AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

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

*The Child Pornography Prevention Act of 1996 extended the federal prohibition on child pornography to include sexually explicit images that appear to include minors but that were produced without the use of actual children, whether by using technologically altered images or by using young-looking adults. The Free Speech Coalition, a California trade association representing the adult-entertainment industry, filed suit in federal district court seeking an injunction against the enforcement of the statutory provision. Other plaintiffs joined the case, including a publisher of books advocating nudism, a painter of nudes, and a photographer specializing in erotic images. The district court found for the government, but the Ninth Circuit reversed. In a 6-3 decision, the U.S. Supreme Court affirmed the decision of the Ninth Circuit, holding that the Child Pornography Prevention Act was overly broad and prohibited images that were properly entitled to First Amendment protection.*

JUSTICE KENNEDY delivered the opinion of the Court.

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Congress may pass valid laws to protect children from abuse, and it has. The prospect of crime, however, by itself does not justify laws suppressing protected speech. . . .

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. . . .

The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. . . .

Both themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. In the drama [*Romeo and Juliet*], Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, *Traffic*, which was nominated for Best Picture. The film portrays a teenager, identified as a 16year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her to a filthy room to trade sex for drugs. The year before, *American Beauty* won the Academy Award for Best Picture. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man.

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express 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. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene. . . .

*Ferber* upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. . . . Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came.

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In contrast to the speech in *Ferber,* speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. . . .

. . . . There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable materials to children, and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. . . .

. . . . The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

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To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana* (1973). The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio* (1969). There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. 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.

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*Affirmed*.

JUSTICE THOMAS, concurring.

. . . . [T]echnology 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. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.

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JUSTICE O’CONNOR, with whom CHIEF JUSTICE REHNQUIST and JUSTICE SCALIA join in part, concurring in and dissenting in part.

. . . . The Court concludes, correctly, that the CPPA's ban on youthful adult pornography is overbroad. In my view, however, respondents fail to present sufficient evidence to demonstrate that the ban on virtual child pornography is overbroad. . . .

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Reading the statute only to bar images that are virtually indistinguishable from actual children would not only assure that the ban on virtual child pornography is narrowly tailored, but would also assuage any fears that the "appears to be . . . of a minor" language is vague. . . .

The Court concludes that the CPPA's ban on virtual child pornography is overbroad. The basis for this holding is unclear. Although a content-based regulation may serve a compelling state interest, and be as narrowly tailored as possible while substantially serving that interest, the regulation may unintentionally ensnare speech that has serious literary, artistic, political, or scientific value or that does not threaten the harms sought to be combated by the Government. If so, litigants may challenge the regulation on its face as overbroad, but in doing so they bear the heavy burden of demonstrating that the regulation forbids a substantial amount of valuable or harmless speech. . . . Respondents have not made such a demonstration. Respondents provide no examples of films or other materials that are wholly computer generated and contain images that "appea[r] to be . . . of minors" engaging in indecent conduct, but that have serious value or do not facilitate child abuse. Their overbreadth challenge therefore fails.

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CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins in part, dissenting.

. . . . 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.

I also agree with Justice O'Connor that serious First Amendment concerns would arise were the Government ever to prosecute someone for simple distribution or possession of a film with literary or artistic value, such as *Traffic* or *American Beauty*. . . .

Other than computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct, the CPPA can be limited so as not to reach any material that was not already unprotected before the CPPA. . . .

. . . . So construed, the CPPA bans visual depictions of youthful looking adult actors engaged in *actual* sexual activity; mere *suggestions* of sexual activity, such as youthful looking adult actors squirming under a blanket, are more akin to written descriptions than visual depictions, and thus fall outside the purview of the statute.

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Indeed, we should be loath to construe a statute as banning film portrayals of Shakespearian tragedies, without some indication—from text or legislative history—that such a result was intended. In fact, Congress explicitly instructed that such a reading of the CPPA would be wholly unwarranted. . . .

. . . . In light of this holding in *United States v. X-Citement Video, Inc.* (1994), and consistent with the narrow class of images the CPPA is intended to prohibit, the CPPA can be construed to prohibit only the knowing possession of materials actually containing visual depictions of real minors engaged in sexually explicit conduct, or computer-generated images virtually indistinguishable from real minors engaged in sexually explicit conduct. The mere possession of materials containing only suggestive depictions of youthful looking adult actors need not be so included.

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