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Protecting Speech v. Protecting Children: An Examination of the Judicial Refusal to Allow Legislative Action in the Realm of Minors and Internet Pornography

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PROTECTING SPEECH V. PROTECTING CHILDREN: AN EXAMINATION OF THE JUDICIAL REFUSAL TO ALLOW LEGISLATIVE ACTION IN THE REALM OF MINORS AND INTERNET PORNOGRAPHY

I. INTRODUCTION

The Internet is "the most ubiquitous of information networks," where "users connect to each other and to a dazzling array of online services and products with staggering speed and frequency."[1] While the Internet offers potentially endless educational and cultural benefits, it also raises grave concerns in terms of its potential to deliver inappropriate and dangerous material to children. The presence of sexually explicit material on the Internet is no secret. Disseminating pornography over the internet is a 2.5 billion dollar-a-year industry, consisting of over 4.2 million pornographic websites and approximately 372 million pornographic pages.[2] Although the societal value of Internet pornography for adult users is perhaps arguable, the statistics regarding Internet pornography and children—a group that does not benefit from exposure to sexually explicit materials—trigger much greater concerns. Children in the twelve to seventeen-year-old age group are the dominant consumers of Internet pornography, and the average age of an individual's first exposure to Internet pornography is eleven.[3] Furthermore, eighty percent of fifteen to seventeen-year-olds have had multiple exposures to hard-core pornography, and ninety percent of eight to sixteen-year-olds have viewed pornography online, most often while doing their homework.[4] Research also indicates that certain Internet pornography providers aim their products directly at children by linking their sites to the names of popular children's television and movie characters.[5]

While research confirms children have access to pornography on the Internet, courts have struck down statutes aimed at prohibiting the electronic dissemination of sexually explicit materials.[6] Courts have based their decisions in those cases on First Amendment and Commerce Clause principles.[7] Most recently, in *Southeast Booksellers Ass'n v. McMaster*,[8] the United States District Court for the District of

1. FRED H. CATE, THE INTERNET AND THE FIRST AMENDMENT: SCHOOLS AND SEXUALLY EXPLICIT EXPRESSION 1 (1998).

2. Jerry Ropelato, *Internet Pornography Statistics*, INTERNET FILTER REVIEWS (2005), http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html.

3. *Id.*

4. *Id.*

5. *Id.*

6. *See, e.g.*, Am. Booksellers Found. v. Dean, 342 F.3d 96, 100, 105 (2d Cir. 2003) (striking down part of a Vermont statute regulating dissemination of pornography on the Internet); ACLU v. Johnson, 194 F.3d 1149, 1152, 1164 (10th Cir. 1999) (affirming the district court's injunction against enforcement of a New Mexico Internet dissemination statute); Cyberspace Commc'ns, Inc. v. Engler, 142 F. Supp. 2d 827, 830–31 (E.D. Mich. 2001) (holding entire Michigan Internet dissemination statute unconstitutional); Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 163, 183–84 (S.D.N.Y. 1997) (holding a New York dissemination statute unconstitutional).

7. *See supra* note 6.

8. 371 F. Supp. 2d 773 (D.S.C. 2005).

South Carolina declared a state statute prohibiting the dissemination of harmful materials over the Internet to minors unconstitutional.[9] The district court's ruling in *Southeast Booksellers* followed the United States Supreme Court's decision in *Ashcroft v. ACLU*,[10] in which the Court found a similar dissemination statute to be unconstitutional.[11] These rulings leave a number of questions unanswered concerning the future of the interplay between fundamental constitutional principles and the governmental interest in protecting children from explicit materials on the Internet.

Part II of this Note analyzes *Southeast Booksellers* and its reliance upon the constitutional analysis of *Ashcroft v. ACLU*. The remaining Parts describe specific flaws in the courts' analysis in *Southeast Booksellers* and *Ashcroft v. ACLU*. Specifically, Part III argues the courts failed to apply the appropriate level of scrutiny to the dissemination statutes and thus furthered the confusion over obscenity and pornography, leaving legislators with virtually no guidance in drafting dissemination statutes. Part IV argues both cases misapplied the "least restrictive means" test by comparing the government's statutory regulation of Internet speech to the private action of using filtering devices on the receiving end. Part V examines whether Internet technology has rendered the Supreme Court's current Dormant Commerce Clause doctrine unworkable. Finally, Part VI concludes with a brief consideration of the difficulty state and federal legislatures now face in regulating the Internet.

II. THE *SOUTHEAST BOOKSELLERS* DECISION

A. *The Statute*

The South Carolina dissemination statute stated:

> A person commits the offense of disseminating harmful material to minors if, knowing the character or content of the material, he: (1) sells, furnishes, presents, or distributes to a minor material that is harmful to minors; or (2) allows a minor to review or peruse material that is harmful to minors.[12]

Material was "[h]armful to minors" under the statute if it depicted "sexually explicit nudity or sexual activity . . . that, taken as a whole," tended to have three characteristics.[13] First, "the average adult person applying contemporary community standards would find [the material to have] . . . a predominant tendency to appeal

9. *Id.* at 788.
10. 542 U.S. 656 (2004).
11. *See Se. Booksellers*, 371 F. Supp. 2d at 776–77.
12. S.C. CODE ANN. § 16-15-385(A) (2003), *invalidated by* Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773 (D.S.C. 2005).
13. S.C. CODE ANN. § 16-15-375(1) (2003).

to a prurient interest of minors in sex."[14] Second, "the average adult person applying contemporary community standards would find [the material] . . . patently offensive to prevailing standards in the adult community concerning what is suitable for minors."[15] And third, "a reasonable person" would find that the material, "taken as a whole lacks serious literary, artistic, political, or scientific value for minors."[16]

The controversy in *Southeast Booksellers* centered on an amendment former South Carolina Governor Jim Hodges signed in 2001 concerning the definition of "'material.'"[17] Under the amendment, the definition of material included "'pictures, drawings, video recordings, films, *digital electronic files, or other visual depictions or representations* but not material consisting entirely of written words.'"[18] Pursuant to the italicized language, the definition of material included digital electronic files[19] and thus covered obscene Internet postings. Because the statute provided criminal sanctions for those disseminating harmful materials to minors, the district court examined whether the amended definition encompassed the plaintiffs' actions.[20]

B. The Plaintiffs and Their Complaint

The majority of the plaintiffs in *Southeast Booksellers* were companies that "represent artists, writers, booksellers, and publishers who use the Internet to engage in expression, including graphic arts, literature, and health-related information."[21] The plaintiffs maintain websites containing information on "obstetrics, gynecology, and sexual health; visual art and poetry; and other speech which could be considered 'harmful to minors' in some communities."[22] The plaintiffs argued the South Carolina statute violated the First Amendment and the Commerce Clause by prohibiting adults "from viewing and sending constitutionally-protected images over the Internet."[23] The plaintiffs "brought a pre-enforcement constitutional challenge[] to permanently enjoin the operation" of the South Carolina statute.[24]

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14. *Id.* § 16-15-375(1)(a).
15. *Id.* § 16-15-375(1)(b).
16. *Id.* § 16-15-375(1)(c).
17. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 776 (D.S.C. 2005) (quoting S.C. CODE ANN. § 16-15-375(2) (2003)).
18. *Id.* (quoting S.C. CODE ANN. § 16-15-375(2) (2003)).
19. S.C. CODE ANN. § 16-15-375(2).
20. *Se. Booksellers*, 371 F. Supp. 2d at 775.
21. *Id.* at 775.
22. *Id.*
23. *Id.* at 776. Specifically, the plaintiffs argued that in terms of their First Amendment claim "the Act, as a content-based restriction on speech, [could not] survive strict scrutiny and [was] unconstitutionally overbroad because it substantially infringe[d] on protected speech of adults." *Id.* Concerning their Commerce Clause claim, the plaintiffs stated that "the proscription constitute[d] an unreasonable and undue burden on interstate and foreign commerce and subject[ed] interstate use of the Internet to inconsistent state regulation." *Id.*
24. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 775 (D.S.C. 2005).

C. *The Parties' Summary Judgment Motions*

In February 2003, the defendants moved to dismiss the suit, claiming the plaintiffs lacked standing to challenge the statute on the basis of the First Amendment and the Commerce Clause.[25] The district court denied the initial motion, and the parties moved for summary judgment.[26] The court held the summary judgment motions in abeyance while the United States Supreme Court decided *Ashcroft v. ACLU*[27] because of the similarities between the challenged statutes.[28] Once the Supreme Court issued its opinion in June 2004, the *Southeast Booksellers* court denied both summary judgment motions.[29] The court based its decision on "the *Ashcroft* Court's admonition that a full trial on the merits might be necessary . . . in order to allow for adequate development of the record with respect to the question of plausible, less restrictive alternatives."[30] The district court noted at the time of the July Order, "the record simply did not contain sufficient evidence regarding the effectiveness of less restrictive alternatives."[31] Subsequently, the plaintiffs and defendants filed updated motions for summary judgment, attaching expert opinions concerning the possibility of equally effective—but less restrictive—means of protecting children from explicit material on the Internet.[32] Based on this evidence, the district court granted the plaintiffs' motion for summary judgment and enjoined the operation of the South Carolina statute.[33]

D. *The Reasoning of the* Southeast Booksellers *Court*

The district court struck down the statute and granted the plaintiffs' motion for summary judgment because the statute violated both the First Amendment and the Commerce Clause.[34] In holding the statute unconstitutional under the First Amendment, the district court indicated that the statute, as a "content-based regulation of speech, . . . must be struck down unless the State [could prove] that it [was] narrowly tailored to advance a compelling interest."[35] The district court explained that "[t]he purpose of the test is to ensure that speech is restricted no

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25. *Id.*
26. *Id.*
27. 542 U.S. 656 (2004). The statute at issue in *Ashcroft* was the Child Online Protection Act, which penalized the "knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'" *Id.* at 661. The statute "provide[d] an affirmative defense to those who employ[ed] specified means to prevent minors from gaining access to the prohibited material on their website." *Id.* at 662. Thus, though worded somewhat differently than the South Carolina statute, the Child Online Protection Act had the same effect in requiring the content providers to restrict the access of their potential viewers.
28. *Se. Booksellers*, 371 F. Supp. 2d at 776.
29. *Id.*
30. *Id.* at 777.
31. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 777 (D.S.C. 2005).
32. *Id.*
33. *Id.* at 788.
34. *Id.* at 786, 788.
35. *Id.* at 781.

further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished."[36]

Applying strict scrutiny, the *Southeast Booksellers* court noted "[t]here is no doubt that the regulation of minors' access to obscene material is a compelling interest."[37] Thus, the district court was left to determine only whether the statute was narrowly tailored to advance that interest. The district court stated, "A law is narrowly tailored if (1) it employs the least restrictive means to achieve its goal, and (2) there is a nexus between the government's compelling interest and the restriction."[38]

The defendants argued the statute represented the least restrictive alternative because of the availability of "minimally burdensome measures" for preventing children from accessing the plaintiffs' websites.[39] The defendants relied on measures such as age verification[40] and labeling[41] "as means to save the Act from constitutional infirmity."[42] The district court noted that other courts "have unanimously concluded that these measures are far too burdensome, and chill adults' ability to engage in, and garner access to, protected speech."[43]

The district court identified three problems with age verification measures. First, age verification "deters lawful users from accessing speech they are entitled to receive" by potentially compromising the user's anonymity.[44] Second, "age verification is problematic because it requires the use of a credit card, which not all adults have."[45] Third, age verification would "pose significant costs for Internet speakers who have to segregate harmful and non-harmful material, and update and maintain [the] system."[46]

The district court also discussed the problems with the defendants' labeling proposal.[47] The district court treated labeling much like age verification and found that "[t]he State's labeling proposal creates many of the same constitutional burdens on protected speech."[48] The district court further observed labeling had been

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36. *Id.* at 778–79 (quoting Ashcroft v. ACLU, 542 U.S. 656, 666 (2004)).

37. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 781 (D.S.C. 2005).

38. *Id.*

39. *Id.* at 781–82.

40. Age verification systems either require the Internet speaker to "accept[] and verif[y] a credit card before allowing access" or utilize a third party website to provide passwords or identification numbers to users who supply credit cards. *Id.* at 782.

41. Labeling is a method by which "Internet speakers label every webpage with harmful material with text such as 'XXX' or 'obscene for minors,'" thus enabling "[o]perating systems/web browsers [to] be programmed to block such material." *Id.* at 782.

42. *Id.* at 782.

43. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 782 (D.S.C. 2005) (citing Reno v. ACLU, 521 U.S. 844, 881 (1967); PSINet, Inc. v. Chapman, 362 F.3d 227, 236–37 (4th Cir. 2004)).

44. *Id.*

45. *Id.* at 783.

46. *Id.*

47. *Id.* at 784.

48. *Id.*

"squarely rejected by the Supreme Court as ineffective in *Reno* [*v. ACLU*]."[49] In rejecting labeling as insufficient and overburdensome, the district court echoed the *Reno* Court's concern that the provider would have no way of verifying the end user actually blocked the labeled material.[50]

After determining that age verification and labeling methods would impose a significant burden on free speech, the district court examined the effectiveness and restrictiveness of another method: filtering.[51] In so doing, the district court relied on the *Ashcroft v. ACLU* Court's earlier endorsement of filtering as a less burdensome means of protecting children from Internet pornography:

> "[Filters] impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished."[52]

Thus, because filtering provided a far less burdensome alternative to the South Carolina dissemination statute, the *Southeast Booksellers* court concluded that "the State's contention that the Act is the least restrictive alternative is wholly without merit."[53]

The district court held that the South Carolina statute failed strict scrutiny "because the State . . . failed to prove that [the statute was] more effective at achieving the State's interest in protecting minors than Plaintiffs' proffered less restrictive alternative of filtering."[54] The district court discussed additional ways in which filters are more effective than age verification or labeling systems.[55] First, "filters can prevent minors from seeing all pornography, not just pornography posted to the web from America."[56] Second, filters do not allow minors to access pornography with their own credit cards.[57] Finally, "filters can be applied to all forms of Internet communications, including email, not just communications

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49. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 789 (D.S.C. 2005) (citing Reno v. ACLU, 521 U.S. 844, 881 (1997)).

50. *Id.*

51. *Id.* at 784–85.

52. *Id.* at 785 (quoting Ashcroft v. ACLU, 542 U.S. 656, 667 (2004)).

53. *Id.*

54. *Id.*

55. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 785 (D.S.C. 2005).

56. *Id.* at 785 (citing *Ashcroft*, 542 U.S. at 667).

57. *Id.* (citing *Ashcroft*, 542 U.S. at 668).

available via the web."[58] Because the defendants did not satisfy their burden of showing the South Carolina statute employed the least restrictive method to achieve its goal of protecting minors, the court granted summary judgment in favor of the plaintiffs on their First Amendment claims.[59]

After invalidating the statute on First Amendment grounds, the district court held the statute also violated the Commerce Clause.[60] The statute, according to the district court, "places an undue burden on interstate commerce by regulating commerce occurring wholly outside of South Carolina."[61] Furthermore, the district court stated that "the Act constitutes an invalid indirect regulation of interstate commerce because the burdens it imposes on interstate commerce are excessive in relation to the local benefit conferred."[62] Thus, the court determined that, even without a consideration of the First Amendment issues, the plaintiffs were entitled to summary judgment because the statute violated the Commerce Clause.[63]

In addressing the constitutionality of the two dissemination statutes and the validity of both decisions, it is necessary to recognize that the decision in *Southeast Booksellers* is the unavoidable consequence of the Supreme Court's *Ashcroft* decision. Therefore, arguing *Southeast Booksellers* was "incorrect" is pointless. Nevertheless, *Southeast Booksellers* is worth critiquing because it illustrates the local effect of *Ashcroft* and the difficulty that South Carolina and other states may face in future attempts to regulate electronic speech.

III. THE COURTS FAILED TO CONSIDER THE APPROPRIATE LEVEL OF SCRUTINY

Because the strict scrutiny standard applies only when a statute burdens a fundamental right,[64] the statutes at issue in *Southeast Booksellers* and *Ashcroft* deserved strict scrutiny only if they burdened speech protected by the First Amendment. In both cases, the courts avoided differentiating between protected and unprotected (non-obscene and obscene) speech by simply stating that strict scrutiny applied. The following sections explain the obscenity standard and show

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58. *Id.* at 783 (citing *Ashcroft*, 542 U.S. at 668).

59. *Id.* at 786.

60. *Id.*

61. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 787 (D.S.C. 2005).

62. *Id.*

63. *Id.* at 788.

64. The Supreme Court created this analytic framework in the famous *Carolene Products* footnote in which the Court wrote that a "narrower scope for operation of the presumption of constitutionality [may be necessary] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick* and holding consensual sexual conduct is encompassed within the concept of liberty, a fundamental right that must be subjected to strict scrutiny); Romer v. Evans, 517 U.S. 620, 631 (1996) (holding strict scrutiny only applies if a law burdens a fundamental right or targets a suspect class); Bowers v. Hardwick, 478 U.S. 186, 195–96 (1986), *overruled by Lawrence*, 539 U.S. at 578 (indicating there is no fundamental right for homosexuals to engage in consensual sodomy and thus not applying strict scrutiny).

how the courts erred in using strict scrutiny, furthering the confusion surrounding First Amendment jurisprudence.

A. *The Difference between Pornography and Obscenity*

The United States Supreme Court decided its first case concerning the degree of First Amendment protection afforded material with sexual content in 1957. In *Roth v. United States*,[65] the Court held obscenity does not fall within the First Amendment's protection.[66] With this standard set, the Court faced the difficult task of defining "obscenity."[67] Justice Brennan, writing for the Court in *Roth*, noted, "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties."[68] Justice Brennan then determined that obscenity depends on "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[69]

The current obscenity standard comes from the Supreme Court's 1973 decision, *Miller v. California*,[70] in which Chief Justice Burger narrowed the *Roth* test:

> We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also 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.[71]

By adding additional requirements to the *Roth* "prurient interest" test, the *Miller* Court made it less likely that material containing sexual content would qualify as obscene and fall outside the First Amendment's protection. Though the Court failed to set an extremely clear standard, the *Miller* test has endured and persists as the current standard.

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65. 354 U.S. 476 (1957).

66. *Id.* at 485; *see also* NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA 284–88 (1980) (discussing the impact of the decision in *Roth*, in which the Court held that "obscenity is not within the area of constitutionally protected speech or press").

67. HENTOFF, *supra* note 66, at 284.

68. *Roth*, 354 U.S. at 484.

69. *Id.* at 489.

70. 413 U.S. 15 (1973).

71. *Id.* at 23–24 (citation omitted).

B. The Appropriate Level of Scrutiny

Both the Child Online Protection Act (COPA) in *Ashcroft*[72] and the South Carolina statute in *Southeast Booksellers*[73] covered obscene material under the *Miller* standard. The text of the statutes mirror the *Miller* standard, with the exception of the language that specifically identifies minors.[74] Instead of immediately applying strict scrutiny, which applies only when constitutionally-protected rights are at stake,[75] both courts initially should have determined whether the statutes regulated speech protected by the First Amendment. The courts, however, immediately defined the statutes as "content-based" prohibitions and thus used strict scrutiny without analyzing the nature of the regulated speech.[76] The courts must have assumed that at least some of the speech the statutes outlawed was not obscene.

While each court quickly determined that strict scrutiny applied, the dissents in *Ashcroft* and a pragmatic consideration of the statutory language in that case indicate the strict scrutiny determination was at least premature, if not incorrect. Justice Scalia, in his brief dissent in *Ashcroft*, stated the majority erred in applying strict scrutiny to COPA.[77] Justice Scalia noted, "Nothing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review."[78] He emphasized the Court has held "'commercial entities which engage in "the sordid business of pandering" by "deliberately emphasiz[ing] the sexually provocative aspects of [their non-obscene products]" . . . engage in constitutionally unprotected behavior.'"[79] Stating that the material covered by COPA was constitutionally unprotected, Justice Scalia concluded that "[s]ince this business could, consistent with the First Amendment, be banned entirely, COPA's lesser restrictions raise no constitutional concern."[80] Thus, Justice Scalia asserted that COPA was constitutional because it did not cover non-obscene speech and should not have been struck down on First Amendment grounds.

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72. Ashcroft v. ACLU, 542 U.S. 656, 661–62 (2004).

73. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 775–76 (D.S.C. 2005).

74. Justice Breyer, in his *Ashcroft* dissent, noted the similarity of the language in COPA with the language discussed in *Miller*. *Ashcroft*, 542 U.S. at 679 (Breyer, J., dissenting). The South Carolina statute in *Southeast Booksellers* also resembled the *Miller* language. *Se. Booksellers*, 371 F. Supp. 2d at 775–76. Thus, the statutes and *Miller* all require that the material appeal to the "prurient interest" of the viewer and that the material lack "serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

75. *See supra* note 64.

76. *Ashcroft*, 542 U.S. at 660; *Southeast Booksellers*, 371 F. Supp. 2d at 778.

77. *Ashcroft*, 542 U.S. at 676 (Scalia, J., dissenting).

78. *Id.*

79. *Id.* (quoting United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 831 (2000)). The Court in *Ginzburg v. United States* set the standard for using strict scrutiny for non-obscene material deliberately marketed to accentuate the sexually provocative details of the product. The Court upheld convictions under an obscenity statute for individuals who distributed non-obscene materials through the mail but emphasized the sexually provocative aspects of those materials. Ginzburg v. United States, 383 U.S. 463, 473–75 (1990).

80. Ashcroft v. ACLU, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting).

Justice Breyer provided a more careful analysis of the speech regulated by COPA and determined the Act covered "legally obscene material, and very little more."[81] Nevertheless, Justice Breyer agreed with the majority that strict scrutiny was the appropriate standard for COPA.[82] He asserted that "[g]iven the inevitable uncertainty about how to characterize close-to-obscene material," the Act could apply to "a limited class of borderline material that courts might ultimately find is protected."[83] Justice Breyer perceived a potential sliver of constitutionally-protected material the Act might cover, and thus determined strict scrutiny was the correct standard.[84]

The majority in *Ashcroft* and the district court in *Southeast Booksellers* applied strict scrutiny because they assumed the statutes covered at least some non-obscene speech. Presumably, the courts focused on the statutes' references to the "prurient interests" of "minors" and the lack of "serious literary, artistic, political, or scientific value for minors,"[85] to conclude that some material obscene for minors would be non-obscene for adults, and thus constitutionally protected. While this distinction seems apparent on its surface, as Justice Breyer noted, the difference is insignificant.[86] Justice Breyer indicated "the addition of [the statutory language referring to minors] to a definition that would otherwise cover only obscenity expands the statute's scope only slightly."[87] He buttressed this assertion by noting that "the material in question . . . must, first, appeal to the 'prurient interest' of, *i.e.*, seek a sexual response from, some group of adolescents or postadolescents (since young children normally do not so respond)."[88] Further, as Justice Breyer wrote, "material that appeals to the 'prurient interest[s]' of some group of adolescents or postadolescents will almost inevitably appeal to the 'prurient interest[s]' of some group of adults as well."[89] Justice Breyer drew a similar conclusion with respect to the statute's covering only material lacking "serious literary, artistic, political, or scientific value for minors."[90] He wrote, "one cannot easily imagine material that has serious literary, artistic, political, or scientific value for a significant group of adults, but lacks such value for any significant group of minors."[91]

Justice Breyer's point is particularly apparent when one considers the distinction between a minor and an adult. While it is easy to consider the divergent prurient interests of a thirty-year-old adult and a twelve-year-old minor, the distinction regarding prurient interests and recognition of redeeming social values

81. *Id.* at 678 (Breyer, J., dissenting).

82. *Id.* at 677.

83. *Id.* at 681–82.

84. *Id.*

85. *See* S.C. CODE ANN. § 16-15-385 (2003). The language in the Federal COPA is identical. *See* 47 U.S.C. § 231 (2000), *invalidated by* Ashcroft v. ACLU, 542 U.S. 656 (2000).

86. *Ashcroft*, 542 U.S. at 679 (Breyer, J., dissenting).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See* 47 U.S.C. § 231(e)(6).

91. *Ashcroft*, 542 U.S. at 679.

is much less clear between a seventeen-year-old and an eighteen-year-old.[92] Thus, the statutes' potential chilling effect on protected adult speech is less clear than the courts indicated, and whether the statutes regulate any speech beyond obscenity is uncertain. The differing opinions of the Justices in *Ashcroft* reveal the Court's continuing struggle with the distinction between protected sexually explicit speech and obscenity. In both *Ashcroft* and *Southeast Booksellers*, the courts should have engaged in a more in-depth consideration of the statutes' effect on protected (non-obscene) speech.[93] Such a consideration could have clarified obscenity jurisprudence and provided a workable standard for legislatures seeking to curb dissemination of pornographic materials to children.

IV. THE COURTS MISAPPLIED THE "LEAST RESTRICTIVE MEANS" TEST

After the *Ashcroft* and *Southeast Booksellers* courts determined that strict scrutiny was appropriate for determining the constitutionality of the Internet dissemination statutes, the courts had to apply the standard. To meet strict scrutiny, a statute must be "narrowly tailored" to advance a "compelling interest" of the government.[94] "A law is narrowly tailored if (1) it employs the least restrictive means to achieve its goal, and (2) there is a nexus between the government's compelling interest and the restriction."[95] To satisfy the least restrictive means element of the narrowly tailored standard, the government must prove that any less restrictive alternatives proposed by the plaintiff would "'not be as effective as the challenged statute.'"[96] Thus, the government cannot meet its burden simply by proving that the challenged statute "has 'some effect in achieving [the legislature's] goal.'"[97] While the courts in *Ashcroft* and *Southeast Booksellers* correctly recognized a compelling interest in protecting minors from Internet pornography, they misapplied the least restrictive means test in holding that the respective statutes failed to pass strict scrutiny.

A. *The Compelling Government Interest*

Beginning with the Supreme Court's 1968 decision in *Ginsberg v. New York*,[98] courts have determined that the government has a vested interest in regulating

92. The statutes at issue define "minor" differently. COPA identifies a minor as "any person under 17 years of age," 47 U.S.C. § 231(e)(7), and the South Carolina statute defines a minor as "an individual who is less than eighteen years old." S.C. CODE ANN. § 16-15-375(3) (2003).

93. *Leading Cases*, 118 HARV. L. REV 248, 353–63 (2004).

94. *See, e.g.*, City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (holding city council's requirement that contractors award thirty percent of subcontracts to minority-owned businesses was not narrowly tailored to achieve a compelling government interest); PSINet, Inc. v. Chapman, 362 F.3d 227, 233 (4th Cir. 2004) ("Strict scrutiny requires the law in question to be 1) narrowly tailored to 2) promote a compelling government interest.").

95. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 781 (D.S.C. 2005).

96. *Id.* (quoting Ashcroft v. ACLU, 542 U.S. 656, 665 (2004)).

97. *Id.* (quoting *Ashcroft*, 542 U.S. at 681).

98. 390 U.S. 629 (1968).

materials that are harmful to children.[99] Justice Brennan described the need for government regulation in this area:

> "While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults."[100]

Justice Brennan indicated that "the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed . . . citizens.'"[101] A recent Fourth Circuit decision specifically recognized a similar interest in protecting minors from accessing harmful materials on the Internet.[102] The courts in *Ashcroft* and *Southeast Booksellers*, therefore, correctly decided that the government has a compelling interest to protect children from harmful Internet materials.[103]

B. Narrow Tailoring and the Least Restrictive Means Test

Unfortunately, the courts' analyses of the narrowly tailored element of strict scrutiny was flawed in both *Ashcroft* and *Southeast Booksellers*. The analysis in both opinions began, and ended, with an examination of the first prong of the narrowly tailored test—the least restrictive means test.[104] In applying this test, the *Ashcroft* Court erred in comparing the challenged regulation to the gamut of possible alternatives.[105] Specifically, the Court compared the government action of

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99. *Id.* at 640–41; *see also* FCC v. Pacifica Found., 438 U.S. 726, 748–51 (1978) (holding that protecting minors from exposure to offensive language on the radio is a compelling government interest.); PSINet, Inc. v. Chapman, 362 F.3d 227, 234 (4th Cir. 2004) ("It is clear that the government's interest in protecting minors from sexually explicit Internet materials is compelling.").

100. *Ginsberg*, 390 U.S. at 640 (quoting People v. Kahan, 206 N.E.2d 333, 334–35 (1965)).

101. *Id.* at 640–41 (quoting Prince v. Massachusetts, 321 U.S. 158, 165 (1944)).

102. *See PSINet*, 362 F.3d at 234 ("It is clear that the government's interest in protecting minors from sexually explicit Internet materials is compelling.").

103. The *Ashcroft* Court implicitly held that protecting children from Internet pornography is a compelling interest by applying the strict scrutiny analysis. *See* Ashcroft v. ACLU, 542 U.S. 656, 665–66 (2004). The *Southeast Booksellers* court expressly stated that "[t]here is no doubt that the regulation of minors' access to obscene material is a compelling interest." Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 781 (D.S.C. 2005).

104. *See Ashcroft*, 542 U.S. at 666–67; *Se. Booksellers*, 371 F. Supp. 2d at 781–86. Because the statute failed the least restrictive means prong of the narrowly tailored test there was no need to address the second prong: whether there is a close nexus between the regulation and the compelling interest. *See Se. Booksellers*, 371 F. Supp. 2d at 786.

105. *Ashcroft*, 542 U.S. at 666–70.

requiring Internet content providers at the sending end to prevent the dissemination of harmful materials to children to the parental action of filtering the harmful material at the receiving end.[106] The Court compared a public action, wherein the government requires specific conduct from Internet providers, to a private action, wherein individuals take certain protective steps. In his dissent, Justice Breyer recognized that this comparison was inappropriate:

> Conceptually speaking, the presence of filtering software is not an *alternative* legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo, *i.e.*, the backdrop against which Congress enacted the present statute. It is always true, by definition, that the status quo is less restrictive than a new regulatory law. It is always less restrictive to do *nothing* than to do *something*. But "doing nothing" does not address the problem Congress sought to address—namely, that, despite the availability of filtering software, children were still being exposed to harmful material on the Internet.[107]

In short, Justice Breyer believes that for a regulation to be the least restrictive means for accomplishing the compelling government interest, it need only be the least restrictive possible legislative solution.

Thus, the *Ashcroft* majority's lengthy discussion of the comparable effectiveness of age verification and blocking methods (regulation at the source) versus filtering software (private action at the receiving end)[108] was inappropriate. Encouraging the use of filters at the receiving end would not be a regulation but merely a government initiative advocating a certain private action.[109] This "alternative," therefore, has no place in the least restrictive means analysis. Courts should not restrict the public means by which legislatures can deal with societal problems even if a private method of dealing with the problem would be just as effective and less restrictive of free speech. The courts' actions strip the legislature of control in an area where the government has a compelling interest on which it should be permitted to take affirmative action.

The difficulty of applying the least restrictive means test presumably arose from the unique nature of the Internet and the resulting difficulty of regulating its content. If the scenarios in *Ashcroft* and *Southeast Booksellers* are compared to a

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106. *Id.* at 664–70.

107. *Id.* at 684 (Breyer, J., dissenting).

108. The *Southeast Booksellers* court also compared these age verification and blocking methods. *See Se. Booksellers*, 371 F. Supp. 2d at 781–86.

109. The *Ashcroft* majority emphasized "the argument that filtering software is not an available alternative because Congress may not require it to be used. . . carries little weight, because Congress undoubtedly may act to encourage the use of filters." *Ashcroft*, 542 U.S. at 669. The Court went on to say that "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." *Id.* (citing United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 824 (2000)).

pre-Internet situation, the flaws in the courts' reasoning become apparent. Consider a statute that prohibits the sale of adult magazines to individuals under the age of seventeen.[110] To comply with the statute, vendors of pornographic material would have to request identification from patrons to verify their age.[111] Assuming some adults will lack identification or refuse to sacrifice their anonymity by showing identification, the statute will keep some individuals from their constitutional right to receive such protected speech. Requiring the government to forgo the regulation and instead encourage parents to make sure that their minor children are not purchasing adult magazines may be less chilling to free speech. Nevertheless, the Supreme Court would certainly uphold the statute if it were challenged on First Amendment grounds. In applying the least restrictive means test, the Court would simply ask whether any other regulation could prevent the sale of pornography to minors as effectively as posing these burdens on would-be adult purchasers. The Court would likely find that other alternatives are not as effective. Legislatures should be able to address compelling interests through regulations that may sometimes burden fundamental rights, even when private actors have the option to effectively address those interests. Disallowing government regulation whenever private actors are already addressing a government interest denies the government the autonomy to directly address its own compelling interests.

Another issue that arose with regard to the least restrictive means test in both *Ashcroft* and *Southeast Booksellers* was the statutes' relative ineffectiveness.[112] Many pornographic Internet sites originate from abroad and the statutes only regulated sites originating in the United States.[113] The *Southeast Booksellers* court wrote that "the inability to curtail the flow of sexually-explicit materials from abroad is a fatal flaw in statutes [of this type]."[114] While this limitation is problematic, the federal and state governments should still have the authority to regulate the conduct of individuals in this country or state, notwithstanding their inability to regulate the conduct of individuals in other countries. The government is merely attempting to take a step in the direction of solving a problem, and courts should not block this effort simply because legislation cannot completely solve the problem.

110. *See* N.Y. PENAL LAW § 484-h (1965). The United States Supreme Court upheld the constitutionality of this statute in *Ginsberg v. New York*, 390 U.S. 629, 643 (1968).

111. The New York Law at issue in *Ginsberg* indicated it was a violation to "'knowingly'" sell to a minor "'any picture'" that "'depicts nudity'" and "'is harmful to minors.'" *Ginsberg*, 390 U.S. at 633 (quoting N.Y. PENAL LAW § 484-h).

112. Ashcroft v. ACLU, 542 U.S. 565, 667 (2004); *Se. Booksellers*, 371 F. Supp. 2d at 785 (citing *Ashcroft*, 542 U.S. at 667).

113. *Ashcroft v. ACLU*, 542 U.S. at 667; *Se. Booksellers*, 371 F. Supp. 2d at 785 (citing *Ashcroft*, 542 U.S. at 667).

114. *Se. Booksellers*, 371 F. Supp. 2d at 786.

V. THE DORMANT COMMERCE CLAUSE AS A LINGERING ISSUE

In *Ashcroft*, the Supreme Court struck down COPA entirely on First Amendment grounds.[115] The *Southeast Booksellers* court relied primarily on the First Amendment, but also held that the South Carolina statute violated the Commerce Clause.[116] The *Southeast Booksellers* court determined "the Act [was] invalid because it place[d] an undue burden on interstate commerce by regulating commerce occurring wholly outside of South Carolina."[117] This determination raises the possibility that the Internet is beyond the reach of state regulation. Indeed, one court has likened "'[t]he content of the internet . . . to the content of the night sky. One state simply cannot block a constellation from the view of its own citizens without blocking or affecting the view of the citizens of other states.'"[118] Thus, given its nature, the Internet appears to be beyond legislative control at the state level. One commentator argued "the dormant Commerce Clause argument, if accepted, threatens to invalidate nearly every state regulation of Internet communications. . . . This explains why the dormant Commerce Clause has been called a 'nuclear bomb of a legal theory' against state Internet regulations."[119] Thus, the current state of First Amendment and Dormant Commerce Clause jurisprudence leaves protection of minors almost entirely to parents. Thus, it may be necessary to reevaluate the Dormant Commerce Clause as it relates to the Internet, or for the Supreme Court to act with greater deference to federal Internet regulations so as to avoid the Commerce Clause issue entirely. Something must change if legislatures are to have the ability to police the evasive world of the Internet.

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115. *Ashcroft*, 542 U.S. at 670–73.

116. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 786–88 (D.S.C. 2005). The United States District Court for the Southern District of New York struck down a similar statute, basing its holding almost entirely on the Commerce Clause:

> First, the . . . "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the state." Second, . . . a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." Finally, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."

Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 175 (S.D.N.Y. 1997) (citations omitted) (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

117. *Se. Booksellers*, 371 F. Supp. 2d at 787.

118. *Id.* (quoting PSINet, Inc. v. Chapman, 362 F.3d 227, 240 (4th Cir. 2004)).

119. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001).

VI. CONCLUSION

The *Ashcroft* and *Southeast Booksellers* decisions trigger a serious problem in South Carolina that has already occurred in a number of other states.[120] Namely, the courts have eviscerated the legislature's power to protect minors from Internet pornography and have forced them to rely on parental intervention. Because the pervasiveness of the Internet is growing every day, children are increasingly more likely to use the Internet on a regular basis. Research indicates that many minors are more knowledgeable about the Internet than their parents.[121] Furthermore, some parents undoubtedly have the "not my child" mentality and thus find it unnecessary to purchase software that blocks dangerous materials on the Internet. By refusing to allow legislatures to criminalize the dissemination of harmful material to children, the courts are protecting not only those who merely post harmful material on the Internet, but also those who target children for exploitative purposes. The courts should afford greater respect to the role of the legislatures and allow them to fulfill their responsibility to create laws that address the government's compelling interests.

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120. *See, e.g.*, Am. Booksellers Found. v. Dean, 342 F.3d 96, 105 (2d Cir. 2003) (holding a Vermont act aimed at preventing minors' access to sexually-explicit Internet material unconstitutional); ACLU v. Johnson, 194 F.3d 1149, 1155 (10th Cir. 1999) (holding a New Mexico act aimed at preventing minors' access to sexually-explicit Internet material unconstitutional); Am. Library Ass'n v. Pataki, 969 F. Supp. 160, 184 (S.D.N.Y. 1997) (holding a New York act aimed at preventing minors' access to sexually-explicit Internet material unconstitutional).

121. Todd A. Nist, *Finding the Right Approach: A Constitutional Alternative for Shielding Kids from Harmful Materials Online*, 65 OHIO ST. L.J. 451, 478 n.117 (2004) (noting that "parents often have less knowledge about the Internet compared to their kids" and that research indicates "'[o]nly 23% of parents say they know more about the Internet than their child does'" (quoting AMARACH CONSULTING, INTERNET ADVISORY BOARD RESEARCH OF INTERNET DOWNSIDE ISSUES ii (2001), http://www.ispai.ie/docs%5camarach.pdf)).