Campaign finance is a hotly contested area of constitutional law — many of the Supreme Court's cases on the topic have split along the Court's alleged political lines.[76] While some strongly view campaign expenditures as speech, others see them as simple financial transactions. And while some view government regulation of campaigns as fundamentally antithetical to democracy, others view it as the only way to achieve true democracy. Precisely because of this strong split in opinion, it is especially important for the Supreme Court to address campaign finance cases with care and modesty. Justice Alito's opinion in *Davis* meets this need through its narrow focus on asymmetrical expenditure limits. It says nothing of asymmetrical funding schemes and therefore says nothing about their constitutionality. While some might wish to stretch Justice Alito's reasoning to serve an anti–public finance agenda, or to sound an alarmist warning to rally public finance law supporters, there is nothing to stretch. This opinion does no more than it purports, and such restraint is a welcome development in Supreme Court jurisprudence.

2. Overbreadth Doctrine. — The Supreme Court has long recognized that the existence of laws threatening protected speech can have a chilling effect that unacceptably burdens free expression.[1] The overbreadth doctrine responds to that concern by allowing any individual to argue that a statute unconstitutionally restricts others' speech.[2] Although overbreadth claims are nominally available to both civil litigants and criminal defendants on equal terms, they have been almost invariably rejected by the Supreme Court when brought as defenses to prosecution over the last twenty-five years.[3] Last Term, in *United States v. Williams*,[4] this pattern continued, as the Court avoided a finding of overbreadth that would have stricken Congress's latest effort to deal with online child pornography and instead upheld a conviction for possessing and pandering sexually explicit pictures of children as young as five.[5] In doing so, the Court repeatedly chose to follow its less speech-protective overbreadth precedents, even expanding one of the categorical exclusions to the First Amendment. *Williams* thus reveals a possibly self-defeating flaw in the overbreadth doctrine: when criminal defendants champion speech interests, courts

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[76] *See, e.g.*, FEC v. Wis. Right to Life, 127 S. Ct. 2652 (2007); Randall v. Sorrell, 126 S. Ct. 2479 (2006); McConnell v. FEC, 540 U.S. 93 (2003).

[1] *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1972); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

[2] *See Dombrowski*, 380 U.S. at 486. *See generally* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

[3] *See infra* pp. 390–91.

[4] 128 S. Ct. 1830 (2008).

[5] *See id.* at 1836–38.

may become less protective of First Amendment rights than they would be in response to civil complaints.

In *New York v. Ferber*,[6] the Supreme Court recognized that child pornography "is intrinsically related to the sexual abuse of children," both because its production entails the "sexual exploitation of children" and because its circulation exacerbates the harm caused by its production.[7] Accordingly, the Court categorically excluded child pornography from First Amendment protection, allowing criminalization of its distribution[8] and possession.[9] With the advent of the Internet, child pornography became far harder to police and stamp out, as images could be reproduced infinitely and circulated diffusely. Congress's first response to this development, the Child Pornography Prevention Act of 1996[10] (CPPA), was partially invalidated for overbreadth in *Ashcroft v. Free Speech Coalition*[11] because it criminalized possession of visual depictions that merely appeared to be minors (but might have actually been adults or computer renderings) as well as material that had been pandered in a way that conveyed the impression that it was child pornography, regardless of whether it actually was child pornography.[12]

Congress responded to the invalidation of the CPPA by passing the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act[13] (PROTECT Act). This statute criminalized:

> knowingly . . . advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains — (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.[14]

On April 26, 2004, Michael Williams posted a message in a public Internet chat room claiming that "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam."[15] He then told an undercover Secret Service agent that he had "hc [hard core] pictures" of himself and other men molesting his four-year-old daughter, and requested pictures of the agent's daughter.[16] After the agent failed

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[6] 458 U.S. 747 (1982).

[7] *Id.* at 759. *See generally* Stephen T. Fairchild, Note, *Protecting the Least of These: A New Approach to Child Pornography Pandering Provisions*, 57 DUKE L.J. 163 (2007).

[8] *See Ferber*, 458 U.S. at 747.

[9] Osborne v. Ohio, 495 U.S. 103 (1990).

[10] Pub. L. No. 104-208, 110 Stat. 3009-26 (1996) (codified at 18 U.S.C. § 2251 et seq. (2006)), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

[11] 535 U.S. 234.

[12] *Id.* at 241–42.

[13] 18 U.S.C. § 2252A (2006).

[14] *Id.* § 2252A(a)(3)(B).

[15] *Williams*, 128 S. Ct. at 1837.

[16] United States v. Williams, 444 F.3d 1286, 1288 (11th Cir. 2006).

to send him pornographic pictures, Williams posted a public message that read: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL — SHE CANT."[17] This posting contained a hyperlink that led to "seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals."[18] After obtaining a search warrant, the Secret Service "seized two hard drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sadomasochistic."[19] Williams was charged with one count of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) and one count of promoting child pornography under 18 U.S.C. § 2252A(a)(3)(B). He pled guilty to both counts, but reserved his right to challenge the constitutionality of the pandering[20] offense on overbreadth grounds.[21]

The United States District Court for the Southern District of Florida rejected Williams's challenge.[22] Analyzing the PROTECT Act for substantial overbreadth, Judge Middlebrooks found it to be "a legitimate effort to close the market for child pornography, which has seen a revival as a result of technology" and found that any prohibition of protected speech "is not substantial, particularly in light of the statute's logical sweep."[23]

A unanimous three-judge panel of the Eleventh Circuit reversed.[24] The panel noted that the PROTECT Act criminalizes "not the speech expressed in the underlying materials . . . but the speech promoting and soliciting such materials."[25] Because the PROTECT Act prohibited not only commercial promotion and solicitation but also "non-commercial speech," the Eleventh Circuit subjected it to strict scrutiny.[26] The court criticized the statute on several grounds, finding "particularly objectionable the criminalization of speech that 'reflects the belief' that materials constitute obscene synthetic or 'real' child pornography."[27] Because the statute was not concerned with the actual content of the purported child pornography, but rather punished speech expressing a belief about its content, it "wrongly punishes indi-

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17 *Williams*, 128 S. Ct. at 1837.

18 *Id.*

19 *Id.* at 1837–38.

20 Although the statute does not include the word "pandering," the offenses of advertising, promoting, presenting, and distributing are commonly referred to as such and will be referred to as pandering in this comment.

21 *Williams*, 444 F.3d at 1289.

22 United States v. Williams, No. 04-20299-CR, 2004 U.S. Dist. LEXIS 30603 (S.D. Fla. Aug. 20, 2004).

23 *Id.* at *34.

24 *Williams*, 444 F.3d 1286.

25 *Id.* at 1296–97.

26 *Id.* at 1298.

27 *Id.*

viduals for the non-inciteful expression of their thoughts and beliefs."[28] As a result, the court held that the pandering provision "abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep" and struck it down as overbroad.[29]

Alternatively, the Eleventh Circuit found the provision void for vagueness. It considered the criminalization of speech "that reflects the belief, or that is intended to cause another to believe" to be too "vague and standardless" to give the public any notice on what conduct was prohibited.[30] The provision cannot be applied without a "wholly subjective determination by law enforcement personnel," the panel found, giving law enforcement officers "incredibly broad discretion to define whether a given utterance or writing contravenes the law's mandates."[31]

The Supreme Court reversed. Writing for the Court, Justice Scalia[32] held that a statute is facially invalid under the overbreadth doctrine only "if it prohibits a substantial amount of protected speech . . . not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[33] He first construed the statute, reading "advertises, promotes, presents, distributes" to "have a transactional connotation"[34] and thus to exclude "abstract advocacy" of child pornography.[35] He further limited the statute by finding that it required not only knowing pandering or solicitation but also one of two courses of conduct: either (1) the subjective belief that the material is child pornography, coupled with a correct estimation of what would constitute child pornography and a statement that would lead a reasonable person to believe the speaker held that belief;[36] or (2) a statement made with the intent to cause another person to believe that the material at issue is child pornography.[37]

After construing the statute, Justice Scalia asked whether it "criminalizes a substantial amount of protected expressive activity."[38] He answered this in the negative, holding that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection," whether or not they are commercial.[39] Furthermore, fraudulent

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[28] *Id.* at 1300.

[29] *Id.* at 1305.

[30] *Id.* at 1306.

[31] *Id.*

[32] Chief Justice Roberts and Justices Stevens, Kennedy, Thomas, Breyer, and Alito joined Justice Scalia's opinion.

[33] *Williams*, 128 S. Ct. at 1838.

[34] *Id.* at 1839.

[35] *Id.* at 1842.

[36] *Id.* at 1839–40, 1843.

[37] *Id.* at 1839–40.

[38] *Id.* at 1841.

[39] *Id.* at 1841–42.

offers are proscribable, as are offers to engage in illegal activity where "the offeror is mistaken about the factual predicate of his offer."[40] Although the statute did not require proof of actual child pornography, it was consistent with *Ferber* and *Free Speech Coalition* because it would not force the suppression of "[s]imulated child pornography," but only require that it be "offered and sought *as such*, and not as real child pornography."[41]

Justice Scalia also responded to three scenarios suggested in briefs and at oral argument, dismissing them as demonstrating "nothing so forcefully as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals."[42] He rejected the possibility that a movie reviewer or distributor might mistakenly believe that a promoted movie was actually child pornography or would intend to make a customer believe it to be so.[43] In response to the possibility that a person who delivered child pornography to the police would be prosecuted, he found that no such prosecutions had occurred and that there was no "realistic danger" that such a prosecution would be brought.[44] Finally, he acknowledged that documentary footage of atrocities "such as soldiers raping young children" might be implicated by the statute but that such a case "could of course be the subject of an as-applied challenge."[45]

Justice Scalia rejected the Eleventh Circuit's vagueness holding, dismissing the lower court's hypotheticals as "unproblematic."[46] More pointedly, he noted that "the mere fact that close cases can be envisioned" does not render a statute vague; vagueness only applies where a statute incorporates "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[47]

Justice Stevens concurred to make two points.[48] First, he emphasized the traditional rule that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[49] Second, relying on legislative history, he concluded that the statute's scienter requirements "contain an element of lasciviousness" that shields innocent conduct from the statute's reach.[50]

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[40] *Id.* at 1842–43.
[41] *Id.* at 1844.
[42] *Id.* at 1843.
[43] *Id.*
[44] *Id.* at 1843–44.
[45] *Id.*
[46] *Id.* at 1846.
[47] *Id.*
[48] Justice Breyer joined Justice Stevens's concurrence.
[49] *Williams*, 128 S. Ct. at 1847 (Stevens, J., concurring) (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).
[50] *Id.* at 1847–48.

Justice Souter dissented.[51] He argued that "maintaining the First Amendment protection of . . . fake child pornography requires a limit to the law's criminalization of pandering proposals."[52] The PROTECT Act undermined *Ferber* and *Free Speech Coalition* by circumventing the requirement that depiction of real children be proven for a prosecution to succeed.[53] Justice Souter rejected the majority's holding that pandering proposals and attempted crimes are categorically excluded from First Amendment protection.[54] Instead, Justice Souter wrote, the constitutionality of a statute criminalizing such conduct should "turn on its consequences for protected expression and the law that protects it."[55] Here, "a protected category of expression" — non-obscene pornography created using adults — "would inevitably be suppressed."[56]

Even so, Justice Souter would have upheld the statute if he had found it to be "grounded in a realistic, factual assessment of harm."[57] The PROTECT Act, however, lacked such a "substantial justification."[58] Justice Souter dismissed concerns that prosecutors would be unable to prove that actual children were involved in the making of pornography due to advances in computer simulation, noting that no such defense had yet succeeded.[59] Because the statute was thus unnecessary and substantially inhibited protected speech, Justice Souter would have found it unconstitutional.

Williams's conviction illustrates an underappreciated fact of modern overbreadth doctrine: it is essentially unavailable to criminal defendants who cannot win as-applied challenges. No criminal defendant has won an overbreadth claim without showing that a statute was applied unconstitutionally since 1981's *Schad v. Borough of Mount Ephraim*,[60] a case decided before eight of the nine current Justices were on the bench.[61] Since *Schad*, the Court has rejected at least eight such challenges.[62] By contrast, at least eleven civil litigants have

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[51] Justice Ginsburg joined Justice Souter's dissent.

[52] *Williams*, 128 S. Ct. at 1849 (Souter, J., dissenting).

[53] *Id.* at 1851, 1854.

[54] *Id.* at 1849, 1854.

[55] *Id.* at 1854–55.

[56] *Id.* at 1855.

[57] *Id.*

[58] *Id.*

[59] *See id.* at 1855–58.

[60] 452 U.S. 61 (1981).

[61] Justice Stevens, the only current Justice to hear *Schad*, concurred in the judgment — though not on overbreadth grounds. *Id.* at 79 (Stevens, J., concurring).

[62] *See Williams*, 128 S. Ct. 1830; Virginia v. Hicks, 539 U.S. 113 (2003); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Alexander v. United States, 509 U.S. 544 (1993); Wisconsin v. Mitchell, 508 U.S. 476 (1993); Osborne v. Ohio, 495 U.S. 103 (1990); Maryland v. Macon, 472 U.S. 463 (1985); New York v. Ferber, 458 U.S. 747 (1982). One of those defendants won on

won overbreadth challenges in that time.[63]

This consistent pattern suggests a disinclination to invalidate convictions for offenses that both could be proscribed constitutionally and were clearly proscribed by the challenged statute. Williams was just such a defendant: he did in fact possess and distribute sexually explicit pictures of children between five and fifteen years old, some of them involving sadomasochistic conduct, and he claimed to have molested his four-year-old daughter.[64] This was precisely the "hard core"[65] of wrongful and unprivileged conduct that Congress sought to criminalize with the PROTECT Act.[66] He could not win an as-applied challenge, nor one for vagueness or content discrimination. The apparent unfairness of giving Williams a windfall acquittal based on the PROTECT Act's potential impact on others led several Justices to indicate at oral argument that they were open to the idea of reshaping the overbreadth doctrine,[67] with Chief Justice Roberts and Justice

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other grounds. *See X-Citement Video*, 513 U.S. 64. The Court also left overbreadth challenges undecided in four cases, resolving them on other grounds. *See* City of Chicago v. Morales, 527 U.S. 41 (1999); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Massachusetts v. Oakes, 491 U.S. 576 (1989); Texas v. Johnson, 491 U.S. 397 (1989). A former criminal defendant won on overbreadth grounds in *City of Houston v. Hill*, 482 U.S. 451 (1987), a civil case brought after acquittal.

The only criminal case in which either the Rehnquist or Roberts Court invalidated a law for overbreadth, *Virginia v. Black*, 538 U.S. 343 (2003), deserves special notice. The case involved three convictions that had been consolidated and vacated by the Virginia Supreme Court. A fractured Supreme Court majority found the statute at issue overbroad while concluding that one defendant could win an as-applied challenge. This defendant's conviction was dismissed, while the vacation of the other two convictions was itself vacated. *Id.* at 367–68. Those two convictions were eventually upheld by the Virginia Supreme Court. Elliot v. Commonwealth, 593 S.E.2d 263, 270 (Va. 2004). Thus, although the Supreme Court clearly accepted the possibility that defendants who could not win as-applied challenges might have their convictions dismissed due to the overbreadth of the statute, there remains no defendant since *Schad* who has benefited from a successful overbreadth challenge without also winning an as-applied challenge.

63 *See* Ashcroft v. ACLU, 542 U.S. 656 (2004); Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002); Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002); United States v. Playboy Entm't Group, 529 U.S. 803 (2000); Reno v. ACLU, 521 U.S. 844 (1997); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987); *Hill*, 482 U.S. 451; FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985); Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion).

64 United States v. Williams, 444 F.3d 1286, 1288–89 (11th Cir. 2006).

65 *See* Dombrowski v. Pfister, 380 U.S. 479, 491–92 (1965).

66 *See Williams*, 128 S. Ct. at 1847–48 (Stevens, J., concurring).

67 *See* Transcript of Oral Argument at 39, *Williams*, 128 S. Ct. 1830 (No. 06-694) (Kennedy, J.) ("[M]aybe we should examine the overbreadth rule and just say that your client cannot make this challenge."); *id.* at 40 (Roberts, C.J.) ("You would be saying we're going to treat this area like other areas, which would say that whoever is challenging it has to show that they're a problematic case."); *id.* at 43–44 (Scalia, J.) ("[T]he whole doctrine of overbreadth rests upon dictum, doesn't it?"); *id.* at 38 (Breyer, J.) (suggesting that the opinion might include an appendix enumerating unconstitutional applications).

Kennedy specifically suggesting that relief might be denied to Williams because he could not win an as-applied challenge.[68] That idea was advanced by the Court as recently as 2003, when a unanimous opinion left open the question of whether a plaintiff in federal court could bring a claim where her conduct or speech was itself unprotected.[69]

Instead, the Court preserved Williams's ability to bring an overbreadth challenge — but intensified the elements of that challenge in three ways. It first refined its rule that overbreadth must be "*substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[70] Although this substantiality requirement is a common feature of the Court's overbreadth doctrine,[71] the Court has at times made no effort to discern whether a statute's overbreadth is substantial.[72] Nor was its exact meaning clear before *Williams*; the Court has focused the substantiality inquiry sometimes on the amount of protected speech suppressed, and sometimes on the ratio of protected to unprotected speech within a statute's applications.[73] *Williams* emphatically endorsed the comparative approach, which makes it easier for a statute that has many constitutional applications to survive scrutiny. This substantiality requirement was essential in *Williams*, as the Court noted that some unconstitutional applications might exist even after a limiting construction was imposed.[74]

The Court's next two moves were more unorthodox. First, it discarded the potentially unconstitutional applications of the PROTECT Act by relying on prosecutorial discretion in its enforcement. The statute seems to apply to individuals who inadvertently stumble upon a trove of child pornography and report it to the police.[75] Indeed, it provides an affirmative defense for individuals who come into possession of "less than three" images of child pornography and promptly re-

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[68] *See id.* at 39–40.

[69] *See* Virginia v. Hicks, 539 U.S. 113, 121 (2003); *see also* Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2383 n.5 (2007) (suggesting that the ability of third parties to "defend[] their own interests in court" might be relevant to the availability of an overbreadth remedy to other litigants). Perhaps significantly, the opinions in *Hicks*, *Davenport*, and *Williams* were all written by Justice Scalia.

[70] *Williams*, 128 S. Ct. at 1838.

[71] The substantiality requirement was originally applied to statutes proscribing *conduct* that only incidentally suppressed speech, *see* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); *see also, e.g.*, Parker v. Levy, 417 U.S. 733, 760 (1974), but has long since migrated to speech regulations as well, *see, e.g.*, Osborne v. Ohio, 495 U.S. 103, 112 (1990).

[72] *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003) (plurality opinion); *see also id.* at 375 (Scalia, J., concurring) (criticizing the plurality for ignoring the substantiality requirement).

[73] *See* Geoffrey McGovern & Jonathan S. Krasno, Empirical Overbreadth 5, 9 (Nov. 17, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032341.

[74] *See Williams*, 128 S. Ct. at 1844.

[75] *See id.* at 1843–44.

port or destroy them,[76] but gives no such protection to those who possess three or more images. The Court was apparently unable to come up with a limiting construction that would have closed this trap, leaving a potentially great number of concerned citizens at risk. Nevertheless, the majority disregarded this likely unconstitutional application because it was "aware of no prosecution for giving child pornography to the police"[77] and thus did not find it a "realistic danger."[78] Although not entirely without precedent,[79] this deference to a statute's likely implementation is rare in prior cases.[80]

The Court also invoked a categorical exclusion from First Amendment protection that, although arguably following from precedent, was never definitively stated before *Williams*. *Williams* placed "[o]ffers to engage in illegal transactions" among the few types of speech that are outside the ambit of the First Amendment.[81] The cases the majority cited, however, did not establish this proposition, but rather laid out a narrower exclusion of illegal *commercial* transactions. In one case, the suppressed speech was part of an illegal restraint on trade; the case denied protection to speech because of its illicit use, but did not state that *any* speech effecting an illegal purpose could be criminalized.[82] The other case was explicitly grounded in the lesser constitutional status of commercial speech.[83] Although the *Williams* Court portrayed a broad categorical exclusion as settled law, prior cases seemed to take the limitation to commercial speech seriously.[84]

In three different ways, then, the Court followed and extended its less speech-protective precedents with little discussion of how the

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[76] 18 U.S.C. § 2252A(d) (2006).

[77] *Williams*, 128 S. Ct. at 1844.

[78] *Id.* (quoting N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11 (1988)).

[79] *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 122 (2003) (defendant "failed to demonstrate" that a trespass policy would be applied against "anyone engaged in constitutionally protected speech").

[80] The Court routinely points to hypothetical unconstitutional applications without considering their likelihood. In *Free Speech Coalition*, for example, the prime examples of materials that might subject their possessors to "severe punishment" were films such as *American Beauty*, *Traffic*, and *Romeo and Juliet*, despite the improbability of the government ever bringing such prosecutions. Ashcroft v. Free Speech Coal., 535 U.S. 234, 247–48 (2002).

[81] *Williams*, 128 S. Ct. at 1841.

[82] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[83] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 387 (1973). The *Williams* majority read *Pittsburgh Press Co.*'s description of the want ad at issue in that case as "not only commercial activity [but] *illegal* commercial activity," *id.* at 388, as embodying the proposition that "noncommercial proposals to engage in illegal activity have no greater protection than commercial proposals to do so." *Williams*, 128 S. Ct. at 1841 n.3. This misses the import of the use of "not only," which clearly situates the discussion within the context of commercial speech.

[84] *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 55 (1982) (holding that a solicitation to enter into a vote-buying agreement could be prohibited because it was "in essence an invitation to engage in an illegal exchange *for private profit*" (emphasis added)).

modifications related to the purposes of the First Amendment. It is, of course, impossible to know if a challenge to the PROTECT Act would have been received differently had it been raised in another posture, or if the CPPA would have been upheld had an as-applied criminal challenge been brought rather than a civil action. Perhaps it made no difference that the plaintiffs in *Free Speech Coalition* included a publishing house, a painter, and a photographer[85] — litigants unquestionably engaged in protected speech — while the claimant in *Williams* was a confessed distributor of child pornography who held himself out as a child molester.[86] But while the identity of the parties was surely not the only reason for the different outcomes in the two cases, it is plausible that the Court might focus on the alleged chilling effect of a statute when presented with plaintiffs afraid of its application to their protected behavior and, conversely, see the statute's legitimate sweep more vividly when presented with a conviction within its core.[87]

It thus seems possible that the reasoning and holding of *Williams* may have been driven as much by an attentiveness to the needs of law enforcement and a disinclination to award windfalls to defendants who are guilty of clearly proscribed and clearly proscribable offenses as by the Court's views on the policies underlying the overbreadth doctrine.[88] While such sentiment is certainly understandable, it can make for bad law: as has often been noted, courts may rein in the scope of rights and contort constitutional doctrine when the remedy calls for leaving unpunished a noxious offense.[89] The *Williams* changes cannot be confined to criminal cases; they affect the speech rights of *all* individuals. The irony of *Williams* is that criminal defendants' nominal ability to bring overbreadth claims, while intended to *protect* First Amendment claimants not before the court,[90] instead seems to have shrunk that protection.

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

86 United States v. Williams, 444 F.3d 1286, 1288 (11th Cir. 2006).

87 *Cf.* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 11 (Daniel Kahneman et al. eds., 1982) (discussing the "availability heuristic," which leads people to "assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind").

88 The *Williams* Court shaped its stringent overbreadth test with little discussion of its goals. For example, the Court never referred explicitly to the "chilling effect" concept so central to earlier cases.

89 *See, e.g.*, Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 856 (1991) ("[T]he assumption that overbreadth rulings are irreducibly draconian may have discouraged the Supreme Court from applying the doctrine consistently."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885 (1999) ("[T]he threat of undesirable remedial consequences motivat[es] courts to construct the right in such a way as to avoid those consequences.").

90 *See* sources cited *supra* notes 1–2.