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# High Court Rejects Focus on Effects of Speech As Basis for Regulating Virtual Child Pornography

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In *Ashcroft v. Free Speech Coalition*,[1] the U.S. Supreme Court surprised many by striking down portions of the Child Pornography Prevention Act of 1996 (CPPA).[2] The CPPA expanded the definition of child pornography under federal law to include computer-generated virtual child pornography and other images created without the use of real children. It did so by defining as child pornography (and, hence, unprotected speech) any visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct."[3] In *Free Speech Coalition*, seven Justices agreed that the "appears to be" provision was overbroad as applied to images created using youthful-looking adults, while six found it overbroad as applied to virtual images. Justice O'Connor joined the majority only as to the former.[4]

The ruling was a significant victory for the mainstream book and magazine publishers and distributors and other media and free-speech organizations that had supported the First Amendment challenge to the CPPA, notwithstanding the risk of appearing to defend child pornography.[5] These amici welcomed the ruling in part because, as the Court found, the CPPA, although intended to combat "virtual" child pornography, on its face proscribed a substantial amount of constitutionally protected speech with serious literary, artistic, political, or scientific value, including, the Court found, mainstream movies like *Traffic* and *American Beauty* and even Renaissance paintings depicting scenes from classical mythology.[6] As the Court observed, the severe criminal penalties imposed under the CPPA were such that "few legitimate movie producers or book publishers . . . . would risk distributing images in or near the uncertain reach of this law."[7]

Although the overbreadth of the "appears to be" language was certainly alarming, this problem was susceptible to at least partial remedy by limiting § 2256(8)(B) to images that are "virtually indistinguishable" from actual children engaging in sexual conduct—which, the legislative history suggests, is what Congress meant to target.[8] Indeed, bills were promptly introduced following the ruling that would do just that.[9] But beyond the CPPA's overbreadth, the media amici were deeply concerned with the broader threat presented by the possibility that the Court would accept as compelling government interests combating the harmful primary effects of sexually explicit images created without real children. By contrast, the principal rationale for denying First Amendment protection to traditional child pornography is to prevent the harm to children arising out of their participation in the production of the images.

The CPPA was predicated on findings that simulated child pornography, like real child pornography, stimulates the sexual appetites of pedophiles and is used to persuade children to engage in sexual conduct.[10] Congress was also concerned that (1) virtual child pornography hindered the prosecution of child pornography defendants by permitting them to raise reasonable doubt as to whether pornographic materials depicted actual children, and (2) such material was used to fuel the market for traditional child pornography.[11] These effects, Congress found, could result whether the images are actual or virtual.[12]

It does not discount the gravity of the problem that Congress sought to address to observe that had the U.S. Supreme Court validated government interests that centered not on the intrinsic characteristics of the images, nor on harm to actual children involved in their production, but rather on the feared direct effects or uses of the images, it would have endorsed a principle that would have threatened a great deal of controversial nonpornographic speech. If the Constitution per-

*(Continued on page 18)*

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IN THIS ISSUE

## *Child Pornography*

*(Continued from page 1)*

mitted Congress to criminalize realistic artistic depictions of children engaging in sexual conduct based on findings as to their harmful direct effects, then Congress could invoke a similar rationale to criminalize other types of creative works that were believed to have harmful effects on readers, viewers, or listeners, as well as on third parties, such as works depicting or describing violence or works perceived as belittling particular racial, ethnic, or religious groups.

In *Free Speech Coalition*, the U.S. Supreme Court made clear that Congress's ability to prohibit speech as a remedy for social ills is narrowly circumscribed, even when the goal is to prevent the sexual exploitation of children. This article focuses first on how the lower courts and the U.S. Supreme Court in *Free Speech Coalition* evaluated the governmental interests advanced to justify the CPPA and on the importance of the Court's rejection of those interests as a compelling basis for criminalizing works of the imagination. It then argues that rigorous scrutiny by the courts of the asserted causal relationship between controversial nonobscene speech and purported harmful effects is an essential bulwark against censorship. Finally, it discusses and evaluates legislation introduced in the House and the Senate following the *Free Speech Coalition* decision and explains why the Senate bill more effectively rectifies the overbreadth problem identified by the U.S. Supreme Court and thus appears on its face to avoid the significant intrusion upon protected expression that marred the CPPA.

**Child Pornography Before the CPPA**

Proscribing sexually explicit images of children based on their purported effects, as the CPPA did, represented a dramatic expansion of the rationale for banning child pornography. Prior to *New York v. Ferber*,[13] the only sexually oriented material that was not protected by the First Amendment was material that was obscene under the three-part test set forth in *Miller v. California*,[14] which required, inter alia, that the speech, taken as a whole, lack serious literary, artistic, scientific, or political value. In *Ferber*, the Court held that child pornography is unprotected speech even if it does not qualify as obscenity under the *Miller* test.[15] That is to say, under *Ferber* child pornography could be prohibited even if it possessed serious literary, artistic, political, or scientific value.[16] However, *Ferber* expressly limited the definition of child pornography to material created using actual children.[17]

The Court in *Ferber* cited several reasons for finding that child pornography is not protected speech, all of which concerned the well-documented harm to children used in the production of sexually explicit images.[18] Making clear that the state's compelling interest did not go beyond protecting children who participated in the creation of the material, the Court stated that "[w]e note that the distribution of descriptions or other depictions of sexual conduct [involving minors], not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[19]

The Court reinforced the limitation of its holding to depictions of actual minors by observing that "[i]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative."[20]

Thus, *Ferber* expressly endorsed using adults who appear to be underage as well as using simulations of minors in nonobscene sexually explicit works.

The CPPA exceeded these carefully delineated parameters by banning the use of (1) young-looking adults who appear to be minors unless the creator or purveyor of the material can demonstrate that it did not intend for the adult to be viewed as a minor,[21] and (2) computer-simulated or other realistic-looking depictions of children in sexually explicit films, paintings, drawings, or sculptures with serious literary, artistic, political, or scientific value.[22]

**The District Court's "Secondary Effects" Analysis**

Notwithstanding the fact that the CPPA ventured beyond *Ferber* as well as *Miller*, four circuit courts upheld the CPPA in challenges brought by persons either indicted for or convicted of violating the CPPA.[23] In each case, the appellate court held that the government's authority to regulate child pornography was not constrained by the requirement that the material be produced using actual children.[24] In this regard, the First Circuit stated that "concerns about how adults may use child pornography vis-à-vis children and how children might behave after viewing it legitimately inform legislators' collective decision to ban this material."[25] All four of the circuit courts that upheld the CPPA, however, found that it was content-based and thus subject to strict scrutiny.[26]

The only challenge not brought in the context of an actual prosecution was mounted in a California district court, spearheaded by the Free Speech Coalition, an adult entertainment industry trade group, and other plaintiffs that feared possible prosecution under the CPPA.[27] The district court, in an opinion by Judge Samuel Conti, held that the CPPA was content-neutral, and subject only to intermediate scrutiny, on the ground that its purpose was to "prevent the secondary effects of the child pornography industry, including the exploitation and degradation of children and the encouragement of pedophilia and molestation of children."[28] The court concluded that "even if no children are involved in the production of sexually explicit materials, the devastating secondary effect that such materials have on society and the well-being of children merits the regulation of such images." [29]

The court justified its conclusion that the CPPA was not content specific by asserting that the object of the regulation was not the nature of the materials or the ideas expressed therein but "the effect of the pornography on innocent children." [30]

Applying intermediate scrutiny, the court held that the CPPA advanced compelling government interests and did not burden more speech than necessary to protect children from the harms of child pornography.[31] The court rejected the overbreadth claim advanced by the plaintiffs, and expressed confidence that works such as "depictions used by the medical profession to treat adolescent disorders, adaptations of sexual works like 'Romeo and Juliet,' and artistically-valued drawings and sketches of young adults engaged in passionate behavior" would not be treated as criminal contraband.[32]

**The Ninth Circuit Rejects "Secondary Effects" Analysis**

The Ninth Circuit reversed. The majority opinion, written by District Judge Donald W. Molloy, sitting by designation, followed the First Circuit's ruling in *Hilton* and held that the CPPA was not a content-neutral time, place, and manner restriction. Rather, because it "expressly aims to curb a particular category of expression . . . by singling out the type of expression based on its content and then banning it," the CPPA was a content-based regulation that was subject to strict-scrutiny review.[33]

The appellate court thus properly recognized that the district court's conclusion that the CPPA was content neutral represented a gross misinterpretation of the secondary effects doctrine. Under settled First Amendment precedent, the government "may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech."[34] Permissible content-neutral justifications for speech regulations include prevention of the secondary effects of speech. In *City of Renton v. Playtime Theaters, Inc.*,[35] for instance, the Court held that a zoning ordinance restricting the proximity of adult movie theaters to churches, parks, or schools was content-neutral because it was justified with reference to the prevention of crime and other undesirable effects associated with adult theaters and was not intended to restrict the content of the speech purveyed by adult theaters.[36]

Content neutrality requires that the regulation in question not focus on the impact of the content of the speech on its audience—in other words, on its primary effect—because "[t]he emotive impact of speech on its audience is not a 'secondary effect.'"[37] The U.S. Supreme Court relied upon this principle in striking down the portions of the Communications Decency Act of 1996 (CDA) that criminalized the transmission of obscene or indecent messages and the sending or display of patently offensive messages to a person under eighteen years of age, which it held that the purpose of the CDA was "to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech," thus making "time, place, and manner" analysis inapplicable.[38]

Time, place, or manner restrictions are content-neutral and pass constitutional muster so long as they are narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication of the information.[39] Thus, a city ordinance regulating the permissible volume of amplified sound in a public park is a content-neutral restriction because its purpose, controlling volume, is unrelated to the content of the speech.[40]

Although in *City of Erie v. Pap's A.M.*,[41] the plurality improperly relied upon the secondary effects doctrine (which it conflated with the *O'Brien* incidental effects doctrine) in upholding a total ban on live nude dancing,[42] the plurality was careful to emphasize that the ordinance "does not attempt to regulate the primary effects of expression *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare."[43]

The CPPA clearly failed this content-neutrality test. It focused on the direct impact of works of specified content on viewers—specifically, on its role in whetting the sexual appetites of pedophiles and its effect on the actions of children to whom prohibited images were shown to entice them into sexual activity—as grounds for suppressing speech altogether. As the Ninth Circuit noted, "Congress has not kept secret that one of its motivating reasons for enacting the CPPA was to counter the primary effect child pornography has on those who view it."[44]

The Ninth Circuit's rejection of a content-neutral "secondary effects" analysis of the CPPA signaled a skepticism toward the government's asserted interests that led the court, in applying strict scrutiny, to diverge from the First Circuit and to conclude that those interests were neither compelling nor, indeed, constitutionally permissible. While the First Circuit held in *Hilton* that the government's compelling interest in protecting children permitted it to focus on the effects of child pornography on children whether real children participated in its production,[45] the Ninth Circuit majority emphasized that the state interests endorsed by the U.S. Supreme Court in *Ferber* focused specifically on the harm suffered by children used in the production of pornographic images, not on "the effects such images have on others, even if those effects exist."[46] The court thus concluded that the government's proffered rationales for criminalizing the use of "fictional images that involve no human being" were "not supported by existing case law."[47]

Definitively rejecting the secondary effects doctrine as a valid prism for evaluating the constitutionality of the CPPA, the court stated that "[t]o accept the secondary effects argument as the gauge against which the statute must be measured requires a remarkable shift in the First Amendment paradigm. Such a transformation, how speech impacts the listener or viewer, would turn First Amendment jurisprudence on its head."[48]

**The CPPA . . . focused on the direct impact of works of specified contents on viewers . . . as grounds for surpressing speech altogether.**

It appears that the Ninth Circuit majority was troubled by the district court's holding that the effect of speech on its listeners or viewers could be defined as a "secondary effect" in order to evade strict scrutiny, as well as by Congress's reliance on prevention of the primary effects of speech—the undesirable responses of pedophiles and children—as a compelling state interest to justify suppressing otherwise protected speech.

Of the five circuits confronted with constitutional challenges to the CPPA, only the Ninth Circuit recognized that by criminalizing works of the imagination Congress had employed a means of thought control in order to protect children. However laudable the objective, the court concluded, thought control cannot justify a content-based regulation of speech. The court held that "[b]ecause the [CPPA] attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment."[49]

In this regard, the court's reasoning

was consistent with that of the Seventh Circuit in *American Booksellers Ass'n, Inc. v. Hudnut*,[50] which struck down an Indianapolis ordinance that prohibited the sale of pornography that portrayed women in a submissive or degrading manner. Although the Seventh Circuit accepted the premise of the legislation—that images of women as subordinate "tend to perpetuate subordination"—it rejected reliance on such consequences as a basis for suppressing speech: "If the fact that speech plays a role in the process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech."[51]

**The U.S. Supreme Court Affirms**

When the High Court granted certiorari in *Free Speech Coalition* (in which the appellate court struck down the CPPA) rather than in *Hilton* (in which the appellate court upheld it), there was good reason to believe that the Court would reverse. It did not. Instead, the Court's majority opinion affirming the Ninth Circuit, written by Justice Kennedy, echoed in crucial respects the Ninth Circuit's evaluation of the government's articulated interests. Sounding themes articulated by the Ninth Circuit as well as by the media amici, the Court's discussion of the constitutionality of Congress's justifications for the CPPA included powerful statements regarding the limits on the government's ability to combat societal problems by controlling thoughts.

Engaging in strict-scrutiny review, Justice Kennedy began his analysis of the government's asserted interests by noting that many otherwise innocent things, such as cartoons, video games, and candy, might be used for immoral purposes but would not be prohibited on that basis.[52] He continued:

> The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.[53]

Thus, Kennedy wrote, the government "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"[54]

The Court was mindful of the fact that although the general proscription against prohibiting speech based on its primary effect (as opposed to its lack of serious value) is not absolute, the circumstances in which speech can be deprived of First Amendment protection based on its primary effect are narrowly circumscribed. For instance, a threat is unlawful only when a reasonable person foresees that the statement "would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm."[55] Similarly, denying First Amendment protection to so-called fighting words is premised on the immediate harm caused by their utterance.[56] Advocacy of violence or lawless action can be punished only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[57] The CPPA implicated none of these categories of speech.[58] Instead, the Court found that the government had "shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."[59] While it did not completely foreclose the possibility of prohibiting virtual child pornography, the Court held that "[w]ithout a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[60]

**Implications**

The most important lesson of *Free Speech Coalition* in terms of First Amendment doctrine is that regulation of otherwise protected speech on the ground that it may stimulate improper thoughts or be used as an instrument of crime in the hands of deviant persons, absent compelling evidence of a causal link to actual harm, is a dangerous incursion on the First Amendment, an invitation to censorship, and a return to an approach, long ago discarded as unconstitutional by the U.S. Supreme Court, under which sexually explicit speech could be restricted as obscene based on its effect on particularly susceptible persons.[61] *Free Speech Coalition* stands for the proposition that attempting to control evil conduct by banning evil thoughts is fundamentally antithetical to the concept of free speech. As the Court observed in *Stanley v. Georgia*, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[62]

Had the Court come out the other way, the potential implications for freedom of speech would have been far-reaching. A holding that nonobscene sexually explicit images created without actual children could be banned based on their purported effect on certain viewers would have supported the restriction of any type of speech that could be asserted to induce socially undesirable behavior on the part of certain recipients.

This is more than a theoretical concern. Studies purporting to find that depictions of violence may cause young viewers to react aggressively or violently have been cited to justify a number of laws aimed at regulating violent imagery in the interest of protecting minors and society from juvenile crime.[63] A federal trial court recently upheld a St. Louis County (Missouri) ordinance predicated on a legislative finding that "exposure of children to graphic and lifelike violence contained in some video games has been correlated to violent behavior."[64]

Congress has considered restrictions on violent imagery, musical lyrics, and even written descriptions. These measures include a bill introduced in the House of Representatives in June 1999 that would have made it a crime to expose children to images, sound recordings, or printed descriptions of graphic violence.[65] Another bill sought to ban the broadcasting of certain violent video programming during hours that children are likely to be in the viewing audience, based on Congress's belief that "violent video programming influences children, as does indecent programming."[66] Another bill would have made marketing "adult-rated" movies, video games, and music to minors illegal as a "deceptive" trade practice, based on the assertion that "media violence can be harmful to children."[67] A bill introduced in June 2002 would punish retailers that fail to enforce the video game industry's self-imposed rating system in order to "protect our children from video games' sex and violence."[68] These legislative efforts highlight the ongoing threat to mainstream speech that is vulnerable to claims that it leads some recipients to engage in aberrant behavior.

Recent experience has painfully shown that grappling with reality inevitably involves confrontation with violence and death, with the unpleasant

and disturbing, as well as the uplifting, aspects of human experience. While the impulse to censor so as to eliminate dangerous influences is understandable, as Judge Posner recently observed:

> People are unlikely to become well-functioning, independent minded adults and responsible citizens if they are raised in an intellectual bubble. . . . To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.[69]

In *Herceg v. Hustler Magazine, Inc.*,[70] the Fifth Circuit eloquently expressed our constitutional commitment to protecting even harmful speech in the interest of permitting freedom of thought to flourish:

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naïve belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.[71]

The perceived urgency of addressing child abuse by pedophiles and juvenile crime makes even purely fictional, creative speech associated with those problems an irresistible target for legislators. But unless such laws are tested against rigorous First Amendment standards, we risk compromising the bedrock principles on which our entire free speech edifice rests. The U.S. Supreme Court's forceful rejection of thought control as a permissible aim of government speech regulation may prove to be an important precedent in future clashes between the First Amendment and well-meaning but misguided efforts to use censorship as a tool to solve social problems.

**Constitutionality of Pending Legislation**

Two weeks after the U.S. Supreme Court handed down its ruling in *Free Speech Coalition*, legislation was introduced in the House of Representatives that purported to remedy the constitutional defects that the Court had identified. That bill, the Child Obscenity and Pornography Prevention Act of 2002 (H.R. 4623), fails to rectify the core constitutional defects of the CPPA. On the other hand, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2002 (S. 2520), introduced by Senators Orrin Hatch and Patrick Leahy on May 15, 2002, much more faithfully implements the U.S. Supreme Court's ruling and avoids the overbreadth problems of the CPPA by conforming the definition of the proscribed materials to the obscenity standard.

As noted above, in *Ferber*, the Court specifically suggested that using young-looking adults or some type of simulation instead of actual minors would be a constitutionally permissible means of avoiding the proscription against child pornography.[72] In *Free Speech Coalition*, the Court held that *Ferber* "provides no support for a statute that eliminates the distinction [between actual and virtual child pornography] and makes the alternative mode criminal as well."[73] "In contrast to the speech in *Ferber*," the Court observed, "the CPPA prohibits speech that records no crime and creates no victims by its production."[74] As noted above, the Court went on to reject each of the government's asserted rationales for extending the definition of child pornography beyond the limits authorized by *Ferber*.[75]

**The Supreme Court's forceful rejection of thought control as a permissible aim of . . . regulation may prove to be an important precedent . . .**

In light of the Court's unambiguous refusal to erase the clear line drawn in *Ferber* between actual and virtual child pornography, merely amending the statutory definition of child pornography to include "a computer image or computer-generated image that is, or *appears virtually indistinguishable from*, that of a minor engaging in sexually explicit conduct," as the House bill does,[76] is insufficient to pass constitutional muster. Although that language would not cover most artistic renderings and would not apply to images of young-looking adults (that are not computer generated), thus significantly reducing the CPPA's overbreadth, its coverage of virtual images contravenes the Court's holding that images that do not "create[ ] . . . victims by [their] production"[77] cannot be proscribed.

The House bill attempts to cure this problem by providing an affirmative defense if the alleged offense "did not involve child pornography produced using a minor engaging in sexually explicit conduct."[78] However, this defense is constitutionally problematic because it places on the defendant the burden of demonstrating that the images in question are not child pornography. Addressing the CPPA's affirmative defense for nonpossession offenses of images that could be shown to have been produced using adults,[79] the Court in *Free Speech Coalition* noted that it "raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not lawful."[80] The Court pointed out that an affirmative defense "applies only after prosecution has begun, and the speaker must prove, on pain of a felony conviction, that his conduct falls within the affirmative defense."[81]

The Court did not decide whether this burden shifting was in itself unconstitutional, as it held that the CPPA's affirmative defense was "insufficient, even on its own terms," because (1) it did not apply to possession, as opposed to distribution, offenses, and (2) it provided no protection in cases involving computer-generated images, which could not be shown to depict adults.[82] The Court also pointed out that where defendants did not produce the work in question, they may have no way of establishing "the identity, or even the existence, of the actors."[83]

Unlike the affirmative defense in the CPPA, the affirmative defense provided in the House bill would apply to virtual images as well as to possession offenses, but it fails to address two of the problems identified in *Free Speech Coalition*: (1) the shifting of the burden of proof and (2) the difficulty of making the required showing faced by defendants who did not create the works.[84]

The Senate bill (S. 2520) modifies the "appears to be" provision of the CPPA by adding that the image must be obscene.[85] This effectively renders the provision superfluous, because obscene images are unprotected in any event, but it clarifies that the bill is not intended to cover works that would be protected under *Ferber*, i.e., works that do not depict actual children and possess literary, artistic, political, or scientific merit. The bill also would amend 19 U.S.C. § 2256(8)(D)—the provision applicable to advertising, promotion, and distribution—so that it would criminalize images that depict "a

minor, or an individual who appears to be a minor," engaging in specified sexual acts where the image lacks "literary, artistic, political, or scientific value," again linking the definition of proscribed material to the obscenity definition, thus rectifying the overbreadth and vagueness problems that infected the CPPA.[86] Thus, unlike the House bill, the Senate bill would, in theory, spare from prosecution the types of mainstream artistic works cited by the U.S. Supreme Court in finding the CPPA overly broad.

It is likely that legislation similar to one of the pending bills discussed above will be enacted and will be the subject of a constitutional challenge, either facial or as applied. Congress's prompt response to *Free Speech Coalition* is testimony to the powerful political imperative to pass laws giving prosecutors additional tools to combat the dissemination of sexually explicit virtual images that are thought to contribute to the sexual abuse of minors. The bills currently being considered in Congress are of varying constitutional merit. The House bill, by failing to recognize that *Free Speech Coalition* places virtual child pornography—however realistic—beyond the reach of the law if it is otherwise lawful (i.e., not obscene), suffers from serious constitutional defects. The Senate bill, which expressly protects images with literary, artistic, political, or scientific value, is a far more faithful implementation of *Free Speech Coalition* and thus far more likely, if enacted, to be upheld.

**Endnotes**

1. 122 S. Ct. 1389 (2002).
2. 18 U.S.C. §§ 2251 *et seq.*
3. 18 U.S.C. § 2256(8)(B). The CPPA also banned depictions that are "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)(D). Section 2256(8)(C), the provision relating to computer-morphed images—pictures of real children altered so that the children appear to be engaging in sexual activity—was not challenged.
4. The Court also struck down § 2256(8)(D) as overbroad by a seven-to-two vote.
5. Weil, Gotshal & Manges LLP filed an amicus brief with the U.S. Supreme Court in support of respondents on behalf of the Association of American Publishers, Inc.; American Booksellers Foundation for Free Expression; Freedom to Read Foundation; International Periodical Distributors Association; Magazine Publishers of America; Publishers Marketing Association; and Video Software Dealers Association.
6. *Free Speech Coalition*, 122 S. Ct. at 1397, 1400.
7. *Id.* at 1398.
8. *See* S. Rep. No. 104–358, at 7 (1996) (indicating that the purpose of the phrase "appears to be" was to extend the prohibition against child pornography from photographic images of actual minors engaging in sexually explicit conduct to "the identical type of depiction, one which is virtually indistinguishable from the banned photographic depiction"). *See Free Speech Coalition*, 122 S. Ct. at 1412 (Rehnquist, J., dissenting).
9. H.R. 4623, the Child Obscenity and Pornography Prevention Act of 2002, was introduced on April 30, 2002, and approved by the House on June 25, 2002. An identical Senate bill, S. 2511, was referred to the Senate Committee on the Judiciary on June 26, 2002. An alternative Senate bill, S. 2520, has been introduced by Senators Orrin Hatch and Patrick Leahy. The Judiciary Committee heard testimony on S. 2520 on October 2, 2002, but as of this writing has not yet acted on the bill.
10. *See* S. Rep. No. 104–358, at 12–14 (1996).
11. *See id.* at 16–17.
12. *See id.* at 26 ("'synthetic' child pornography, which looks real to the naked eye, will have the same effect upon viewers as 'traditional' child pornography"); *id.* at 18 ("the danger to actual children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses [computer simulations] as when the material consists of unretouched images of actual children").
13. 458 U.S. 747 (1982).
14. 413 U.S. 15, 24 (1973).
15. In rejecting application of the *Miller* standard to child pornography, the Court in *Ferber* observed that the *Miller* factors "bear no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." 458 U.S. at 761.
16. Following *Ferber*, the Child Protection Act of 1984, Pub. L. No. 98–292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251–2253), eliminated the requirement that material be obscene under *Miller* in order to be proscribed.
17. *See Ferber*, 458 U.S. at 764 ("When a definable class of material . . . bears so heavily and pervasively on the welfare *of children engaged in its production* . . . it is permissible to consider these materials as without the protection of the First Amendment.") (emphasis added).
18. *Id.* at 756–64.
19. *Id.* at 764–65.
20. *Id.* at 763.
21. 18 U.S.C. §§ 2252A(c), 2256(8)(B).
22. 18 U.S.C. § 2256(8)(B). The affirmative defense provided in § 2252A(c), which permitted a defendant to avoid conviction for offenses other than possession by showing that the materials were produced using adults, does not apply to computer-generated or other artistic images. *See* Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1405 (2002).
23. *See* United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).
24. *See Fox*, 248 F.3d at 401–02; *Mento*, 231 F.3d at 918–20; *Acheson*, 195 F.3d at 650; *Hilton*, 167 F.3d at 70, 72.
25. *Hilton*, 167 F.3d at 70.
26. *Fox*, 248 F.3d at 400; *Mento*, 231 F.3d at 918; *Acheson*, 195 F.3d at 650; *Hilton*, 167 F.3d at 68–69.
27. The other plaintiffs were Bold Face Type, Inc., the publisher of a book advocating nudism; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images.
28. Free Speech Coalition v. Reno, No. C 97–0281VSC, 1997 WL 487758, at *4 (N.D. Cal. Aug. 12, 1997).
29. *Id.*
30. *Id.*
31. *Id.* at *6.
32. *Id.* The court also held that the CPPA was not void for vagueness. *Id.*
33. Free Speech Coalition v. Reno, 198 F.3d 1083, 1090 (9th Cir. 1999).
34. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added) (citation omitted).
35. 475 U.S. 41 (1986).
36. *Id.* at 47–48.
37. Boos v. Barry, 485 U.S. 312, 321 (1988) (holding that District of Columbia law making it unlawful to display within 500 feet of an embassy any sign that tends to bring the foreign government into "public odium" or "public disrepute" is content-based because its justification focuses on the content of the speech and the direct impact that such speech has on its listeners). *See also* Reno v. ACLU, 521 U.S. 844, 868 (1997) ("The purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech. Thus, the CDA is a content-based blanket restriction on speech.").
38. *ACLU*, 521 U.S. at 867–68.
39. *Id.*
40. Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989).
41. 529 U.S. 277 (2000).
42. *Id.*
43. *See id.* at 291 ("the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments . . . and not at suppressing the erotic message conveyed by this type

of nude dancing").

44. Free Speech Coalition v. Reno, 198 F.3d 1083, 1091 (9th Cir. 1999) (quoting United States v. Hilton, 167 F.3d 61, 68–69 (1st Cir. 1999)).

45. *Hilton*, 167 F.3d at 70.

46. *Reno*, 198 F.3d at 1092.

47. *Id.*

48. *Id.* at 1094–95.

49. *Id.* at 1094.

50. 771 F.2d 323, 334 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

51. 771 F.2d at 330 (quoted in *Reno*, 198 F.3d at 1093). The Ninth Circuit also held that the statutory words "appears to be a minor" and "convey[s] the impression" that the material depicts a minor engaged in explicit sexual activity were "highly subjective" and thus unconstitutionally vague. *Reno*, 198 F.3d at 1095.

52. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1402 (2002). In that regard, the media amici, in their brief to the Ninth Circuit, cited a study that found that "[m]ost paedophiles seem not attracted by child pornography" and that some use nonpornographic depictions of children such as mail-order clothing catalogues and television programs to stimulate their sexual fantasies. Dennis Howitt, *Pornography and the paedophile: Is it criminogenic?*, 68 BRIT. J. MED. PSYCH. 15, 24 (1995).

53. Howitt, *supra* note 52, at 15.

54. *Id.* (citing Hess v. Indiana, 414 U.S. 105, 108 (1973)). With respect to the government's contention that the possibility of producing computer-generated child pornography made it difficult to obtain convictions under the existing child pornography law because it is difficult to prove that images are actual, rather than virtual, child pornography, the Court held that the government "may not suppress lawful speech as the means to suppress unlawful speech." *Free Speech Coalition*, 122 S. Ct. at 1404.

55. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, Inc., 290 F.3d 1058, 1077 (9th Cir. 2002) (en banc).

56. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (First Amendment does not protect "fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

57. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Courts have construed strictly *Brandenburg*'s requirements of intent, imminence, and likelihood. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 409 (1989) (ban on flag burning not permitted based on its "potential for a breach of the peace"); Hess v. Indiana, 414 U.S. 105, 109 (1973) (provocative remarks by a demonstrator to police could not be punished on the ground that they had a mere tendency to lead to violence); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (magazine's detailed description of autoerotic asphyxia, which teenager followed in making fatal attempt to perform the act, protected by First Amendment because it did not "incite" the teenager to harm himself); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988) (dismissing on First Amendment grounds claim that song "Suicide Solution" intentionally incited suicide of listener); Yakubowitz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071–72 (Mass. 1989); Byers v. Edmondson, 826 So. 2d 551 (La. Ct. App. 2002) (nothing in Oliver Stone film *Natural Born Killers* constituted incitement because it "does not purport to order or command anyone to perform any concrete action immediately or at any specific time"), *writ denied*, 809 So. 2d 142 (La. 2002).

58. *See Free Speech Coalition*, 122 S. Ct. at 1403 ("There is here no attempt, incitement, solicitation, or conspiracy.").

59. *Id.*

60. *Id.* The Seventh Circuit, in an opinion by Judge Richard A. Posner, reached a similar conclusion in *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 462 (2001), a First Amendment challenge brought by a trade association of video game manufacturers against an Indianapolis ordinance that limited the access of minors to video games containing either "graphic violence" or "strong sexual content." Reversing the district court's holding that "graphic violence" could be regulated to the same extent as "harmful to minors" sexual material, the court held that violent imagery could not be proscribed absent compelling evidence that it incited consumers of the video games to commit violent acts or inflicted psychological harm on children exposed to such images. *Id.* at 576.

61. *See* Roth v. United States, 354 U.S. 476, 489 (1957) (rejecting holding of Regina v. Hicklin, L.R. 3 Q.B. 360).

62. 394 U.S. 557, 565 (1969).

63. *See, e.g.*, *Am. Amusement Mach. Ass'n*, 244 F.3d at 578 (rejecting psychological studies as support for violent video game ordinance). *But see* Interactive Digital Software Ass'n v. St. Louis Co., 200 F.2d 1126 (E.D. Mo. 2002) (crediting expert testimony and referenced studies as demonstrating causal link between viewing violent video games and aggressive thought and behavior in children). *Cf.* Eclipse Enters., Inc. v. Gulotta, 134 F.3d 63, 64 (2d Cir. 1997) (striking down local ordinance barring distribution to minors of trading cards depicting heinous crimes or criminals that legislators considered a contributing factor to juvenile crime).

64. *Interactive Digital Software Ass'n*, 200 F.2d at 1129. The ruling has been appealed to the Eighth Circuit.

65. *See* H.R. 2036, 106th Cong. (1999).

66. *See, e.g.*, H.R. 1005, 107th Cong. (2001).

67. *See* S. 792, 107th Cong. (2001).

68. H.R. 4645, 108th Cong. (2002). *See* Catherine Donaldson-Evans, *Explicit Video Games May Become Illegal*, foxnews.com (June 18, 2002), *available at* www.Foxnews.com/story/0,2933,55689,00.html.

69. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

70. 814 F.2d 1017 (5th Cir. 1987).

71. *Id.* at 1019.

72. New York v. Ferber, 458 U.S. 747, 763 (1982) ("[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative.").

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

74. *Id.*

75. *See id.* at 1402–05.

76. H.R. 4623, 107th Cong., 2d Sess. (2002), § 2(a).

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

78. H.R. 4623, § 2(c).

79. *See* 19 U.S.C. § 2252A(c).

80. *Free Speech Coalition*, 122 S. Ct. at 1404. *See also* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (government must prove that defendant charged with shipping child pornography in interstate commerce knew material depicted a minor).

81. *Free Speech Coalition*, 122 S. Ct. at 1404.

82. *Id.* at 1405.

83. *Id.* at 1404.

84. *Id.* The House bill also contains provisions criminalizing pandering materials as child pornography and using child pornography to facilitate offenses against minors. *See* H.R. 4623, 107th Cong., 2d Sess. §§ 3, 5 (2002).

85. S. 2520, 107th Cong., 2d Sess., Z § 4(2)(A) (2002).

86. *Id.* § 4(2)(D).