STARTING WITH THE SCALES TILTED: THE SUPREME COURT'S ASSESSMENT OF CONGRESSIONAL FINDINGS AND SCIENTIFIC EVIDENCE IN *ASHCROFT V. FREE SPEECH COALITION*

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I. INTRODUCTION

The First Amendment protects freedom of expression by prohibiting the government from regulating speech. Importantly, the United States Supreme Court has carved out several exceptions, allowing the government to regulate certain forms of speech if they "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[1] Until *New York v. Ferber*,[2] exceptions to the First Amendment's protection of expression were limited to expression that was obscene, profane, libelous, and insulting or fighting words.[3]

In 1982, the Court created an additional exception for child pornography.[4] Paul Ferber, owner of a bookstore specializing in sexually-oriented merchandise, was convicted for promoting a sexual performance by a child[5] when he sold two films depicting young boys masturbating.[6] The Supreme Court affirmed his convictions, and in so

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1. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See also* New York v. Ferber, 458 U.S. 747, 776 (1982) (Brennan, J., concurring).

doing, created a new category of unprotected speech in child pornography.[7]

Then, in 2002, the Court decided the landmark case *Ashcroft v. Free Speech Coalition* that scaled back Congress' and state legislatures' ability to combat the nefariously multitudinous effects of child pornography by limiting the First Amendment's child pornography exception to only allow regulation of actual child pornography, finding that virtual child pornography is constitutionally protected speech.[8] Thus, *Free Speech Coalition* left a gap of protected speech that may not be prohibited because the pornography was not produced using actual children. This decision was a heavy blow to interest groups seeking to Tm]TJ-9.651 -0 -1.125 TD-0 oftualTD-0.6s0009 Tc0Mhe nefariou. Tigh2 TT9 M

Part V discusses emerging scientific research and data that is sufficient to support the opposite holding were the issue of virtual child pornography to come again before the Court. Part VI offers a brief conclusion.

II. REGULATION OF CHILD PORNOGRAPHY AND THE ASHCROFT DECISION

Child pornography came to the forefront of the American news scene when, in 1973, the first child pornography ring was openly prosecuted.[10] Numerous incidents in the following four years prompted Congress to launch a full investigation of the mounting problem of child pornography. Not only was child-pornography reported to be a multi-million dollar business with 30,000 child victims in the city of Los Angeles alone, but child pornography had solidified a position in mainstream pornography culture.[11] Congress reacted to the mounting evidence by enacting the Protection of Children from Sexual Exploitation Act of 1977.[12] When the 1977 Act proved severely limited, and with the Court's *Ferber* decision clearly allowing for government regulation of child pornography, Congress enacted the Child Protection Act of 1984 ("the 1984 Act").[13] Difficulties in prosecuting production and distribution of child pornography made it necessary to criminalize possession in the hopes of destroying the economic motive of the child pornography industry.[14] The Attorney General's Commission on Pornography continued to research and submit legal recommendations of the regulation and prosecution of pornography and child sex abuse. Several pieces of legislation codified these recommendations, the most recent of which was the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act.[15]

10. U.S. DEP'T OF JUSTICE, ATT'Y GENERAL'S COMM'N ON PORNOGRAPHY: FINAL REPORT 599 (1986).

11. *Id.* at 599-601.

12. *Id.* at 603. *See* 18 U.S.C.S. §§ 2251-2253 (LexisNexis Supp. 1985).

13. 18 U.S.C.S. §§ 2251-2255 (LexisNexis Supp. 1985). The 1984 Act improved the federal government's ability to prosecute noncommercial incidences of child pornography, eliminated any semblance of *Miller*-obscenity restrictions, increased the age limit to even protect eighteen-year-olds, increased potential penalties including fines and criminal and civil forfeiture actions, altered the several definitions of "sexual abuse," and limited the Act's scope to "visual depictions" of children. U.S. DEP'T OF JUSTICE, *supra* note 11, at 604-07.

14. Osborne v. Ohio, 495 U.S. 103, 103 (1990) (upholding a state ban on possession—in addition to production and distribution—of child pornography).

15. Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18

The most recent and publicly visible piece of legislation to further the interests of protecting children from child pornography was the Child Pornography Prevention Act of 1996 ("CPPA"), which prohibited possession and distribution of visual depictions of children engaged in sexually explicit conduct, regardless of whether an actual child was used in the production of the depiction.[16] Congs ue3.U4 6(o)-bli3(3)]5a7g3ts rega2Jm52 xp

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ing to only allow for government proscription of actual child pornography.[21] The Court was especially concerned that speech with serious literary, artistic, political, or scientific value[22] was suppressed by the CPPA's prohibitions, providing a chilling effect on freedom of expression.[23] The Court clarified the *Ferber* holding when it reiterated its position that child pornography may be low value speech, but it is not no-value speech.[24]

The Court rejected the Government's argument that virtual child pornography was closely analogous with the material at issue in *Ferber*, distinguishing *Ferber*: "Virtual child pornography is not 'intrinsically related' to the sexual abuse of children" because it neither records a crime nor creates a victim by its production.[25] In reaching this decision, the Court addressed congressional findings that correlated child abuse with actual and virtual child pornography but ultimately concluded that the evidence was insufficient to sustain the constitutional viability of the CPPA. The proffered evidence was insufficient because, in the Court's estimation, it did not provide an adequate proximate link to support either Congress' contention that virtual child pornography harms children by leading to downstream child sexual abuse or incitement to other criminal acts.[26] Thus, the Government was unable to meet its burden under the Court's strict scrutiny test to justify a compelling state interest. The Court's dismissal of the evidence leads to the question of when legislative findings are sufficient to outweigh the interest of protecting low value speech such as virtual child pornography.

III. LEGISLATIVE FINDINGS AND SCIENTIFIC EVIDENCE IN SUPREME COURT CASES

Judicial review hearkens back to Justice Marshall's 1803 opinion

21. The Court in *Free Speech Coalition* was the first court to describe *Ferber's* holding as creating an exception only for "pornography produced with real children." *See id.* at 245-46.

22. The Court clarified that child pornography is not deemed to be of no value, but rather of low value. *See id.* at 250-51. The dissenting Justices felt, however, that the minimal value of child pornography, weighed against the government's compelling interest, was insufficient to protect virtual child pornography as unregulatable expression. *Id.* at 260-67 (O'Connor, J., dissenting).

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in *Marbury v. Madison*,[27] which set the precedent for what has become a fundamental component of the American legal system.[28] The doctrine of judicial review, or a court's ability to overrule a legislative act as running afoul of the Constitution, with ultimate authority to determine the constitutionality of a particular legislative act resting in the United States Supreme Court, has shaped the landscape of American jurisprudence. As the Supreme Court has levied constitutional guarantees and prohibitions against the life of a congressional enactment, it has sometimes turned to the legislative record and other scientific evidence to determine the fate of the enactment. A brief examination of the Supreme Court's reactions to the legislative record[29] and supplementary scientific evidence demonstrates a marked pattern of deference versus scrutiny.

Generally, Congress may enact legislation with a "broad brush"[30] according to the powers it derives from, and limited to the restrictions placed upon government regulation by, the Constitution. In reviewing a questionable piece of legislation, the Court may use the legislative record in a variety of ways: (1) the Court may use congressional findings to clarify what otherwise would be the plain language of the statute;[31] (2) evidence from testimony at hearings, compilations of studies and letters, etc., in the legislative record may be considered vital evidence and in fact a requirement in order for the Court to uphold a statute;[32] (3) congressional findings may also evidence Congress's careful crafting of the statute; however, even when Congress's care is clear, the Court must sometimes invalidate the statute.[33] Although Congress is t8tConn75 -1.125 zii58 .125.2(oc-0.0p0-0.0gTonn75.5(y use theke(iculgis1.125 l)1y)-6

cantly, the Court's review of congressional findings is not a *de novo* review of the findings; rather, the Court is deferential, limiting its review only "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[38] But, the Court has said, "It is not for us to resolve empirical uncertainties underlying state legislation, *save in the exceptional case where that*

assumptions are necessary in the enactment of legislation and absolute scientific proof of otherwise socially acceptable assumptions are unnecessary to buttress legislation that otherwise would contravene the protection of the First Amendment.

Following its obscenity precedent, the Court also reacted to legislative evidence in *New York v. Ferber* by explicitly declining to "second-guess [the] legislative judgment" that supported the compelling government interest to regulate child pornography.[45] Interestingly, the Court made this statement of its own volition, acknowledging that neither party so much as intimated that it do so.[46] Given the Court's eagerness to uphold New York's legislation banning child pornography, even to the extent of creating a new exception to protected speech for child pornography, one would anticipate that the Court's decision in *Ashcroft v. Free Speech Coalition* would continue to protect the safety, interests, and well-being of minors. However, the *Ashcroft* Court systematically eliminated all of the government's rationales for upholding the Child Pornography Prevention Act of 1996 despite the congressional findings amassed to support enactment of the CPPA. What *Aschroft* indicates is the Supreme Court's eagerness to reach a certain conclusion by disregarding evidence as well as available options to limit the scope of the questionable legislation.

IV. ASHCROFT, FERBER, AND THE COURT'S APPLICATIONS OF LEGISLATION MOTIVATIONS

Given the context of a Court that doesn't demand scientifically conclusive data and prefers not to second guess legislative judgment, it is unclear why the CPPA's congressional findings that followed *Ferber's* rationales were insufficient to deny constitutional protection to virtual child pornography. The resulting requirements are ambivalent: to what extent does the Court examine empirical findings to determine whether the findings sufficiently justify a compelling government interest in a strict-scrutiny-First-Amendment context?

A. Legislative Findings in the Ferber Analysis

The *Ferber* Court proffered five reasons for its significant decision to allow proscription of speech depicting children engaging in sexual acts as distinguished from obscenity. First, the Court recog-

45. 458 U.S. 747, 758 (1982).

46. *Id.*

formances.[54]

Clearly, society has an interest in protecting children because they are our future; the Court accepted this interest as a compelling state interest weighed against the low value of child pornography under its strict scrutiny analysis.[55]

B. Ashcroft's Rejection of Scientific Evidence/Congressional Findings

The Child Pornography Prevention Act of 1996 (CPPA) prohibited "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[56] Although the Supreme Court acknowledged child sexual abuse as morally repugnant, it ultimately drew boundaries around the *Ferber*-created child pornography exception when it ignored Congress's express findings that child pornography—actual *and* virtual—leads to further child abuse.[57] Rather than

54. *Id.* at 757 (citing 1977 N.Y. Laws, ch. 910, § 1).

55. Interestingly, the *Ferber* Court also cited Committee statements on the destructive effect of child pornography: "'The act of selling these materials is guaranteeing that there will be additional abuse of children.'" *Id.* at 761-62 n. 13 (quoting Texas House Select Committee on Child Pornography: Its Related Causes and Control 132 (1978)). The committee was likely referring to additional abuse resulting from the economic driving forces of the multimillion dollar child pornography and prostitution industry; however, there is additional physical and sexual abuse of children, namely, the use of child pornography by pedophiles. *See Ferber*, 458 U.S. at 749 n.1.

56. 18 U.S.C.S. § 2256(8)(B). *See* 18 U.S.C.S. § 2256..

57. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246 (2002); Brief for the Petitioners, 2001 WL 432538, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795). Congress published thirteen findings in support of the Child Pornography Prevention Act:

> [T]he use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;
>
> where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;
>
> child pornography is often used as part of a method of seducing other children into sexual activity; 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;
>
> child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer;

extending the child pornography exception to include virtual pornography or creating a new exception for virtual child pornography, the Court followed the Ninth Circuit's reasoning that although virtual child pornography may *tend* "to persuade viewers to commit illegal acts," [58] the mere tendency is insufficient to permit the government to impose criminal sanctions for production, distribution, or possession of virtual child pornography;[59] the CPPA was unconstitutional because the government did not prove "more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."[60]

However, the Government provided substantial legislative findings, not only as cited in its brief and other amici briefs,[61] but in the notes following each CPPA provision. In addition to legislative findings specific to the CPPA, the Court also had access to the report of the 1986 Attorney General's Commission on Pornography.[62] Refer-

> the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct.

Pub.L. No. 104-208, 110 Stat. 3009-26 to 27 (1996).

58. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 243 (2002).

59. Although only discussed briefly at the beginning of its opinion, the Court seemed to be especially concerned with the severity of the criminal sanctions Congress created under the CPPA:

> The First Amendment commands, "Congress shall make no law . . . abridging the freedom of speech." The government may violate this mandate in many ways, but a law imposing criminal penalties on protected speech is a stark example of speech suppression. The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison.

Id. at 244 (internal citations omitted).

60. *Id.* at 253.

61. The National Center for Missing and Exploited Children, National Coalition for the Protection of Children & Families, National Center for Children and Families, Family Research Council, the States of New Jersey, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin, the National Legal Foundation, Morality in Media, Inc., and several individual parties filed amici briefs in support of the petitioner.

62. In 1985, President Ronald Reagan specifically requested the formation of the com-

V. A RETURN TO *ASHCROFT*—THE EVIDENCE THAT IS AND THE DECISION THAT SHOULD HAVE BEEN

The *Ashcroft* Court expressly rejected the link between child pornography and consequential sexual abuse of children as "contingent and indirect."[67] But the Court was mistaken when it wrote that "the CPPA prohibits speech that records no crime and creates no victims by its production."[68] While virtual child pornography creates no victims in its production, it creates child victims of exploitation and sexual abuse because of its downstream effects.

A. Correlation v. Causation—When Enough is Enough

First Amendment jurisprudence has clearly established that "the government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'"[69] However, once private thoughts translate to actions, the government has an interest in interfering with behavior that threatens public safety.[70] Despite the evidence offered in the legislative findings and referenced by the government in its briefs, the *Ashcroft* Court declined to find support for regulation of virtual child pornography as a means for pedophiles to "whet their own sexual appetites":[71] "Without 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."[72]

Unfortunately, the Court did not elaborate on what aspect of the evidence was insufficient, but a walk through the evidence in support of the Government's compelling interest to ban virtual child pornography is instructive.

Had the Court not already made up its mind that the correlation between pornography and child sexual abuse was attenuated, it could have walked itself through the following rubric and found the current evidence to be sufficient:

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67. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250 (2002).

68. *Id.* at 250.

69. *Id.* at 253 (citing *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)).

70. *See, e.g.*, Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1301-09 (1998) (discussing the religious Free Exercise belief-action distinction from its inception in *Reynolds v. United States*).

71. *Ashcroft*, 535 U.S. at 241.

72. *Id.* at 253-54.

> [F]ocus on whether the allegation relates to a harm that comes from the sexually explicit material itself, or whether it occurs as a result of something the material does. If it is the former, then the inquiry can focus directly on the nature of the alleged harm. But if it is the latter, then there must be a two-step inquiry. First it is necessary to determine if some hypothesized result is in fact harmful. In some cases, where the asserted consequent harm is unquestionably a harm, this step of analysis is easy. With respect to claims that certain sexually explicit material increases the incidence of rape or other sexual violence, for example, no one could plausibly claim that such consequences were not harmful and the inquiry can then turn to whether the causal link exists.[73]
>
> Understandably, difficulties arise when issues of multiple causation arise, as they do with pornography and possible subsequent criminal behaviors; when multiple causation is recognized, it is likely to be attributed to those factors that are readily within our power to change. Often we ignore larger causes precisely because of their size.[74]

Without further inquiry, singling pornography out of a variety of factors leading to child sexual abuse would be disingenuous. However, conclusive proof is not required.

> Correlational evidence suffers from its inability to establish a causal connection between the correlated phenomena. It is frequently the case that two phenomena are positively correlated precisely because they are both caused by some third phenomena. We recognize, therefore, that a positive correlation between pornography and sex offenses does not itself establish a causal connection between the two. . . . But the fact that correlational evidence cannot definitively establish causality does not mean that it may not be some evidence of causality. . . .[75]

Sometimes the unique nature of a questionable harm increases the likelihood of causality. Because of the rather unique nature of the

Pornography presented its finding, the "cottage industry" of child pornography was thriving, especially on the international front.[77] Advances in computer technology from the 1980s until the present put an entirely new dimension on child pornography.[78] Based on the difficulties that were reported in print and via Senate hearings, technology was the main impetus that prompted congressional action to amend the existing laws in order to effectively combat what child pornography had become.[79]

The pool of scientific research and evidence is continually growing to support the legislative findings that pedophiles use pornography—virtual and actual—to "whet their appetites" to engage in further sexual activity with children. Victor B. Cline, a clinical psychologist who specializes in treating individuals with sexual dysfunctions, observes that "pornography has been a major or minor contributor or facilitator in the acquisition of their deviation or sexual addiction."[80] Dr. Cline described the addictive effect pornography has on his patients: first the pornography consumers got hooked and then relied on continued material as a "sexual stimulant" or "aphrodisiac" culminating in a sexual release.[81] The next step was escalation of pornographic consumption from soft porn to harder, more explicit, and eventually deviant pornography.[82]80 82

Additional studies indicate that pornographic images become implanted in the brain, and are thus available as a memory for subsequent recollection and sexual stimulation.[85] The Lighted Candle Society, a public interest group located in Centreville, Utah and Washington, D.C. is engaged in efforts to fund research using a functional magnetic resource imaging machine (fMRI) to provide scientific documentation via brain mapping that pornographic exposure creates similar addictions as alcohol or drug use.[86] These researchers are hopeful that the evidence collected from these studies will conclu-

Although the scientific data cannot be absolutely conclusive,[88] the currently available scientific data at least supports a correlation between the use of child pornography and the likelihood of the user sexually exploiting children, if not indicating a stronger causal link

search of psychologists, psychiatrists, sex educators, and social workers viewed exposure to sexual materials as harmless to both adults and adolescents.[105]

sive. Indeed, the past four decades have produced a significant amount of data both buttressing and negating the Commission's findings.[111] Furthermore, members of the Commission expressed dissent-

Because the legislation at issue infringes on First Amendment rights, the *Ashcroft* Court seemed to be looking for concrete scientific proof.[117] It rejected the Government's evidence because of the foundling nature of the studies showing a causal link between child pornography and pedophilia.[118] The *Ashcroft* holding demonstrates that the Court will "resolve empirical uncertainties underlying" an act of Congress "where [the] legislation plainly impinges upon rights protected by the Constitution."[119] In doing so, it departed from prior precedent that deferred to legislative judgment and didn't require conclusive scientific evidence, to the detriment of children.[120]

B. The Possibility of a Different Outcome: Create a New Exception for Virtual Child Pornography or Apply a Limitation Instruction

The Court's swift decision to hold the challenged CPPA's provisions as facially overbroad contravened the Court's traditional approach of striking down a statute on an overbreadth challenge as a last resort.[121] Rather than applying this "strong medicine," the Court should have either created a new exception to the First Amendment for virtual child pornography or applied limiting instructions to the CPPA provisions to avoid overbroad or vague language.

117. *But see* Gonzales v. Carhart, 127 S. Ct. 1610,1637-38 (2007) (upholding the Partial-Birth Abortion Ban despite inconsistencies in the congressional findings). *See also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432-33 (2006) (pointing out that congressional findings are not infallible and sometimes contain inconsistencies).

118. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253-54 (2002). Ironically, while the Court rejected these studies, it favored its own unscientific logic:

> The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contents, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

Id.

119. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60 (1973).

120. *See generally* Ladle, *supra* note 18.

121. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Both Justice O'Connor and Judge Ferguson of the Ninth Circuit Court of Appeals pointed out the majority's eagerness to strike down the provisions as facially overbroad. *See Ashcroft*, 535 U.S. at 261; Free Speech Coalition v. Reno, 198 F.3d 1083, 1101 (9th Cir. 1999).

1. The Ashcroft Court Could Have Created a New Exception for Virtual Child Pornography

The Court could have adhered to precedent by recognizing *Ferber* as creating a category for child pornography produced with actual children and creating a new exception for virtual child pornography. As Judge Ferguson of the Ninth Circuit suggested, the Court had the opportunity to create a virtual child pornography exception.[122] The Court could have done this by examining Congress's proffered evidence and weighing it against the limited value of virtual child pornography.[123] Had the Court deferred to Congress's legislative judgment with the same deference it afforded to the government's harm to children, prosecutorial needs, and market effects arguments in *Ferber*, the Court should have found the scales tilted in favor of upholding the CPPA.

2. The Ashcroft Court Could Have Limited the Scope of the CPPA to Find the Prohibited Material Within the Purview of Ferber's "Child Pornography."

Although the *Ashcroft* majority supposed that creating a new exception was a necessary step in order to uphold the CPPA,[124] there was an additional alternative. Both Chief Justice Rehnquist[125] and Justice O'Connor[126] proposed applying a limiting instruction to the

122. *Free Speech Coalition*, 198 F.3d at1101 (Ferguson, J., dissenting).

123. In his dissent, Judge Ferguson remarked,

> Virtual pornography, like its counterpart real child pornography, is of "slight social value" and constitutes "no essential part of the exposition of ideas." Therefore, the majority is wrong to accord virtual child pornography the full protection of the First Amendment. . . . Virtual child pornography should be evaluated in a similar fashion. The majority should have weighed Congress' reasons for banning virtual child pornography against the limited value of such material. If the majority had, it would have realized that Congress' interests in destroying the child pornography market and in preventing the seduction of minors outweigh virtual child pornography's exceedingly modest social value.

Id.(internal citation and footnote omitted).

124. *Ashcroft*, 535 U.S. at 246 ("While these categories may be prohibited without vio-

CPPA rather than striking it down.[127] Both Justices pointed out the possibility of interpreting virtual child pornography to be "virtually indistinguishable" from *Ferber* child pornography, thus limiting the scope of the CPPA's virtual child pornography ban through interpretation of its language.[128]

Chief Justice Rehnquist chided the Court for not deferring to Congress's substantial findings: "Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, and we should defer to its findings that rapidly advancing technology soon will make it all but impossible to do so."[129] Justice O'Connor was also concerned with the rapid advance in computer-graphics technology, validating the Government's concern that a defendant facing charges for the production, distribution, and/or possession of actual child pornography could evade criminal penalties by attributing the images to computer generation.[130] However, Justice O'Connor was additionally concerned that virtual child pornography "whet[s] the appetites of child molesters."[131]

Had the majority looked more closely, the legislative record supports the proposition that the CPPA was intended to reach virtual por-

"youthful-adult pornography" from "virtual child pornography" in order to sustain the CPPA's ban on "virtual child pornography." Agreeing with the majority, she would strike down the CPPA provision that bans material using "conveys the impression" language and pornographic depictions that "appear to be . . . of minors" "insofar as it is applied to the class of youthful adult pornography." *Id.* at 261. She agrees with the majority that "the causal connection between pornographic images that 'appear' to include minors and actual child abuse is not strong enough to justify withdrawing First Amendment protection for such speech," adding to the Court's reasoning that the "conveys the impression" provision is also not narrowly tailored. *Id.* at 262. Justice Rehnquist disagreed that the Justices would even need distinguish "youthful-adult pornography" from child pornography: "The Court and Justice O'Connor suggest that this very graphic definition reaches the depiction of youthful looking adult actors engaged in suggestive sexual activity, presumably because the definition extends to 'simulated' intercourse. Read as a whole, however, I think the de

nography that was indistinguishable from actual child pornography:

> [Section] 2252A only prohibits knowing traffic in that type of "child pornography" under §2256(8) that is indistinguishable from actual photographic child pornography. In other words, only images that are or appear to have been produced in violation of §2251 and contraband under §2252 are "child pornography" under §2252A. Congress made this legislative intent explicit in narrowing the scope of the Act, as written and as it must be authoritatively construed, to apply only to the distribution, receipt, and possession of such realistic "counterfeit," "synthetic," or apparently authentic "virtual" child pornography that it appears to be an actual child being sexually exploited or abused or conveys the impression that it is an actual child subjected to sexually explicit conduct.[132]

Supporters of the CPPA referred to an "actor" in child pornography as an "identifiable minor," or in other words "recognizable as an actual person."[133] It is unclear how the majority misunderstood these intentions to be something other than indistinguishable from actual pornography. Even in the instance where the government was seeking to include youthful-adult pornography within the scope of the CPPA's ban, as Justice O'Connor and the majority intimated it was trying to do,[134] the Court could have limited the statute's language to conform with *Ferber's* well-established and constitutionally accepted child pornography exception.

In further support of this alternative, the limits on the child pornography category anticipated by the *Ferber* Court were that (1) the work must be a visual work, and (2) "sexual conduct" must be "suita-

132. Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the National Law Center for Children and Families, National Coalition for the Protection of Children & Families, and the Family Research Council, In Support of Petitioners,

bly limited and described."[135] While the Supreme Court is neither expected to anticipate nor elucidate all possibilities, this admittedly nonexhaustive list of limitations does not intimate that the *Ferber* Court was concerned that splitting the hairs of what constitutes an "actor" depicted in child pornography would necessarily affect the viability of legislation criminalizing child pornography. Given the advancements of technology and research validating the causal link between child pornography and child sexual abuse, the Court should have followed Chief Justice Rehnquist's and Justice O'Connor's recommendations, applied a limiting instruction to the CPPA's ban on virtual child pornography, and allowed the Act to stand in its strongest form as intended by Congress.

VI. CONCLUSION

The *Ashcroft* decision stands as a clear example of the United States Supreme Court's eagerness to act as jury in assessing and rejecting congressional findings. While it is clear that the Court has some authority to do so, it overstepped the appropriate bounds in *Ashcroft*, especially in light of the alternative judicial availabilities before it. The Court stretched the purity of its jurisprudence when it rejected the congressional findings, negating Congress's compelling interest and eagerly validated respondents' overbreadth claims. The scales were titled against the Child Pornography and Prevention Act even before the Court embarked on its strict scrutiny analysis because of the lack of scientific evidence. The question also remains after *Ashcroft* whether any legislation regulating virtual child pornography has the possibility of being deemed constitutional. The Court's summary judgment of the evidence indicates that the chances are slim.

Government and private entities should heed the Attorney General Commission's challenge—"As we in 1986 reexamine what was done in 1970, so too do we expect that in 2002 our work will similarly be reexamined"[136]—and consider Justice O'Connor's opinion as an invitation to continue research in order to supply scientific evidence in support of the state's compelling interest to protect vulnerable populations such as its children.[137] With increasing technological

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

136. U.S. DEP'T OF JUSTICE, *supra* note 10, at 226-27.

137. *See Ashcroft*, 535 U.S. at 262 (J. O'Connor concurring in judgment in part and dissenting in part) (commenting that the government has not met its burden under strict scrutiny of proving a compelling state interest for which the statute in question is narrowly tailored as it

advances and emerging scientific evidence and new research to support prohibition of child pornography, legislatures should not shirk at the seemingly-awesome task of crafting legislation prohibiting virtual child pornography. The task is not trivial, but continued research, legislation, and supporting interest groups are necessary to make headway against the tilted scales of justice.

regards youthful-adult pornography).