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PICTURE PERFECT: THE FIRST AMENDMENT TRUMPS CONGRESS IN *ASHCROFT V. FREE SPEECH COALITION*

Paul Finkelman*

I began my research for this article with a trip to New York City. Notorious for its open display of sexually oriented literature and movies,¹ I was not surprised by what I saw. In one establishment, I encountered stunning pictures of naked children, usually boys. Many were pre-pubescent, some were infants, and others no older than five or six. Here I also encountered a picture of a naked boy on the verge of puberty or just beyond. Sometimes the children depicted were discreetly posed, so that their most private parts were hidden. But often, I was confronted with full frontal nudity. And almost as often, I saw the backsides of these naked children. Perhaps a majority of the pictures of naked boys also showed a naked or partially naked adult woman. Occasionally there was even full frontal nudity of women in a picture that also contained children. In many of the pictures, the children were touching the women's breasts. In another room, I encountered dozens of pictures of naked and semi-naked women and girls. Many of the girls seemed to be barely pubescent. Others were surely no more than sixteen or seventeen. Many were in the most provocative of poses, sexually alluring and stunningly sensual. In yet another room, I encountered a number of photographs of men and boys displaying full frontal nudity. Some of the teenage boys had their bodies pressed close to each other, with arms around various parts of each others' bodies. Some of these boys looked like they were under eighteen, and some looked to be slightly older. Finally, I encountered the "real thing": pictures of men and young women—some of the women seemed to be teenagers, surely under the age of eighteen—actually engaged in sexual intercourse. The pictures were explicit, showed numerous sexual "positions," and left little to the imagination.

This foray into voyeurism did not take place near 42nd Street, that infamous haven of pornography, or at some adult emporium. No, I was at the Metropolitan Museum of Art, strolling through the galleries of European paintings, visiting the special Paul Gauguin exhibit, a Thomas Eakins exhibit that included his famous

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1. Even after Rudi Giuliani allegedly "cleaned up" the city in his first years in office.

photographs of men and boys swimming and wrestling in the nude, and finally looking at art from India and Japan.

Had I gone to the Museum of Modern Art, I would doubtlessly have encountered even more pictures involving children, nudity, and sex. A museum collection of the artifacts of popular culture might have brought me face-to-face with the exposed buttocks of a small child whose bathing suit had been pulled off by a dog in the famous Coppertone advertisement. I might have topped-off my cultural tour with a trip to a high-quality bookstore, where I could have bought Shakespeare's *Romeo and Juliet*, Nabokov's *Lolita*, or John Cleland's classic novel, *Memoirs of a Woman of Pleasure*, also known as *Fanny Hill*. Then it would have been off to the video store for movies of *Romeo and Juliet*,²—the story of the most famous thirteen-year-old female fornicator in western culture.³ Or perhaps I could rent *Traffic*, nominated for a Best Picture Oscar in 2001;⁴ *American Beauty*, which won the academy award for best picture in 2000;⁵ the award-winning film *Midnight Cowboy*;⁶ the 1970's anti-establishment film, *Joe*;⁷ and perhaps a movie version of *Lolita*. All of these films showed, in differing levels of detail, teenagers having sex, sometimes with other teenagers, sometimes with adults. Finally, back in my hotel room, I would have picked up my handy Bible, conveniently provided by the Gideons, and then read the story of Lot and his incestuous relations with his young daughters.⁸

How much of this art and literature would have been illegal under the Child Pornography Prevention Act of 1996 ("CPPA")?⁹ This is not an easy question to answer. The majority in *Ashcroft v. Free Speech Coalition*¹⁰ clearly believed much

2. In his opinion for the Court, Justice Kennedy notes:

In the drama, 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. *E.g.* *Romeo and Juliet* (B. Luhrmann director, 1996). 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.

Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1400 (2002).

3. *Romeo and Juliet*, Act. I, Scene 2, l. 9 ("She hath not seen the change of fourteen years.").

4. As Justice Kennedy described this movie: "The film portrays a teenager, identified as a sixteen year 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." *Ashcroft*, 122 S. Ct. at 1400 (discussing *Traffic* (USA 2000) (motion picture)).

5. Kennedy described this movie: "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." *Ashcroft*, 122 S. Ct. at 1400 (discussing *American Beauty* (DreamWorks 1999) (motion picture)).

6. In this movie, a teenage boy, who is clearly under the age of eighteen, performs a sexual act on an adult male character played by Jon Voigt, while in a movie theater. *Midnight Cowboy* (MGM 1969) (motion picture).

7. This movie includes a number of scenes in which teenage girls who are runaways have sex with adult men. *Joe* (MGM 1970) (motion picture).

8. *Genesis* 19:31-38.

9. 18 U.S.C. § 2256 (1996).

10. 122 S. Ct. 1389.

of it to be vulnerable to this poorly drafted statute that seemed to pander explicitly to the anxieties of the religious right.

While known as the “virtual pornography case,” the statute at issue in *Ashcroft* proscribed far more than virtual pornography. The CPPA expanded the existing federal prohibitions on child pornography to criminalize “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “appears to be, of a minor engaging in sexually explicit conduct.”¹¹ As described by Justice Kennedy in his majority opinion, the 1996 statute went beyond the existing law to prohibit “sexually explicit images that appear to depict minors but were produced without using any real children”—what the Court calls virtual pornography.¹² The statute also prohibited the use of adult (over the age of eighteen) actors or models who looked like they were under eighteen—what some of the Justices referred to as “youthful-adult pornography.”¹³ Finally, the Act banned works that are “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” that they contain images of “a minor engaging in sexually explicit conduct.”¹⁴

While the traditional Bible or some other pure “text” would probably have not have been illegal under the law, movie versions of some Biblical stories or an illustrated Bible might have been open to prosecution.¹⁵ So, too, might other illustrated books. A book, magazine, or movie might also be deemed in violation of the statute, because it was “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” that it contains pictures of “minor[s] engaging in sexually explicit conduct.”¹⁶ Thus it is possible that a book without any sexually explicit illustrations, and which standing on its own would be neither pornographic nor obscene, could be considered illegal under the law.¹⁷ Indeed, a video film that had a lurid cover, implying that it contained child pornography, but in fact had no pornography in it at all, would be actionable under the law.¹⁸

11. 18 U.S.C. § 2256(8)(B). See *id.* § 2256(2) (definition of “sexually explicit conduct”).

12. *Ashcroft*, 122 S. Ct. 1389.

13. *Id.* at 1407 (O'Connor, J., concurring in the judgment in part, and dissenting in part).

14. 18 U.S.C. § 2256(8)(D).

15. See e.g. Genesis 34:1-5. The story of the rape of Jacob's daughter, Dinah, if illustrated would show this “young girl” having sexual intercourse. *Id.* at 34:3. A drawing of this event would violate the statute. Similarly, while the Bible does not give the ages of Lot's daughters, they are described as “virgins” and unmarried. *Id.* at 19:7-14. Thus, it is quite possible that they were under age eighteen. A picture of Lot and his daughters, or a movie which “simulated” their sexual encounter, could be in violation of the statute.

16. 18 U.S.C. § 2256(8)(D).

17. One can imagine some enterprising person selling the “illustrated Bible” with the promise of pictures of what “your minister did not want you to know about,” including “sex with children,” murder, adultery, etc. Such an advertisement would make the book illegal under the law.

18. Justice Kennedy thus noted, “The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled.” *Ashcroft*, 122 S. Ct. at 1406.

In *Ashcroft*, the Court wisely struck down a number of provisions of this statute.¹⁹ Before turning to a detailed analysis of these provisions, it is useful to consider the state of the law surrounding pornography, obscenity, and child pornography before 1996.

I. THE LAW OF OBSCENITY AND PORNOGRAPHY BEFORE THE CPPA

The distinction between pornography and obscenity has bedeviled the Court for about half a century. When asked by students to explain the difference between pornography and obscenity, I often respond that the former is legal and the latter is illegal. Beyond that, it is often hard to know where a work of art, a photograph, or simply a "dirty" book or movie might fall. As Justice Potter Stewart wisely noted in *Jacobellis v. Ohio*,²⁰ in trying to define obscenity the Court was "faced with the task of trying to define what may be indefinable."²¹ At best, Stewart could say, "I know it when I see it," and declare that the material in *Jacobellis* was "not that."²² Stewart's standard, while imprecise, seems to be where the Court has in fact ended up. As Justice William O. Douglas noted in his dissent in *Miller v. California*,²³ "The Court has worked hard to define obscenity and concededly has failed."²⁴

Under *Miller*, which Justice Douglas rejected, the Court held that a state obscenity law must "be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."²⁵ In Chief Justice Warren Burger's majority opinion in *Miller*, he set out the following guidelines to determine if a work of art or book was obscene:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁶

19. 18 U.S.C. § 2256(8)(B), (8)(D). The provisions are:

(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—

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

See *Ashcroft*, 122 S. Ct. 1389.

20. 378 U.S. 184 (1964).

21. *Id.* at 197 (Stewart, J., concurring).

22. *Id.*

23. 413 U.S. 15 (1973).

24. *Id.* at 37 (Douglas, J., dissenting).

25. *Id.* at 24.

26. *Id.* (citations omitted).

Burger went on to note that the Court rejected “as a constitutional standard the ‘utterly without redeeming social value’”²⁷ test proposed in *Memoirs of Woman of Pleasure v. Massachusetts*.²⁸ Burger further concluded that in deciding what constituted “contemporary community standards” the triers of fact were permitted to “draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national ‘community standard’ would be an exercise in futility.”²⁹

The dissenters in *Miller* argued that the “community standard” test was equally futile, since no artist, journalist, photographer, filmmaker, theater owner, or distributor could possibly know what “community standards” were everywhere in the nation—or even in their state or their community—and that constitutionally this meant that the First Amendment would mean different things, in different parts of the nation.³⁰ Furthermore, as critics of *Miller* have pointed out, “patently offensive” is a standard that is clearly subjective. Moreover, the fact that a work could be obscene if it simply “described” sexual conduct in a “patently offensive” way, sets the stage for the prosecution of literary works, non-fiction, or even movies that do not show any sexual acts at all.

Illustrative of the weakness of the *Miller* standard is the result in *Jenkins v. Georgia*.³¹ Jenkins, a theater owner, had been prosecuted for showing the nationally distributed movie *Carnal Knowledge*.³² The Court reversed the conviction even though the jury in a small Georgia town found that the movie violated its community standards. The movie was “patently offensive” to the jurors, but the Court reversed, on the grounds that the movie did not focus on hard-core sexual content and was therefore not obscene under *Miller*.³³ This outcome exposed the impossibility of applying the *Miller* test in a coherent manner. The Court in the end was unwilling to allow community standards to suppress the speech of mainstream movies, even if those movies offended the sensibilities of particular communities.³⁴ Despite the limitations of *Miller*, it remains the standard for obscenity cases.

Under *Miller*, a film or picture is not obscene if it has some “serious literary, artistic, political, or scientific value,”³⁵ or if it is not “patently offensive.”³⁶ Clearly, works of art, or even “dirty” books or magazines, would not be obscene—or “patently offensive”—merely because they contained pictures of people under the age of eighteen or of actors portraying characters under the age of eighteen.

27. *Id.* at 24-25.

28. 383 U.S. at 419.

29. *Miller*, 413 U.S. at 31.

30. *Id.* at 37-48.

31. 418 U.S. 153 (1974).

32. *Id.* at 154; *Carnal Knowledge* (MGM 1971) (motion picture).

33. *Jenkins*, 418 U.S. at 162.

34. *Id.* at 153.

35. *Miller*, 413 U.S. at 24.

36. *Id.* at 24.

Some works which contain scenes or images of sex and nudity that involve children have clear literary, artistic, political, or scientific merit. The easy, classic examples might be a film of *Romeo and Juliet*, which actually depicted the two children having sex, or a film based on Nabokov's classic book, *Lolita*. Beyond this, it might be hard to argue that the mere presence of a sixteen or seventeen-year-old in a pornographic movie that is not otherwise "patently offensive" would make that film patently offensive. Similarly, underage actors, perhaps a seventeen-year-old who appears to be older, might perform in movies that are in fact pornographic, but not obscene. They might also perform in movies that are not even pornographic, but have particular scenes that are sexually explicit. The age of the actor or model cannot *per se* make the content of an otherwise permissible film or picture impermissible.

Clearly, the age of the actor cannot turn a merely pornographic movie into an obscene (and therefore illegal) film, as the content of a film is not changed by the age of an actor. A movie or picture showing a person who is seventeen years, eleven months, and twenty-nine days old cannot be any more or less offensive than one with an actor or model who is eighteen-years-old. As the Court notes, a film showing someone under the age of eighteen engaged in sex would not necessarily violate the *Miller* standard of being patently offensive. "Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards."³⁷ Indeed, the Court in *Miller* did not hold that "child pornography is by definition without value."³⁸ As Justice Kennedy noted, "On the contrary, the Court [has] recognized [that] some works in this category might have significant value."³⁹

Although movies that deal with sex and people under age eighteen may have significant literary, social, or political value, the Court has found no constitutional problem with the prosecution of the producers and sellers of films or still photographs of underage actors and models. Such prosecutions are not, in the end, based on the content of the film—that is, the prosecutions are not based on a claim that the film is legally obscene—but rather on the age of the actor. State legislatures and Congress have understood this, and thus passed laws prohibiting the sale and distribution of otherwise legal pornographic works if they contain images of children.⁴⁰ The Court upheld such laws in *Ferber v. New York*⁴¹ on the grounds that the state had a legitimate interest in protecting children from sexual exploitation. In order to protect children, it is permissible to prosecute not only the producers of child pornography but also retailers. As Justice Anthony Kennedy noted in his opinion of the Court in *Ashcroft*, the *Ferber* Court "distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production

37. *Ashcroft*, 122 S. Ct. at 1400.

38. *Id.* at 1402.

39. *Id.*

40. See 18 U.S.C. §§ 1460-1466 (1994); *id.* § 2252.

41. 458 U.S. 747 (1982).

process.”⁴² As Kennedy explained, while generally pornography could be banned only if it was deemed obscene, “pornography showing minors can be proscribed whether or not the images are obscene” because of the “State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.”⁴³

Before 1996, the states and the national government had sufficient statutory power—backed by Supreme Court precedent—to prosecute the producers and vendors of pornography produced with children.⁴⁴ Such statutes might be seen as similar to statutory rape laws. Statutory rape laws assume that it is legally impossible for a minor to consent to have sexual relations with an adult, and thus the sex act itself, however objectively consensual, is illegal. Similarly, under the *Ferber* standard, it does not matter if the underage actor voluntarily performed or modeled, or if the film itself is not objectively illegal, because it is obscene: the underage status of the actor or model is what creates the crime.⁴⁵

Thus, under existing federal and state law adopted before the 1996 Act, as well as under existing Supreme Court precedents, law enforcement agencies at the national and local level were empowered to prosecute those who used children for the production of sexual explicit movies, magazines, and other media.⁴⁶

II. THE CHILD PORNOGRAPHY PROTECTION ACT OF 1996

Congress, however, did not seem to think the law provided enough protection for children, and responded with the 1996 Act. The 1996 statute provided criminal penalties for the reproduction, sale, production, distribution, reception, or possession of what the statute defined as child pornography. Penalties for a first offense under the Act ranged up to fifteen years in prison, with a second conviction leading to a sentence of no less than five years, but as high as thirty years.⁴⁷

At first glance, there would seem to be no obvious constitutional problem with this law, since *Ferber* clearly allowed the government great latitude in proscribing otherwise permissible movies or photographs if they involved the sexual exploitation of minors.⁴⁸ Indeed, even as it struck down a number of

42. *Ashcroft*, 122 S. Ct. at 1396.

43. 458 U.S. at 761.

44. See e.g. 18 U.S.C. §§ 2251-2259 (1994).

45. The precise age used in these statutes is clearly arbitrary. As Justice Kennedy noted in his opinion, Congress’ use of eighteen to define what is a “child” for purposes of child pornography “is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations.” *Ashcroft*, 122 S. Ct. at 1400. Indeed, the Court observed that sixteen is the age of consent in the federal maritime and territorial jurisdiction; in addition, the age of consent is sixteen or younger in thirty-nine states and the District of Columbia. *Id.* Forty-eight states allow sixteen-year-olds to marry with parental consent. *Id.* Under provisions of the law not challenged in this case, if two seventeen-year-olds were legally married, they would violate the statute by filming themselves having intercourse, and their own possession of the movie would be criminal.

46. See *Child Pornography Prevention Act*, Pub. L. No. 104-208, § 121(3)(b), 110 Stat. 3009-26, 3009-29 (1997).

47. *Id.*

48. See *Ferber*, 458 U.S. at 750-51, 774.

provisions of this law, the Court reaffirmed, without the slightest murmur of dissent, that Congress has the power to “pass valid laws to protect children from abuse,”⁴⁹ because, as Justice Kennedy noted, “[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.”⁵⁰

The 1996 Act provided some new protections for children and reiterated existing protections. No one challenged the provisions that dealt with the use of images of real children in the production of hard-core pornography.⁵¹ However, the open-ended, overly broad, and indeed somewhat bizarre definitions in this law led to a facial challenge of the constitutionality of some of its provisions. The various plaintiffs, including the Free Speech Coalition, Ron Raffaelli, a well-known “photographer specializing in erotic images,”⁵² a publishing company, and Jim Gingerich, “a painter of nudes,”⁵³ argued that the new law abridged the First Amendment in a variety of ways.⁵⁴ Reciting the severe punishments under the Act, Justice Kennedy in his majority opinion noted that “few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law.”⁵⁵ Thus, this was “a textbook example of why [the Court] permit[s] facial challenges to statutes that burden expression.”⁵⁶ The plaintiffs lost in the district court, but won on appeal in the Ninth Circuit.⁵⁷ The Court affirmed the Ninth Circuit by a vote of six-to-three on all issues, and by a greater margin on some of the issues.⁵⁸

The constitutionally suspect language and definitions of child pornography were found in Subsection 2 of the statute, as they applied to existing definitions of child pornography in Section 2256.⁵⁹ The existing language in Section 2256 defined “sexually explicit conduct” as “actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex.”⁶⁰ Subsection 2 of the 1996 Act subsumed this definition of “sexually explicit conduct” and amended Section 2256 in the following way:

49. *Ashcroft*, 122 S. Ct. at 1399.

50. *Id.*

51. One new protection is a prohibition on the use of a technique known as “computer morphing.” This technique turns an innocent photograph of a real child into a picture that makes the child appear to be naked or engaged in sexual activities. The provision was not challenged in this case, but the Court in dicta implied its support for the provision, noting that such pictures would “implicate the interests of real children and are in that sense closer to the images in *Ferber*.” *Id.* at 1397.

52. *Id.* at 1398.

53. *Id.*

54. See *Ashcroft*, 122 S. Ct. at 1396.

55. *Id.*

56. *Id.* at 1398.

57. *Id.*; see *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999).

58. *Ashcroft*, 122 S. Ct. at 1396.

59. 18 U.S.C. § 2256(2).

60. *Id.* Other definitions of “sexually explicit conduct” in the chapter were “actual or simulated: (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person.”

(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, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.⁶¹

The plaintiffs challenged those provisions of the law that did not involve the use of children in the production of sexually explicit materials. These included portions of Sections 8, 8(B), and 8(D). The plaintiffs challenged the language of Sections 8 and 8(B) which criminalized (1) the use of an adult actor or model who “appears to be” a minor—what Justice O’Connor referred to as “youthful-adult pornography;”⁶² (2) the production of any “computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means” that did not actually involve any live model, or at least any child model—that is, virtual pornography;⁶³ and (3) the language that criminalizes any depiction which “appears to be, of a minor engaging in sexually explicit conduct”—that is, the prohibition on simulated or apparent sexual conduct that in fact is not sexual conduct.⁶⁴ Finally, the plaintiffs challenged Section 8(D) which dealt with the use of “sexually explicit” images that are “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” that the images were of “a minor engaging in sexually explicit conduct.”⁶⁵

Regarding the first, second, and fourth issues, the plaintiffs argued that no actual minors were used. The plaintiffs stated that the third provision might involve minors, but they would not have actually engaged in any sexual acts. Thus, the plaintiffs argued that while these provisions did not protect minors from sexual exploitation, they would undermine First Amendment rights and have a deeply chilling effect on freedom of expression.⁶⁶

61. 110 Stat. at 3009-27 to 3009-28.

62. *Ashcroft*, 122 S. Ct. at 1407.

63. 18 U.S.C. 2256(8).

64. *Id.* § 2256(8).

65. *Id.* § 2256(8)(D).

66. *See Ashcroft*, 122 S. Ct. at 1397-1407.

III. THE GOVERNMENT POSITION: THE REVIVAL OF THE BAD TENDENCY TEST

No one challenged the prohibitions on the use of children in the production of pornography. As noted above, everyone seems to agree that the government has a legitimate, indeed compelling, interest in protecting children from abuse.

The government was forced, however, to defend the provisions that did not deal with the actual abuse of children. The best defense of the statute was set out in the congressional "findings" that prefaced it. These findings stressed two interrelated reasons and purposes for the provisions that did not involve the use of children in the production of pornography. The first focused on the harmful effects of portrayals of children in sexually explicit literature, movies, and pictures, even when no child actors or model were used.⁶⁷ This was essentially a "bad tendency" test for free speech.⁶⁸ The second dealt with the technology of production and the alleged difficulty of prosecuting producers of these materials, if they in fact did not use real children. This position essentially asserted that with the new technology it is impossible to know if a model or actor is over eighteen, under eighteen, or even a real person, and thus the statute must proscribe all images which purport to be of children, or appear to be of children.⁶⁹

A. *The Bad Tendency Arguments*

In its findings, the government admitted that there was nothing inherently harmful in these materials—that is, no children were harmed in the production of the materials. Rather, the government argued that these materials would be used, or could be used, to harm children, that their use might lead people to harm children subsequently, or that the effect of viewing them might be harmful to viewers and society.⁷⁰ Congress had no evidence that any particular film, picture, work of art, or computer generated image might lead to these results, or that any particular individual viewing them might be inclined to act in an illegal manner involving children. Thus Congress asserted:

[T]he 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,

67. See 110 Stat. at 3009-26.

68. For a history of this test, see Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* 10-12 (Duke U. Press 2000).

69. Curiously, the Court did not address the notion that this is not in fact a "new" technological problem at all. A painter with his canvass and oils could have long ago produced the most explicit pictures of children in sexually provocative circumstances without ever using a child model. Even more than with the modern computer artist, it would be impossible to know if the painting was of a real or imaginary child.

70. See *Ashcroft*, 122 S. Ct. at 1402-04; 110 Stat. at 3009-26.

including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children.⁷¹

The bad tendency arguments took three forms. The first involved the potential use of child pornography, whether or not it was made with actual children. The second involved the potential acts of those who purchased and read or viewed child pornography. The third involved the detrimental effect on society that child pornography has, whether literary or pictorial and whether with real children or not.⁷² In the context of the statute's bans on virtual pornography and the use of "youthful adult actors," these bad tendency arguments do not presume that any children are harmed from the actual production of the images—since no children are involved in that kind of production. Rather, the arguments presume that the existence of the images themselves will lead to bad results. These arguments stem from the presumption that Congress in fact articulated that any depiction of children involved in sex created a "clear and present danger to all children."⁷³

The defense of the statute starts with the assumption that the very idea of child pornography is so dangerous that it must be suppressed even if no children are in fact harmed by it. Thus, pornography produced with "youthful adults" or virtual pornography made by computers or artists is so dangerous that it has to be suppressed.

The first prong of the bad tendency argument is tied to the belief, articulated by Congress, that reading "bad" books or seeing "bad" pictures will inevitably lead to "bad" acts. Accordingly, the government argued that pedophiles used photographs and movies of child pornography to seduce young children. The theory of this argument is that when shown pictures of other children engaged in sex, new child victims will be convinced that this is permissible behavior. The Congressional findings that prefaced the act declared:

(3) 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.⁷⁴

Consequently, depictions of children having sex, even if not made with real children, could be used to harm real children.

Second, Congress asserts that when pedophiles view child pornography they are more likely to harm children. The congressional findings here asserted:

(4) 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.⁷⁵

71. 110 Stat. at 3009-26 to 3009-27.

72. See *Ashcroft*, 122 S. Ct. at 1402-04; 110 Stat. at 3009-26.

73. 110 Stat. at 3009-27.

74. 110 Stat. at 3009-26.

75. 110 Stat. at 3009-26.

In essence, Congress argued here that because some people might be stimulated to commit illegal acts by viewing certain movies or pictures, that all people must be prohibited from viewing them. This was in effect an attempt to revive the test outlined in *Regina v. Hicklin*,⁷⁶ commonly referred to as the "*Hicklin* test," which was devised by Lord Cockburn, Chief Justice of the Court of the Queen's Bench in 1868. Cockburn asserted that a writing would be obscene if "the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."⁷⁷ Under the *Hicklin* test, a work was judged by the part that was considered obscene, and then it was tested against the weakest, most susceptible mind in the community. Under this standard, courts declared numerous important books to be obscene,⁷⁸ including: Theodore Dreiser's *An American Tragedy*⁷⁹ and D.H. Lawrence's *Lady Chatterly's Lover*.⁸⁰ Starting with the attempt to ban James Joyce's *Ulysses*,⁸¹ state and federal courts began to abandon the *Hicklin* test in favor of a test that examined the work in its entirety and considered how average members of society might respond to it. This might be seen as an early move toward the current *Miller* test.⁸² Thus, one way of understanding the 1996 Act is that it was designed to revert to a theory of free speech developed in the mid-nineteenth century, and abandoned more than six decades ago.

The third prong of the bad tendency argument was not even marginally rooted in harms that Congress has power to prevent. Congress argued that:

(11)(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and

(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.⁸³

Here Congress asserted that it has the power to suppress ideas, that it does not like, plain and simple. Such a power is totally at odds with the First Amendment, and, if accepted by the Court, would set the stage for congressional regulation of all speech. It is obvious that Congress is free to stimulate and

76. 3 L.R. 360, 371 (Q.B 1868).

77. *Id.*

78. For a history of this sort of suppression, see David M. Rabban, *Free Speech in Its Forgotten Years* 64-75 (Cambridge U. Press 1997); Paul Finkelman, *Cultural Speech and Political Speech in Historical Perspective*, 79 B.U. L. Rev. 717, 721-40 (1999).

79. *Commw. v. Friede*, 171 N.E. 472, 473-74 (1930).

80. *Commw. v. Delacey*, 171 N.E. 455, 456-57 (1930).

81. *U.S. v. One Book Called "Ulysses"*, 5 F. Supp. 182, 183-84 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705, 709 (2d Cir. 1934).

82. 413 U.S. 15.

83. 110 Stat. at 3009-27.

support speech it likes. Just as obvious, however, is that Congress cannot criminalize speech it does not like. As Justice Brandeis pointed out nearly eighty years ago, “Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.”⁸⁴ Essentially, in its finding on Subsection 11 above, Congress rejected this idea, and the notion that the answer to bad speech is more speech and better speech; rather, Congress concluded that the answer to bad speech is suppression.⁸⁵

B. *The Technological Argument*

Congress’s defense of the statute was further supported by a second set of “findings” that focused on the inability of people to determine if the children in pornography were “real” or whether they were either adults or artistic renditions of children. Congress asserted that:

(9) 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.⁸⁶

This argument is plausible *only* if one accepts a series of assumptions about speech and congressional power. This finding assumes that Congress has the power and the duty to suppress speech it does not like, or speech that might have a “bad tendency.” In this finding, Congress also assumes that any portrayal of non-adult sexuality is harmful to society. Furthermore, Congress assumes it has the power and the duty to prevent this speech in all forms. If this is so, then suppression of artistic renditions of children, or pictures of adults who look like children, is just as reasonable as suppressing pictures of actual children. However, if Congress does not have the power to suppress ideas or thoughts, then these arguments collapse. In *Ferber*, the Court endorsed the notion that Congress or the states may protect *children* from abuse and exploitation.⁸⁷ Here Congress was attempting to prevent adults from expressing themselves without the involvement of any children.

IV. STRIKING DOWN THE LAW

In considering the 1996 law, Justice Kennedy noted, “The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child

84. *Whitney v. Cal.*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring).

85. 110 Stat. at 3009-27.

86. *Id.*

87. *Ferber*, 458 U.S. at 764.

pornography under *Ferber*.⁸⁸ This revolved around three separate issues: the ban on “youthful adult” pornography; the ban on the use of “sexually explicit” images that are “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” that the images were of “a minor engaging in sexually explicit conduct;”⁸⁹ and the ban on “virtual pornography.” Despite the deep ideological cleavages on this Court, there was great agreement among the Justices on most of these issues. In striking down the portion of the law dealing with adult actors and models,⁹⁰ the Justices were more-or-less unanimous.⁹¹ Seven agreed on striking down the advertising portion of the law,⁹² and six of the nine Justices agreed on the unconstitutionality of the remaining provisions and struck them down.⁹³

A. *Youthful Adults in Movies and Magazines*

The issue of “youthful adult” pornography was the easiest to deal with. No one on the Court was persuaded that filmmakers or any other producers of pornography could be prosecuted for using adult actors and models.⁹⁴ Justice Kennedy pointed out that in *Ferber* the Court had noted that some films involving children and sex might have artistic merit.⁹⁵ A film version of *Romeo and Juliet* or *Lolita* are only the easy examples of such films. This provision of the law in essence discriminate against people for looking young. Surely such a law not only stretched the First Amendment beyond recognition, but also raises a clear equal protection argument. If the law had been upheld, adults who looked young would be unable to obtain work, because moviemakers would be fearful of prosecution.

88. *Ashcroft*, 122 S. Ct. at 1396.

89. 110 Stat. at 3009-28.

90. That part of Section 2256 criminalizing a film or photograph that “appears to be . . . of a minor” but is actually of an adult. 18 U.S.C. § 2256(8)(B).

91. Chief Justice Rehnquist and Justice Scalia dissented, and would have upheld the entire statute. Rehnquist takes note of the majority’s criticism of the law, but argues that their reading of the law is wrong. He disagreed with the majority view that the law could reach mainstream films, such as *American Beauty*, *supra* n. 5, or film portrayals of Shakespeare. Furthermore, he argues that the ban on “youthful-adult pornography” could only be applied to films that were in fact obscene. Thus, the Chief Justice declares he “would construe the CPPA in a manner consistent with the First Amendment . . . and uphold the statute in its entirety.” *Ashcroft*, 122 S. Ct. at 1414 (Rehnquist, C.J., dissenting). In effect, the Chief Justice and Scalia agree with the majority, including O’Connor, on the unconstitutionality of the “youthful-adult pornography” provision of the law, but, rather than strike it down, would prefer to use their judicial office to rewrite the law through their interpretation of what it should mean. This sort of analysis totally ignores the chilling effect of this statute, and would leave publishers, photographers, and film-makers forever uncertain as to what might be legal and might not be legal, and would of course leave them vulnerable to the whims of a majority of the Court at any given moment. Furthermore, Rehnquist’s position would have made the statute redundant, meaningless, and unnecessary. If the statute only prohibited obscene material, as Rehnquist argued, then it was unnecessary because existing laws already prohibited obscenity. Clearly Congress did not intend in this law to simply reiterate existing legislation.

92. Justice O’Connor joined the six-Justice majority in striking down the ban on advertising in Section 2256(8)(D). *Id.* at 1408 (O’Connor, J., concurring).

93. Justices O’Connor and Scalia and Chief Justice Rehnquist would have upheld the ban on “virtual child pornography.” *Id.* at 1407-08.

94. Chief Justices Rehnquist and Justice Scalia would have interpreted this provision to only apply to obscenity, and would have thus upheld the provision. *Id.* at 1413 (Rehnquist, C.J., dissenting).

95. *Id.* at 1402.

But persons of the same age, who looked more “mature,” would be able to get work.

B. Advertising

The advertising portion of the law, Section 2256(8)(D), was equally troublesome.⁹⁶ As Kennedy noted, under this provision, “[e]ven if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted.”⁹⁷ Clearly such a rule impinges on the First Amendment in three ways. First, it criminalizes mere speech that has no otherwise illegal content. Thus, while the Court has no problem with a law that bans the actual use of children in a pornographic movie, it simply defies imagination to believe that a movie with no children in it all, or for that matter no explicit sexual content at all, might be illegal merely because of the way it is advertised. Second, the language is utterly vague and impossible to define precisely. Finally, as Justice Kennedy notes, this portion of the law is so broad that it “prohibits a substantial amount of speech that falls outside”⁹⁸ the area of advertising that might be prohibited because it constitutes pandering. Moreover, as Kennedy pointed out, anyone receiving materials deemed to be based on this unlawful advertising might be prosecuted, even “though they bear no responsibility for how it was marketed, sold, or described.”⁹⁹ The result would be an *Alice in Wonderland*-like world, in which a crime would be committed by the purchaser or owner of “a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled.”¹⁰⁰ As Kennedy noted, “The First Amendment requires a more precise restriction.”¹⁰¹

The utter failure of this portion of the law to pass constitutional muster was apparent even to the Bush Administration. As Kennedy noted, “The Government does not offer a serious defense of this provision.”¹⁰² In her concurring opinion, Justice O’Connor noted with some understatement that “[t]he Government fails to explain how this ban serves any compelling state interest.”¹⁰³ Existing legislation allowed for the prosecution of speech, including films and photographs that “[are] obscene, actual-child pornography, or otherwise indecent.”¹⁰⁴ But even the government did not try very hard to preserve this portion of the law.

96. 18 U.S.C. § 2256(8)(D).

97. *Ashcroft*, 122 S. Ct. at 1405.

98. *Id.* at 1406.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Ashcroft*, 122 S. Ct. at 1405.

103. *Id.* at 1408 (O’Connor, J., concurring).

104. *Id.*

In this part of the law, Congress in effect tried to ban through a collateral attack what it could not ban directly. As the Court has reminded Congress and state legislatures in various cases, including *Miller*, pornography, however offensive it might be, is legal.¹⁰⁵ Here, Congress hoped to find a way to prosecute sellers or buyers of otherwise legal materials by attacking the method of advertising, with vague and open-ended language. The Court properly struck it down.

C. *Virtual Pornography*

In striking down the prohibition on virtual pornography, Justice Kennedy noted that the CPPA offered a striking contrast to the statute at issue in *Ferber*. In that case, the court upheld the prosecution of those who used children to produce pornography. But CPPA prohibited “speech that records no crime and creates no victims by its production.”¹⁰⁶ *Ferber* allowed for the prosecution of those who distributed child pornography because such distribution was “‘intrinsically related’ to the sexual abuse of children.”¹⁰⁷ As for the CPPA, the opposite was the case. No children were involved, so no crime had been committed. The government tried to justify this statute on two grounds. First was the bad tendency argument: that virtual child pornography would lead to more child abuse. But as Kennedy noted, “the causal link is contingent and indirect.”¹⁰⁸ Whatever harm might result did not come from the speech, but rather from acts done subsequent to the speech. The First Amendment does not allow the suppression of speech merely on the speculation that the speech will cause harm. Moreover, even if the speech might cause some harm, suppression is only allowed when the danger is imminent and immediate.¹⁰⁹

The Court also had little sympathy for the argument that virtual pornography would be used to seduce children. Kennedy noted that “cartoons, video games, and candy . . . might be used for immoral purposes,” but they should not be banned for that reason.¹¹⁰ The government retains the power to prosecute adults who display such materials to children, or who attempt to seduce them with candy, promises of presents, or anything else. But as long as there is no harm to children in making a video or a picture—that is, as long as the depiction is virtual—there can be no “child pornography.” There are many things that society may keep from the hand or eyes of children, but “speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.”¹¹¹

105. See *Miller*, 413 U.S. at 20.

106. *Ashcroft*, 122 S. Ct. at 1402.

107. *Id.*

108. *Id.*

109. See generally *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Abrams v. U.S.*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

110. *Ashcroft*, 122 S. Ct. at 1402.

111. *Id.* at 1402.

The government also argued that virtual pornography had to be banned because it was impossible to tell the difference between “real” images and those created by computers.¹¹² In his concurrence, Justice Thomas noted that “the Government points to no case in which a defendant has been acquitted based on a ‘computer-generated images’ defense.”¹¹³ Thus, he argued, the government’s claim was at best “speculative.”¹¹⁴

Justice Kennedy offered a more intriguing answer to this claim. If in fact virtual pornography were indistinguishable from images of actual people, then “[f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.”¹¹⁵ Indeed, this analysis suggests that in the future technology can protect children from those who would exploit them, by making them unnecessary for the production of what would otherwise be illegal child pornography.

Yet even if technology cannot stop the misuse and abuse of children, the government may not use the fear of technology to undermine First Amendment values. The government argued that the ban on virtual child pornography was essential because it could not distinguish pictures made with real children from those made with no children at all.¹¹⁶ But as Kennedy notes, this sort of analysis “turns the First Amendment upside down.”¹¹⁷ The purpose of the First Amendment is to protect speech, even speech that some people may find offensive. Thus, Kennedy asserted, “The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.”¹¹⁸ Thus, a majority of the Court found this portion of the statute overbroad and in violation of the First Amendment.¹¹⁹

V. THE INTRACTABLE PROBLEM: CAN WE DEFINE CHILD PORNOGRAPHY WITHOUT ASSAULTING THE FIRST AMENDMENT?

The analysis in *Ashcroft* and the obvious unconstitutionality of the 1996 statute illustrates that despite society’s desire to protect children, the solution will not be found in simplistic statutes that paint with a broad brush. In his majority opinion, Justice Kennedy noted that the pre-1996 laws and the *Ferber* precedent allowed for the protection of minors—that is, people under eighteen—from exploitation in films and pictures. But the very language of existing law in Section 2256, which defines “sexually explicit conduct” as “actual or simulated . . . sexual intercourse,”¹²⁰ is clearly problematic. Consider a movie version of *Romeo and*

112. *Id.* at 1403-04.

113. *Id.* at 1406 (Thomas, J., concurring).

114. *Id.*

115. *Ashcroft*, 122 S. Ct. at 1404.

116. *Id.* at 1403-04.

117. *Id.* at 1404.

118. *Id.*

119. *Id.* at 1406.

120. 18 U.S.C. § 2256(2).

Juliet that stars two teenage actors. It would be reasonable to show the two child-lovers actually having sexual relations. It need not be graphic, and it need not show any exposed body parts; it would be done discreetly, under a blanket or sheet. But it would be “simulated . . . sexual intercourse” and expose those associated with the movie to criminal sanctions.¹²¹

In *Ashcroft*, the government argued that because child pornography is dangerous and that depictions that appear to be of children—whether youthful adults or artists’ renditions of children—can be misused by pedophiles. This is undoubtedly true. Nevertheless, “[t]he Government cannot ban speech fit for adults simply because it may fall into the hands of children.”¹²² In a free society, we cannot limit the rights of freedom of expression, or the interchange of ideas, merely because the ideas—even though expressed in magazines, movies, or photographs—may be unsuitable for children. We can, as *Ferber* held, protect children from being exploited in the making of these pictures, and all states have laws that prohibit adults from exposing children to these pictures. These laws are based on the theory that society can protect children and not on the theory that adults must also be protected from “bad ideas.”

Ultimately, the CPPA rested on the assumption that the portrayal of children involved in sex has no intrinsic value, and thus does not come under First Amendment protection. The government argued that a statute regulating or suppressing sexually oriented images of children must be held to a lower standard than would a statute regulating other speech. But in fact, the Court had never held this. In *Ferber*, the Court upheld the statute regulating child pornography, not because of the content, but because of the conditions of production—that it harmed children. Without these conditions, the government would have to prove speech was obscene—and not merely that it was pornographic—to justify its suppression. But the CPPA did not prohibit obscene material, or even pornographic material. Rather, it sought to ban all speech that portrayed children in a sexual context.

In both *Ferber* and *Ashcroft*, the Court asserted that films and other materials that deal with sex and children are not *per se* without value. A literal reading of the statute would lead to a ban on some of the great art of the world. “For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a ‘picture’ that ‘appears to be, of a minor engaging in sexually explicit conduct.’”¹²³ Citing Shakespeare, current movies, and a variety of literature, the Court pointed out that the “themes” of “teenage sexual activity and the sexual abuse of children[] have inspired countless literary works.”¹²⁴ With measured eloquence, and a strong sense of the importance of art and literature to our culture, Justice Kennedy noted that:

121. *Id.* § 2256(2)(A).

122. *Ashcroft*, 122 S. Ct. at 1403.

123. *Id.* at 1397.

124. *Id.* at 1400.

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.¹²⁵

In dissent, Chief Justice Rehnquist argued that the Court should be "loath to construe" such works as those of Shakespeare, or such movies as *American Beauty*, as coming under the law.¹²⁶ However, the prosecution of a theater owner for showing *Carnal Knowledge* in *Jenkins*¹²⁷ suggests that the fears of the majority are not out of line. Petty local officials, like those in *Jenkins*, are too often ready to impose their own view of morality on those who have different notions of culture, art, or religion. Here we might heed the reminder of Justice Robert Jackson, that "there are village tyrants as well as village Hampdens,"¹²⁸ and thus the Constitution provides protection for all from arbitrary laws and arbitrary enforcement. Chief Justice Rehnquist might have thought the CPPA was a tool that could have been used like a scalpel to excise only obscene materials, but the language of the law was created more like a meat axe, to be used by "village tyrants" and federal prosecutors alike to crusade against art, literature, and films, which were constitutionally protected forms of expression.

The CPPA in the end fails because it is based on a theory that the government should suppress what it does not like. Rather than narrowly tailoring a statute to meet the problem of the exploitation of children, Congress sought to close down legal and sometimes significant methods of communication and ideas about society. With Justice's Kennedy's opinion, the Court supported free speech and artistic expression. If the CPPA was part of the "culture wars" being fought in America, in this round at least, culture itself, as well as the First Amendment, won an important victory.

125. *Id.* at 1400-01.

126. *Id.* at 1412 (Rehnquist, C.J., dissenting).

127. 418 U.S. 153.

128. *W. Va. St. Bd. of Educ. v. Barnett*, 319 U.S. 624, 638 (1943).

