPA), LEAVING VIRTUAL CHILD PORNOGRAPHY VIRTUALLY UNREGULATED

Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002)*

I. FACTS

Congress enacted the Child Pornography Prevention Act of 1996 (CPPA)[1] in response to advances in technology that allowed the creation of computer images of what appear to be minors engaging in sexually explicit conduct.[2] Actual children are not harmed in the production of these computer-generated images, but the depictions are practically indistinguishable from those in which real children are sexually abused.[3]

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1. Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-2260 (2000).

2. S. REP. No. 104-358, at 7 (1996).

3. *Id.* at 2. Congress noted the realistic images created by computer animation in movies such as *Jurassic Park, Twister,* and *Independence Day. Id.* at 15. Furthermore, Congress relied on the testimony of Deputy Assistant Attorney General Di Gregory, who stated that pedophiles have altered and created images for many years, but in the past, the images were rudimentary magazine cutouts or assembled collages that were re-photographed. *Id.* These images could either be quickly identified as false, or a careful inspection would prove they were not actual pictures. *Id.*

Deputy Assistant Attorney General Di Gregory further noted that the ability of detectives to easily reveal the images as false may no longer be possible because of image-altering software and computer hardware. *Id.* Computers allow for the creation of images that appear to be real children engaging in sexual activity. *Id.* He stated it would soon be possible to produce child pornography without actually molesting children, and these images could be used to foster actual abuse. *Id.* Finally, he noted that the computers and software used to create these images are inexpensive and readily available. *Id.*

Graphics specialists at the United States Postal Inspection Service supported the fact that the tools to produce child pornography are inexpensive and readily available. *Id.* at 15-16. The only equipment needed to create child pornography is a computer, images of children, and image-editing software that can cost as little as fifty dollars. *Id.* at 16-17. According to the Inspection Service, the images needed to create child pornography can be loaded onto a computer in several ways:

> [E]xisting images can be loaded onto the computer from a disk or CD; images taken by a digital camera can be loaded from a disk; a scanner can be used to load photographs, book and magazines pictures, etc.; a video card, either internal or in an external device, can capture and load frames from video tapes or directly from a television; or a modem can download images from the Internet or other online computer service.

Id.

Congress made a number of findings regarding the effects of child pornography.[4] It determined that pedophiles often use child pornography as a method to seduce reluctant children into participating in the production of child pornography.[5] It also determined that pedophiles and child sexual abusers use child pornography to "stimulate and whet their own sexual appetites."[6]

Furthermore, Congress found that images created wholly by electronic means had the same effect as images created with actual children on pedophiles who used that material to rouse their own sexual appetites.[7] The level of danger to children who are persuaded to participate in child pornography was determined to be the same regardless of whether the pictures used to seduce the children are of actual children, or computer-generated images created without the use of children.[8] Congress determined that this sexualization of minors creates an unhealthy environment for children because it encourages society to perceive children as sexual objects, and further perpetuates their abuse and exploitation.[9] Based on these findings, Congress concluded that this sexualization of minors affects the "psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children."[10]

After the CPPA was enacted, the Free Speech Coalition filed a preenforcement challenge to the constitutionality of specific provisions of the Act.[11] The Free Speech Coalition is a California trade association of busi-

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4. *Id.* at 2-7.

5. *Id.* at 2. Congress found that child pornography is frequently used to seduce children into sexual activity. *Id.* "[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." *Id.* Congress noted findings by Dr. O'Brien, a prominent author in child pornography. *Id.* at 14.

> [T]he "cycle" of child pornography: (1) child pornographic material is shown to a child for "educational purposes"; (2) an attempt is made to convince a child that explicit sex is acceptable, even desirable; (3) the child is convinced that other children are sexually active and that such conduct is okay; (4) child pornography desensitizes the child, lowering the child's inhibitions; (5) some of these sessions progress to sexual activity involving the child; (6) photographs or films are taken of the sexual activity; and (7) this new child pornographic material is used to attract and seduce yet more child victims.

Id.

6. *Id.* at 2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Free Speech Coalition v. Reno, 25 Media L. Rep. (BNA) 2305; No. 97-0281SC, 1997 U.S. Dist. LEXIS 12212, at *1-*2 (N.D. Cal. August 12, 1997).

nesses involved in the production and distribution of non-obscene adult-oriented materials.[12] Other plaintiffs involved in the suit were individual publishers, artists, and photographers whose works consisted of nude and erotic images.[13]

The Free Speech Coalition filed suit in the United States District Court for the Northern District of California.[14] The Coalition alleged that certain provisions of the CPPA unconstitutionally violated its First Amendment rights.[15] The plaintiffs contended that their works did not involve material that would be regulated by the CPPA, but that for fear of prosecution, they had discontinued production, distribution, and possession of certain materials.[16] Both parties filed motions for summary judgment.[17]

The district court granted the government's motion for summary judgment and upheld the constitutionality of the provisions.[18] The Free Speech Coalition appealed to the United States Court of Appeals for the Ninth Circuit,[19] which reversed the district court and found the CPPA provisions unconstitutional.[20] Specifically, the court found the language "appears to be"[21] a minor, and "convey[s] the impression"[22] of a minor to

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12. Brief for Respondents at 8 n.7, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002) (No. 00-795). For more information about the Free Speech Coalition see http://www.freespeechcoalition.com/home.htm.

13. *Free Speech Coalition*, 1997 U.S. Dist. LEXIS 12212, at *1. Plaintiffs were "Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images." Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1398 (2002).

14. *Free Speech Coalition*, 1997 U.S. Dist. LEXIS 12212, at *1.

15. *Id.* at *2. The relevant provision at issue was 18 U.S.C. § 2256(8) (2000), which defines child pornography as:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced 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(8)(A)-(D) (2000).

16. *Free Speech Coalition*, 1997 U.S. Dist. LEXIS 12212, at *7.

17. *Id.* at *2.

18. *Id.* at *23.

19. Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999).

20. *Id.* at 1097.

21. 18 U.S.C. § 2256(8)(B) (2000).

22. *Id.* § 2256(8)(D).

be overbroad and unconstitutional.[23] The court found that the CPPA was constitutional when the two provisions were stricken from it.[24]

The court of appeals further found that the CPPA regulated speech based on its content.[25] Therefore, the government needed to establish a compelling interest and show that the CPPA was narrowly tailored to achieve that interest.[26] The court relied on *New York v. Ferber*,[27] in which the Supreme Court found the government's compelling interest was protecting children from the harmful effects child pornography had on the actual children involved in the production of pornographic materials.[28] The court of appeals found that the government was unable to prove a link existed between virtual child pornography and harm to actual children.[29] Accordingly, the court of appeals determined that the government lacked the compelling interest necessary to justify criminalizing virtual child pornography.[30]

The United States Supreme Court granted certiorari and *held* that the prohibitions of §§ 2256(8)(B) and 2256(8)(D) of the Child Pornography Prevention Act were overbroad and unconstitutional.[31] The Court reasoned that the provisions prohibited a substantial amount of lawful speech without a justification supported by First Amendment law.[32]

II. LEGAL BACKGROUND

The First Amendment of the United States Constitution states "Congress shall make no law . . . abridging the freedom of speech."[33] However, the Supreme Court has recognized that freedom of speech has its limits and specific types of speech are outside the realm of constitutionally protected speech.[34] The categories of speech that fall outside First Amendment

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23. *Free Speech Coalition*, 198 F.3d at 1086.

24. *Id.*

25. *Id.* at 1091.

26. *Id.*

27. 458 U.S. 747 (1982).

28. *Free Speech Coalition*, 198 F.3d at 1092 (citing *Ferber*, 458 U.S. at 757).

29. *Id.* at 1094.

30. *Id.* at 1095.

31. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1406 (2002); 18 U.S.C. § 2256(8)(B), (D) (2000).

32. *Free Speech Coalition*, 122 S. Ct. at 1405.

33. U.S. CONST. amend. I.

34. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding obscenity is outside the realm of constitutionally protected speech).

> 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 . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any

protection include incitement, defamation, obscenity, and child pornography produced with actual children.[35] An overview of First Amendment jurisprudence is helpful in order to gain a more complete understanding of the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*.[36]

A. CONSTITUTIONAL OVERBREADTH

In order to allow the First Amendment the maximum amount of breathing space, and to ensure that statutes are narrowly construed to regulate the smallest amount of speech, a person may challenge a statute for constitutional overbreadth.[37] The overbreadth doctrine is designed to limit government infringement on First Amendment rights to only prohibit non-protected speech such as obscenity, defamation, and incitement.[38] The doctrine allows people to challenge a statute's constitutionality even when it does not violate their freedom of expression.[39] A challenger must merely prove that the statute violates the First Amendment rights of someone.[40] This is a deviation from the normal constitutional standing requirements that require litigants to prove their First Amendment rights have been violated.[41] The danger of an overly broad statute is that it is apt to create a chilling effect on speech, whereby people may refrain from constitutionally protected speech because they fear prosecution.[42]

Before a statute will be invalidated, a court must find that it prohibits a substantial amount of protected speech as compared to its legitimate application.[43] For example, the Supreme Court invalidated a city ordinance as substantially overbroad in *R.A.V. v. City of St. Paul*.[44] In *R.A.V.*, the petitioner was charged with violating a bias-motivated crime ordinance for

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benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 n.2, n.4 (1942).

35. *E.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991).

36. 122 S. Ct. 1389 (2002).

37. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

38. *See id.* at 612-13 (explaining the overbreadth doctrine); *Simon & Schuster, Inc.*, 502 U.S. at 127 (listing unprotected categories of speech).

39. *Broadrick*, 413 U.S. at 612.

40. *Id.*

41. *Id.* Constitutional standing normally requires that the plaintiff has suffered an "injury in fact"; that there be a "causal connection" between the conduct complained of and the suffered injury; and that it is likely that a favorable decision will redress the injury. Bennett v. Spear, 520 U.S. 154, 167 (1997).

42. *Broadrick*, 413 U.S. at 612.

43. *Id.* at 615.

44. 505 U.S. 377 (1992).

burning a cross on the front lawn of an African-American family.[45] The petitioner challenged the ordinance as overbroad because it not only criminalized unprotected speech, but it also criminalized a large portion of protected speech under the First Amendment.[46] The ordinance prohibited displaying a symbol that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[47] The Court found that the ordinance was unconstitutional because although it criminalized constitutionally unprotected speech, it also reached a substantial amount of constitutionally protected expressions.[48]

Justice White's concurrence noted that a law that criminalizes a substantial amount of protected speech is facially invalid even if it has lawful applications.[49] Justice White stated that the ordinance criminalized conduct that "causes only hurt feelings, offense, or resentment and is protected by the First Amendment."[50] Therefore, the ordinance was "fatally overbroad" and unconstitutional on its face.[51] Before the Court could correctly apply the doctrine of overbreadth, it first had to identify areas of speech that fell outside the protection of the Constitution.

B. DEVELOPMENT OF CONSTITUTIONALLY UNPROTECTED OBSCENITY

Prior to the adoption of child pornography as an unprotected category of speech, the Supreme Court applied obscenity guidelines to determine whether speech such as this was protected.[52] In *Roth v. United States*,[53] the Court first held that obscenity was outside the realm of constitutionally protected speech.[54] The Court stated that the test for a finding of obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[55] The Court defined prurient material as material that has a

45. *R.A.V.*, 505 U.S. at 379-80.
46. *Id.* at 380.
47. *Id.* (citing ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).
48. *Id.* at 391. At the end of the opinion, the majority added the following statement: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.* at 396.
49. *Id.* at 414 (White, J., concurring).
50. *Id.*
51. *Id.*
52. *See* Miller v. California, 413 U.S. 15, 24 (1973).
53. 354 U.S. 476 (1957).
54. *Roth*, 354 U.S. at 485.
55. *Id.* at 489.

tendency to "excite lustful thoughts."[56] Because the Court in *Roth* did not have reason to consider whether the material at issue was obscene, the definition remained unclear.[57]

1. *The Court's Struggle to Define Obscenity*

The Supreme Court continued to struggle with creating a concrete definition of obscenity.[58] In *Jacobellis v. Ohio*,[59] the Court reversed a judgment against Jacobellis for possessing and exhibiting an obscene film in a movie theater.[60] Revealing the Court's frustration at attempting to define what qualified as obscenity, Justice Stewart wrote in his concurrence, "I know it when I see it."[61]

The frustration continued as a majority of the Court was unable to agree on a single test for obscenity.[62] In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*,[63] the Court reversed a ruling that held John Cleland's book, written in 1750, was obscene.[64] A plurality of the Court revised the *Roth* test to include three elements that must be satisfied before a finding of obscenity was proper.[65] The test required a finding of the following three elements: the theme of the whole work must appeal to a prurient interest; the work must be patently offensive because of an affront to contemporary community standards; and the material must be "utterly without redeeming social value."[66]

2. *A Common Definition of Obscenity*

After sixteen years of confusion, a majority of the Court was finally able to agree on a definition of obscenity.[67] In *Miller v. California*,[68] the

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56. *Id.* at 486. The Court defined prurient as "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid or lascivious longings; of desire, curiosity, or propensity, lewd." *Id.* at 487 n.20 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (unabridged, 2d ed., 1949)).

57. *See id.* The Court did not consider whether the material was obscene because the challenge was to a federal statute barring the mailing of such material. *Id.* at 493.

58. *See* Jacobellis v. Ohio, 378 U.S. 184, 194-95 (1964).

59. 378 U.S. 184 (1964).

60. *Jacobellis*, 378 U.S. at 186-87.

61. *Id.* at 197 (Stewart, J., concurring).

62. *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 414 (1966) (the majority opinion was comprised of three Justices).

63. 383 U.S. 413 (1966).

64. *John Cleland's Memoirs*, 383 U.S. at 417.

65. *Id.* at 418 (citing Roth v. United States, 354 U.S. 476, 489 (1957)).

66. *Id.*

67. Miller v. California, 413 U.S. 15, 24 (1973).

Court faced the challenge of creating a common definition of obscenity that would put an end to the confusion resulting from the standards created in earlier cases.[69] Miller was convicted of knowingly distributing obscene material, a misdemeanor under California law, after he had sent out a mass mailing of adult material.[70] Miller's conviction arose specifically because he sent five unsolicited brochures to a business in Newport Beach, California.[71] The manager of the business and his mother opened the envelope, which contained the unsolicited adult material.[72] They complained to the police because they had not requested the material.[73]

The Court noted that the states have a legitimate interest in prohibiting the distribution of obscene material when the method of distribution creates a significant danger of offending unwilling recipients.[74] The challenge in *Miller* was defining a standard to identify what was obscene material that a state could regulate without violating the protections of the First Amendment.[75]

The *Miller* Court developed a test that combined the Court's past rulings on obscenity and set out the following basic guidelines:

> (a) whether 'the average person applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest; . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[76]

The *Miller* test gave the states a concrete definition of obscenity.[77] However, it did not offer any more protection to children from obscenity and pornography than previous decisions.[78]

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68. 413 U.S. 15 (1973).

69. *Miller*, 413 U.S. at 16.

70. *Id.* at 16-18.

71. *Id.* at 17-18.

72. *Id.* at 18.

73. *Id.*

74. *Id.* at 18-19.

75. *Id.* at 19-20. For sixteen years before the Court decided *Miller*, it was not able to agree on a standard to determine what constituted obscene material outside the protection of the First Amendment. *Id.* at 29.

76. *Id.* at 24. The *Miller* Court recognized that developing a uniform national standard of what "appeals to the prurient interest" or is "patently offensive" would be an "exercise in futility." *Id.* at 30. The Court stated that the determination of what constitutes "contemporary community standards" is better left to the trier of fact. *Id.*

77. *Id.* at 24.

78. *See* Ginsberg v. New York, 390 U.S. 629, 643 (1968) (ruling New York could regulate pornographic material given to children). Ginsberg was convicted of selling "girlie" magazines to a sixteen-year-old boy in violation of a New York criminal statute. *Id.* at 631. Although the

C. CREATING A CONSTITUTIONAL FRAMEWORK FOR REGULATING CHILD PORNOGRAPHY

The Supreme Court extended the states' ability to protect children from pornography and its harmful effects in *New York v. Ferber*.[79] *Ferber* was the Court's first assessment of a statute directed at prohibiting sexual depictions of children.[80] The *Miller* standard did not apply because the New York statute did not require that the prohibited material be legally obscene.[81] Therefore, the *Ferber* Court created a new category of unprotected speech and unanimously ruled that child pornography was not protected by the First Amendment.[82]

The case arose when Ferber, who owned a bookstore specializing in sexually oriented materials, sold two films to undercover police officers.[83] The films contained images of children engaged in sexual activity.[84] Ferber was convicted under a New York statute that criminalized the promotion and distribution of materials depicting sexual performances of children under the age of sixteen.[85]

Ferber argued that the materials prohibited must be legally obscene under the *Miller* test.[86] However, the Court ruled that the *Miller* test did not accurately represent the more compelling interest a state has in protecting the health and well-being of its youth.[87] The Court further reasoned that the *Miller* test was not connected to whether a child had been harmed in the material's production.[88]

The *Ferber* Court created a new test for child pornography that did not require a finding of legal obscenity.[89] The Court determined that the states were allowed greater leeway to regulate materials that sexually exploited

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magazine would not have been considered obscene if sold to an adult, the statute prohibited the stocking and selling of the magazines to people younger than seventeen. *Id.* at 634-35. The Court reasoned that because of the state's interest in the well-being of its children, it could regulate the distribution of pornographic material to juveniles even though it could not regulate it as to adults. *Id.* at 640-43.

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

80. *Ferber*, 458 U.S. at 753.

81. *Id.* at 749-50; Miller v. California, 413 U.S. 15, 24 (1973).

82. *Ferber*, 458 U.S. at 764.

83. *Id.* at 751-52.

84. *Id.* at 752.

85. *Id.* at 749.

86. *Id.* at 760; *Miller*, 413 U.S. at 24.

87. *Ferber*, 458 U.S. at 761; *Miller*, 413 U.S. at 24.

88. *Ferber*, 458 U.S. at 761. The Court stated that a child could be sexually exploited and harmed regardless of whether the depiction satisfied the "patently offensive" requirement of *Miller*. *Id.* Furthermore, it was irrelevant to an abused child whether the material as a whole contained serious literary, artistic, political, or scientific value. *Id.*; *Miller*, 413 U.S. at 23.

89. *Ferber*, 458 U.S. at 764.

and abused children.[90] The *Ferber* Court used the guidelines developed for regulating obscenity in *Miller*, but changed them as follows to more accurately identify and regulate child pornography: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[91] The test developed in *Ferber* was used only for the regulation of child pornography; it did not change the obscenity standard that the Court previously developed in *Miller*.[92]

The *Ferber* Court set out five justifications for its departure from *Miller*.[93] First, the Court found that a state's interest in protecting the physical and psychological health of a minor is so compelling that a further elaboration was unnecessary.[94] Second, the distribution of materials portraying sexual activity involving children is fundamentally related to the sexual abuse of children.[95] Third, marketing and selling child pornography provides an economic incentive to continue producing such materials.[96] Fourth, little or no value exists in the performances and reproductions of children engaged in sexual activity.[97] Fifth, creating a new category of unprotected speech is compatible with the Court's earlier decisions that allowed content-based classifications of speech when the evil to be restricted so overwhelmingly outweighs the expressive interests that a case-by-case adjudication is unnecessary.[98]

The *Ferber* analysis focused on the harm done to actual children used in the production of child pornography.[99] The Court reasoned that the materials produced created a permanent record of a child's sexual abuse and that this harm was exacerbated by their continued circulation.[100] Furthermore, in order to control the production of materials that sexually exploit children, the network used to distribute the materials must be stopped.[101]

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90. *Id.* at 757-58.

91. *Id.* at 764-65; *Miller*, 413 U.S. at 24.

92. *Ferber*, 458 U.S. at 764; *Miller*, 413 U.S. at 24.

93. *Ferber*, 458 U.S. at 756-63.

94. *Id.* at 756-57.

95. *Id.* at 759.

96. *Id.* at 761.

97. *Id.* at 762.

98. *Id.* at 763-64 (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 66 (1976)) (stating that whether speech is protected by the First Amendment frequently depends on the content of the speech).

99. *See id.* at 759 (referring to the sexual abuse of the children photographed during the production of child pornography).

100. *Id.*

101. *Id.*

Ferber also argued that the New York statute was unconstitutionally overbroad because it prohibited material with serious literary, scientific, or educational value.[102] The First Amendment overbreadth doctrine allows people, such as Ferber, to attack overly broad statutes even though their conduct is not constitutionally protected.[103] The doctrine is based on the potential chilling effect that may result if people refrain from constitutionally protected expression for fear of criminal punishment.[104] However, a statute is not invalid on its face simply because it is possible that a single impermissible application may occur.[105]

While application of the overbreadth doctrine was possible, the Court stated that the statute in question must be substantially overbroad before it will be invalidated on its face.[106] When conduct, as opposed to pure speech, is involved, a finding of substantial overbreadth is especially important.[107] Furthermore, the Court acknowledged that the penalty imposed, whether civil or criminal, is relevant in determining whether a statute is substantially overbroad.[108]

The *Ferber* Court found the New York statute was not substantially overbroad.[109] The Court reasoned that the legitimate reach of the statute outweighed the tiny fraction of potentially impermissible applications.[110] The tiny fraction may consist of pictures contained in medical textbooks or *National Geographic* magazines.[111] The Court stated that this small potential for overbreadth would be better cured through a case-by-case analysis, rather than a finding that the statute was unconstitutionally overbroad.[112]

D. THE SUPREME COURT PROHIBITS THE MERE POSSESSION OF CHILD PORNOGRAPHY

Protection for victims of child pornography was further extended in *Osborne v. Ohio*.[113] Osborne was convicted of violating a statute that

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102. *Id.* at 766 (referring to the 1977 New York Penal Law, Article 263, § 263.15).
103. *Id.* at 768-69.
104. *Id.* at 768.
105. *Id.* at 771 (citing Broadrick v. Oklahoma, 413 U.S. 601, 630 (1973)).
106. *Id.* at 769.
107. *Id.* at 770 (citing CSC v. Letter Carriers, 413 U.S. 548, 580-81 (1973)) (noting the Court's reluctance to strike down a statute that "covers a whole range of easily identifiable and constitutionally proscribable . . . conduct").
108. *Id.* at 773.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 773-74.
113. 495 U.S. 103 (1990).

prohibited the mere possession of child pornography.[114] Specifically, he was convicted for possessing four pictures of a nude male adolescent in sexually explicit positions.[115] In *Osborne*, the Supreme Court upheld the conviction and ruled that a state's interest in protecting the well-being of children used in the production of child pornography justified the ban on possession of those materials produced with actual children.[116]

The Court noted that since *Ferber*, much of the market for child pornography had gone underground, making it nearly impossible to stop the harm done to children by only attacking the distribution and production of child pornography.[117] The Court remarked that because child pornography creates a permanent record of a child's abuse, its existence continues to haunt the child.[118] Furthermore, encouraging the destruction of the material is helpful because pedophiles use the material to seduce other children into participating in the production of child pornography.[119] Based on these facts, the Court secured its holding in the gravity of the state's interest of protecting children harmed in the production of child pornography.[120] In *Ashcroft v. Free Speech Coalition*, the Court found that the state's interest in protecting children harmed in the production of pornography was not furthered by banning virtual child pornography.[121]

III. ANALYSIS

In *Free Speech Coalition*, Justice Kennedy wrote the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined.[122] The majority held that §§ 2256(8)(B) and (D) of the CPPA were overbroad and unconstitutional.[123] Justice Thomas concurred with the judgment.[124] Justice O'Connor concurred in part and dissented in part; Chief Justice Rehnquist and Justice Scalia joined in her dissent.[125] Chief Justice Rehnquist filed a separate dissenting opinion, in which Justice Scalia joined, except for the discussion on legislative history.[126]

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114. *Osborne*, 495 U.S. at 107.
115. *Id.*
116. *Id.* at 110.
117. *Id.* at 110-11.
118. *Id.* at 111 (citing New York v. Ferber, 458 U.S. 747, 759 (1982)).
119. *Id.*
120. *Id.*
121. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1403 (2002).
122. *Id.* at 1395-96.
123. *Id.* at 1406; 18 U.S.C. § 2256(8)(B), (D) (2000).
124. *Free Speech Coalition*, 122 S. Ct. at 1406 (Thomas, J., concurring).
125. *Id.* at 1407 (O'Connor, J., concurring in part and dissenting in part).
126. *Id.* at 1411 (Rehnquist, C.J., dissenting).

A. THE MAJORITY OPINION

The Court was faced with deciding whether certain subsections of the Child Pornography Prevention Act of 1996 violated the First Amendment's protection of freedom of speech.[127] The CPPA prohibited sexually explicit images that appear to be minors, regardless of whether real children were used in their production.[128] The Court found that because the CPPA banned images that were made without using actual children, it prohibited speech beyond that proscribed by *New York v. Ferber*.[129] Furthermore, the Court found that the CPPA did not regulate obscene speech and made no attempt to conform to the obscenity standards created in *Miller*.[130] The Court concluded that the main issue was whether the CPPA was constitutional when it prohibited speech that was neither legally obscene under *Miller* nor child pornography under *Ferber*.[131]

1. *Speech Prohibited by the CPPA*

The CPPA prohibits child pornography, as defined in *Ferber*, and three other categories of speech.[132] The Free Speech Coalition challenged two of the new categories, § 2256(8)(B) and § 2256(8)(D).[133] Section 2256(8)(B) prohibits what is commonly called "virtual child pornography."[134] Section 2256(8)(B) proscribes "any visual depiction . . . [that] is, or appears to be, of a minor engaging in sexually explicit conduct."[135] The Court noted that the prohibition on "any visual depiction" extended to all images without regard to how they were produced.[136] The Court postulated that the statute could go so far as to prohibit a Renaissance painting that appeared to be of a

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127. *Id.* at 1396.

128. *Id.*; Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-2260 (2000).

129. *Free Speech Coalition*, 122 S. Ct. at 1396 (citing New York v. Ferber, 458 U.S. 747, 764 (1982)).

130. *Id.* The Court noted that Congress prohibited obscene material in a separate statute, 18 U.S.C. §§ 1460-1466 (2000). *Id.* (citing Miller v. California, 413 U.S. 15, 24 (1973)).

131. *Id.*

132. *Id.* at 1397. The three other categories of speech include images commonly referred to as virtual child pornography; computer morphing, a lower tech version of virtual child pornography; and any "sexually explicit images pandered as child pornography." *Id.*

133. *Id.*; 18 U.S.C. § 2256(8)(B), (D).

134. *Free Speech Coalition*, 122 S. Ct. at 1397. The third new category of speech banned by § 2256(8)(C) of the CPPA was computer morphing. *Id.* The morphed images are created by altering innocent pictures of actual children so it appears the children are engaged in sexual activity. *Id.* The Free Speech Coalition did not challenge this provision, so the Court did not consider it. *Id.* However the Court did explain that the morphed images "implicate the interests of real children" making them closer to the images banned in *Ferber*. *Id.*

135. 18 U.S.C. § 2256(8)(B).

136. *Free Speech Coalition*, 122 S. Ct. at 1397.

minor engaged in sexual conduct or a movie filmed with youthful looking adult actors.[137]

Additionally, the Court noted that the production of these and other prohibited images did not harm, or even involve, actual children.[138] Congress found that virtual child pornography threatens children in less direct ways.[139] The Court stated that the harm done to actual children, arising from virtual child pornography, is caused by the content of the images, not the manner of production.[140]

The Free Speech Coalition also challenged § 2256(8)(D), which extended the definition of child pornography to include any sexually explicit image "that was '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.'"[141] The Court stated that although the provision was intended to prohibit images intentionally pandered as child pornography, the actual reach of the provision was much greater.[142] The Court further explained that "[o]nce a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable."[143]

Considering the speech at issue, the Court stated that the First Amendment prevents the government from controlling what people "see or read or speak or hear."[144] However, this freedom of speech is limited and does not encompass all categories of speech, including "defamation, incitement, obscenity, and pornography produced with real children."[145] The Court found that the speech prohibited by the CPPA was not included in any of these categories.[146] The Court would have had to establish virtual child pornography as a new category of unprotected speech before the CPPA could

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137. *Id.*

138. *Id.*

139. *Id.*; *see supra* notes 4-9 and accompanying text.

140. *Free Speech Coalition*, 122 S. Ct. at 1397.

141. *Id.* (citing 18 U.S.C. § 2256(8)(D) (2000)).

142. *Id.* at 1397-98 (citing S. REP. No. 104-358, at 22 (1996)). This provision prevented child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic material that is intentionally pandered as child pornography. S. REP. No. 104-358, at 22 (1996).

143. *Free Speech Coalition*, 122 S. Ct. at 1398.

144. *Id.* at 1399.

145. *Id.*

146. *Id.*

pass constitutional standards.[147] Justice Kennedy noted that the Court was unwilling to take this step.[148]

2. *The CPPA Is Inconsistent With Miller*

The CPPA prohibits images without regard to the obscenity requirements contained in *Miller*.[149] The *Miller* standard requires that the work appeal to the prurient interest.[150] The CPPA proscribed any image of child sexual activity regardless of whether the work appeals to the prurient interest.[151] The Court stated that the CPPA would prohibit pictures in a psychology manual, documentary, or movie describing the trauma of sexual abuse.[152] The CPPA also did not include the *Miller* requirement that the work be patently offensive.[153] The Court noted that although images of what would appear to be teenagers engaged in sexual conduct may offend some community standards, they would not in every case.[154]

Finally, *Miller* required that the work in question lack serious literary, artistic, political, or scientific value.[155] The CPPA prohibited speech in spite of its potential value.[156] The Court stated that the CPPA prohibited "the visual depiction of an idea, that of teenagers engaging in sexual activity, that is a fact of modern society and has been a theme in art and literature throughout the ages."[157] The Court noted that both William Shakespeare's *Romeo and Juliet* and modern movies have involved scenes and themes that could potentially fall under the prohibitions of the CPPA.[158]

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147. *Id.*

148. *Id.*

149. *Id.* (citing Miller v. California 413 U.S. 15, 24 (1973)).

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

151. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1400 (2002).

152. *Id.*

153. *Id.* (citing *Miller*, 413 U.S. at 24).

154. *Id.* The Court noted that the CPPA prohibited images of persons that appear to be under the age of eighteen; even though the legal age for marriage is below eighteen in many states. *Id.*

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

156. *Free Speech Coalition*, 122 S. Ct. at 1400.

157. *Id.* Furthermore, the Supreme Court has noted that it is a fundamental principle of the First Amendment that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989).

158. *Free Speech Coalition*, 122 S. Ct. at 1400. The Court noted that the movie *Traffic*, a film that received an Academy Award nomination for Best Picture in 2001, portrays a sixteen-year-old drug addict who trades sex for drugs. *Id.* Also, *American Beauty*, a movie that won the Oscar for Best Picture in 2000, contains images of teenagers engaging in sexual relations. *Id.* The movie also involves a teenage girl who becomes sexually involved with a middle-aged man and "a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man." *Id.*

The Court reasoned that possessors of such works would suffer severe punishment without an inquiry into whether the material had redeeming value.[159] The Court stated that *Miller* protected against this by requiring that the work be considered as a whole.[160] The CPPA did not offer the same protection.[161] Furthermore, the Court noted that "an essential First Amendment rule" is that a work cannot be judged by the existence of a single scene.[162] The Court concluded that the CPPA did not prohibit obscenity because it failed to require a link between what was prohibited and an affront to community standards as was required by the definition of obscenity in *Miller*.[163]

3. *The CPPA Is Not Supported by Ferber*

Alternatively, the government argued that the CPPA prohibited speech that is virtually indistinguishable from child pornography.[164] The government reasoned that because *Ferber* allowed prohibiting child pornography without regard to its value, virtual child pornography should also be prohibited.[165] *Ferber* prohibited child pornography to prevent the harm done to the actual children involved in the production of the images.[166] The CPPA prohibited speech that does not harm actual children during its production.[167] The government argued that the virtual images could lead to actual cases of child abuse.[168] The Court dismissed this argument and concluded that these harms were contingent and indirect.[169] Furthermore, the Court stated "harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[170]

The government also argued that the indirect harms were adequate because *Ferber* found child pornography had little, if any, value.[171] The Court

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159. *Id.* at 1401. The CPPA allowed for imprisonment of a first offender for up to fifteen years. 18 U.S.C. § 2252A(b)(1) (2000).

160. *Free Speech Coalition*, 122 S. Ct. at 1401; *Miller*, 413 U.S. at 24.

161. *Free Speech Coalition*, 122 S. Ct. at 1401.

162. *Id.* (citing A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 419 (1966)).

163. *Id.*; *Miller*, 413 U.S. at 24.

164. *Free Speech Coalition*, 122 S. Ct. at 1401 (discussing New York v. Ferber, 458 U.S. 747, 761 1982)).

165. *Id.*

166. New York v. Ferber, 458 U.S. 747, 759 (1982); *see also supra* notes 89-101 and accompanying text.

167. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1402 (2002).

168. *Id.*; *see also supra* text accompanying notes 4-5.

169. *Free Speech Coalition*, 122 S. Ct. at 1402.

170. *Id.*

171. *Id.* (citing *Ferber*, 458 U.S. at 762).

found this argument failed for two reasons.[172] First, *Ferber* confirmed that speech had to be a product of child sexual abuse before it falls outside the protections of the First Amendment.[173] The Court stated that *Ferber* was concerned with the harm caused to children during the production of the materials, not with what the speech communicated.[174] The second problem with the government's argument was that *Ferber* did not find child pornography valueless.[175] The Court noted that *Ferber* found a youthful looking adult or other simulation could be used to create images that would otherwise be prohibited.[176] The Court reasoned that *Ferber* could not support the statute because it relied on the very distinction the CPPA sought to eliminate.[177]

4. *The Government's Justifications Were Not Supported by Law*

The government argued that the CPPA was necessary because it keeps virtual child pornography away from pedophiles that can use it to seduce children.[178] The Court reasoned that although the government could penalize adults who give unsuitable material to children, it could not reduce speech for adults to that suitable for children.[179] The CPPA's ban on speech encompassed a significant amount of speech that would be legal in the hands of law-abiding adults.[180] The Court reasoned that the government could not ban speech "simply because it may fall into the hands of children."[181] The Court found that the evil the government was trying to prevent depended on the illegal acts of a third party, and did not necessarily flow from the speech itself.[182] The Court stated that protecting children from criminal acts was a legitimate objective, but the ban on virtual child pornography was not narrowly tailored to meet this objective.[183]

The government also suggested that the banned speech "whets the appetites of pedophiles and encourages them to engage in illegal conduct."[184]

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172. *Id.*
173. *Id.* (citing *Ferber*, 458 U.S. at 764-65).
174. *Id.*
175. *Id.* (citing *Ferber*, 458 U.S. at 761).
176. *Id.* (citing *Ferber*, 458 U.S. at 763).
177. *Id.*
178. *Id.*
179. *Id.* (citing Ginsberg v. New York, 390 U.S. 629, 643 (1968); Butler v. Michigan, 352 U.S. 380, 383 (1957)).
180. *Id.* at 1403.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

The Court noted that the government could not constitutionally attempt to control the private thoughts of its citizens.[185] Furthermore, the government was unable to show that child abuse occurs because pedophiles view virtual child pornography.[186] The Court noted that the First Amendment requires more than banning speech because it may, at some point in the future, encourage an unlawful act.[187] The speech must incite "imminent lawless action," and the action must be likely to occur.[188] The Court concluded that the government had to prove a "significantly stronger, more direct connection," before speech could be prohibited because it may encourage illegal activity.[189]

The government next argued that virtual child pornography promotes the market for real child pornography because the images are indistinguishable, part of the same market, and often exchanged together.[190] Therefore, the government argued, virtual images encourage trafficking of images created with real children.[191] The Court found this argument implausible because no one would risk using real children if a legal alternative, computerized images, would achieve the same goal.[192]

Finally, the government argued that virtual images make it nearly impossible to prosecute pornographers that use actual children.[193] According to the government, experts struggle to determine whether the images were made with real children or by computer imaging.[194] The Court reasoned that this is the reverse of what the First Amendment requires because it necessitates a ban on protected speech in order to ban unprotected speech.[195] The First Amendment requires the opposite—a certain amount of unprotected speech may go unpunished in order to protect the lawful expression of others.[196]

The government argued that the challenged provisions of the CPPA did not suppress speech, but merely shifted the burden to the defendant to prove

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185. *Id.* (citing Stanley v. Georgia, 394 U.S. 557, 566 (1969)). The Court stated, "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Id.*

186. *Id.*

187. *Id.* (citing Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam)).

188. *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).

189. *Id.*

190. *Id.* at 1403-04.

191. *Id.* at 1404.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).

that the speech was lawful.[197] The CPPA included an affirmative defense, which allowed an accused to evade conviction by proving that the material was created with adults and did not otherwise convey the impression that the images were of actual children.[198] The defense was only available for distributors or producers of the work; it did not apply to those who simply possess the material.[199]

The Court stated that this defense raised "serious constitutional difficulties" because it required that a defendant prove that his speech was lawful.[200] The stakes are high, the affirmative defense applies only after prosecution has begun, and failure of the defense results in a felony conviction.[201] The Court noted that if it is nearly impossible for the government to prove how the material is made, it would be equally, if not more difficult, for the "innocent possessor."[202]

The Court noted that the affirmative defense could not save the statute because it was incomplete for a number of reasons.[203] First, the defense only applied to distributors or producers, not to those who merely possess the material.[204] Second, the defense was only available for those who produce materials with youthful looking adult actors.[205] It was not available to those who produce material, without using actual children, through other methods, such as computer imaging.[206] This was not tied to the government's interest of distinguishing between real and virtual images, leaving a substantial amount of speech unprotected.[207] The Court concluded that § 2256(8)(B) banned material beyond either child pornography or obscenity and the government's justifications were not supported by precedent or the First Amendment.[208] Furthermore it prohibited a substantial amount of lawful speech and was therefore unconstitutionally overbroad.[209]

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197. *Id.*

198. *Id.* (citing 18 U.S.C. § 2252A(c) (2000)).

199. *Id.* at 1404-05.

200. *Id.* at 1404.

201. *Id.*

202. *Id.* The Court went on to explain the unreasonably high evidentiary burden placed on the defendant and stated, "Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors." *Id.*

203. *Id.* at 1405.

204. *Id.* The Court stated that "while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work." *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*; 18 U.S.C. § 2256(8)(B) (2000).

209. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1405 (2002).

5. *Section 2256(8)(D) Is Unconstitutionally Overbroad*

Subsection D barred advertising or promoting sexually explicit material that suggested children were involved.[210] The Court stated that a movie which does not contain child pornography would be prohibited if the title or trailer conveys the impression that sexually explicit scenes of minors are included.[211] The decision depends on how the speech is offered, according to the Court, not on what is portrayed.[212] The Court noted that Congress was silent on the harm arising from lawful images pandered as child pornography.[213]

Although pandering may be a relevant consideration, subsection D went beyond commercial exploitation.[214] The CPPA prohibited possession of material that may have been pandered as child pornography earlier in the distribution chain unbeknownst to an innocent possessor.[215] The Court noted that possession would become illegal even if the possessor knew the material was mislabeled.[216] In essence, it would punish someone for possessing child pornography that was not in fact child pornography.[217] The First Amendment requires a more narrow constraint.[218] The Court concluded that the government did not offer a serious defense of this section and ruled that it was overbroad and therefore unconstitutional.[219]

B. JUSTICE THOMAS' CONCURRENCE

Justice Thomas was most persuaded by the government's assertion that those in possession of child pornography created with actual children could escape conviction by merely claiming that the images were computer-generated.[220] However, he noted that the government was unable to prove that a defendant had actually been acquitted by this "computer-generated

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210. 18 U.S.C. § 2256(8)(D).

211. *Free Speech Coalition*, 122 S. Ct. at 1405.

212. *Id.*

213. *Id.*

214. *Id.* at 1405-06 (citing Ginzburg v. United States, 383 U.S. 463, 474 (1966)). The *Ginzburg* Court found that the context in which materials were promoted could be a relevant consideration as to whether material satisfied the obscenity test. *Ginzburg*, 383 U.S. at 474. The Court explained that conduct which "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed" would lose protection under the First Amendment. *Id.* at 472; *see also* 18 U.S.C. § 2256(8)(D).

215. *Free Speech Coalition*, 122 S. Ct. at 1406.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 1405-06.

220. *Id.* at 1406 (Thomas, J., concurring).

images defense."[221] Justice Thomas stated that this speculation could not support the CPPA.[222] He did suggest that if technological advances made it impossible to enforce actual child pornography laws, the government might have a compelling interest in regulating a narrowly defined category of lawful speech.[223] Justice Thomas concluded that it would be possible for the government to narrowly tailor a statute prohibiting virtual child pornography.[224]

C. JUSTICE O'CONNOR'S CONCURRENCE IN PART AND DISSENT IN PART

Justice O'Connor agreed with the majority's conclusion that the CPPA was overbroad on its ban of pornography created with youthful looking adults.[225] She disagreed with the Court's finding that the ban on virtual child pornography was also overbroad.[226] Justice O'Connor suggested that the striking of "appears to be" language from the statute should only apply to youthful adult pornography.[227]

1. *Justice O'Connor's Concurrence*

Justice O'Connor agreed with the Court that *Ferber* did not support the CPPA because the Act sought to regulate images that were created without harming actual children.[228] The government was unable to prove a strong enough link between virtual images and actual child abuse that justified creating a new category of unprotected speech.[229]

Justice O'Connor declared that the Court correctly struck down the language "conveys the impression" in § 2256(8)(D)'s regulation of advertising and promotion of materials.[230] She noted that the government failed to show how this ban on images conveying the impression that they contain child pornography served a compelling state interest.[231] Justice O'Connor further noted that the Court correctly concluded that the provision was overbroad and not narrowly tailored.[232] Finally, Justice O'Connor agreed

221. *Id.*
222. *Id.*; 18 U.S.C. §§ 2251-2260 (2000).
223. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1406-07 (2002).
224. *Id.* at 1407.
225. *Id.* (O'Connor, J., concurring in part, dissenting in part).
226. *Id.*
227. *Id.*
228. *Id.* at 1408 (citing New York v. Ferber, 458 U.S. 747, 759 (1982)).
229. *Id.*
230. *Id.*; 18 U.S.C. § 2256(8)(D) (2000).
231. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1408 (2002).
232. *Id.*

that the ban on youthful adult pornography was overbroad.[233] She relied on the majority's reasoning that many of the most popular movies and serious literary works would be prohibited by the CPPA's language "appears to be . . . of a minor engaging in sexually explicit conduct."[234]

2. *Justice O'Connor's Dissent, Joined by Chief Justice Rehnquist and Justice Scalia*

Justice O'Connor disagreed with the Court's finding that the CPPA's ban on virtual child pornography was overbroad.[235] She determined that the ban on virtual child pornography could pass strict scrutiny and was not unconstitutionally vague.[236] Justice O'Connor stated that the government's compelling interest in protecting the health and well-being of children is well settled.[237] She noted Congressional findings that stated virtual images are used to "whet the appetites" of pedophiles, seduce children, and allow defendants to evade conviction by claiming the images are computer-generated.[238] Justice O'Connor found that the government's interest of banning virtual child pornography was promoted by an effort to stop this harm from occurring.[239] Furthermore, the government does not have to wait until harm has occurred before it can create legislation to prevent it.[240]

Justice O'Connor disagreed with the Free Speech Coalition's argument that the language "appears to be . . . of a minor" was not narrowly tailored to meet the government's interest of protecting children.[241] Justice O'Connor would have narrowly interpreted "appears to be" to read "virtually indistinguishable from."[242] She concluded that this interpretation would have cured any constitutional claim of overbreadth or lack of narrow tailoring.[243] The narrow interpretation would also alleviate any concern that the language was vague.[244] Finally, Justice O'Connor found that the Free

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233. *Id.*

234. *Id.* (citing 18 U.S.C. § 2256(8)(B)).

235. *Id.*

236. *Id.*

237. *Id.* (citing New York v. Ferber, 458 U.S. 747, 756-57 (1982) (citing cases in support of protecting the health and well-being of children)).

238. *Id.* at 1408-09.

239. *Id.*

240. *Id.* at 1409 (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 212 (1997)).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* Justice O'Connor noted that "[t]his Court has never required 'mathematical certainty' or 'meticulous specificity' from the language of a statute." *See id.* (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (holding that a city's anti-noise ordinance prohibiting deliberate noisy activity that disrupted school activity was not unconstitutionally vague)).

Speech Coalition was unable to prove that the CPPA prohibited a substantial amount of protected speech.[245] Therefore, Justice O'Connor stated, the Court was incorrect in concluding that the statute was overbroad.[246]

Justice O'Connor would have rectified the constitutional concerns of the CPPA by striking the "appears to be" provision as it applied to youthful adult pornography and the "conveys the impression" language of the advertising and promotion provision.[247] However, she would have kept the "appears to be" language as it applied to computer-generated child pornography.[248]

D. CHIEF JUSTICE REHNQUIST'S DISSENT IN WHICH JUSTICE SCALIA JOINED IN PART

Chief Justice Rehnquist, joined by Justice Scalia, agreed with Justice O'Connor that the government had a compelling interest in protecting children from the harm of sexual abuse, and that technological advances will soon make it nearly impossible for the government to protect children from sexual abuse.[249] The Chief Justice found that the CPPA could have been limited to only reach what was previously unprotected speech.[250] Although the Court and Justice O'Connor read the statute to include images of "youthful looking adult actors engaged in suggestive sexual activity" because it contains the word "simulated," the Chief Justice would not have gone so far.[251] The CPPA's definition of sexually explicit conduct only included the "hard core of child pornography," which the Court found unprotected in *Ferber*.[252] According to the Chief Justice, the CPPA would only ban actual sexual activity between youthful looking adult actors, not mere suggestions of sexual activity.[253]

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245. *Id.* at 1410.

246. *Id.* at 1409-10.

247. *Id.* at 1411 (citing 18 U.S.C. § 2256(8)(B), (D) (2000)).

248. *Id.*

249. *Id.* (Rehnquist, C.J., dissenting).

250. *Id.*

251. *Id.*; 18 U.S.C. § 2256(8).

252. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1411 (2002) (citing New York v. Ferber, 458 U.S. 747, 773-74 (1982)). The Chief Justice noted that the CPPA defines sexually explicit conduct as follows: "Actual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; . . . or lascivious exhibition of the genitals or pubic area of any person." *Id.* (citing 18 U.S.C. § 2256(2)(A)-(E) (2000)).

253. *Id.* The Chief Justice stated that "*suggestions* of sexual activity, such as youthful looking adult actors squirming under a blanket" are more like written descriptions of sexual activity, and fall outside the reach of the statute. *Id.*

Furthermore, Chief Justice Rehnquist noted that Congress intended for the CPPA to only reach those computer-generated images that are easily mistaken for pictures of actual children engaging in sexual conduct.[254] The CPPA proscribed images that are virtually indistinguishable from pictures of actual children, not depictions of Shakespearian tragedies, as the majority purported.[255]

In addition, the Chief Justice noted that actual movie producers never felt the chill of protected speech that the majority claimed would occur from the CPPA.[256] The CPPA was enacted in 1996, the movies the majority mentioned as potentially violating it won Academy awards in 2000 and 2001.[257]

Finally, the CPPA's prohibition on advertising and promoting did not reach any further than the "sordid business of pandering" that was already unprotected by the First Amendment.[258] The Court read this provision too broadly, according to the Chief Justice, because it would not reach a person who possesses protected materials.[259] The provision could be constitutionally limited by requiring that a possessor know the material contains images of real minors engaged in sexually explicit conduct or virtually indistinguishable computer-generated images.[260]

Chief Justice Rehnquist concluded by stating that the CPPA constitutionally extended the definition of child pornography to include computer-generated images that are virtually indistinguishable from images of actual children.[261] Furthermore, although unacceptable applications of the CPPA might occur, the Chief Justice did not believe they would be substantial compared to the "legitimate sweep."[262]

IV. IMPACT

The Supreme Court's decision in *Free Speech Coalition* attracted a great deal of attention.[263] Supporters of civil rights commended the ruling,

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254. *Id.* at 1412. Justice Scalia did not join the paragraph of Chief Justice Rehnquist's dissent that discussed the statute's legislative history. *Id.* at n.2.

255. *Id.* at 1412.

256. *Id.* at 1412-13.

257. *See id.* (referring to the movies *American Beauty* and *Traffic*); *see also supra* note 158 and accompanying text.

258. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1413 (2002) (Rehnquist, C.J., dissenting).

259. *Id.*

260. *Id.* at 1413-14.

261. *Id.* at 1414.

262. *Id.* (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

263. Stephen V. Treglia, *Lawyers and Technology After 'Ashcroft,' Is Virtual Child Porn A Crime*, 228 N.Y. L. J. 5, 5 (Sept. 17, 2002).

while the Attorney General promised to advocate for a constitutional alternative.[264]

A. LEGISLATIVE CHANGES

In response to the Court's decision, Congress drafted bills to remedy the constitutional defects of the CPPA.[265] In light of the Supreme Court's decision, a new bill regulating virtual child pornography will have to more closely resemble the *Miller* obscenity test before it will pass constitutional muster.[266] Adding a condition that the work must lack serious literary, artistic, scientific, or political value may bring new legislation safely under the umbrella of First Amendment jurisprudence.[267] Even if proposed legislation does not completely comply with the *Miller* test by not requiring that the work appeal to the prurient interest, the Court may allow for a slight modification in the obscenity test because the health and safety of children is at issue.[268] Although changing the bill to include a requirement that the material meet legal obscenity guidelines will satisfy the Constitution, it may create procedural and substantive difficulties.[269]

B. PROSECUTORIAL CHALLENGES

Since the Supreme Court found portions of the CPPA unconstitutional, prosecutors have faced new challenges in proving cases against potential child pornographers.[270] Less than a month after the Supreme Court's decision, an Illinois man charged with possession of child pornography filed a motion to dismiss the case against him based on the Court's ruling.[271]

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264. Joan Biskupic, *Supreme Court Ends Ban on Virtual Child Porn*, USA TODAY, Apr. 16, 2002, at 3A.

265. Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2002, S. 2520, 107th Cong. (2002); H.R. 4623, 107th Cong. (2002).

266. *Stopping Child Pornography: Hearing on S. 2520 Before the Senate Judiciary Comm.*, 107th Cong. (2002) (statement of Frederick Schauer, Professor, John F. Kennedy School of Government and Harvard Law School), *available at* LEXIS, Federal Document Clearing House Congressional Testimony.

267. *Id.*

268. *Id.* (citing Ginsberg v. New York, 390 U.S. 629, 643 (1968)).

269. *See id.* (noting that proving a work is obscene beyond a reasonable doubt is a daunting task).

270. *E.g.*, Tony Gordon, *Round Lake Beach Man Tests High Court's Virtual Porn Ruling*, CHI. DAILY HERALD, May 11, 2002, *available at* 2002 WL 20844639.

271. *Id.* The defendant contended that the state statute he was charged under contained language identical to the language found unconstitutional in *Free Speech Coalition*. *Id.* Therefore, the defendant argued, the state must prove actual children were depicted in the images taken from his computer. *Id.*

Constitutional challenges to state laws governing child pornography have allowed at least three defendants to walk free.[272]

In Virginia, a man accused of possessing thousands of images of virtual child pornography asked the judge to allow him to withdraw his guilty plea.[273] Some of the images confiscated from the man's home were of infants, but the question remains as to whether they were real children.[274] The prosecutors have the heavy burden of proving beyond a reasonable doubt that the images depicted actual children.[275]

Another challenge faced by prosecutors is the individual review of every pornographic image involving children to determine if the image is of an identifiable child or if it is virtual, and therefore, non-actionable.[276] In Cook County, Illinois, the state's attorney found around 250,000 images of potential child pornography in one man's home.[277] If the investigators were forced to review each picture individually, spending one second on each image, it would take close to seventy-two hours.[278]

Fortunately, the investigators have the resources available to run the pictures through a computer with a massive database of published pornographic images.[279] The investigators will know they have a picture of an actual child if an image matches a picture in the database that was created before computers were able to generate virtually indistinguishable images.[280] The computer database solves the problem for those prosecutors that have access to the system, but for those who do not, the task could be overwhelming.

C. NORTH DAKOTA

The Supreme Court's decision to strike two provisions of the CPPA does not invalidate North Dakota's statutes regulating child pornography.[281] The state's child pornography laws do not specifically mention virtual child pornography, nor do they include the language "appears to be" or "conveys

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272. Tony Gordon, *Judge Again Throws Out Porn Charges*, CHI. DAILY HERALD, July 20, 2002, *available at* 2002 WL 23520215.

273. Tad Dickens, *Guilty Plea in Child Porn Case May be Altered; Man Asks Roanoke Judge to Let Him Withdraw Plea*, ROANOKE TIMES & WORLD NEWS, July 8, 2002, *available at* 2002 WL 24045079.

274. *Id.*

275. *Id.*

276. Dave Orrick, *Ruling Means Checking 250,000 'Potential' Porn Images—For One Case*, CHI. DAILY HERALD, Sept. 27, 2002, *available at* 2002 WL 100765508.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *See* N.D. CENT. CODE §§ 12.1-27.2-04.1, -27.2-01, -31-08 (1997).

the impression" that was so troublesome to the Court in *Free Speech Coalition*.[282] Furthermore, the North Dakota Legislature did not contemplate computer-generated pornography when it enacted the child pornography laws.[283]

Although North Dakota law does not currently regulate virtual images of child pornography, the CPPA has impacted the ability of North Dakota prosecutors to pursue child pornographers.[284] According to North Dakota Congressman Earl Pomeroy, United States Attorneys have had to suspend the prosecution of child pornography cases because they no longer had a legal action after the *Free Speech Coalition* decision.[285] As technology advances, so will the challenges that face judges and lawyers "who must meld their collective meaningful understanding of both technology and the law."[286]

V. CONCLUSION

In *Free Speech Coalition*, the Supreme Court ruled that two provisions of the CPPA were unconstitutional.[287] The Court found the language of the statute prohibited a large amount of lawful speech, such as mainstream movies and Renaissance paintings.[288] The Court found that the CPPA proscribed a universe of speech outside of constitutionally unprotected obscenity and child pornography produced with actual children.[289] The Court held that §§ 2256(8)(B) and 2256(8)(D) of the CPPA were unconstitutionally overbroad.[290]

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282. *See, e.g.*, N.D. CENT. CODE § 12.1-27.2-04.1. "A person is guilty . . . if, knowing of its character and content, that person knowingly possesses any motion picture, photograph, or other visual representation that includes sexual conduct by a minor." *Id.*

283. 1989 Senate Standing Committee Minutes, Hearing on H.B. 1419 Before the Senate Judiciary Comm. 1989 Leg., 51st Sess. 1-3 (N.D. 1989) (testimony of Lyle E. Ferch, D.D.S., focused on the harm perpetrated against children during the production of pornography).

284. Transcript of News Conference with Attorney General John Ashcroft, Supreme Court Decision on Child Pornography, Justice Department, Washington, D.C. (May 1, 2002), *available at* http://www.usdoj.gov/criminal/ceos/ashcroft_childporn.htm.

285. *Id.* (quoting Congressman Earl Pomeroy).

286. Treglia, *supra* note 263, at 5.

287. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1406 (2002).

288. *Id.* at 1397.

289. *Id.* at 1402.

290. *Id.* at 1406.

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