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

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I. INTRODUCTION

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

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

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

2. 458 U.S. 747.

3. *Chaplinsky*, 315 U.S. at 572.

4. *See Ferber*, 458 U.S. at 747.

5. Mr. Ferber was convicted under New York Penal Law § 263.15, which reads: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." *Id.* at 751-52.

6. *Id.* The jury acquitted Mr. Ferber of two additional counts of promoting an obscene sexual performance by a child. *Id.* at 752.

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

Then, in 2002, the Court decided the landmark case *Ashcroft v. Free Speech Coalition* that scaled back Congress' and state legislatures' ability to combat the nefariously multitudinous effects of child pornography by limiting the First Amendment's child pornography exception to only allow regulation of actual child pornography, finding that virtual child pornography is constitutionally protected speech.[8] Thus, *Free Speech Coalition* left a gap of protected speech that may not be prohibited because the pornography was not produced using actual children. This decision was a heavy blow to interest groups seeking to protect children's rights and answered the Court's anticipation of limits on the child pornography category of unprotected speech.[9]

This paper explores the Supreme Court's reasoning for limiting the child pornography exception to actual child pornography, with a particular emphasis on the Justices' evaluation of when the legislative record and scientific evidence is insufficient. Part II discusses the Court's reasoning in *Free Speech Coalition*. Part III introduces the Supreme Court's use of legislative records, and Part IV illustrates how the Supreme Court treated congressional findings in *Free Speech Coalition* and *Ferber*.

7. The *Ferber* holding was significant because it solidified the Court's departure from requiring pornography depicting children to meet the requirements of the *Miller* obscenity test:

> The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.

Id. at 764-65.

8. 535 U.S. 234 (2002). Prior to *Free Speech Coalition*, however, the Court expanded the government's ability to prosecute pornography by upholding a law criminalizing mere possession of child pornography. *See* Osborne v. Ohio, 495 U.S. 103 (1990).

9. Following its five justifications for creating the child pornography category, the *Ferber* Court qualified its decision when it stated, "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." 458 U.S. at 764.

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

II. REGULATION OF CHILD PORNOGRAPHY AND THE ASHCROFT DECISION

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

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

11. *Id.* at 599-601.

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

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

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

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

The most recent and publicly visible piece of legislation to further the interests of protecting children from child pornography was the Child Pornography Prevention Act of 1996 ("CPPA"), which prohibited possession and distribution of visual depictions of children engaged in sexually explicit conduct, regardless of whether an actual child was used in the production of the depiction.[16] Congress' purpose was clear:

> This legislation is needed due to technological advances in the recording, creation, alteration, production, reproduction, distribution and transmission of visual images and depictions, particularly through the use of computers. Such technology has made possible the production of visual depictions that appear to be of minors engaging in sexually explicit conduct which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct. Child pornography, both photographic and computer-generated depictions of minors engaging in sexually explicit conduct, poses a serious threat to the physical and mental health, safety and well-being of our children.[17]

U.S.C., 28 U.S.C., and 42 U.S.C.). One of the recommendations by the Attorney General's Commission on Pornography was for Congress to "enact a statute requiring the producers, retailers or distributors of sexually explicit visual depictions to maintain records containing consent forms and proof of performers' age." U.S. DEP'T OF JUSTICE, *supra* note 10, at 618-23. This recommendation is now codified as 18 U.S.C.S. § 2257(a) (LexisNexis 2000 & Supp. 2007).

16. 18 U.S.C.S. § 2256 (LexisNexis Supp. 2007):

> For purposes of this chapter, the term—
>
> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

17. S. REP. NO. 104-358 at 7 (1995). *See also* 142 Cong. Rec. S. 11838, 11840 (1996):

> [M]odern computer imaging and morphing technology has made possible the production of pornographic depictions of minors which are virtually indistinguishable to the unsuspecting viewer from unretouched photographs of actual children engaging in sexually explicit conduct.
>
> Such computer generated child pornography has many of the same harmful effects, and thus poses the same threat to the physical and mental health, safety and well-being of our children and of our society as pornographic material produced us-

Technology had advanced, and continues to advance, allowing computer users to graphically alter and digitally create sexually explicit images of children. Despite Congress's good intentions through this bipartisan yet nearly unanimous legislation,[18] the United States Supreme Court struck down several of the CPPA's provisions that attempted to regulate virtual child pornography as violations of the First Amendment.

The Free Speech Coalition and fellow respondents[19] filed an action in the District Court for the Northern District of California challenging the constitutionality of the CPPA. Careful to point out that no minors were used in the production of their material, respondents were concerned that some of the works they produced might be encompassed by Congress's expanded definition of child pornography. The District Court granted summary judgment to the Government, disagreeing with respondents that the CPPA's virtual child pornography provisions were overbroad and vague. The Ninth Circuit reversed, finding the CPPA to be invalid on its face because it banned materials that were neither obscene nor fell within the *Ferber* exception for pornographic materials produced by exploitation of actual children.[20] The Supreme Court agreed.

In striking down sections of the CPPA that prohibited pornography regardless of whether an actual child was used in the production, the Court drew several divisive lines around *Ferber*, limiting its hold-

> ing actual children. However, because current Federal law pertaining to the sexual exploitation of children and the production, distribution, possession, sale, or transportation of child pornography is limited to material produced using actual children engaging in sexually explicit conduct, computer generated child pornography is presently outside the scope of Federal law…
>
> [The Child Pornography Prevention Act of 1996] will close this computer generated loophole and give our law enforcement authorities the tools they need to protect our children by stemming the increasing flow of high-technology child pornography.

See also A Bill to Amend Certain Provisions of Law Relating to Child Pornography: *Hearing on S. 1237 Before the Subcommittee on the Judiciary*, 104th Cong. 1- 6 (1996) (statements of Sen. Orrin G. Hatch, Strom Thurmond, Joseph R. Biden, and Charles E. Grassley).

18. *See* Jeremy G. Ladle, Comment, *Protecting Pedophiles and Valuing Virtual Child Pornography: A Critique of* Ashcroft v. Free Speech Coalition, 40 IDAHO L. REV. 457, 458 (2004).

19. The Free Speech Coalition is the trade organization of the adult entertainment industry, with information available at www.freespeechcoalition.com. Bold Type, Inc. published a book advocating the nudist lifestyle. Jim Gingerich is a painter of nudes and Ron Raffaeilli is a photographer specializing in erotic images. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 243 (2002).

20. *Id.* at 243-44.

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

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

III. LEGISLATIVE FINDINGS AND SCIENTIFIC EVIDENCE IN SUPREME COURT CASES

Judicial review hearkens back to Justice Marshall's 1803 opinion

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

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

23. *See id.* at 244.

24. "*Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value. . . ." *Id.* at 251.

25. *Id.* at 250.

26. *See id.* at 250, 253-54.

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

Generally, Congress may enact legislation with a "broad brush"[30] according to the powers it derives from, and limited to the restrictions placed upon government regulation by, the Constitution. In reviewing a questionable piece of legislation, the Court may use the legislative record in a variety of ways: (1) the Court may use congressional findings to clarify what otherwise would be the plain language of the statute;[31] (2) evidence from testimony at hearings, compilations of studies and letters, etc., in the legislative record may be considered vital evidence and in fact a requirement in order for the Court to uphold a statute;[32] (3) congressional findings may also evidence Congress's careful crafting of the statute; however, even when Congress's care is clear, the Court must sometimes invalidate the statute.[33] Although Congress is typically not required to make particularized findings to support its legislation, it must when there is a special constitutional

27. 5 U.S. (1 Cranch) 137 (1803).

28. *See* JEREMY COHEN, CONGRESS SHALL MAKE NO LAW: OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION MAKING 46-47 (1989).

29. For purposes of this paper, "legislative record" and "congressional findings" will be used interchangeably.

30. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 134 (1970).

31. In *General Dynamics Land Sys., Inc. v. Cline*, the Court utilized the congressional findings as evidence that when people speak of "age discrimination," they are referring to discrimination against the older. 540 U.S. 581, 591 (2004) ("Congress used the phrase 'discrimina[tion] . . . because of [an] individual's age' in the same way that ordinary people in common usage might speak of age discrimination any day of the week.")

32. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 n.11 (2003) (noting that the majority's holding rests on the congressional findings at the time the FMLA was enacted).

33. *See* Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (noting that Congress's commendable consideration to the Court's earlier decisions does not diminish the government's burden of proof in a preliminary injunction action).

right, such as the First Amendment right to freedom of expression at stake.[34]

The Court's level of deference to congressional enactments correlates with the particular power Congress exercised when it passed the legislation.[35] Also, the Court reacts differently to legislative findings depending on the level of scrutiny the Justices are applying to the issue before them.[36] The significance of the rights protected by the First Amendment not only requires Congress to make particularized findings in support of its action, but also obligates the Court to exercise its own independent assessment of empirical evidence.[37] Signifi-

34. Gonzales v. Raich, 545 U.S. 1, 21 (2005) ("[W]e have never required Congress to make particularized findings in order to legislate, absent a special concern as the protection of free speech.").

35. Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47, 58 (2006) (stating that "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies"); McConnell v. FCC 540 U.S. 93, 137 (2003) ("The less rigorous standard of review we have applied to contribution limits shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.") (following the precedent of Buckley v. Valeo, 424 U.S. 1 (1976)); Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180, 196 (1997) (noting deference to "congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change"); Washington v. Harper, 494 U.S. 210, 223-224 (1990) (the Court grants considerable deference to prison authorities regarding the difficult decisions of prison administration) (citing Turner v. Safley, 482 U.S. 78, 84-84 (1987)); Dowling v. United States, 473 U.S. 207 (1985) (demonstrating that the Court exercises restraint when appraising the scope of federal criminal statutes); Chevron U.S.A., Inc. v. Nat'l Res. Defense Council, Inc., 467 U.S. 837, 843-44 (1984) (finding that where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," in which case the Court gives deference to both the agency and Congress); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978) (deference to Congress is akin to deference owed to administrative agencies); Fiallo v. Bell, 430 U.S. 787, 792-93 (1977) (supporting the notion that the Court gives wide deference to Congress's exercise of immigration and naturalization power).

36. Even when the Court is applying an intermediate level of scrutiny, such as in the First Amendment context when it determines the constitutionality of a content-neutral law, the Court will still examine the legislative record. *See* Gonzales v. Carhart, 127 S.Ct. 1610 (2007) (upholding the Partial-Birth Abortion Ban Act based partly on the Court affording "state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty," even in the face of inconsistencies of empirical evidence in the legislative record); Century Commc'n Corp. v. FCC, 835 F.2d 292, 304 (1987) ("[W]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures."); Gonzales v. Carhart, 127 S.Ct. 1610,(2007) (upholding the Partial-Birth Abortion Ban Act based partly on the Court affording "state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty," even in the face of inconsistencies of empirical evidence in the legislative record).

37. "That Congress' predictive judgments are entitled to substantial deference does not

cantly, the Court's review of congressional findings is not a *de novo* review of the findings; rather, the Court is deferential, limiting its review only "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[38] But, the Court has said, "It is not for us to resolve empirical uncertainties underlying state legislation, *save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself*."[39] Because First Amendment protections are so vital to American democracy, it follows that the Court will exercise particular scrutiny in assessing congressional findings: "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[40] However, a seemingly conflicting jurisprudence has emerged when the Court has examined legislation targeting the multi-faceted problems of obscenity, pornography, and child pornography.

In *Paris Adult Theatre I v. Slaton*,[41] the Court upheld a Georgia law prohibiting public exhibition of obscene materials, affording particular deference to the legislature's assessment of methods to uphold "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[42] The Court expressly rejected the need for conclusive scientific data: "We do not demand of legislatures scientifically certain criteria of legislation. Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist."[43] Additionally, the Court recognized the probability that legislatures and judges are required to "act on various unprovable assumptions."[44] Thus, the totality of the opinion can be understood to support the proposition that

mean, however, that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 666 (1994) (quoting Sable Comm'n of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989)).

38. *Id.*

39. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60 (1973) (emphasis added).

40. Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 391 (2000).

41. 413 U.S. 49 (1973).

42. *Id.* at 58.

43. *Id.* at 60-61 (internal citations omitted).

44. *Id.* at 61.

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

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

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

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

A. Legislative Findings in the Ferber Analysis

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

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

46. *Id.*

nized states' compelling interests in "safeguarding the physical and psychological well-being of a minor."[47] Second, the Court recognized distribution of depictions of juveniles engaging in sexual activities to be "intrinsically related to the sexual abuse of children" as permanent records of actual abuse and as a network perpetuating the sexual abuse.[48] Third, distribution of child pornography creates the "economic motive" for continued illegal activity—child exploitation and sexual abuse.[49] Fourth, the Court acknowledged the value of live performances and photographic reproductions of children engaging in sexual activities[50] as *de minimis*.[51] Finally, the Court unequivocally carved out child pornography as an exception to First Amendment protection:

> When a definable class of material, such as that covered by [the New York law], bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.[52]

Throughout its analysis, the *Ferber* Court declined to "second-guess [the] legislative judgment"[53] and granted considerable deference to the congressional findings describing the calamity of child sexual abuse and exploitation. When discussing the interest in safeguarding the physical and psychological well-being of a minor, the Court particularly deferred to legislative findings:

> The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern:
>
> > There has been a proliferation of exploitation of children as subjects in sexual performances. 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. The public policy of the state demands the protection of children from exploitation through sexual per-

47. *Id.* at 756-57 (internal citations omitted).
48. *Id.* at 759-60.
49. *Id.* at 761-62.
50. The Court specifically referred to the activities as "lewd sexual conduct." *Id.* at 762.
51. *Id.*
52. *Id.* at 764.
53. *See Id.* at 757-58.

formances.[54]

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

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

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

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

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

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

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

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

new photographic and computer imagining technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;

computers and computer imaging technology can be used to—

alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;

produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and

alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come;

the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children;

the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;

> (A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and
> (B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials;
>
> (A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them;
> (B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental, and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children;
>
> prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and

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

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

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

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

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

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

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

Id. at 244 (internal citations omitted).

60. *Id.* at 253.

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

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

ring to the regulation of obscenity, the Commission stated, "Although we are satisfied that there is a category of material so overwhelmingly preoccupied with sexual explicitness and so overwhelmingly devoid of anything else, that its regulation does no violence to the principles underlying the First Amendment, we recognize that this cannot be the end of the First Amendment analysis."[63] The Commission also recognized the potential, although not necessarily unjustifiable, "chilling effect" that creating exceptions to the First Amendment produces.[64] Although the Attorney General's final report did not discuss the implications of virtual child pornography, the report did discuss the evils of child pornography to children and society as a whole: "None of us doubt that child pornography is extraordinarily harmful both to the children involved and to society, that dealing with child pornography in all of its forms ought to be treated as a governmental priority of the greatest urgency. . . ."[65]

Interestingly, the Attorney General's Commission observed that adult-only theatres were becoming less and less prevalent with the advent of video cassettes.[66] The advance in technology over the past four decades alone has caused a dramatic shift in the individual's consumption of pornography, and more importantly, in the abilities of the pornographic industry's producers and distributors. Society must also be concerned with the ways in which technology gurus can manipulate pornographic images. This substantial change in our technological landscape should likewise be reflected in the legal landscape, especially regarding exceptions to the First Amendment, which is exactly what the government argued and the Supreme Court rejected in *Ashcroft.*

mission under the direction of then-Attorney General William French Smith. Edwin Meese took office shortly thereafter and the commission proceeded under his direction. The President's mandate was to "'study . . . the dimensions of the problem of pornography,' to 'review . . . the available empirical evidence on the relationship between exposure to pornographic materials and antisocial behavior,' and to explore 'possible roles and initiatives that the Department of Justice and agencies of local, state, and federal government could pursue in controlling, consistent with constitutional guarantees, the production and distribution of pornography.'" U.S. DEP'T OF JUSTICE, *supra* note 10, at 215-16.

63. *Id.* at 269.

64. *Id.* at 269-75. The Commission was especially interested in the "chilling effect" that obscenity regulation had on television producers, motion picture studies, public library trustees, boards of education, convenience stores, and bookstores. *See id.* at 270-74.

65. *Id.* at 417-18.

66. *Id.* at 287.

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

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

A. Correlation v. Causation—When Enough is Enough

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

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

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

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

68. *Id.* at 250.

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

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

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

72. *Id.* at 253-54.

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

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

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

Sometimes the unique nature of a questionable harm increases the likelihood of causality. Because of the rather unique nature of the child pornography industry, the Attorney General's Commission determined that "child pornography must be considered as substantially inseparable from the problem of sexual abuse of children."[76]

Even back in 1986 when the Attorney General's Commission on

73. U.S. DEP'T OF JUSTICE, *supra* note 10, at 305 (1986).

74. *Id.* at 311.

75. *Id.* at 317.

76. *Id.* at 410.

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

The pool of scientific research and evidence is continually growing to support the legislative findings that pedophiles use pornography—virtual and actual—to "whet their appetites" to engage in further sexual activity with children. Victor B. Cline, a clinical psychologist who specializes in treating individuals with sexual dysfunctions, observes that "pornography has been a major or minor contributor or facilitator in the acquisition of their deviation or sexual addiction."[80] Dr. Cline described the addictive effect pornography has on his patients: first the pornography consumers got hooked and then relied on continued material as a "sexual stimulant" or "aphrodisiac" culminating in a sexual release.[81] The next step was escalation of pornographic consumption from soft porn to harder, more explicit, and eventually deviant pornography.[82] After escalation is the desensitization phase; as pornography users experience more and more pornography, what they previously viewed as taboo or repulsive became more and more commonplace.[83] Other psychologists and researchers have performed additional studies that indicate that sexually deviant behaviors, including child molestation, are learned behaviors.[84]

77. *See id.* at 406-09. The Commission referred to the "cottage industry" as a noncommercial, informal distribution network where child abusers would take pictures of the children they molested, even recording the actual abuse, and save the recording as a "memento." The recordings get passed around between child abusers, and in limited circumstances were available as "under-the-counter" materials. *See id.* at 406-10.

78. S. REP. NO. 104-358, at 15-20 (1996).

79. *Id.*

80. Victor B. Cline, Pornography's Effects on Adult and Child, http://mentalhealthlibrary.info/library/porn/pornlds/pornldsauthor/links/victorcline/porneffect.htm (last visited Oct. 5, 2007).

porn/pornlds/pornldsauthor/links/victorcline/porneffect.htm (last visited April 12, 2007). The deviation and sexual addition Dr. Cline referred to includes unwanted compulsive sexual acting-out, child molestation, exhibitionism, voyeurism, sadomasochism, fetishism, and rape. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See, e.g.*, PATRICK CARNES, DON'T CALL IT LOVE: RECOVERY FROM SEXUAL

Additional studies indicate that pornographic images become implanted in the brain, and are thus available as a memory for subsequent recollection and sexual stimulation.[85] The Lighted Candle Society, a public interest group located in Centreville, Utah and Washington, D.C. is engaged in efforts to fund research using a functional magnetic resource imaging machine (fMRI) to provide scientific documentation via brain mapping that pornographic exposure creates similar addictions as alcohol or drug use.[86] These researchers are hopeful that the evidence collected from these studies will conclusively prove that pornography is a highly addictive material, causing chemical changes to the brain that affect a person's functioning abilities and create a dependence upon continued viewing.[87]

ADDICTIONS (1991); D.R. Evans, *Masturbatory Fantasy and Sexual Deviation*, 6 BEHAVIORAL RESEARCH & THERAPY 17 (1968); R.J. McGuire, et. al., "Sexual Deviation as Conditioned Behavior," 2 BEHAVIOR RESEARCH & THERAPY 185 (1965); S. Rachman, "Experimentally Induced Sexual Fetishism," 18 THE PSYCHOLOGICAL RECORD 25 (1968).

85. *See* Cline, *supra* note 80.

86. Elaine Jarvik, *Group Fighting Porn—Via MRIs*, DESERET MORNING NEWS, May 5, 2004, *available at* http://deseretnews.com/dn/view/0,1249,595060957,00.html. *See also* Mark Pilkington, *Sex on the Brain*, THE GUARDIAN, July 14, 2005, *available at* http://www.guardian.co.uk/life/farout/story/0,13028,1527638,00.html; Jennifer Toomer-Cook, *Group Trying to Snuff Out Porn: S.L. Therapist Says Pornography Highly Addictive*, DESERET MORNING NEWS, May 13, 2004, *available at* http://deseretnews.com/dn/view/0,1249,595062868,00.html.

87. Dr. Judith Reisman asserts that the necessary research is already in place. *See* Testimony of Judith Reisman to the Senate Committee on Commerce, Science, and Transportation, *available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1343&Witness_ID=3910*. However, the validity of her findings are frequently questioned. *See e.g.*, Free Speech Coalition, http://www.freespeechcoalition.com/dan_linz.htm (accusing Dr. Reisman's research of being scientifically unfounded) (last visited Oct. 5, 2007).

Formal criteria of pornography addiction similar to the DSM criteria for substance abuse addictions have been proposed; they include:

> Recurrent failure to resist impulses to engage in a specified behavior
>
> Increasing sense of tension immediately prior to initiating the behavior
>
> Pleasure or relief at the time of engaging in the behavior
>
> Some symptoms of the disturbance have persisted for at least one month, or have occurred repeatedly over a longer period of time

See Richard Irons, M.D. and Jennifer P. Schneider, M.D., Ph.D., *Differential Diagnosis of Addictive Sexual Disorders Using the DSM-IV*, SEXUAL ADDICTION & COMPULSIVITY Vol. 3, 7-21 (1996). It is important to note, however, that opponents of the hypothesis that pornography can be addictive distinguish these criteria as applicable to nearly any excessive behavior. Indeed, the great criticism of pornography-as-an-addictive-material-research is that the evidence is not scientifically credible because it is vague and can be applied broadly to condemn other non-addictive behaviors. *See* Free Speech Coalition, http://www.freespeechcoalition.com/dan_linz.htm.

Although the scientific data cannot be absolutely conclusive,[88] the currently available scientific data at least supports a correlation between the use of child pornography and the likelihood of the user sexually exploiting children, if not indicating a stronger causal link than the *Ashcroft* Court credited. This causal link is similar to the connection between thoughts and actions required to qualify under the incitement exception to the Free Speech Clause.[89] As other critics of the *Ashcroft* decision observed, the Court mentioned *Brandenburg* dismissively without fully addressing the merits of whether the CPPA's provisions prohibited material that would qualify as incitement.[90] Other critics credit the Court's conclusion with the method that they approached constitutional scrutiny of the CPPA—i.e., by determining virtual child pornography did not fit into a current exception rather than conducting a balancing test under the precedent of *Osborne* and *Ferber*.[91]

Research has also uncovered a clear cyclical effect that child pornography has on children: the child is shown pornography for the purposes of "sex education" and as component of inducing the child to participate in explicit sex, the child pornography desensitizes the potential child victim, which lowers the child's inhibitions and sometimes progresses to sexual activity, at which time photos and movies are taken of the activity.[92] These pictures and movies are then available to the "producer" for future use, as well as for distribution to other viewers of child pornography. The Supreme Court overlooked this key, and practically indisputable, evidentiary link when it did not

88. Note the ethical problems of control group experiments, which are clearly scientifically favored, studying the causality of viewing child pornography and consequential child sexual abuse. U.S. DEP'T OF JUSTICE, *supra* note 10, at 319 (stating that "enormous ethical problems surround control group experiments involving actual anti-social conduct). In other words, entities such as the Congress enacting the CPPA had to rely on anecdotal evidence. *See A Bill to Amend Certain Provisions of Law Relating to Child Pornography*, *supra* note 17.

89. Freedom of expression is not protected from government action when the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Brandenburg v. Ohio, 395 U.S. 444 (1969).

90. *See, e.g.*, Justin Leach, *Reacting to* Ashcroft v. Free Speech Coalition *and the Burial of the CPPA: An Argument to Regulate Digital Child Pornography Because it Incites Imminent Lawless Action*, 5 VAND. J. ENT. L. & PRAC. 114 (2002) (arguing that the government 's argument was deficient because there is a plausible argument under *Brandenburg* that virtual child pornography imminently incites users to lawless action because it leads to the viewing of actual child pornography, which is criminal).

91. Ladle, *supra* note 18, at 469 (2004).

92. U.S. DEP'T OF JUSTICE, *supra* note 10, at 617 (citing S. O'BRIEN, CHILD PORNOGRAPHY 89 (1983)).

address *Brandenburg* incitement implications of virtual child pornography.[93]

The Court's decision in *Ashcroft* is most similar to the recommendations of the President's Commission on Obscenity and Pornography. Because Congress cited traffic in obscenity and pornography to be a matter of national concern,[94] the President established the Congressional Commission on Obscenity and Pornography in 1968 to study and report on "(a) constitutional and definitional problems relating to obscenity controls, (b) traffic in and distribution of obscene and pornographic materials, and (c) effects of such materials, particularly on youth, and their relationship to crime and other antisocial conduct."[95] Focusing on empirical description, the Commission examined a variety of areas regarding obscenity and pornography, especially including traffic, distribution, and market analyses of erotic and pornographic material, clinical research on the correlation between viewing erotic and pornographic materials, and sex offenses.

The Commission reported that "[p]ictures and words that depict various aspects of human sexuality serve to produce sexual arousal in a large proportion of the adult population."[96] While Cairns, Paul, and Wishner acknowledged that correlating pornography with criminal sexual behavior had "thus far yielded negative results," "[i]t would be premature . . . to conclude from these studies that obscene or pornographic stimuli play no role whatsoever in the elicitation and maintenance of antisocial sexual or aggressive acts."[97] The evidence from studies of human sexual arousal supported several tentative conclusions that pictorial or literary descriptions of nudes or sexual activity[98] psychologically and physiologically affected both male and female

93. *See* Leach, *supra* note 90, at 122, 124 (criticizing the Government for not providing ample argument for and the Court's cursory treatment of the *Brandenburg* precedent and how there is substantial evidence to support digital child pornography's incitement of "downloading actual child pornography, distributing and sharing files of actual child pornography, and most significantly, seducing and molesting actual children," all of which are clearly criminal).

94. Pub. L. No. 90-100. *See also* COMM'N ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY 1 (1970).

95. COMM'N ON OBSCENITY AND PORNOGRAPHY, 1 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, v (1971).

96. *Id.* at 5 (*Psychological Assumptions in Sex Censorship* study by Robert B. Cairns, J.C.N. Paul, and J. Wishner of Indiana University).

97. COMM'N ON OBSCENITY AND PORNOGRAPHY, *supra* note 95, at 9.

98. For a 1971 definition and description of hard-core pornographic materials, see 3 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, *supra* note 95, at 179-81.

adult research subjects.[99]

The Commission attempted to present an unbiased report. Some of the articles they assembled specifically discussed diverging viewpoints, and, of most relevance to the purposes of this Article, performed an examination of the discussion regarding the views in the 1970s regarding the correlation of pornographic stimuli to the commission of aggressive sexual offenses. C. Eugene Walker of Baylor University described the attitudes on this subject as forming two distinct viewpoints. On the one hand, some researchers indicate that "[I]t is a fact that most violent sex offenders are collectors of pornography. Law enforcement officials cite many cases in which sex criminals tell them that they were incited to the crime by reading sexually stimulating material."[100] On the other hand, a significant number of clinical psychology, psychiatry, and social work professionals reported that they consider erotic and pornographic material "at worst, harmless."[101] Walker's research actually indicated that the control groups were exposed and responded more positively to pornographic material than the aggressive sex offenders.[102] Other research supported Walker's conclusion that the "relationship between early exposure to pornography and the tendency to commit a sex crime" appeared to be negative.[103] The Commission distilled the research in this area to report that "There is no consensus among Americans regarding what they consider to be the effects of viewing or reading explicit sexual materials. A diverse and perhaps inconsistent set of beliefs concerning the effects of sexual materials is held by large and necessarily overlapping portions of American men and women."[104] Essentially, even in 1970, law enforcement and prosecutors felt that exposure to sexual materials correlated with sexual offenses, whereas the empirical re-

99. 1 TECHNICAL REPORT OF THE COMM'N OBSCENITY AND PORNOGRAPHY, *supra* note 95, at 52-54. *See* Marvin Zuckerman, *Physiological Measures of Sexual Arousal in the Human*, *in* 1 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, *supra* note 95, at 61 (discussion of the scientific methods available in 1971 to study human sexual arousal).

100. 7 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, *supra* note 95, at 91 (citing J.F. Fink, *The Enemy of Youth*, THE FAMILY DIGEST (1966)).

101. *Id.*

102. 7 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, *supra* note 95, at 130.

103. Robert F. Cook and Robert H. Fosen. *Pornography and the Sex Offender*, in 7 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, *supra* note 95, at 160.

104. THE REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, *supra* note 94, at 24.

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

In addition to presenting empirical findings, the Commission made a number of recommendations: launching a massive sex education program, continued discussion on issues related to obscenity and pornography, continued research, and organization of local community interest groups.[106] Due in large part to lack of empirical evidence supporting a correlative link between erotic or pornographic material and sexual offenses, the Commission recommended that the government should repeal old laws and refrain from enacting new laws that did or would prohibit consensual distribution of erotic and pornographic materials to consenting adults.[107] Foundational to the Commission's recommendation is the feeling that "it is exceedingly unwise for government to attempt to legislate individual moral values and standards independent of behavior, especially by restrictions upon consensual communication."[108] The Commission, however, distinguished consensual adult exposure from juvenile access to erotic and pornographic material where there is no parental consent, agreeing that the government may prohibit public display and unsolicited mailings of erotic and pornographic material.[109] "We therefore repeat our recommendation for the repeal of all existing statutes concerned with obscenity and pornography."[110]

It is important to note that the findings of the Commission on Obscenity and Pornography are not foolproof, nor are they conclu-

105. *See also id.*

106. *Id.* at 47-49.

107. *Id.* at 52-54.

108. *Id*. at 55. The Commission goes on to say,

> This is certainly true in the absence of a clear public mandate to do so, and our studies have revealed no such mandate in the area of obscenity. The Commission recognizes and believes that the existence of sound moral standards is of vital importance to individuals and to society. To be effective and meaningful, however, these standards must be based upon deep personal commitment flowing from values instilled in the home, in educational and religious training, and through individual resolutions of personal confrontations with human experience. Governmental regulation of moral choice can deprive the individual of responsibility for personal decision which is essential to the formation of genuine moral standards. Such regulation would also tend to establish an official moral orthodoxy, contrary to our most fundamental constitutional traditions.

Id.

109. *Id.* at 56-62.

110. *Id.* at 377.

sive. Indeed, the past four decades have produced a significant amount of data both buttressing and negating the Commission's findings.[111] Furthermore, members of the Commission expressed dissenting opinions as to the validity of the Commission's recommendation,[112] and the Attorney General's Commission on Pornography in 1986 made several significant and opposite findings,[113] including that there is "a direct relationship . . . between pornographic literature and the sexual molestation of young children."[114] Law enforcement officials report that child sexual abuse investigations almost exclusively uncover a perpetrator with extensive child pornography collections.[115] The statistics are alarming: 87% of convicted molesters of girls and 77% of molesters of boys admit to use of pornography, most often in the commission of their crimes.[116]

111. Consider Lenore Kupperstein's article, *The Role of Pornography in the Etiology of Juvenile Delinquency*, 1 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, *supra* note 95, at 103-111, and undocumented reports from juvenile court judges, such as Judge Kay A. Lindsay of Utah's Fourth Circuit Juvenile Court, indicating that the vast majority of sex offenders in the juvenile system commit sex offenses as an acting out or experimentation of the pornography they view.

112. Dr. Winfrey C. Link expressed dissatisfaction with the fractured nature of the Commission, which in his opinion, thwarted the recognition and validity of the majority report and "will be to the detriment of our nation" if the Commission's recommendation is followed. 9 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY, *supra* note 95, at 379. See also Morton A. Hill and Winfrey C. Link's joint statements, in which Charles H. Keating, Jr. concurred. *Id.* at 383.

113. *See e.g.*, U.S. DEP'T OF JUSTICE, *supra* note 10, at 291-92

> We recognize that the statement that there is a connection between the pornography industry and organized crime is contrary to the conclusion reached by the President's Commission on Obscenity and Pornography in 1970. . . . Caution about jumping too easily to conclusions about organized crime involvement in the pornography industry was further included by the evidence offered to us by Director William H. Webster of the Federal Bureau of Investigation. Director Webster surveyed the FBI field offices throughout the country, and reported to us that "about three quarters of those [fifty-nine] offices indicated that they have no verifiable information that organized crime was involved either directly or through extortion in the manufacture of pornography. Several offices did, however, report some involvement by members and associates of organized crime." We reach our conclusions in the face of a negative conclusion by the 1970 Commission, and in the face of the evidence provided by the FBI, not so much because we disagree, but because we feel that more careful analysis will reveal that the discrepancies are less than they may at first appear.

Id. at 292.

114. S. REP. NO. 104-358, at 13 (citing Dr. Shirley O'Brien).

115. *Id.* at 12-13. *See also A Bill to Amend Certain Provisions of Law Relating to Child Pornography: supra* note 17, at 20-25 (1996) (statement of Jeffrey J. Dupilka).

116. *Id.* at 39 (citing Dr. William Marshall, A REPORT OF THE USE OF PORNOGRAPHY BY SEXUAL OFFENDERS (1983)).

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

123. In his dissent, Judge Ferguson remarked,

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

Id.(internal citation and footnote omitted).

124. *Ashcroft*, 535 U.S. at 246 ("While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA. In his dissent from the opinion of the Court of Appeals, Judge Ferguson recognized this to be the law and proposed that virtual child pornography should be regarded as an additional category of unprotected speech. It would be necessary for us to take this step to uphold the statute.") (citation omitted).

125. Chief Justice Rehnquist was joined by Justice Scalia in his dissenting opinion. *Id*. at 267.

126. Justice O'Connor's opinion concurs in part and dissents in part by distinguishing

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

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

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

"youthful-adult pornography" from "virtual child pornography" in order to sustain the CPPA's ban on "virtual child pornography." Agreeing with the majority, she would strike down the CPPA provision that bans material using "conveys the impression" language and pornographic depictions that "appear to be . . . of minors" "insofar as it is applied to the class of youthful adult pornography." *Id.* at 261. She agrees with the majority that "the causal connection between pornographic images that 'appear' to include minors and actual child abuse is not strong enough to justify withdrawing First Amendment protection for such speech," adding to the Court's reasoning that the "conveys the impression" provision is also not narrowly tailored. *Id.* at 262. Justice Rehnquist disagreed that the Justices would even need distinguish "youthful-adult pornography" from child pornography: "The Court and Justice O'Connor suggest that this very graphic definition reaches the depiction of youthful looking adult actors engaged in suggestive sexual activity, presumably because the definition extends to 'simulated' intercourse. Read as a whole, however, I think the definition reaches only the sort of "hard core of child pornography" that we found without protection in *Ferber*." *Id.* at 269 (internal citations omitted).

127. *Id.* at 261, 270-71.

128. *Id.* Interestingly, despite mostly agreeing on the proper outcome, these dissenting Justices were persuaded differently by the congressional findings as they reached a similar conclusion: O'Connor phrased this reading as interpreting the CPPA's provision banning pornography that "appears to be . . . of a minor" as "[r]eading the statute only to bar images that are virtually indistinguishable from actual children," whereas Chief Justice Rehnquist read the statute as a whole as applying to hard core pornographic depictions of children. *Id.* at 264-65, 269.

129. *Id.* at 267.

130. *Id.* at 263-64.

131. *Id.* at 263.

nography that was indistinguishable from actual child pornography:

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

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

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

132. Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the National Law Center for Children and Families, National Coalition for the Protection of Children & Families, and the Family Research Council, In Support of Petitioners, *Ashcroft*, 535 U.S. 234 (No. 00-795), 2001 WL 417668. (Apr. 23, 2001).

133. As Senator Hatch stated in his September 30, 1996 remarks in support of the Child Pornography and Prevention Act,

> Under this bill, a visual depiction would be classified as child pornography if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. The term identifiable minor would be defined as a person who was a minor at the time the visual depiction was created, adapted, or modified, or whose image as a minor was used in creating, adapting, or modifying the visual depiction, and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, but such term does not require proof of the minor's actual identity.

142 Cong. Rec. S11838, at 11841. *See also* S. REP. NO. 104-358, at 11.

134. *See Ashcroft*, 535 U.S. at 249-50, 262.

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

VI. CONCLUSION

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

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

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

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

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

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

regards youthful-adult pornography).