NOTES

RECONCILING THE PROTECT ACT WITH THE FIRST AMENDMENT

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This Note explores the recent expansion of child pornography law and its impact on socially valuable art and film. It focuses on how the federal government regulates "virtual child pornography"—both computer-generated materials that are produced without real children and authentic images made with seemingly young adult actors. First, I trace the history of child pornography doctrine from the Supreme Court's foundational case, New York v. Ferber*, to its recent discussion of virtual child pornography in* Ashcroft v. Free Speech Coalition*. I argue that modern laws and court decisions have become increasingly untethered from* Ferber*'s limiting interest in protecting children from physical and emotional harm. In* Free Speech Coalition*, the Supreme Court added a key limitation to child pornography doctrine, categorically protecting non-obscene virtual child pornography. As with all sexually themed materials, the obscenity test established in* Miller v. California *applies as a backstop, allowing the government to regulate material that violates community standards of decency and that lacks serious literary, artistic, political, or scientific value. Yet Congress's post-*Free Speech Coalition *statute, the Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today (PROTECT) Act, threatens to undermine the First Amendment by once again shifting focus from punishing crimes against children to preventing disturbing but nevertheless protected private thoughts. Despite* United States v. Williams*, a recent, narrow Supreme Court decision upholding the PROTECT Act's pandering provision, I argue that Congress should reexamine the PROTECT Act as a whole. Looking for guidance in the Supreme Court's foundational child pornography cases, as well as recent decisions in other First Amendment contexts, I conclude that Congress should amend the Act to comport with established doctrine.*

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INTRODUCTION

In 1997, filmmaker Adrian Lyne adapted Vladimir Nabokov's famous novel *Lolita* for the screen.[1] *Lolita* traces a middle-aged man's spiraling sexual obsession—and its ultimate consummation—with his twelve-year-old stepdaughter.[2] Despite its highly controversial subject matter, readers and critics have lauded it as one of the best novels of

[1] LOLITA (Guild 1997). Stanley Kubrick also adapted Nabokov's novel, with a screenplay written by Nabokov himself, in 1962. LOLITA (Metro-Goldwyn-Mayer 1962). Kubrick's version predated the Supreme Court's first child pornography case, *New York v. Ferber*, 458 U.S. 747 (1982), by two decades.

[2] *See generally* VLADIMIR NABOKOV, LOLITA (Random House 1997) (1955).

the twentieth century.[3] Lyne shot his adaptation, which starred a fifteen-year-old actress, with careful attention to applicable child pornography laws, using adult body doubles for the film's more sexually explicit scenes.[4] Nevertheless, he expressed fear that "some redneck sheriff might cart us off" for memorializing a tale of pedophilia and child sexuality.[5]

Despite the fact that Lyne spent $58 million producing and promoting the film and despite critically acclaimed runs in several European markets, American distributors shared the director's fears about the potential legal repercussions of what some might misconstrue as child pornography.[6] Lyne's distributors sent the film straight to cable.[7] Many artists and filmmakers were outraged, viewing the decision as a cowardly manifestation of "a troglodyte misunderstanding of the fact that art is not advocacy and advocacy is not art."[8]

The rejection of Lyne's *Lolita* by American distributors illustrates the chilling effect created by child pornography law's recent expansion.[9] Professor Amy Adler explains that child pornography doctrine has become the "new crucible of the First Amendment," testing the limits of modern free speech doctrine by exploring restrictions on uniquely unpopular content.[10] Unquestionably, child sexual exploitation is "a most serious crime and an act repugnant to the moral

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[3] *Lolita* is included on several lists of the twentieth century's best English-language novels. *See, e.g.*, *100 Best Novels*, MODERN LIBRARY, http://www.modernlibrary.com/top-100/100-best-novels/ (last visited Oct. 16, 2012); Lev Grossman & Richard Lacayo, *All-TIME 100 Novels*, TIME (Oct. 16, 2005), http://entertainment.time.com/2005/10/16/all-time-100-novels/slide/times-list-of-the-100-best-novels/#all.

[4] Lyne described how he "sat with a lawyer for six weeks," scrupulously reviewing each shot to ensure that his work complied with the Child Pornography Prevention Act of 1996, the applicable federal statute at the time. *Erica Jong Screens Lolita with Adrian Lyne*, N.Y. OBSERVER (June 1, 1998), http://observer.com/1998/06/erica-jong-screens-lolita-with-adrian-lyne/.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* Although Lyne's distributors explained that they had refused to release the film theatrically because it was too artistic to earn back its expenditures, "underneath was a feeling that nobody wanted to stand up and be counted" as a proponent or panderer of child pornography. *Id.*

[9] A "chilling effect" occurs when the state permits speakers to communicate certain ideas only within unclear boundaries, therefore putting them at risk of potentially severe ex post punishment. Unclear boundaries cause communicators to censor their own expression. DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS 24 (2011). As a striking example, the ancient Greek colony of Thourioi required speakers proposing amendments to the colony's laws to wear nooses around their necks while speaking. If their proposals were unconvincing, speakers were immediately strangled. *Id.* (citing KATHLEEN FREEMAN, GREEK CITY-STATES 38 (W.W. Norton & Co. 1963) (1950)).

[10] Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 921 (2001).

instincts of a decent people."[11] Reasonable concerns about the rise of child exploitation, fueled in part by the expansion of the Internet,[12] have inspired vigorous legislative and prosecutorial efforts.[13] Unsurprisingly, scholars otherwise interested in the nuances of the First Amendment shy away from analysis that might be mischaracterized as facilitating the sexual exploitation of children.[14] For this reason, the critical analysis applied to other types of speech has been applied only haphazardly to increasingly broad child pornography laws.

Yet, as much-needed child abuse legislation expands beyond its constitutional breadth, it becomes a dangerous one-way ratchet, threatening legitimate constitutional protections and, in so doing, undermining its own power. While legislators have strong incentives to expand laws and increase criminal penalties, they face no countervailing pressure to scale back their efforts or to ensure that their actions are properly calibrated.[15] Criminal law loses its moral authority when it unnecessarily transgresses fundamental civil rights.[16] Thus, crucial child pornography legislation risks ineffectiveness if viewed as overbroad, illegitimate, or subject to the shifting whims and idiosyncrasies of prosecutorial discretion.

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11 Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002).

12 *See Child Exploitation and Obscenity Section*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/ceos/subjectareas/childporn.html (last visited Oct. 16, 2012) (observing that "the child pornography market exploded in the advent of the Internet" and that now victims' "images are available for others to view in perpetuity").

13 *See id.* ("[We have] seen a historic rise in the distribution of child pornography, in the number of images being shared online, and in the level of violence associated with child exploitation and sexual abuse crimes. Tragically, the only place we've seen a decrease is in the age of victims." (quoting Attorney General Eric Holder Jr.)).

14 Scholars fear this reaction for good reason. A lawyer who represents abused children explained: "In truth, when it comes to child pornography, any discussion of censorship is a sham, typical of the sleight of hand used by organized pedophiles as part of their ongoing attempt to raise their sexual predations to the level of civil rights." Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 (2001) (quoting Andrew Vachss, *Age of Innocence*, THE OBSERVER (London), Apr. 17, 1994, at 14).

15 *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005) ("[A]ppearing tough on crime wins elections . . . while it is difficult to recall a single modern politician who came into office on a platform of decriminalization or punishment reduction.").

16 *See* Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 55 (1998) ("Any responsible attempt to provide effective protection against crime . . . must include a significant reliance upon voluntary public conformity to the requirements of law. In order to achieve public compliance, though, the criminal laws and the criminal justice process must be, and must be publicly perceived to be, sensible . . . ."); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952) ("If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. . . . Nowhere in the entire legal field is more at stake for the community, for the individual.").

Additionally, we can only establish the proper boundaries of First Amendment protection by exploring the expression of deeply distasteful thoughts.[17] While we must always prioritize child safety, a thoughtful and principled analysis can protect children without imposing unconstitutional restrictions on legitimate speakers. This Note focuses on the impact of increasingly expansive child pornography doctrine on artists and filmmakers seeking to make positive contributions to the marketplace of ideas.[18] Specifically, it explores how the federal government regulates "virtual child pornography."[19] Virtual child pornography is sexually explicit material produced without using real children, such as films made with adult actors portraying children or computer-generated images of children.[20]

Writers and artists have explored the theme of adolescent sexuality in countless valuable works. These works express, as Justice Kennedy described, "the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach."[21] I argue that, by

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[17] United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (famously explaining that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate"); Sherri Sylvester, *Flynt Flaunts Values in Full Public View*, CNN (Dec. 4, 1996), http://www.cnn.com/SHOWBIZ/9612/04/larry.flynt/index.html (quoting Larry Flynt, perhaps a less distinguished authority, as similarly stating that "freedom of press is not the freedom for the thought you love the most . . . [but rather] freedom for the thought you hate the most").

[18] In his treatise *On Liberty*, philosopher John Stuart Mill posited that free expression is crucial to civilized societies because it contributes to an active marketplace of ideas. Only by engaging within an open and competitive forum can society reach and understand truth. *See* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 59 (John Gray ed., Oxford Univ. Press 1998) (1859) (describing the "necessity to the mental well-being of mankind" of striving for truth through free expression). Justice Holmes famously incorporated this rationale into First Amendment jurisprudence in his dissent in *Abrams v. United States*: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [men's] wishes safely can be carried out. That at any rate is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[19] Both the federal and state governments act in the child pornography arena. In accordance with the Constitution, federal law is limited to protecting federal, rather than state or local, interests. Recently, use of the Internet to distribute child pornography has vastly expanded federal jurisdiction. *See* ALISDAIR A. GILLESPIE, CHILD PORNOGRAPHY: LAW AND POLICY 64 (2011) (explaining that "the federal law applies wherever the internet . . . exists and so it is the provision that is perhaps most commonly violated").

[20] Many scholars use the term "virtual child pornography" to refer specifically to computer-generated but life-like images. This Note adopts the broader definition Justice Kennedy presents in *Ashcroft v. Free Speech Coalition*, which includes "images produced by more traditional means," such as using of-age actors to portray minors. Ashcroft v. Free Speech Coal., 535 U.S. 234, 241 (2002).

[21] *Id.* at 248.

banning non-obscene virtual depictions of child sexuality without reference to their social value, we exceed the First Amendment's crucial dictates and jeopardize these works, including acclaimed films like *Romeo and Juliet*, *The Tin Drum*, *American Beauty*, and *Taxi Driver*.[22]

With this in mind, Part I traces the history of child pornography law, beginning with Congress's first statute, the Protection of Children Against Sexual Exploitation Act of 1977,[23] and the Supreme Court's foundational case, *New York v. Ferber*.[24] I argue that post-*Ferber* child pornography regulation and court decisions interpreting this regulation have become untethered from the Supreme Court's crucial

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[22] All of these films explore the popular theme of adolescent sexuality through virtual depictions. Shakespeare's *Romeo and Juliet*, which famously portrays two "star-crossed" teenage lovers, has inspired numerous film adaptations. Among them, Baz Luhrmann's recent adaptation was nominated for a number of Academy Awards and won several awards at the Berlin International Film Festival. ROMEO + JULIET (Twentieth Century Fox Film Corp. 1996); *Romeo + Juliet*, ACADEMY AWARDS DATABASE, http://www.oscars.org/awards/academyawards/index.html (search "By Film Title" for "Romeo + Juliet") (last visited Oct. 16, 2012); *Prizes & Honors 1997*, BERLIN INT'L FILM FESTIVAL, http://berlinale.de/en/archiv/jahresarchive/1997/03_preistr_ger_1997/03_Preistraeger_1997.html (last visited Oct. 16, 2012). Franco Zeffirelli's earlier adaptation was also nominated for a number of Academy Awards and won several Golden Globes. ROMEO AND JULIET (BHE Films 1969); *Romeo and Juliet*, ACADEMY AWARDS DATABASE, http://www.oscars.org/awards/academyawards/index.html (search "By Film Title" for "Romeo and Juliet") (last visited Oct. 16, 2012); *Romeo and Juliet*, GOLDEN GLOBE AWARDS, http://www.goldenglobes.org/browse/film/24856 (last visited Oct. 16, 2012). Günter Grass's novel *The Tin Drum*, which includes sexually explicit depictions of a young man before and during World War II, inspired an acclaimed German film adaptation by Volker Schlöndorff. GÜNTER GRASS, THE TIN DRUM (Ralph Manheim trans., Vintage Books 2004) (1959); THE TIN DRUM (Argos Films 1979). The film won the Palme d'Or at the Cannes Film Festival and the Academy Award for best foreign language film. *Die Blechtrommel [The Tin Drum]*, FESTIVAL DE CANNES, http://www.festival-cannes.fr/en/archives/ficheFilm/id/1890.html (last visited Oct. 16, 2012); *The Tin Drum*, ACADEMY AWARDS DATABASE, http://www.oscars.org/awards/academyawards/index.html (search "By Film Title" for "The Tin Drum") (last visited Oct. 16, 2012). In 1999, Sam Mendes directed *American Beauty*, exploring a depressed suburban father's infatuation with a high school cheerleader. AMERICAN BEAUTY (Dreamworks SKG 1999). Film critic Roger Ebert explained that, despite several sexually themed scenes involving teenagers, the film is not about sex; instead, it is about "yearning after youth, respect, power and, of course, beauty." Roger Ebert, *'Beauty' Is More Than Skin-Deep—Middle-Age Rebel's Take Hits Universal Truths*, CHICAGO SUN-TIMES, Sept. 24, 1999. Mendes's film won five Academy Awards. *American Beauty*, ACADEMY AWARDS DATABASE, http://www.oscars.org/awards/academyawards/index.html (search "By Film Title" for "American Beauty") (last visited Oct. 16, 2012). Martin Scorcese's early film *Taxi Driver* featured Jodie Foster as a twelve-year-old prostitute on the streets of Times Square. TAXI DRIVER (Columbia Pictures Corp. 1976). *Taxi Driver* won the Palme d'Or at the Cannes Film Festival. *Taxi Driver*, FESTIVAL DE CANNES, http://www.festival-cannes.fr/en/archives/ficheFilm/id/2123.html (last visited Oct. 16, 2012).

[23] Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251–2253, 2423 (2006)).

[24] 458 U.S. 747 (1982).

limiting interest in protecting children from physical and emotional harm. Increasingly, congressional action and court opinions reflect concerns about controlling private thoughts rather than preventing and punishing direct harm. Part I ends with a discussion of the Child Pornography Prevention Act of 1996,[25] which directly regulated virtual child pornography, and the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*[26] striking it down. In *Free Speech Coalition*, the Court added an important limitation to child pornography doctrine by treating non-obscene virtual child pornography—materials that by definition do not directly harm children in their production—as protected by the First Amendment. In spite of this important opinion, current law undermines free speech principles by shifting the government's focus from legitimately punishing crimes against children to illegitimately discouraging unsettling but nevertheless private and protected thoughts.

In Part II, I describe the current manifestation of this problem: the Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today (PROTECT) Act.[27] The PROTECT Act's sweeping definition of child pornography and its ostensibly counterbalancing affirmative defense directly undermine *Free Speech Coalition*'s treatment of virtual child pornography. Additionally, its pandering provision, which prohibits offers to sell or distribute material believed to be child pornography, poses serious questions about First Amendment protection for virtual materials. A majority of the Supreme Court recently upheld this provision as constitutional in *United States v. Williams*,[28] interpreting it as consistent with traditional inchoate crime analysis. Yet Justice Souter's dissent persuasively argued that the majority's approach ignores the provision's indirect but powerful tension with *Free Speech Coalition*'s requirements.

Part III then argues that Congress should reexamine the PROTECT Act, looking for guidance in the Supreme Court's reasoning in *Ferber* and *Free Speech Coalition*, as well as in its recent decisions in other First Amendment contexts. In order to ensure that regulation continues to protect children without policing thoughts and sacrificing socially valuable speech, Congress should reform its overbroad definition of child pornography and reevaluate its pandering

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[25] Pub. L. No. 104-208, 110 Stat. 3009-26 (1996) (codified as amended at 18 U.S.C. §§ 2251–2252, 2256 (2006)).

[26] 535 U.S. 234, 240 (2002).

[27] Pub. L. No. 108-21, § 501(10)–(14), 117 Stat. 650, 677–78 (2003) (codified as amended in scattered sections of 18, 28, and 42 U.S.C. (2006)).

[28] 128 S. Ct. 1830 (2008).

provision. Congress should act consistently with the Court's holding in *Free Speech Coalition* that the First Amendment unequivocally protects non-obscene virtual child pornography. Importantly, the *Free Speech Coalition* standard is not a green light for all virtual child pornography, regardless of its content. As with all sexually themed materials, *Miller v. California*'s obscenity test applies as a backstop, allowing Congress to regulate material that violates community standards of decency and that lacks literary, artistic, political, or scientific value.[29]

I
The Rationale Underlying Child Pornography Doctrine Has Shifted from Protecting Children Toward Controlling Disturbing Thoughts

This Part provides a brief history of child pornography law, beginning with Congress's first child pornography statute, the Protection of Children Against Sexual Exploitation Act, and the Supreme Court's foundational case, *New York v. Ferber*. In *Ferber*, the Court established that the First Amendment does not extend to child pornography because the state has a special interest in protecting children from harm. After *Ferber*, several statutes and cases gradually expanded this doctrine, unlinking *Ferber*'s unique First Amendment exception from its goal of direct child protection by focusing on preventing and punishing disturbing thoughts. However, in *Ashcroft v. Free Speech Coalition*, the Supreme Court returned to its logic in *Ferber*, striking down the Child Pornography Prevention Act and establishing that non-obscene virtual child pornography receives First Amendment protection. Because, by definition, no actual children are harmed in the production of virtual child pornography, *Ferber*'s limited child protection concerns are not implicated.

A. The Protection of Children Against Sexual Exploitation Act and New York v. Ferber

In 1977, Congress passed the first national statute devoted to the prevention and prosecution of child pornography, the Protection of Children Against Sexual Exploitation Act.[30] The legislative history of the Act reflected a heightened national concern about child abuse and a desire to condemn "such base and sordid activities which may

[29] 413 U.S. 15, 24 (1973).

[30] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251–2253, 2423 (2006)).

permanently traumatize and warp the minds" of children.[31] Although Congress had always sought to protect child health and safety, the rapid development of a highly organized, multimillion-dollar child pornography industry galvanized legislators to undertake more targeted action.[32]

New to child pornography regulation, Congress presumed that the First Amendment restricted the reach of its power to ban depictions of child sexuality. Only a few years earlier, in *Miller v. California*, the Supreme Court had constructed a doctrinal test for determining when sexually themed material was "obscene"—and therefore without First Amendment protection—and when it was protected speech.[33] Because Congress presumed that *Miller* applied to child pornography, it drafted a narrow law tracking the Court's doctrinal test. However, several states, including New York, took a more expansive approach to regulation.[34]

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[31] S. REP. NO. 95-438, at 4 (1977). In proposing legislative action, the Senate Committee on the Judiciary noted that, because "child pornography is often a clandestine operation, it is extremely difficult to determine its full extent." *Id.* at 5. However, the committee referred to several recent studies indicating a drastic expansion. *See id*. at 5–6 (documenting an abundance of magazines, short films, still photographs, slides, playing cards, video cassettes, and mail order catalogues featuring young children engaging in sexually explicit activity with peers or adults). Responding to news of this expansion, staunch civil libertarians wholeheartedly agreed that Congress needed to enact and enforce legislation prohibiting child exploitation—consistent with civil liberties, of course. *See* H.R. REP. NO. 95-696, at 3 (1977) ("The ACLU believes and strongly urges that criminal laws prohibiting child abuse . . . should be vigorously enforced, and if appropriate and useful, enhanced in order to eliminate this repugnant activity.").

[32] *See* S. REP. NO. 95-438, at 5 (explaining that "child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale" and that "specific legislation in this area is both advisable and needed"). The Senate Judiciary Committee provided a "graphic example" of the economics of child pornography. *Id.* at 6. The Chicago Police Department infiltrated a pornography ring that used two fourteen-year-old boys to make a disturbing film for national distribution. The cost of producing this film was a mere $21.00 per copy, while the retail sale price was $100.00. When law enforcement arrested the producers, they stated that they were planning to sell as many as 10,000 copies of the film over a six-month period. *Id*.

[33] Miller v. California, 413 U.S. 15, 18–20 (1973). The *Miller* Court required a jury to consider three factors:

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

Id. at 24 (citations omitted) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

[34] *See* N.Y. PENAL LAW § 263 (McKinney 1977) (criminalizing "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age").

In *New York v. Ferber*,[35] a unanimous Supreme Court definitively distinguished child pornography from obscenity. The Court held that the state has more leeway to proscribe materials featuring sexual acts by children, establishing child pornography as a unique type of valueless expression wholly unprotected under the First Amendment.[36] Although child pornography laws, like all content-based restrictions on speech, "run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy,"[37] several key public interests supported the state's expanded authority to regulate. First and most crucially, the state must safeguard the physical and psychological well-being of its children by preventing and punishing child abuse.[38] "The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children."[39]

The court adduced several additional, related rationales for the state's expanded regulatory power over child pornography. Pornographic materials comprise permanent records of sexual exploitation, exacerbating a child's original injury through their circulation.[40] Also, in order to effectively control the production of material involving child abuse, the state must close the distribution network. Because the child pornography production network is clandestine, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" by severely punishing distributors and buyers.[41]

Thus, unlike ordinary sexually themed materials, the government may regulate child pornography without providing an exception for works with literary, artistic, political, or scientific value. The Court noted that an artist wishing to create a socially valuable depiction of child sexuality could simply simulate sexual conduct outside of the penal law's prohibition; for example, he could employ a young-looking adult over the statutory age.[42] As I will discuss in Part II, this

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35 458 U.S. 747 (1982).

36 *Id.* at 764.

37 *Id.* at 756.

38 *Id.* at 756–57.

39 *Id.* at 757 (quoting 1977 N.Y. LAWS, ch. 910, § 1) (internal quotation marks omitted).

40 *Id.* at 759.

41 *Id.* at 759–60 & n.11 (citing *Sexual Exploitation of Children: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 95th Cong. 34 (1977) (statement of Charles Rembar) ("It is an impossible prosecutorial job to try to get at the acts themselves."). The Court revisited this market-drying rationale in *Free Speech Coalition*, finding that it only applies in the context of child pornography produced with real children. *See infra* note 115 and accompanying text.

42 *Ferber*, 458 U.S. at 763.

suggestion firmly supports the Court's protection of non-obscene virtual child pornography in *Free Speech Coalition*.

The Court's majority opinion in *Ferber* clearly disconnected child pornography doctrine from *Miller*'s narrower obscenity test. However, while the majority determined that regulation *may* ban child pornography without reference to its literary, artistic, political, or scientific value, it did not determine whether it *must* do so.[43] On opposite sides of this debate, Justice O'Connor and Justice Brennan wrote separate concurrences. Justice O'Connor argued that the First Amendment test for child pornography should not include a consideration of *Miller*'s serious value prong. She explained that an audience's appreciation of a child's sexual depiction should play no role in determining whether a state may prohibit material involving harm to children.[44] In his separate concurrence, Justice Brennan disagreed, explaining that regulating material with social value violates the First Amendment: "[I]t is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed 'material outside the protection of the First Amendment.'"[45] This debate—in the context of the real child pornography at issue in *Ferber*—foreshadowed the *Free Speech Coalition* Court's concern about socially valuable virtual child pornography.[46]

*B. The Expansion of Post-*Ferber *Child Pornography Doctrine*

Bolstered by the Supreme Court's approval of strict child pornography regulation, two years later Congress passed the Child Protection Act (CPA) of 1984.[47] The CPA distinguished child pornography from obscenity and expanded the definition of "visual or print medium[s]" involving or depicting "a minor engaging in sexually

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[43] *Id.* at 761 ("[A] work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. . . . We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.").

[44] *Id.* at 774–75 (O'Connor, J., concurring).

[45] *Id.* at 776–77 (Brennan, J., concurring in the judgment).

[46] *See infra* notes 79–85 and accompanying text (describing Justice Kennedy's concern about socially valuable virtual materials featuring child sexuality in *Free Speech Coalition*).

[47] Child Protection Act (CPA) of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–2254, 2256, 2516 (2006)). In the hearings preceding the CPA's passage, members of Congress noted disappointment that their original effort to regulate child pornography, the Protection of Children Against Sexual Exploitation Act, had been ineffective. *Protection of Children Against Sexual Exploitation: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 1–2 (1983) (statement of Rep. William J. Hughes, Chairman, Subcomm. on Crime) (noting that, by 1983, not a single criminal had been convicted for producing child pornography under the Protection of Children Against Sexual Exploitation Act and promoting more expansive legislation in line with *Ferber*).

explicit conduct"[48] to include some non-obscene depictions of children.[49] In harmony with the public's desire for tough regulation,[50] a series of cases following the CPA expanded *Ferber*'s boundaries, unlinking child pornography doctrine from *Ferber*'s original child protection rationale. At the same time, Congress consistently expanded sentences for crimes related to child pornography.[51]

In the 1989 case *Massachusetts v. Oakes*,[52] the Supreme Court considered an overbreadth challenge[53] to a Massachusetts statute that

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[48] 18 U.S.C. § 2252(a) (1982).

[49] CPA § 4, 98 Stat. at 204 (amending 18 U.S.C. § 2252 "by striking out 'obscene' each place it appears").

[50] *See* Barbara Basler, *Child-Pornography Ruling Is Seen Acting as Deterrent*, N.Y. TIMES, July 6, 1982, at B1 (citing law enforcement officials' opinions that the New York law upheld in *Ferber* successfully acts as a "deterrent and drive[s] dealers in child pornography deeper underground or out of the market entirely"); *Meese Proposal Seeks Stricter Legislation Against Pornography*, WALL ST. J., Oct. 23, 1986, at 11 (describing Attorney General Edwin Meese's efforts to enact more stringent federal legislation and increase prosecution efforts to combat "an explosion of obscenity"). *But see* David Margolick, *Pornography Ruling: Court's Decision Sparks Little Outcry; Other Laws Cover Proscribed Activity*, N.Y. TIMES, July 3, 1982, at 36 ("A decision like [*Ferber*] inevitably inspires censorship . . . . We're going to see a rampage of prosecutions against films and books that deal with juvenile sex but have scientific or educational value. In states where the Moral Majority reigns supreme, these books are going to be taken from the library shelves." (quoting attorney Herald Price Fahringer)).

[51] For a historical overview of Congress's actions in the area of child pornography sentencing, see generally U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009), *available at* www.lb9.uscourts.gov/webcites/11documents/Henderson_History.pdf. Many scholars have criticized harsh sentencing guidelines as blurring the distinction between thoughts and actions. For a few examples, see generally Ian N. Friedman & Kristina W. Supler, *Child Pornography Sentencing: The Road Here and the Road Ahead*, 21 FED. SENT'G REP. 83, 88 (2008) ("The child pornography Guidelines reflect a steady history of congressionally mandated amendments resulting in Guidelines ranges that call for long terms of imprisonment that are greater than necessary to serve the purposes of sentencing."); Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545, 584 (2011) ("[W]hile it is certainly laudable to deter sexual violence against children and to impose severe penalties for child molesters, the criminalization with lengthy sentences for child pornographers who are not contact offenders is a poor proxy for this goal."); Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 853 (2011) (describing severe sentencing practices and arguing that this severity "appears to be premised on arguments that blur the distinction between those who possess images of child pornography and those who sexually abuse children").

[52] 491 U.S. 576 (1989).

[53] The Supreme Court has established that, even if a law can be applied constitutionally to a certain defendant, he can bring a facial "overbreadth" challenge. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)); Thornhill v. Alabama, 310 U.S. 88 (1940) ("Where regulations of the liberty of free discussion are concerned, there are special rea-

made it a crime to knowingly cause or permit a minor "to pose or be exhibited in a state of nudity" for visual representation or reproduction in a book, magazine, photograph, or film. [54] The Supreme Judicial Court of Massachusetts struck down the statute as substantially overbroad under the First Amendment, [55] holding that it "makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool."[56]

When the case reached the Supreme Court,[57] Justice Scalia, relying on his perception of the infrequency of family photographs depicting nude children,[58] rejected the defendant's overbreadth challenge.[59] He gave great weight to *Ferber*'s recognition of a compelling interest in safeguarding minors' physical and emotional health and well-being, highlighting the "known extent of the so-called kiddie-porn industry" to support his estimation that the statute's legitimate applications exceeded its illegitimate applications.[60] In response to the Massachusetts court's concern about innocent family photographs,

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sons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."). To succeed, a defendant must demonstrate that the overbroad law substantially prohibits protected speech as well as unprotected speech. *Broadrick*, 413 U.S. at 615. The Court has reasoned that facial overbreadth challenges are necessary because overly broad statutes will, by their very existence, deter people from exercising their right to constitutionally protected speech. *Id.* at 612; *see also Dombrowski*, 380 U.S. at 487 ("If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation.").

[54] MASS. GEN. LAWS ch. 272, § 29A (1986).

[55] Commonwealth v. Oakes, 518 N.E.2d 836, 838 (Mass. 1988), *vacated*, 491 U.S. 576 (1989).

[56] *Id*.

[57] *Massachusetts v. Oakes* reached the Supreme Court with a unique procedural posture. While the case was pending review, Massachusetts amended the statute in question. *Oakes*, 491 U.S. at 582–84 (plurality opinion). Upon review, four Justices declined to address Oakes's First Amendment argument, finding that the question was moot. *Id.* at 583–84. Five Justices disagreed, holding that a defendant's overbreadth challenge survives even when the state legislature amends the criminal statute under which the defendant was convicted. *Id.* at 585–86 (Scalia, J., concurring in the judgment in part and dissenting in part). In Part II of his opinion, Justice Scalia reached and rejected the defendant's overbreadth claim without earning a majority's approval. *Id*.

[58] Justice Scalia commented:

> Perhaps I am wrong in my estimation of how frequently the posings prohibited by this law are done for artistic purposes, or for family photographs—or in some other legitimate and constitutionally protected context I have not envisioned. My perception differs, for example, from Justice Brennan's belief that there is an "abundance of baby and child photographs taken every day" depicting genitals.

Id. at 589–90.

[59] *Id.* at 588.

[60] *Id*.

Justice Scalia deferred to prosecutorial discretion: "We can deal with such a situation in the unlikely event some prosecutor brings an indictment."[61] Thus, Justice Scalia approved a statute that swept within its textual scope material created without physical or emotional harm to children, such as family photographs incidentally featuring nude minors.

One year later, in *Osborne v. Ohio*,[62] a defendant convicted for possessing child pornography argued that the state law prohibiting personal possession of child pornography was unconstitutional because it regulated purely private conduct.[63] The Court rejected the defendant's proposed connection between protected possession of obscene materials and possession of child pornography on the grounds that the state's interest in protecting children from direct harm far exceeds a defendant's interest in private possession of materials depicting child sexual exploitation.[64]

Although *Osborne*'s central holding—that the state may regulate the possession of child pornography—is unobjectionable, Justices Brennan, Marshall, and Stevens dissented, finding the Ohio criminal statute to be otherwise overbroad.[65] Similar to the statute at issue in *Oakes*, the Ohio law used expansive language, making it a crime to "[p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity."[66] To cure potential unconstitutionality, the Ohio Supreme Court had construed the statute to apply only "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals."[67]

However, the dissenting Justices argued that the vague and overbroad "lewd exhibition" and "graphic focus" tests only compounded

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[61] *Id.* at 589. In his dissent, Justice Brennan expressed concern about Justice Scalia's reliance on prosecutorial discretion, explaining that "[t]he ordinance's plain language is admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—are arrested." *Id.* at 598 (Brennan, J., dissenting) (alteration in original) (quoting Houston v. Hill, 482 U.S. 451, 466–67 (1987)) (internal quotation marks omitted).

[62] 495 U.S. 103 (1990).

[63] Osborne based his argument on a foundational obscenity case, *Stanley v. Georgia*, in which the Supreme Court invalidated a law prohibiting the possession of obscene material. 394 U.S. 557 (1969). The *Stanley* Court explained that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565.

[64] *Osborne*, 495 U.S. at 108–10.

[65] *Id.* at 126 (Brennan, J., dissenting).

[66] *Id.* at 106 (majority opinion).

[67] *Id.* at 128 (Brennan, J., dissenting) (quoting State v. Young, 525 N.E.2d 1363, 1368 (1988), *rev'd sub nom.* Osborne v. Ohio, 495 U.S. 103 (1990)) (internal quotation marks omitted).

the statute's First Amendment problems.[68] In contrast to the more precise statute at issue in *Ferber*, Ohio's overbroad definition of child pornography could include any photograph with a "lewd exhibition" of even a small portion of a child's nude body. Yet the open-ended nature of the term "lewd"[69] left its definition in the eye of the beholder, encouraging juries to consider whether innocent photographs are pornographic from a pedophile's point of view.[70] Justice Brennan argued that this swept within the statute's reach many types of fully protected materials that are not "child pornography" as the Court used that term in *Ferber*.[71] Despite these concerns, a majority approved statutory language that could be construed as prohibiting even innocent material created without harming children, based on concerns about pedophilic thoughts rather than actions.[72]

C. The Child Pornography Prevention Act of 1996 and Free Speech Coalition

After *Oakes* and *Osborne* expanded the standards for prosecuting child pornography, the Supreme Court established an

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[68] *Id.* at 136–38.

[69] *Id.* at 135 ("[T]here is no longstanding, commonly understood definition of 'lewd' upon which the Ohio Supreme Court's construction might be said to draw that can save the 'lewd exhibition' standard from impermissible vagueness.").

[70] *See id.* at 137 ("[T]he addition of a 'lewd exhibition' standard . . . creates a new problem of vagueness, affording the public little notice of the statute's ambit and providing an avenue for 'policemen, prosecutors, and juries to pursue their personal predilections.'" (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983))). Only a few years earlier, the Ninth Circuit had approved such an approach in *United States v. Wiegand*:

> In the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles. . . . The picture of a child 'engaged in sexually explicit conduct' . . . is a picture of a child's sex organs displayed lasciviously—that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.

812 F.2d 1239, 1244 (9th Cir. 1987). Importantly, however, the court in *Wiegand* focused on a depiction's *intended* effect on a pedophilic audience—not its *actual* effect. *Id.* at 1245.

[71] *Osborne*, 495 U.S. at 131–32 (Brennan, J., dissenting).

[72] Lower court cases have similarly upheld broad child pornography statutes. In the influential case *United States v. Dost*, for example, a district court in California established a test for determining when an image constitutes child pornography under a statute prohibiting "lascivious exhibition" of a minor's genitals. 636 F. Supp. 828, 830 (S.D. Cal. 1986). Under *Dost*, a court must consider "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id*. at 832. This test plainly focuses on a potential pedophile's internal response to an image, rather than on whether a child was harmed during its production. A mother's photograph of her toddler at the beach, produced through no criminal activity but found in the hands of a pedophile, might satisfy *Dost* if a jury decides it evokes troubling thoughts. *See also* United States v. Knox, 32 F.3d 733, 754 (3d Cir. 1994) (holding that federal child pornography law does not require nudity to violate its prohibition against "lascivious exhibition of the genitals or pubic area").

important constitutional restriction in *Ashcroft v. Free Speech Coalition*.[73] In the early nineties, Congress became concerned that the growth of the Internet, with its endless commercial possibilities for pornography, posed special dangers to children.[74] In addition to enhanced access to child pornography, new technology increasingly enabled pedophiles and pornographers to create realistic simulated images of children.[75]

In response, in 1996 Congress passed the Child Pornography Prevention Act (CPPA),[76] expanding federal prohibitions against pornography involving real children as well as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture . . . [that] is, *or appears to be*, of a minor engaging in sexually explicit conduct."[77] With this broad language, Congress disconnected its regulation from *Ferber*'s concern about protecting children from abuse during the production of child pornography; purely "virtual child pornography" by definition involves no direct harm. Civil libertarians immediately criticized the CPPA's breadth, concerned that, despite Justice Scalia's assurances, shifting standards of prosecutorial discretion would not protect innocent citizens from lengthy prison sentences.[78]

A few years later, in *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down the CPPA, holding that it exceeded First Amendment boundaries by banning materials that are neither obscene under *Miller* nor produced by exploiting real children as in

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[73] 535 U.S. 234, 240 (2002).

[74] *See* FRALEIGH & TUMAN, *supra* note 9, at 229 (asserting that perceived gaps in the law arising from new technologies led Congress to take action). In addition to the proliferation of virtual pornography, Congress and law enforcement were—and remain—concerned about how the Internet enables child pornographers to congregate, share information, and collectively further criminal activity. For an overview of "cyber child pornography rings," see generally Michal Gilad, *Virtual or Reality: Prosecutorial Practices in Cyber Child Pornography Ring Cases*, 18 RICH. J.L. & TECH. 1 (2012).

[75] This is accomplished by computer imaging, using adults who merely appear to be under age, and "morphing." "Morphing" refers to "altering innocent pictures of real children so that the children appear to be engaged in sexual activity." *Free Speech Coal.*, 535 U.S. at 242.

[76] Pub. L. No. 104-208, 110 Stat. 3009-26 (1996) (codified as amended at 18 U.S.C. §§ 2251–2252, 2256 (2006)) (emphasis added).

[77] *Id.* § 121(2)(4), 110 Stat. at 3009-28.

[78] Brief of Association of American Publishers et al. as Amici Curiae Supporting Respondents at 13, Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (No. 00-795), 2001 WL 754704, at *13 (describing the fear generated by publicized prosecutions under this law); *see also* John Schwartz, *New Law Expanding Legal Definition of Child Pornography Draws Fire*, WASH. POST, Oct. 4, 1996, at A10 (quoting Daniel E. Katz, legislative counsel to the American Civil Liberties Union, as lamenting that "what [Congress is] going to do is sweep up a great deal of constitutionally protected activity").

Ferber.[79] The CPPA, unlike the statute in *Ferber*, made no reference to protecting real children from harm in the production of virtual child pornography.[80] Instead, Congress had sought to prevent several indirect harms. Pedophiles might use virtual child pornography to seduce or encourage children to participate in sexual activity, to "whet their own sexual appetites . . . thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children," or to evade prosecution by raising a "virtual child pornography" defense.[81]

In his majority opinion, Justice Kennedy rejected the government's rationale, noting that the statute's literal terms prohibited "a Renaissance painting depicting a scene from classical mythology."[82] Under the CPPA's severe penalties, "few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law."[83] This

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[79] *Free Speech Coal.*, 535 U.S. at 256. Plaintiffs challenging the CPPA as overbroad included the Free Speech Coalition, a California trade association for the adult-entertainment industry; Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nude portraits; and Ron Raffaelli, a photographer of erotic images. *Id.* at 243. Several organizations filed amicus briefs. Brief of American Civil Liberties Union et al. as Amici Curiae Supporting Respondents, Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (No. 00-795), 2001 WL 740913; Brief of Association of American Publishers, *supra* note 78.

[80] Note that neither party in *Free Speech Coalition* challenged 18 U.S.C. § 2256(8)(C), the CPPA's "morphing" provision which prohibits altering innocent pictures of real children so that they appear to be engaged in sexual conduct. *Free Speech Coal.*, 535 U.S. at 242. However, Justice Kennedy noted that morphed images "implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Id*. Recent Second and Eighth Circuit opinions have upheld § 2256(8)(C), concluding that morphed images do not constitute protected speech. United States v. Hotaling, 634 F.3d 725, 726 (2d Cir. 2011); United States v. Bach, 400 F.3d 622, 632 (8th Cir. 2005). Thus, this provision remains in effect, posing an interesting First Amendment question outside the scope of this Note.

[81] *Free Speech Coal.*, 535 U.S. at 241–42. In his concurrence, Justice Thomas found the "virtual child pornography" defense to be the government's most persuasive asserted interest in support of the CPPA. However, he found that the government had presented evidence only that defendants *raise* this defense—not that they had ever been successful. "While this speculative interest cannot support the broad reach of the CPPA, technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the government cannot prove that certain pornographic images are of real children." *Id.* at 259 (Thomas, J., concurring in the judgment). If this were to happen, Justice Thomas would approve a statute prohibiting virtual child pornography.

[82] *Id.* at 241 (majority opinion).

[83] *Id.* at 244. In the period between the CPPA's passage and the Court's consideration of *Free Speech Coalition*, several widely publicized prosecutions inspired fear for legitimate speakers. *See* Andrew Jacobs, *Grandmother, Nude Photos and Charges*, N.Y. TIMES, Feb. 13, 2000, at NJ6 (discussing the prosecution of Marian Rubin—a grandmother and amateur photographer—for taking and possessing nude photographs of her grandchildren); Bill Lohmann, *Now, What's Wrong with This Picture?*, RICHMOND TIMES-DISPATCH, Apr. 11, 2000, at D1 (describing the prosecution and plea agreement of a mother, Cynthia Stewart, for taking and possessing bath-time photographs of her eight-year-old daughter); James

would deprive the public of countless valuable works, from Shakespeare's *Romeo and Juliet* to the Oscar-nominated films *American Beauty* and *Traffic*.[84] Yet the Court in *Ferber* had explicitly recognized that some works about child sexuality might have significant social value, encouraging the use of virtual depictions in such works.[85]

Furthermore, under traditional First Amendment doctrine, the possibility that certain materials might lead to or encourage future crimes does not justify laws banning protected speech.[86] The state, for example, cannot outlaw cartoons, video games, or candy, even though evidence establishes that some pedophiles use these materials to seduce children.[87] Similarly, the fact that speech is offensive does not justify its suppression.[88]

Sterngold, *For Artistic Freedom, It's Not the Worst of Times*, N.Y. TIMES, Sept. 20, 1998, at AR1 (describing the Alabama and Tennessee indictments of Barnes & Noble bookstores for selling Jock Sturges's and David Hamilton's art photography books featuring nude children).

[84] *Free Speech Coal.*, 535 U.S. at 248. Justice Kennedy noted that "[o]ur society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young." *Id*.

[85] *Id.* at 251 (citing New York v. Ferber, 458 U.S. 747, 763 (1982)).

[86] *Id.* at 245 (citing Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 689 (1969) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech.")).

[87] *Id.* at 251. Justice Kennedy cited *Brandenberg v. Ohio*, 395 U.S. 444 (1969), to support the Court's distinction between speech and its indirect results. In *Brandenburg*, Ohio authorities convicted the leader of a Ku Klux Klan group under a statute criminalizing "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." *Id.* at 447. The Court struck down the statute, explaining:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 444. However, the mere abstract teaching or support of force or violence is not the same as "preparing a group for violent action and steeling it to such action." *Id.* at 447–48 (citing Noto v. United States, 367 U.S. 290, 297–98 (1961)). The Court has interpreted *Brandenburg* as prohibiting the government from punishing speech because it has a tendency, or even reasonable possibility, of inciting illegal conduct. Instead, the speech must be *directed* at inciting *imminent* lawless action, and this result must be *likely*. FRALEIGH & TUMAN, *supra* note 9, at 78.

[88] *Free Speech Coal.*, 535 U.S. at 245 (citing Reno v. ACLU, 521 U.S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'")); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression.").

While the Court has recognized that certain categories of speech fall outside of First Amendment protection—including defamation, incitement, obscenity, and *real* child pornography—in *Free Speech Coalition* the Court refused to recognize a new category of unprotected speech. Instead, Justice Kennedy held that Congress must operate within the boundaries of *Miller* and *Ferber*, banning only obscenity or materials based on their dangerous means of *production*, as opposed to their content.[89]

Nor may the government suppress lawful speech simply because it resembles unlawful speech.[90] A decision to the contrary would move beyond the important goal of protecting children and into the realm of thought control. Citing *Stanley v. Georgia*,[91] Justice Kennedy wrote that "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."[92] As long as otherwise protected materials do not involve harm to real children, they receive full First Amendment protection.

II
The PROTECT Act's Regulation of Virtual Child Pornography Fails To Protect Legitimate First Amendment Interests

The Court's decision in *Free Speech Coalition* represented an important contraction in increasingly expansive child pornography doctrine, reattaching state and federal laws to *Ferber*'s child protection rationale. However, the current federal child pornography statute, the Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today (PROTECT) Act, is inconsistent with the Court's clear requirements. In this section, I describe the PROTECT Act's core provisions, focusing on its definition of child pornography and its affirmative defense for virtual child pornography. Then I describe the PROTECT Act's separate pandering provision, which criminalizes offers to distribute material believed to be child pornography. Finally, I identify and analyze the serious First Amendment problems the PROTECT Act leaves unresolved.

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89 *Free Speech Coal.*, 535 U.S. at 256.

90 *Id.* at 255.

91 394 U.S. 557 (1969).

92 *Free Speech Coal.*, 535 U.S. at 253. For a discussion of *Stanley v. Georgia*, see *supra* note 63.

A. Examination of the PROTECT Act's Core Provisions and Pandering Section

Following *Free Speech Coalition*, some legislators were concerned that the Supreme Court had "sided with pedophiles over children," prioritizing abstract First Amendment ideals over law enforcement's practical ability to prosecute criminals.[93] They believed that *Free Speech Coalition* remedied a chilling effect on socially valuable speakers by imposing another chilling effect on the state —discouraging effective prosecution through a new virtual child pornography defense.[94] Furthermore, they worried that this defense would expand over time, as continuing technological advancements made real and virtual child pornography less distinguishable.[95] At the same time, the ever-expanding Internet would provide more access and anonymity for pedophiles.[96] One legislator expressed even stronger views:

> Whether in movies or photographs, it doesn't make a difference whether or not the person engaged in sex is actually a child. If it looks like a child and is said to be a child, pedophiles have found

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[93] John Schwartz, *Swift, Passionate Reaction to a Pornography Ruling*, N.Y. TIMES, Apr. 17, 2002, at A18; *see also* Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 501(10)–(14), 117 Stat. 650, 677–78 (2003) (codified as amended in scattered sections of 18, 28, and 42 U.S.C. (2006)) (describing complexities in the enforcement of child pornography laws in the wake of the Supreme Court's *Free Speech Coalition* decision); Linda Greenhouse, *'Virtual' Child Pornography Ban Overturned*, N.Y. TIMES, Apr. 17, 2002, at A1 (describing Attorney General John Ashcroft's statement that the Court's decision would make prosecuting child pornography "immeasurably more difficult"); Thomas G. West & Katherine McGinnis, *The Limits of Freedom: Protect Children; Virtual Pornography Can Cause Real Harm*, ST. LOUIS POST-DISPATCH, Apr. 24, 2002, at B7 (rejecting Justice Kennedy's assertion that the holding of *Free Speech Coalition* is necessary to protect "high art" consistent with the First Amendment and explaining that, instead, the Court's decision will only promote further harm to children).

[94] *See* PROTECT Act § 501(10) ("[D]efendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real.").

[95] *See* PROTECT Act § 501(13) ("In the absence of congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse.").

[96] *See* United States v. Williams, 444 F.3d 1286, 1290 (11th Cir. 2006), *rev'd on other grounds*, 128 S. Ct. 1830 (2008) (explaining that technology increasingly invites "those who view children in sexually deviant ways to websites and chat rooms where they may communicate and exchange images with other like-minded individuals"). The Eleventh Circuit described the "cottage industry" the Internet fosters. *Id*. For example, in 1998, law enforcement discovered the "Wonderland Club," an online child pornography ring based in the U.S. and spanning twelve countries. Police uncovered 750,000 disturbing images of sexually exploited children. *Id.* at 1290 n.4.

their fix—and their search for *true* child pornography will only be enhanced.[97]

Less than a year after the Court decided *Free Speech Coalition*, Congress passed the PROTECT Act.[98]

1. *The Act's Definition of Child Pornography and Affirmative Defense*

The PROTECT Act altered language in the CPPA in a deliberate effort to survive post–*Free Speech Coalition* judicial scrutiny while strengthening law enforcement's tools in the fight against child pornography.[99] The Act prohibits receiving, distributing, and possessing "child pornography"—redefined as any visual depiction of sexually explicit conduct involving the use of a real minor *or* a "digital image, computer image, or computer-generated image that is, or is *indistinguishable from*," that of a real minor.[100] The term "indistinguishable" is further defined as "such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct," excluding drawings, cartoons, sculptures, or paintings.[101]

The PROTECT Act also creates an affirmative defense for defendants who can prove that the alleged child pornography was produced

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[97] Charles Lane, *Law Aimed at "Virtual" Child Porn Overturned: High Court Says Ban Too Broadly Worded*, WASH. POST, Apr. 17, 2002, at A1 (emphasis added) (quoting Rep. Mark Foley of Florida, co-chairman of the Congressional Missing and Exploited Children's Caucus).

[98] Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18, 28, and 42 U.S.C. (2006)). Justice Scalia poked fun at Congress's choice of such an "unlikely" title in *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008).

[99] *See* 149 CONG. REC. 4227 (2003) (statement of Sen. Leahy) ("It is important that we do all we can to end the victimization of real children by child pornographers, but it is also important that we pass a law that will withstand First Amendment scrutiny. We need a law with real bite, not one with false teeth."); Press Release, Senator Orrin G. Hatch, Hatch Statement on Supreme Court's Decision Regarding Virtual Child Pornography (Apr. 16, 2002), *available at* http://web.archive.org/web/20030223175108/http://hatch.senate.gov/pressapp/record.cfm?id=182317 (expressing disappointment in the Supreme Court's decision in *Free Speech Coalition* and explaining that he "will be studying the Court's opinion to see exactly how we can craft new legislation to punish the sexual exploitation of children consistent with the Court's decision"); *see also* Robert S. Greenberger, *High Court Strikes Down Ban on 'Virtual' Child Pornography*, WALL ST. J., Apr. 17, 2002, at A4 ("Attorney General John Ashcroft . . . said he would take steps within his department to ensure that the ruling 'affects as few of our pending child pornography cases as possible,' and work with Congress to develop 'stronger measures to fight child pornography that will survive judicial scrutiny.'").

[100] PROTECT Act § 502 (emphasis added).

[101] *Id.*

using adults or, alternatively, produced without using actual minors, such as through digital imaging.[102]

2. *The Act's Pandering Provision*

Additionally, a separate section of the Act addresses criminal pandering.[103] Early obscenity cases introduced the term "pandering" as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."[104] The Supreme Court has held that the pandering of materials as obscene may serve as determinative evidence of their obscenity.[105] A defendant's deliberate representation of depictions as erotically arousing itself stimulates customers or recipients to accept them as prurient—a kind of obscene self-fulfilling prophecy.[106]

The PROTECT Act extends beyond the obscenity doctrine's notion of pandering as evidence and makes it a criminal act in itself. The Act punishes any person who knowingly:

> [A]dvertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—
> (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
> (ii) a visual depiction of an actual minor engaging in sexually explicit conduct . . . .[107]

This standard appears to avoid *Free Speech Coalition*'s restrictions by incorporating both *Miller* and *Ferber*—punishing only obscenity or depictions of actual minors. It also incorporates a scienter element by prohibiting pandering only when an actor believes or causes another to believe that the pandered depiction contains obscenity or actual child pornography.

The PROTECT Act's plain text prohibits the act of offering child pornography regardless of an offeree's response. In this way, the statute treats pandering as similar to traditional attempted or inchoate crimes because a defendant can be prosecuted even if he does not successfully complete a transaction.[108] Under the well-established

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[102] *Id*.

[103] *Id.* § 503.

[104] Ginzburg v. United States, 383 U.S. 463, 467 n.7 (1966) (citing Roth v. United States, 354 U.S. 476, 495–96 (1957) (Warren, C.J., concurring)).

[105] *Id.* at 470–71.

[106] *Id.*

[107] PROTECT Act § 503.

[108] The PROTECT Act's pandering provision is also similar to many state laws criminalizing "pandering" as a prostitution-related offense. These laws typically criminalize

criminal law doctrine of attempt, the government may convict a defendant by proving that a defendant acted with the statutorily required level of culpability and took an overt "substantial step" toward committing the crime.[109]

B. The PROTECT Act's Unanswered First Amendment Questions

1. The PROTECT Act's Core Provisions Are Unconstitutional

Unfortunately, like the CPPA, the PROTECT Act obfuscates several crucial First Amendment concerns. Seizing on Justice Thomas's concurrence in *Free Speech Coalition*, the PROTECT Act's proponents have argued that it complies with the First Amendment by replacing the CPPA's unconstitutionally overbroad definition of child pornography—including virtual materials that "appear[ ] to be" actual child pornography—with a narrower definition that includes virtual materials that are "indistinguishable from" actual child pornography.[110] Despite the wordplay, this altered definition raises many of the same concerns that fueled the overbreadth challenge in *Free Speech Coalition*. Digital virtual pornography, produced without harming children, may indeed be "indistinguishable from" actual pornography. In fact, legislators testified to this concern as the primary motivation for passing both the CPPA and PROTECT Act.[111]

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inducing, soliciting, persuading, encouraging, or enticing a person to become a prostitute. *See, e.g.*, CAL. PENAL CODE § 266i (West 2008) (finding a person guilty of pandering if he, "[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute"); GA. CODE ANN. § 16-6-12 (2011) ("A person commits the offense of pandering when he or she solicits a person to perform an act of prostitution . . . or when he or she knowingly assembles persons at a fixed place for the purpose of being solicited by others to perform an act of prostitution."); WIS. STAT. § 944.33 (2009) (finding a person guilty of pandering if he "[s]olicits another to have nonmarital sexual intercourse or to commit an act of sexual gratification, in public or in private"). Like the PROTECT Act, anti-prostitution pandering statutes focus on illegal recruiting and attempted management activity—not success. According to their plain text, they do not require successful acts of prostitution.

109 *See* United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001) (explaining the requirements for criminal attempt in upholding a defendant's conviction for attempting to persuade and entice a minor to engage in criminal sexual activity). For a more thorough description of traditional attempt doctrine, see also Robert M. Sieg, *Attempted Possession of Child Pornography—A Proposed Approach for Criminalizing Possession of Child Pornographic Images of Unknown Origin*, 36 U. TOL. L. REV. 263, 267–68 (2005).

110 *See* PROTECT Act §§ 501(13)–(14), 502(c) (defining "indistinguishable" as "virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct"). For a discussion of Justice Thomas's concurrence in *Free Speech Coalition*, see *supra* note 81 and accompanying text.

111 *See supra* notes 93–97 and accompanying text (discussing legislators' concerns that *Free Speech Coalition* would facilitate child pornography viewers, especially with technology advancements over time).

Similarly, as proposed by the *Ferber* Court, a film director might hire a particular actress over the age of eighteen to portray a younger girl precisely because audiences will be unable to distinguish her from a minor.[112]

As Justice Kennedy wrote for the Court in *Free Speech Coalition*, when pornography is produced without actual harm to actual children, the First Amendment does not allow the state to punish speakers for their thoughts as opposed to their actions. [113] The government had argued that, in order to eliminate the market for real child pornography, Congress must also prohibit virtual pornography.[114] Justice Kennedy rejected this argument, explaining that the market deterrence rationale presented in *Ferber* assumed that the market in question was comprised solely of illegal and unprotected materials.[115] It does not extend to virtual child pornography by allowing regulation of activity that involves no underlying crime. The state cannot prohibit protected speech in an effort to strike at unprotected speech, and protected speech does not lose its protection simply because it resembles unprotected speech.[116] Rather, "[t]he Constitution requires the reverse. '[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . .'"[117]

The Supreme Court spoke clearly in *Free Speech Coalition*, and the PROTECT Act appears to overlook its message. Furthermore, the Act's affirmative defense does not cure its constitutional deficiency; instead, it privileges law enforcement's needs over citizens' speech rights. In *Free Speech Coalition*, the Supreme Court struck down Congress's attempt in the CPPA to compensate for an overbroad law through the use of an affirmative defense.[118] However, the Court avoided deciding whether an affirmative defense in this context could *ever* satisfy the First Amendment, because the provision at issue allowed conviction even when a defendant could prove that no actual children were involved in production.[119] The PROTECT Act seized upon this opening, crafting a narrower defense that retains the problematic feature of shifting the burden of proof from the government to the defendant.

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112 New York v. Ferber, 458 U.S. 747, 763 (1982).
113 Ashcroft v. Free Speech Coal., 535 U.S. 234, 253–55 (2002).
114 *Id.* at 254.
115 *Id*.
116 *Id.* at 255.
117 *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).
118 *Id.* at 256.
119 *Id.*

For a criminal prosecution related to the exercise of constitutional rights, due process requires the government to bear the burdens of providing proof and persuading a jury beyond a reasonable doubt that a defendant has committed a crime.[120] This is rooted in a well-known tenet of American criminal law: All defendants are innocent until proven guilty.[121] Furthermore, the prosecution's burden in criminal cases applies even when it poses substantial difficulties in convicting defendants for serious crimes.[122] Traditional affirmative defenses, such as self-defense or entrapment, explicitly manipulate the evidentiary burdens of proof and persuasion only after the government has first demonstrated that the defendant has engaged in criminal conduct. Once the government has met its initial burden of proof, the burden shifts to the defendant to rebut the government's claim by proving a legal defense or justification.[123] A statute may not simply eliminate the government's initial burden by transforming a constitutionally required element of a crime into an affirmative defense.[124]

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[120] Apprendi v. New Jersey, 530 U.S. 466, 476–77 (2000) (holding that a defendant's rights to due process and a "speedy and public trial, by an impartial jury," entitle him to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt" (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)) (internal quotation marks omitted)); Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) (holding, in a homicide case, that the Due Process Clause requires the prosecution to prove each of the crime's required elements beyond a reasonable doubt, instead of shifting the burden to the defendant to prove the presence of heat of passion); *In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."). Ample scholarship has addressed burdens of proof and persuasion in the federal criminal context. *See generally* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980) (describing and critiquing evidentiary devices—most notably burdens of proof and persuasion—used to structure and guide a jury's rational decisionmaking process); Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969) (discussing presumptions and burdens in the criminal context); James T. Ranney, *Presumptions in Criminal Cases: A New Look at an Old Problem*, 41 MONT. L. REV. 21 (1980) (analyzing shifting presumptions in criminal cases).

[121] *See* George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968) (tracing the development of the "innocent until proven guilty" requirement, which does not appear in the explicit text of the Constitution).

[122] *See Mullaney*, 421 U.S. at 701 (noting that, although the prosecution bore a heavy burden to prove the absence of "heat of passion" or "sudden provocation" in a homicide case, "[t]he same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential").

[123] 9A FEDERAL PROCEDURE, LAWYERS EDITION § 22:1474 cmt. (West 2012).

[124] *See, e.g.*, Francis v. Franklin, 471 U.S. 307, 314 (1985) ("[P]resumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense."); Patterson v. New York, 432 U.S. 197, 210 (1977) (explaining that there are

Here, the PROTECT Act's core provision criminalizes all materials that are indistinguishable from child pornography. This fails to tie the government's initial burden of proof to conduct that can be criminalized without running afoul of the First Amendment, since *Free Speech Coalition* protects non-obscene virtual child pornography. As a stark parallel example, Congress could not pass a law prohibiting all statements that criticize the government, even if it included an affirmative defense for defendants who could prove that they did not intend for their statements to incite imminent lawless action. Such a law, like the PROTECT Act, would sacrifice the core constitutional right of free speech, transforming the prosecution's burden of proving that a citizen engaged in unprotected activity into that citizen's burden of proving that his activity was in fact protected.[125]

Furthermore, as a policy matter, broadly criminalizing protected speech with an affirmative defense savings clause encourages overreliance on prosecutorial discretion for efficiency and fairness. Although Justice Scalia in *Massachusetts v. Oakes* suggested that expansive prosecutorial discretion in the child pornography context is no cause for concern,[126] many courts and scholars fervently disagree.[127] Some

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"constitutional limits beyond which the States may not go" in relying on affirmative defenses (citing McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 86 (1916) ("[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."))); BSA, Inc. v. King County, 804 F.2d 1104, 1110 (9th Cir. 1986) (holding that local ordinances banning nude dancing failed to comport with *Miller*'s obscenity test, and thus violated the First Amendment, because they required defendants to affirmatively prove that expressive conduct did *not* "appeal to [a] prurient interest").

125 Along these lines, the Third Circuit recently "sound[ed] an alarm" about the "troubling issues" raised when the government uses an affirmative defense to save an otherwise unconstitutional statute. United States v. Stevens, 533 F.3d 218, 231 n.13 (3d Cir. 2008), *aff'd*, 130 S. Ct. 1577 (2010). Quoting *Free Speech Coalition*, the court explained:

> The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense.

Id. (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002)).

126 Massachusetts v. Oakes, 491 U.S. 576, 589 (1989) (Scalia, J., concurring in the judgment in part and dissenting in part).

127 *See* United States v. Stevens, 130 S. Ct. 1577, 1591 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."); Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008) (arguing that prosecutorial discretion in the American criminal justice system has expanded beyond proper boundaries and suggesting that scholars and legal reformers should devote greater attention and creativity to addressing the problem); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (suggesting that the current scope of prosecutorial discretion is unjustifiably broad and emphasizing the need to reexamine its "broad and rather casual acceptance").

deference to prosecutorial discretion is necessary in a fully functioning criminal law regime,[128] but granting prosecutors too much power to determine whom to charge under overreaching laws breeds confusion, distrust, and injustice.[129] It also creates an unconstitutional imbalance, allowing the executive branch, in effect, to make and interpret the laws it enforces.[130]

Finally, the affirmative defense structure leaves in place a serious chilling effect. Even if a defendant filmmaker is confident that he can prove his "virtual child pornography" affirmative defense, he may nevertheless choose not to create a socially valuable film. The ordeal of being charged with a heinous crime, hiring a lawyer, and going to court to prove his innocence may deter even the most confident speaker.

2. *Justice Souter's Dissent in* United States v. Williams *Challenges the PROTECT Act's Pandering Provision*

In addition to raising several fundamental First Amendment concerns with respect to its core definition of child pornography and affirmative defense, the PROTECT Act also elicits questions as to the constitutionality of its pandering provision. Notably, while the

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[128] Justice Powell explained in *Town of Newton v. Rumery*:

> The reasons for judicial deference are well known. Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. Finally, they also must decide how best to allocate the scarce resources of [the] criminal justice system . . . .

Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) (Powell, J.) (citation omitted). *See also* Wayte v. United States, 470 U.S. 598, 607 (1985) (noting that prosecutorial discretion is necessary because, among other reasons, criminal charging decisions are "not readily susceptible to the kind of analysis the courts are competent to undertake"); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 557 (noting that, due to inevitable gaps in the rules guiding prosecutors' behavior, their discretion or "interest in reaching fair and just decisions is often the only compass pointing to the right procedure").

[129] *See* Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 579 (2000) (arguing that more transparent and principled prosecutorial discretion has "the potential to enhance perceptions of procedural justice, thereby increasing the apparent legitimacy of the process and popular compliance with an official's decision"); *cf.* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1514 (2000) ("[L]ack of uniformity with respect to discretionary decision-making by prosecutors reduces the public's perception that the legal system employs a fair and ethical process.").

[130] In *The Federalist Papers*, James Madison powerfully explained the fundamental importance of the "separation of powers" doctrine. *See generally* THE FEDERALIST NO. 47, at 101 (James Madison) (Michael A. Genovese ed., 2009) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

Supreme Court recently analyzed and upheld the Act's pandering provision in *United States v. Williams*,[131] the majority's opinion did not persuasively address many of the legitimate concerns Justices Souter and Ginsburg identified in their dissent.[132] These concerns are especially problematic in combination with the unconstitutionality of the PROTECT Act's core definitions and affirmative defense.

In *Williams*, an unsympathetic defendant was convicted under the PROTECT Act's pandering provision for attempting to "swap" graphic photographs of his four-year-old daughter with an undercover agent.[133] On appeal he argued that the Court should strike down the PROTECT Act's pandering provision as unconstitutionally overbroad.[134]

The majority examined the technical nature of inchoate crime doctrine, holding that the PROTECT Act's pandering provision is consistent with the notion that the state can punish criminal intent and active steps leading toward the commission of a crime, even if the defendant did not succeed in completing his plan.[135] Justice Scalia reconciled the Act's pandering provision with *Free Speech Coalition* by holding that the statute does not prohibit offers to provide or requests to receive virtual child pornography. Instead, the Act requires scienter for a pandering violation: "A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children."[136]

Justice Souter disagreed with the majority's assessment, finding that Congress made an "end-run" around *Free Speech Coalition* by prohibiting proposals to transact in virtual child pornography rather than prohibiting it directly.[137] He agreed that the government may punish general proposals to sell or distribute child pornography when such proposals are unrelated to specific, extant images.[138] However, when a defendant proposes to sell or distribute identifiable, existing representations, Congress violates *Free Speech Coalition*'s controlling interpretation of First Amendment requirements by blurring the distinction between real and virtual child pornography.[139] In "failing to confront the tension between ostensibly protecting the material

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131 128 S. Ct. 1830 (2008).

132 *Id.* at 1849 (Souter, J., dissenting).

133 *Id.* at 1837 (majority opinion).

134 *See id.* at 1838 (explaining that the Eleventh Circuit reversed the conviction after deciding that the PROTECT Act was vague and overbroad).

135 *Id.* at 1843.

136 *Id.* at 1844 (emphasis in original).

137 *Id.* at 1853–54 (Souter, J., dissenting).

138 *Id.* at 1849.

139 *Id.* at 1851.

pandered while approving prosecution of the pandering of that same material," the Court undermines its binding precedent "in both reasoning and result."[140]

Justice Souter's dissent addressed and rejected each of the majority's rationales for independently criminalizing proposed transactions in potentially protected materials. First, Justice Scalia held that only a mischaracterization of the Act interprets it as criminalizing a proposal for a lawful transaction.[141] In fact, the provision contains a scienter requirement: A defendant must "express a belief or inducement to believe that the subject of the proposed transaction shows actual children."[142] Yet Justice Souter explained that this statement misses the mark. The applicable constitutional objection is not that the PROTECT Act criminalizes proposals for transactions in virtual—and therefore protected—child pornography. Instead, the objection is that some proposals are criminalized simply because defendants believe they refer to real child pornography, even though the existing material is not itself prohibited.[143]

The majority then held that a proposal to commit a crime enjoys no First Amendment protection.[144] Again, Justice Souter explained that this interpretation misses the key point. A proposal to transact in virtual child pornography is *not* a proposal to commit a crime; it is a proposal to engage in protected First Amendment activity.[145] To refer to my example above, if the government cannot criminalize speech simply because it is critical, the government cannot criminalize the publication or sale of such speech.

The majority then analogized pandering to a traditional attempted crime, relying on the foundational criminal law theory that the "impossibility of completing the crime because the facts were not as the defendant believed is not a defense."[146] That is, the speaker is liable because his *intended* transfer is criminal, even if the actual transfer turns out to be non-criminal. However, Justice Souter responded that the majority's effort to shoehorn the pandering of virtual child pornography into attempt doctrine is incoherent by noting that, in effect, the majority created a statutory inchoate offense of

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140 *Id.* at 1849.

141 *Id.* at 1842–43 (majority opinion).

142 *Id.* at 1851 (Souter, J., dissenting).

143 *Id*.

144 *Id.* at 1842 (majority opinion).

145 *See id.* at 1851 (Souter, J., dissenting) ("[I]t is not enough just to say that the First Amendment does not protect proposals to commit crimes. For that rule rests on the assumption that the proposal is actually to commit a crime, not to do an act that may turn out to be no crime at all.").

146 *Id.* at 1843 (majority opinion).

"attempting to attempt to commit" a substantive crime. [147] "A metaphysician could imagine a system like this, but the universe of inchoate crimes is not expandable indefinitely under the actual principles of criminal law, let alone when First Amendment protection is threatened."[148] A defendant can be guilty of attempted murder if he pulled the trigger but his gun accidentally contained no bullets because only the factual impossibility of completing his intended act prevented the completion of the crime. [149] Here, though, the majority would find a defendant guilty even when he completed his course of conduct exactly as intended but, in so doing, committed no crime.[150]

Finally, the majority analogized a panderer to a drug dealer constitutionally convicted of an attempted drug sale even if, by accident, he was in fact selling a legal substance.[151] Of course, selling a legal substance such as baking powder is not more inherently criminal than selling virtual child pornography. However, Justice Souter responded that the majority overlooked a key distinction between selling baking powder and selling virtual child pornography: "Powder sales are lawful but not constitutionally privileged."[152] Although any justification "within the bounds of rationality" would suffice for limiting baking powder transactions, the Supreme Court has held that virtual child pornography falls within the First Amendment's affirmative protection; thus, regulating virtual child pornography is "not merely allowed as a matter of course."[153]

Justice Souter's points about the disconnect between traditional inchoate crime doctrine and protected speech under *Free Speech*

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147 *Id.* at 1852 (Souter, J., dissenting).

148 *Id*.

149 *Id*.

150 *Id.* at 1852–53. The Eleventh Circuit cited Professor Frederick Schauer to clarify this complicated distinction: "[W]hen the non-existence of illegality is a function not of the non-existence of an illegal product but rather the non-illegality of an existing product, the First Amendment returns to the picture." United States v. Williams, 444 F.3d 1286, 1304 (11th Cir. 2006), *rev'd*, 128 S. Ct. 1830 (2008) (quoting *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 152 (2002) (statement of Frederick Schauer, Professor of Law, Harvard University)) (internal quotation marks omitted). The court continued, clarifying that this distinction also distinguishes the PROTECT Act's pandering provision and valid state laws criminalizing the pandering of prostitution:

> While a defendant may be convicted, for example, for soliciting sex from an undercover police officer, even though the officer has no intention of actually consummating the deal, in a jurisdiction that has outlawed prostitution, there is no circumstance under which sex for money may be legal. For this reason, the Government's 'phantom' drug analogy is also unpersuasive.

Id. at 1304 n.90.

151 *Williams*, 128 S. Ct. at 1843.

152 *Id.* at 1853 (Souter, J., dissenting).

153 *Id*.

Coalition failed to convince the *Williams* majority, but additional policy arguments highlight the troubling implications of the PROTECT Act's pandering provision. Consider the example of Adrian Lyne's film *Lolita*. Assume that the film is unequivocally protected as virtual child pornography because no actual child was harmed during the production of the film—the director used adult body doubles for all scenes involving sexual conduct. When Lyne advertises his film to art house cinema audiences as a modern take on Nabokov's classic novel, he is safe from prosecution. However, when an unsavory character advertises precisely the same material to an audience of pedophiles, he can be prosecuted and incarcerated. Although society may be uncomfortable with the way a particular audience reacts to provocative material, the First Amendment makes our discomfort irrelevant. Treating speakers inconsistently depending on the nature of their private interest in constitutionally protected speech risks turning the PROTECT Act's pandering provision into a thought crime law.

III
Congress Must Regulate Virtual Child Pornography Within First Amendment Boundaries

The previous sections described the establishment and expansion of child pornography doctrine over the past three decades. Since *Ferber*, legislators have increasingly focused on society's deep disapproval of pedophilic thoughts. In *Free Speech Coalition*, the Supreme Court created an important exception for virtual child pornography, but the subsequently enacted PROTECT Act violates that decision in letter and effect.

This section argues that the PROTECT Act's child pornography provisions are unconstitutionally overbroad. For this reason, Congress should replace the Act with more narrowly tailored legislation that protects children without sacrificing legitimate, socially valuable virtual depictions of child sexuality. Although the First Amendment unequivocally protects non-obscene virtual child pornography, *Miller*'s obscenity test applies as a backstop. Thus, the government has the power to regulate not only real child pornography, but also virtual child pornography that violates community standards of decency and lacks literary, artistic, political, or scientific value. For guidance, Congress should look to two recent Supreme Court cases that rejected expansive attempts to punish other forms of disfavored thoughts.

A. The Supreme Court's Rejection of Content-Based Speech Restrictions in Other Contexts

In two recent cases, the Supreme Court rejected attempts to regulate constitutionally protected material because of its association with troubling thoughts. In the 2010 case *United States v. Stevens*, the Court examined a federal statute that prohibited the commercial creation, sale, or possession of certain depictions of animal cruelty.[154] The statute addressed only portrayals of illegal acts, rather than the underlying illegal acts themselves. The statute's legislative background focused on "crush videos," disturbing depictions of women intentionally torturing and killing helpless animals by slowly crushing them "with their bare feet or while wearing high heeled shoes."[155] Congress was concerned primarily with private thoughts—focusing *not* on preventing harm to the subjects depicted but instead on preventing viewers' distasteful reactions to such depictions. Congress explained that the targeted videos "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting."[156]

The defendant in *Stevens* argued that the statute was invalid under the First Amendment because it regulated expression based on its content.[157] The government responded that the Court should recognize a new categorical exclusion similar to child pornography, arguing that depictions of animal cruelty should receive no First Amendment protection because, under a simple balancing test, social costs outweigh the value of such depictions.[158] Additionally, the government's general interest in "preventing the erosion of public morality" justifies suppressing such low- or no-value speech.[159]

Justice Roberts forcefully rejected these arguments: "As a free-floating test for First Amendment coverage, that [notion] is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[160] To the contrary, the

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

155 *Id.* at 1583 (quoting H.R. REP. NO. 106-397, at 2 (1999)) (internal quotation marks omitted).

156 *Id.* (quoting H.R. REP. NO. 106-397, at 2–3) (internal quotation marks omitted).

157 *Id.* at 1583–84.

158 *Id.* at 1585 (citing Brief for the United States at 8, United States v. Stevens, 130 S. Ct. 1577 (2010) (No. 08-769), 2009 WL 1615365, at *8).

159 Brief for the United States, *supra* note 158, at 34. In their amicus brief, several civil liberties organizations responded that this "argument flies in the face of the well-settled principle 'that speech may not be prohibited because it concerns subjects offending our sensibilities.'" Brief of DKT Liberty Project et al. as Amici Curiae Supporting Respondent at 12, United States v. Stevens, 130 S. Ct. 1577 (2010) (No. 08-769), 2009 WL 2247129, at *1 (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002)).

160 *Stevens*, 130 S. Ct. at 1585.

First Amendment reflects our founders' fundamental judgment that restrictions on government regulation outweigh the costs.[161] Justice Roberts distinguished child pornography from depictions of animal cruelty, declining to extend *Ferber*'s rationale beyond materials intrinsically involving direct harm to children.[162] In *Ferber*, the Court did not simply determine that depictions of children engaging in sexual conduct lacked social value; instead, the Court found that free speech rights do not extend to materials that are an integral part of child sexual exploitation.[163] *Ferber* does not establish a "freewheeling authority" to declare new categories of speech outside of First Amendment protection.[164]

Justice Roberts also rejected the government's argument that the executive branch does not plan to prosecute anything less than extreme cruelty. In contrast to Justice Scalia's opinion in *Massachusetts v. Oakes*, Justice Roberts noted that the First Amendment does not "leave us at the mercy of *noblesse oblige.*"[165] The Court should not uphold an unconstitutional statute merely because the government promises to "use it responsibly."[166]

In the 2011 case *Brown v. Entertainment Merchants Ass'n*, the Supreme Court similarly rejected California's attempt to regulate protected materials.[167] The state law at issue in *Brown* restricted selling or renting violent video games to minors, again focusing on viewers' internal reactions to graphic materials rather than on an intrinsic relationship between the materials and an underlying crime. The statute covered games in which a player kills, maims, dismembers, or sexually assaults images of human beings if these acts are presented in a manner that "appeals to a [minor's] deviant or morbid interest."[168]

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161 *Id.* Note that in *Stevens* the government argued that a "serious value" savings clause based on *Miller* protected the statute from unconstitutionality. *See* Brief for the United States, *supra* note 158, at 38. The Court rejected this analysis, limiting *Miller* to depictions of sexual conduct: "In *Miller* we held that 'serious' value shields depictions of sex from regulation as obscenity. . . . We did not . . . determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place." *Id.* at 1591.

162 *Id.* at 1586.

163 *Id.* (citing New York v. Ferber, 458 U.S. 747, 759, 761 (1982)).

164 *Id.*

165 *Id.* at 1591.

166 *Id*.

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

168 *Id.* at 2732 (quoting CAL. CIV. CODE § 1746 (West 2009)) (internal quotation marks omitted). Like the federal statute at issue in *Stevens*, California included a savings clause based on *Miller*'s value prong, excepting material with serious literary, artistic, political, or scientific value. As in *Stevens*, the Court rejected the application of *Miller*'s test to "save" an unconstitutional statute: "[*Miller*] does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'" *Id.* at 2734.

The Court, relying heavily on its reasoning in *Stevens*, held that, although video games may feature depictions of astounding violence—including dismemberment, decapitation, impaling, immolation, and mutilation—"disgust is not a valid basis for restricting expression."[169] Furthermore, even if violent video games are interactive, no compelling evidence proves that they directly incite players to violence in the real world.[170] The majority compared California's attempt to regulate video games based on the potential crimes they may encourage to several similar attempted laws. In the late nineteenth and early twentieth centuries, many believed dime novels, motion pictures, radio dramas, and comic books fostered a "preoccupation with violence and horror among the young, leading to a rising juvenile crime rate."[171] Yet efforts to restrict these forms of entertainment failed; under the First Amendment, Congress may regulate action, but never thoughts.[172]

As in *Stevens*, the Court found California's concern about the long-term impact of violent materials on future conduct to be insufficient to justify speech regulation. Thus, in both of these recent cases, the Supreme Court reinforced the constitutional restriction on the government's ability to prohibit protected materials simply because of the thoughts and reactions they inspire. Many commentators saw these decisions as victories for the First Amendment.[173]

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169 *Id.* at 2738.

170 *See id.* at 2737–38 (rejecting the argument that the interactivity of video games makes them especially likely to encourage violence). Of course, many social scientists believe such compelling evidence exists. In his dissent, Justice Breyer presented a laundry list of scientific studies linking violent video games and aggressive behavior in youths. *Id.* at 2768–70 (Breyer, J., dissenting). These studies include Craig A. Anderson et al., *Longitudinal Effects of Violent Video Games on Aggression in Japan and the United States*, 122 PEDIATRICS e1067 (2008), http://pediatrics.aappublications.org/content/122/5/e1067.full.pdf; Douglas A. Gentile & J. Ronald Gentile, *Violent Video Games as Exemplary Teachers: A Conceptual Analysis*, 37 J. YOUTH & ADOLESCENCE 127 (2008); Ingrid Möller & Barbara Krahé, *Exposure to Violent Video Games and Aggression in German Adolescents: A Longitudinal Analysis*, 35 AGGRESSIVE BEHAV. 75 (2009); and Marjut Wallenius & Raija-Leena Punamäki, *Digital Game Violence and Direct Aggression in Adolescence: A Longitudinal Study of the Roles of Sex, Age, and Parent-Child Communication*, 29 J. APPLIED DEVELOPMENTAL PSYCHOL. 286 (2008). The majority rejected these studies as inconclusive, explaining that, at best, they show "some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game." *Brown*, 131 S. Ct. at 2739 (majority opinion).

171 *Id.* at 2737 (citing Note, *Regulation of Comic Books*, 68 HARV. L. REV. 489 (1955)).

172 *Id.* (citing Brief for Comic Book Legal Defense Fund as Amicus Curiae Supporting Respondents at 11–15, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 3697188, at *11–15).

173 *See, e.g.*, Robert Barnes, *Supreme Court Overturns Anti-animal Cruelty Law in First Amendment Case*, WASH. POST, Apr. 21, 2010, at A3 ("David Horowitz, executive director

Importantly, the statutes in both *Stevens* and *Brown* attempted to incorporate *Miller*'s obscenity test as a savings device to prevent overbreadth challenges. The Court rejected this attempt in both cases, explaining that *Miller* applies only to depictions of sex.[174] Although *Miller* is inapplicable to Congress's efforts to regulate depictions of animal cruelty or video games, it is useful in the virtual child pornography context.

B. Congress Should Amend the PROTECT Act's Overbroad Regulation of Virtual Child Pornography, Relying Instead on Miller *To Regulate Obscene Depictions*

The preceding section reinforced *Free Speech Coalition*'s implicit holding that the government cannot criminalize speech because of its tendency to produce distasteful reactions. With this in mind, I argue that Congress should amend the PROTECT Act's regulation of non-obscene virtual child pornography to comport with *Free Speech Coalition*'s First Amendment protection. The Act's overbroad definition of child pornography and its problematic pandering provision undermine *Free Speech Coalition* by untethering regulation from the Court's approved child-protection rationale. To ensure that anti-child pornography legislation is effective, Congress should replace the PROTECT Act with narrower legislation.

Additionally, to allay reasonable concerns about regulating disturbing material while protecting valuable artistic depictions of child sexuality, Congress should look to the Court's implicit recommendation in *Free Speech Coalition*: Established obscenity doctrine allows the government to regulate materials that offend community standards and lack serious value. To clarify, as referenced in Part I, the Supreme Court established that obscene materials do not receive First Amendment protection in a series of cases beginning in 1957. In *Roth v. United States*,[175] Justice Brennan reasoned that, although the Court

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of the Media Coalition, said in a statement that the court rightly decided that if the First Amendment were rewritten 'every time an unpopular or distasteful subject was at issue, we wouldn't have any free speech left.'"); Catherine J. Ross, *The Supreme Court Was Right To Strike Down California's Video Game Law*, WASH. POST, June 28, 2011, at A1 (explaining that the Supreme Court properly "rejected a radical challenge to free speech—in the process protecting all of us, not just children"); David G. Savage, *Supreme Court Strikes Down California Video Game Law*, L.A. TIMES (June 28, 2011), http://articles.latimes.com/2011/jun/28/nation/la-na-0628-court-violent-video-20110628 (noting that, for the Roberts Court, freedom of speech "is almost always a winner, even if the context is unusual").

174 For a discussion of the savings clause in *Stevens*, see *supra* note 161. For a discussion of the savings clause in *Brown*, see *supra* note 168.

175 354 U.S. 479 (1957).

had never explicitly addressed the question, it had always assumed that obscenity constitutes a narrow First Amendment exception—similar to defamation law or the incitement doctrine. After several attempts at limiting the scope of its obscenity jurisprudence, the Court established the enduring test to distinguish between obscene and non-obscene depictions of sex in *Miller v. California*.[176] The *Miller* test requires the trier of fact to consider three factors in determining whether the government can regulate material as obscene:

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[177]

If Congress narrowed the PROTECT Act's direct regulation of all virtual child pornography, which circumvents *Free Speech Coalition*, the government would retain the power to regulate virtual materials in accordance with obscenity law. I do not propose altering current child pornography doctrine as it applies to images of *real* children. The Court in *Ferber* was extremely clear—and its analysis was persuasive—that the government can regulate materials that depict harm to real children regardless of whether they are technically obscene.[178] However, when the Court established that this reasoning did not extend to virtual child pornography, it opened the door to reliance on standard obscenity regulation in that context.

C. The Key Benefits and Drawbacks of This Approach

One of the core benefits of eliminating the PROTECT Act's unconstitutional regulation of virtual child pornography and relying instead on *Miller* to regulate truly offensive virtual materials is that the Court has already established protection for expression with redeeming social value. As Justice Kennedy noted in *Free Speech Coalition*, all decent people agree that the sexual abuse of a child is a heinous crime worthy of punishment.[179] Communities are particularly cautious to ensure that their children are safe. Thus, under ordinary obscenity law, juries are likely to find even virtual material to be

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[176] Miller v. California, 413 U.S. 15, 24 (1973).

[177] *Id.* (citations omitted) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

[178] *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982). For a thorough discussion of the *Ferber* Court's distinction between child pornography and obscenity, see *supra* notes 35–39 and accompanying text.

[179] Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002).

obscene if it is "indistinguishable" from real depictions of harm to children and lacks redeeming value.[180] Yet the *Miller* test protects *Romeo and Juliet*, *The Tin Drum*, *American Beauty*, and *Taxi Driver*.

Although this proposal reconciles Congress's concerns about child safety with established First Amendment doctrine more coherently than the PROTECT Act's current child pornography provisions, several potential drawbacks exist. The clearest drawback is that obscenity law is famously puzzling,[181] and artists and scholars argue that the confusion it engenders has a chilling effect on those seeking to test the boundaries of taboo and transgression.[182] Because the *Miller* test relies on ever-shifting community standards, the power to determine whether certain material is obscene depends on unpredictable juries. For this reason, important art at the margins of broad community acceptance will remain in a precarious situation.

However, although courts and scholars have long debated the hazy boundaries of obscenity, *Miller* provides a useful standard—if not a bright-line rule—for protecting socially valuable works. Moreover, juries may be more protective of artistic expression than skeptics assume. In 1990, at the height of Senator Jessie Helms's battle against the National Endowment for the Arts, [183] Ohio authorities charged the Cincinnati Arts Center and its director with obscenity for its

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[180] In fact, courts already rely on *Miller*'s obscenity test to prohibit receipt of obscene virtual child pornography. *See* United States v. Whorley, 550 F.3d 326, 347 (4th Cir. 2008) ("[T]he jury's finding that the graphic cartoons of fictional children being raped and sodomized by adults are obscene should not be disturbed because a cartoon does not have to contain actual children in order to be obscene.").

[181] In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), an obscenity case decided on the same day as *Miller*, Justice Brennan—the original explicator of obscenity law—expressed dismay with the Court's tangled jurisprudence. "No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards." *Id.* at 73 (Brennan, J., dissenting). He abandoned the course he had established, explaining:

> I am convinced that the approach initiated 16 years ago in *Roth v. United States* . . . and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.

Id. at 73–74.

[182] *See, e.g.*, Randy Kennedy, *An Online Artist Challenges Obscenity Law*, N.Y. TIMES, July 28, 2005, at E3 (describing an artist's contention that unclear obscenity standards that may vary from community to community have caused her and others to self-censor their art).

[183] In the late 1980s and early 1990s, Senator Jesse Helms, disdainful of several controversial artists who had received federal grants for subversive works of art, led a charge against funding for the National Endowment for the Arts. For a helpful overview, see generally Kim M. Shipley, Comment, *The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms*, 40 EMORY L.J. 241 (1991).

exhibition of the photographer Robert Mapplethorpe's work, which included graphic images of gay sex.[184] Despite predictions to the contrary, a jury of "working-class" Ohioans acquitted the defendants. The museum's director described the decision as a win in the "battle for art and for creativity, for the continuance of creativity in this country."[185]

Opponents may also express concern that obscenity doctrine is less protective than child pornography law because, under *Stanley v. Georgia*, the state cannot regulate the possession of obscene materials.[186] Additionally, if the Court strikes down the PROTECT Act, it ignores virtual child pornography's effect on the market for *real* child pornography, shifting the burden back to the government to prove that the material in question is real. This was precisely the fear that motivated Congress to pass the Act.[187]

To reference Justice Souter's opinion in *Williams*[188] and Justice Kennedy's opinion in *Free Speech Coalition*, [189] these arguments may be intuitively appealing, but they miss the mark. Unless materials involve actual harm to children, the First Amendment does not allow Congress to regulate them as child pornography—regardless of the indirect effect they may have on viewers or the child pornography market. The state may not punish mere thoughts, even if those thoughts are disturbing and may eventually lead to criminal action.[190] And, although the state retains the burden of proof to demonstrate that materials are real rather than virtual, the state may always rely in the alternative on obscenity doctrine to strike at producers and distributors. Thus, Congress can and should focus its attention and

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184 Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, at 1.

185 *Id*.

186 Stanley v. Georgia, 394 U.S. 557, 568 (1969). For a discussion of *Stanley v. Georgia*, see *supra* note 63 and accompanying text.

187 *See supra* note 81 and accompanying text (explaining that Congress was concerned that defendants might be able to raise a virtual child pornography defense).

188 *See supra* notes 137–53 and accompanying text (discussing Justice Souter's dissent in United States v. Williams, 128 S. Ct. 1830 (2008)).

189 *See supra* notes 79–92 and accompanying text (discussing Justice Kennedy's majority opinion in Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002)).

190 I argue that, even assuming that concerns about the indirect correlation between virtual child pornography and actual child exploitation are valid, Congress must find alternative regulatory solutions that do not infringe upon citizens' fundamental rights. However, some scholars have noted that the first order question is whether empirical evidence supports the existence of this presumed correlation. *See* Neil Malamuth & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773 (2007) (examining scientific literature to analyze whether a connection exists between child pornography and the commission of sexually abusive acts).

resources on improving its ability to detect and prosecute actual child exploitation in accordance with constitutional requirements.[191]

CONCLUSION

Just as Shakespeare wrote about star-crossed teenage lovers in *Romeo and Juliet*, artists have long sought new ways to express their "empathy and enduring fascination with the lives and destinies of the young."[192] Recognizing the social value of artistic depictions of child sexuality, this Note has sought a reasoned balance between protecting children from abuse through effective criminal laws—a goal of the utmost importance—and protecting legitimate expression from overbroad content-based restrictions.

In Part I of this Note, I traced the history of child pornography doctrine from *New York v. Ferber* to *Ashcroft v. Free Speech Coalition*. I argued that modern regulations and court decisions have increasingly strayed from *Ferber*'s interest in protecting children from physical and emotional harm. In Part II, I described the PROTECT Act and argued that it is unconstitutional. The Act's sweeping definition of child pornography undermines *Free Speech Coalition*'s explicit protection of virtual child pornography. Although the Court has not yet addressed this general concern, in *United States v. Williams*, two Supreme Court Justices argued that the PROTECT Act's specific pandering provision violates the First Amendment. Finally, in Part III, I argued that Congress should replace the PROTECT Act's overbroad child pornography regulation with more narrowly tailored provisions that comport with *Free Speech Coalition*'s holding that the First Amendment unequivocally protects non-obscene virtual depictions. *Miller*'s obscenity test provides a convenient backstop, allowing the government to regulate material that violates community standards of

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[191] A crucial question remains open: How far may the government go in its efforts to improve detection and prosecution of actual child exploitation? Consider the Protecting Children from Internet Pornographers Act of 2011, which a House of Representatives committee recently approved. H.R. 1981, 112th Cong. (2011). Under this bill, Internet service providers would be required to track all users' online activity—including users' names, addresses, bank account numbers, credit card numbers, and assigned IP addresses—and save it for eighteen months. *Id.* Civil liberties organizations have expressed grave concerns about the effects of sacrificing privacy rights to improve law enforcement. For example, the Electronic Frontier Foundation stated: "The data retention mandate in this bill would treat every Internet user like a criminal and threaten the online privacy and free speech rights of every American." Conor Friedersdorf, *The Legislation That Could Kill Internet Privacy for Good*, THE ATLANTIC (Aug. 1, 2011), http://www.theatlantic.com/politics/archive/2011/08/the-legislation-that-could-kill-internet-privacy-for-good/242853/. Despite its deficiencies, some fear that Congress will soon approve the bill because "history shows that in times of moral panic, overly broad legislation has a way of becoming law." *Id.*

[192] Ashcroft v. Free Speech Coal., 535 U.S. 234, 248 (2002).

decency and does not contribute literary, artistic, political, or scientific value.

Of course, this Note does not answer the plethora of additional First Amendment questions raised by child pornography law.[193] However, I have modestly suggested one way Congress can reinforce an important boundary, protecting children while ensuring that the public retains access to valuable art and films.

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[193] As one example, I have not addressed how the government should draw the line between child pornography and non-harmful artistic expression when real children are involved. Should the state prosecute Sally Mann, a mother who creates non-virtual art photographs of her nude children in intentionally provocative poses—but lovingly and without physical or emotional abuse? For a discussion of Mann's photography, see Richard B. Woodward, *The Disturbing Photography of Sally Mann*, N.Y. TIMES, Sept. 27, 1992, at A29.