Florida State University Law Review

Volume 29 | Issue 3 Article 4

2002

State Regulation of Pornographic Internet Transmissions: The Constitutional Questions Raised by Senate Bill 144

Richard H. Martin
rhm@rhm.com

FLORIDA STATE UNIVERSITY
LAW REVIEW

STATE REGULATION OF PORNOGRAPHIC INTERNET TRANSMISSIONS: THE CONSTITUTIONAL QUESTIONS RAISED BY SENATE BILL 144

Richard H. Martin

VOLUME 29 SPRING 2002 NUMBER 3

Recommended citation: Richard H. Martin, *State Regulation of Pornographic Internet Transmissions: The Constitutional Questions Raised by Senate Bill 144*, 29 FLA. ST. U. L. REV. 1109 (2002).

STATE REGULATION OF PORNOGRAPHIC INTERNET TRANSMISSIONS: THE CONSTITUTIONAL QUESTIONS RAISED BY SENATE BILL 144

RICHARD H. MARTIN*

I. INTRODUCTION

Although the Internet is an important resource for America's youth, the anonymity provided by the shield of technology has also made the Internet a fertile ground for child pornographers and sexual predators. All levels of government are hurrying to impose laws that will protect children as they venture out, often unsupervised, into cyberspace. Laws enacted by Congress and the states have come under constitutional attack by civil rights organizations. These attacks have invalidated much of the legislation, despite the strong governmental interest in protecting children. An emerging constitutional doctrine strongly protects information on the Internet and favors federal regulation over state regulation. Aware of these constitutional issues, the 2001 Florida Legislature passed Senate Bill 144 (SB 144) to criminalize the transmission of child pornography to persons in Florida and the transmission of images "harmful to minors" to minors in Florida.

This article discusses the provisions of SB 144 and the constitutional issues raised by the bill. Like its predecessors in other states,

* J.D. Candidate, May 2002, Florida State University College of Law; B.S. with Highest Honors, University of Florida, 1997. Thanks to Charles Davidson, all of the House Information Technology Committee staff, and Representative Chris Hart, IV for their encouragement. Eternal thanks and love to Melissa for her patience and perseverance during my legal education.

the bill likely will come under constitutional scrutiny. Civil rights groups are likely to argue that the bill violates both the First Amendment and the Commerce Clause of the U.S. Constitution. Despite the legislature's obvious attempt to narrowly craft the legislation, different portions of the bill are more likely or less likely to survive this scrutiny, depending on the significance of the state's interest in regulating the type of prohibited content. Weighing these significant constitutional interests is a daunting task. The final judicial decision, regardless of its outcome, will undoubtedly fuel the debate about which governmental entity is best suited to regulate conduct and content on the Internet, and to what extent the Constitution restrains state governments from regulating the Internet.

II. THE PROBLEM OF SEXUAL EXPLOITATION OF CHILDREN ON THE INTERNET

The Internet is the fastest growing communication medium in American society. As with any new technology, younger generations have readily embraced the Internet. A study funded by the National Center for Missing and Exploited Children reported that in 1999 nearly twenty-four million children between the ages of ten and seventeen regularly used the Internet, and that number was growing quickly.[1] The Internet offers a vast array of educational and entertainment opportunities that are beneficial to children and that would be unavailable to many children through traditional media.

Despite these obvious benefits, the Internet is more than an educational utopia. The anonymity provided by the shield of technology has given child pornographers and sexual predators a new vehicle for exploiting children. Victimization of children online usually occurs through two avenues. First, children can be victimized by the widespread propagation of digital images of child pornography. Digital imaging technology has made reproducing images of child pornography in electronic format easy and inexpensive. Once such images are digitized, they can be distributed via many different media, such as e-mail, file transfer protocol (ftp), the World Wide Web, or direct computer-to-computer connections. The second primary avenue for child exploitation is direct sexual solicitation of children while they are online. Sexual predators often use pornographic images to coax children to meet them in an offline encounter. The *Online Victimization Report* found that children often encountered "sexual solicita-

1. David Finkelhor et al., Crimes Against Children Research Center, *Online Victimization: A Report on the Nation's Youth* viii (2000), *available at* http://www.ncmec.org [hereinafter *Online Victimization Report*]. For a summary of the survey results in the report, see Kimberly J. Mitchell et al., *Risk Factors for and Impact of Online Sexual Solicitation of Youth*, 285 JAMA 3011 (2001).

tions they did not want, sexual material they did not seek, and people who threatened and harassed them in a variety of ways."[2] While many children disregarded these sexual advances, others were emotionally impacted by these encounters.[3]

The *Online Victimization Report* surveyed 1501 children, asking questions about the children's online experiences.[4] Of those children surveyed, about one in five was sexually solicited while online in the last year.[5] One in thirty-three survey respondents was aggressively solicited; that is, a solicitor asked to meet them somewhere, called them, or sent them money or gifts.[6] About one-fourth of the children receiving these solicitations felt distressed by them, but very few reported the incident to a parent and even fewer reported incidents to the authorities.[7]

The *Online Victimization Report* also indicated that the law enforcement community was not effectively educating parents and children about how to deal with these sexual advances. Of the incidents reported in the survey, less than ten percent were reported to the authorities and most parents could not name a specific authority to which they could make a report.[8] The authors concluded:

> [Y]outh encounter a substantial quantity of offensive episodes, some of which are distressing and most of which are unreported. A comprehensive strategy to respond to the problem would aim to reduce the quantity of offensive behavior, better shield young people from its likely occurrence, increase the level of reporting, and provide more help to youth and families to protect them from any consequences.[9]

III. LEGISLATIVE RESPONSES TO SEXUAL EXPLOITATION OF CHILDREN ONLINE

In recent years, Congress and the states have passed many pieces of legislation attempting to deal with the problem of sexual exploitation of children on the Internet. Many of these laws have come under constitutional attack. Congress's first attempt at regulating the transmission of pornography to children was the Communications Decency Act of 1996 (CDA), which passed as part of the Telecommu-

---

2. *Online Victimization Report*, *supra* note 1, at vii.
3. *Id.*
4. *Id.* at ix.
5. *Id.*
6. *Id.* This amounts to more than 45 of the 1501 children surveyed.
7. *Id.*
8. *Id.*
9. *Id.*

nications Act of 1996.[10] The CDA prohibited the transmission in interstate or foreign commerce of obscene or indecent images to any recipient under the age of eighteen.[11] The CDA also prohibited knowingly sending or displaying patently offensive material in a manner that was available to persons under eighteen.[12] A person who engaged in the prohibited conduct was subject to fines or criminal penalties. The CDA provided two affirmative defenses for persons who made good faith efforts to restrict access to the prohibited material by minors.[13] The Supreme Court eventually struck down the CDA as a content-based regulation of speech that was unconstitutionally vague and overbroad.[14]

In response to the ruling striking down the CDA and in an attempt to address the Court's concerns, Congress passed the Child Online Protection Act (COPA).[15] COPA prohibits any individual or entity from knowingly making a communication using the World Wide Web for commercial purposes when that communication is available to minors and is harmful to minors.[16] Congress intended COPA to limit the scope of the content prohibition to commercial speech on the Web that is harmful to minors. Like the CDA, COPA also provides affirmative defenses for Web publishers who restrict access to minors by requiring a form of identification that proves the accessing person is not a minor.[17] Persons or entities that violate the

---

10. Pub. L. No. 104-104, 110 Stat. 56 (1996). The CDA is found in Title V of the Telecommunication Act. *See* Telecommunications Act of 1996 § 502, 47 U.S.C. §§ 223(a)-(e) (1994 & Supp. II 1996). Apparently, the Senate amended the CDA onto the Act without a hearing, and several members of the House of Representatives objected to the amendment. These members felt the amendment would only result in legal challenges. For an abbreviated summary of the history of the passage of the CDA, see Reno v. ACLU, 521 U.S. 844, 857-60 (1997).

11. 47 U.S.C. § 223(a) (1994 & Supp. II 1996).

12. *Id.* § 223(d).

13. *Id.* § 223(e)(5). One affirmative defense was provided for "good faith, reasonable, effective and appropriate" actions to restrict access to minors as feasible under existing technology. *Id.* § 223(e)(5)(A). The other affirmative defense was provided for using credit card, debit card, adult access codes, or adult personal identification numbers. *Id.* § 223(e)(5)(B).

14. Reno v. ACLU, 521 U.S. at 872-74. The Court, noting the lack of historical government regulation of Internet content, applied strict scrutiny, stating, "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* at 870. The Court noted that the CDA's breadth was "wholly unprecedented" because it applied to all content on the Internet, both commercial and noncommercial. *Id.* at 877. The Court also stated: "We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Id.* at 874.

15. Pub. L. No. 105-277, div. C., title XIV, § 1403, 112 Stat. 2681-736 (codified at 47 U.S.C. § 231 (1994 & Supp. V 1999)).

16. 47 U.S.C. § 231(a)(1).

17. *Id.* § 231(c)(1)(C). This provision provides a variety of permissible age verification mechanisms including credit cards, debit cards, adult access codes, adult personal identification numbers, digital certificates that verify age, or "any other reasonable measures that are feasible under available technology." *Id.*

prohibitions are subject to criminal penalties and substantial fines.[18] While noting the government's compelling interest in protecting children from harmful material, the Third Circuit recently affirmed a preliminary injunction that prevented COPA's enforcement, holding that COPA was more likely than not unconstitutionally overbroad.[19] The Supreme Court has accepted the case for review during the October 2001 term.[20]

In addition to Congress's attempts to regulate online pornography, numerous states have attempted to pass legislation to address the issue. Nearly every state statute that has faced constitutional challenge in federal court has been invalidated.[21] Most of these statutes have been held unconstitutional violations of either the First Amendment or the Commerce Clause, or both.

IV. FLORIDA'S ATTEMPT TO ADDRESS THE PROBLEM

In the 2001 session, the Florida Legislature enacted SB 144, which attempts to address the problem of child pornography and the transmission of images harmful to minors via the Internet. In the 1999 session, the legislature created the Information Service Technology Development Task Force to study several issues related to government and technology.[22] One such issue was the sufficiency of Florida's criminal laws to deal with Internet-related crimes. The Task Force released its report in February 2001 and recommended that the legislature enact a law proscribing the transmission of child pornography and the transmission of pornographic images to minors in Florida.[23] Apparently, this recommendation was in response to an increasing number of widely publicized incidents of sexual solicitation and exploitation in Florida[24] and a bill that had been debated in

---

18. *Id.* § 231(a)(2).

19. *See* ACLU v. Reno, 217 F.3d 162, 181 (3d Cir. 2000), *cert. granted sub nom.* ACLU v. Ashcroft, 121 S. Ct. 1997 (2001).

20. ACLU v. Ashcroft, 121 S. Ct. 1997.

21. *See* ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999) (invalidating N.M. STAT. ANN. § 30-37-3.2 (Michie Supp. 1998)); PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611 (W.D. Va. 2000) (invalidating VA. CODE. ANN. § 18.2-391 (Michie Supp. 1999)); Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (invalidating MICH. COMP. LAWS § 722.675(1) (2000)); Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (invalidating N.Y. PENAL LAW § 235.21 (McKinney's 1997)).

22. *See* Ch. 99-354, § 11, 1999 Fla. Laws 3606, 3614.

23. INFORMATION SERVICE TECHNOLOGY DEVELOPMENT TASK FORCE, 2001 ANNUAL REPORT OF THE INFORMATION SERVICE TECHNOLOGY DEVELOPMENT TASK FORCE, at 113 (Feb. 14, 2001) (on file with the Florida House of Representatives Committee on Information Technology) [hereinafter TASK FORCE REPORT].

24. *See, e.g.*, Michael Barbaro et al., *Broward Teachers' Union Chief Accused of Computer Child-Porn*, MIAMI HERALD, July 27, 2001, at 4B; Tony Bridges, *Man Facing Charges After Ex-Girlfriend Finds Child Porn*, TALLAHASSEE DEM., Apr. 28, 2001, at 2B; *Dad Helps Nab Rabbi in Web-Sex Case*, ORLANDO SENTINEL, Apr. 8, 2001, at B3; *Former Orlando Attorney Convicted of Internet Sex Offenses*, NAPLES DAILY NEWS, Feb. 17, 2001; Lisa Fuss,

the 2000 legislative session.[25] The Task Force also recommended that civil immunity be provided for persons who report such crimes, but that a mandatory reporting requirement not be enacted.[26] Noting jurisdictional problems with addressing the issue, the Task Force nevertheless felt the legislature could effectively draft a criminal law that would protect Florida's minors.[27] SB 144 represents the 2001 legislature's implementation of the Task Force's recommendations. Both the House and the Senate heard bills addressing the issue,[28] with SB 144 resulting as the compromise measure that the legislature enacted. The Governor signed SB 144 on May 25, 2001, and the law became effective on July 1, 2001.

SB 144, entitled "an act relating to computer crimes," contains numerous "Whereas" clauses demonstrating the legislature's findings that criminalization of transmission of child pornography and images harmful to minors was necessary to protect Florida's children.[29] Regarding child pornography, the legislature found that the use of minors in pornographic images was harmful to the psychological well-being of minors and that the dissemination of such images by any means resulted in a continuing, irreparable injury to the minor who was the subject of the image.[30] Related to sexual solicitation of children, the legislature found that pornographic images were frequently used to entice minors to engage in improper sexual activity that was harmful to their emotional well-being.[31] The legislature further found that "the advent . . . of the Internet and other electronic devices has greatly facilitated transmission of child pornography and images . . . harmful to minors."[32]

SB 144 created and revised numerous definitions in section 847.001, *Florida Statutes*, the definitional section for Florida's chapter on computer crimes.[33] The bill defined the term "child pornography" as "any image depicting a minor engaged in sexual conduct."[34]

Man Facing More Child Porn Counts, MIAMI HERALD, Mar. 2, 2001, at 5B; Matthew Henry, *Police: Worker Had Kiddie Porn*, SARASOTA HERALD-TRIB., Apr. 19, 2001, at BV1; *Lawyer Guilty in Internet Case*, ORLANDO SENTINEL, Feb. 18, 2001, at B3; *Man Arrested, Charged in Assault of Teen*, S. FLA. SUN-SENTINEL, June 14, 2001, at 3B; Brigid O'Malley, *North Naples Man Arrested on Child Pornography Charges*, NAPLES DAILY NEWS, June 8, 2001, at D1; Andreas Tzortzis, *Officer Arrested on Sex Charges*, S. FLA. SUN-SENTINEL, June 22, 2001, at A1.

25. Fla. HB 895 (2000).

26. TASK FORCE REPORT, *supra* note 23, at 113.

27. *Id.*

28. Fla. CS for CS for SB 144 (2001); Fla. HB 203 (2001).

29. Fla. CS for CS for SB 144 (2001) (Second Engrossed); *see also* Act effective July 1, 2001, 2001 Fla. Laws ch. 54, at 345-46.

30. *Id.*

31. *Id.*

32. *Id.* at 3.

33. *Id.* at 5.

34. Fla. SB 144, § 1 (creating a new subsection (1) for FLA. STAT. § 847.001).

By using the term "sexual conduct," the definition of child pornography incorporates the broad definition of that term in subsection (16) of section 847.001.[35] The bill also revised the definitions of "harmful to minors" and "person" to slightly expand their breadth.[36]

The bill created two new criminal statutes. The first, section 847.0137, makes the electronic transmission of child pornography a third-degree felony.[37] The second, section 847.0138, makes the transmission via e-mail of images "harmful to minors" to a minor in Florida a third-degree felony.[38] The two statutes are distinct in their breadth and involve different constitutional analyses.

A. Transmission of Child Pornography

Section 847.0137 criminalizes the transmission of child pornography by means of any electronic equipment or device. To commit the prohibited act, a defendant must "transmit" child pornography.[39] The term "transmit" was broadly defined to include various types of data and various transfer mechanisms. Specifically, to "transmit" means to send or cause to be delivered "any image, information or data."[40] The definition appears to include both still images and animated video. Regarding the transfer mechanism, transmissions "through any medium, including the Internet, by use of any electronic equipment or device" are included.[41] The definition broadly contemplates any electronic transfer mechanism, including e-mail, fax, ftp, chat rooms, and direct user-to-user modem connections. A person who posted child pornography to a Web site would also "transmit" the images to get the images onto the site. However, this type of transmission does not appear to be within the scope of this bill because section 847.0137(2) requires the transmission be made to another person,

---

35. For the reader's ease, further references to SB 144 will be made to the corresponding section of *Florida Statutes* that SB 144 either creates or modifies. Section 847.001(16) defines the term "sexual conduct" to mean:

> actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding her baby does not under any circumstances constitute "sexual conduct."

FLA. STAT. § 847.001(16) (2001).

36. *Id.* § 847.001(6), (11).

37. *Id.* § 847.0137.

38. *Id.* § 847.0138.

39. *Id.* § 847.0137.

40. *Id.* § 847.0137(1)(b).

41. *Id.*

rather than to another computer.[42] A broad definition of "transfer mechanisms" is probably necessary because a more narrow definition could mean that child pornographers could easily circumvent the law by using technologies not within the definition's scope.

The bill provides that a criminal act has been committed when either the source or the destination of a transmission of child pornography was the State of Florida. Subsection (2) of section 847.0137 provides that any person in Florida who knew or reasonably should have known that they were transmitting child pornography to any person, whether in Florida or not, commits a third degree felony.[43] Thus, where a person in Florida is the source of the prohibited transmission, the sender violates subsection (2). Subsection (3) of section 847.0137 provides that a person in any other jurisdiction who knew or reasonably should have known that they were transmitting child pornography to a person in Florida commits a third degree felony.[44] Thus, where the destination of the prohibited transmission is a person in Florida, the sender violates subsection (3).[45]

B. Transmission of Images "Harmful to Minors" to Minors in Florida

SB 144 also creates section 847.0138, which prohibits the transmission of images "harmful to minors" to a minor in Florida. The

---

42. Possession of digital images of child pornography, however, are prohibited by section 847.0135, *Florida Statutes*. Arguably anyone who posts an image to a Web site could be transmitting the image to another person because they are placing the image in a forum where they know Internet users are likely to view them. However, this type of "indirect transmission" does not appear to be contemplated by the statute. A person who views a Web site with child pornography might also appear to transmit the image because, by accessing the Web site, they are causing the child pornography to be delivered to themselves. However, the knowledge requirement in section 847.0137(2) appears to ensure that unwitting Internet users who stumble onto child pornography do not fall within this prohibition.

43. FLA. STAT. § 847.0137(2).

44. *Id.* § 847.0137(3).

45. Whether a person can reasonably be expected to know that Florida is the destination of a communication transmitted via the Internet is likely to be a subject of debate in any challenge to the bill. For reasons discussed *infra* Parts V.B.1 and V.B.2, courts have noted that determining the geographic location of a person on the Internet is very difficult, if not impossible. Note, however, that the broad definition of the term "transmit" could include instances, such as by fax or direct-dial, where, because of the receiver's area code, the sender should reasonably know Florida is the destination.

Additionally, prosecution of out-of-state offenders raises jurisdictional concerns. The legislature attempted to address these concerns in subsection (5) of section 847.0137 by providing that any person over whom Florida has jurisdiction pursuant to chapter 910 would be subject to prosecution in Florida for a violation of subsection (3). FLA. STAT. § 847.0137(5). Section 910.005 sets out the criminal jurisdiction of the state of Florida. *See id.* § 910.005. Subsection (2) of section 910.005 provides that if either the conduct that is an element of the offense or the result occurs in Florida, then Florida has jurisdiction. *Id.* § 910.005(2). While jurisdiction is arguable, the result of a transmission of child pornography to a Florida resident is the Florida resident's reception of the transmission, and thus jurisdiction could be properly asserted.

term "harmful to minors" is defined in section 847.001(6) and would generally include adult pornography.[46] The statutory definition of "harmful to minors" incorporates the constitutional standard established by the Supreme Court in *Miller v. California*.[47] Apparently in recognition of the constitutional issues related to restricting transmission of adult pornography on the Internet, the legislature drafted a much more narrow prohibition in section 847.0138. First, the definition of "transmit" is much narrower in scope. Unlike the all-encompassing definition in section 847.0137, a person only "transmits" under section 847.0138 when the person sends "to a specific individual known by the defendant to be a minor via electronic mail."[48] Thus, e-mail is the only regulated transmission mechanism, and posting adult pornography on a Web site would not violate the statute. Additionally, for the defendant to "know" the recipient is a minor, the defendant must have had actual knowledge or have believed that the recipient was a minor.[49]

Section 847.0138 criminalizes the transmission of images harmful to minors when the defendant knew or believed the recipient was a minor. Violation of the statute is a third-degree felony.[50] Subsection (2) of section 847.0138 applies to persons in Florida who transmit the prohibited images to minors. Subsection (3) applies to persons outside the state who transmit images to minors. In either case, the minor to whom the defendant transmitted the image must be in Florida.

---

46. As amended by the bill, section 847.001(4) defines the term "harmful to minors" to mean:

> any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:
> (a) Predominantly appeals to the prurient, shameful or morbid interest of minors;
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
> (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.
> A mother's breastfeeding of her baby is not under any circumstance "harmful to minors."

Id. § 847.001(4).

47. 413 U.S. 15 (1973).

48. FLA. STAT. § 847.0138(1)(b).

49. *Id.* § 847.0138(1)(a). The test for knowledge seems to apply in two cases. The first case is where the defendant had actual knowledge. Second, if the defendant subjectively believed the recipient was a minor, the defendant would satisfy the knowledge requirement. It is unclear why the legislature chose to have a subjective standard for the second prong. While the test is consistent with the "knew or believed" test in subsection (2) of section 847.0138, the test is inconsistent with the objective standard or reasonableness in section 847.0137. Prosecution of the offense may be hindered by efforts to prove the defendant's subjective belief. The subjective standard may also pose constitutional questions. *See* discussion *infra* notes 121-23 and accompanying text.

50. FLA. STAT. § 847.0138.

V. CONSTITUTIONAL ISSUES RAISED BY SB 144

The legislature was acutely aware of the constitutional difficulties that SB 144 posed and the significant likelihood that the bill would be challenged.[51] State regulation of the transmission of content over the Internet has come under sharp constitutional attack. Nearly every law attempting to regulate in this area has been struck down as unconstitutional.[52] There are two leading theories by which courts have struck down similar legislation. First, courts have held that statutes similar to those created by SB 144 violate the First Amendment. Second, courts have held that state legislation similar to SB 144 violates the dormant Commerce Clause. This part of the Article discusses the cases dealing with these two constitutional theories and their possible application to the provisions of SB 144.

A. The First Amendment Implications of SB 144

Several courts have found that state and federal legislation similar to SB 144 violates the First Amendment.[53] Because SB 144 singles out two types of content, child pornography and images harmful to minors, the bill is a content-based regulation of speech. Generally, content-based regulations of speech are presumptively invalid and are subjected to strict scrutiny.[54] For a content-based regulation of speech to survive strict scrutiny: (1) the government must have a compelling interest in regulating the speech, (2) the regulation must be narrowly tailored to meet the government's compelling interest, and (3) the regulation must be the least restrictive means possible.[55]

The First Amendment analysis of the provisions of SB 144 differs based on the content being regulated in the different criminal statutes. The cases clearly establish that states have a greater interest in regulating child pornography than in regulating adult pornography. As the First Circuit noted in *United States v. Hilton*:

> [S]exually explicit material may be seen to fall along a constitutional continuum entitling it to varying degrees of protection. At one end of the spectrum, pictures of actual children in sexually compromising positions, deemed to have little or no social value,

---

51. *See* Senate Staff Analysis for SB 144, and House Staff Analysis for HB 203, the Companion Measure to SB 144, *available at* http://www.leg.state.fl.us (last visited July 21, 2001).

52. *See* cases cited *supra* note 21.

53. Reno v. ACLU, 521 U.S. 844, 870-71 (1997); ACLU v. Reno, 217 F.3d 162, 179 (3rd Cir. 2000), *cert. granted sub nom.* ACLU v. Ashcroft, 121 S. Ct. 1997 (2001); ACLU v. Johnson, 194 F.3d 1149, 1160 (10th Cir. 1999); PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611, 626 (W.D. Va. 2000); Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999).

54. ACLU v. Reno, 217 F.3d at 173.

55. *Id.*

> are entitled to no constitutional protection. At the opposite end of the spectrum, non-obscene images involving actual adults are entitled to full protection.[56]

1. The State's Interest in Regulating Child Pornography

In *New York v. Ferber*,[57] the Supreme Court unanimously upheld a New York statute that prohibited persons from knowingly promoting a sexual performance by a child under age sixteen by distributing material that depicted such a performance.[58] Rather than proceed with the traditional strict scrutiny analysis, the Court "believe[d] [its] inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children."[59] The Court determined that states were entitled to "greater leeway" in the regulation of pornographic depictions of children but cautioned that statutes should be drafted to ensure that "the hand of the censor [not] become unduly heavy."[60]

The *Ferber* Court cited five reasons why states were entitled to greater leeway in banning child pornography. First, states have a compelling interest in protecting the physical and psychological well-being of minors.[61] Second, the distribution of photographs depicting child pornography were "intrinsically related" to the sexual abuse the children suffered as a result of the creation of the images.[62] Because the images were a permanent record of the sexual act, the images posed an ongoing injury to the child.[63] Third, allowing a commercial market for child pornography would provide an economic incentive to produce materials that were uniformly outlawed.[64] Fourth, the social value of permitting live performances and photographic reproductions of children engaged in sexual conduct was de minimis.[65] Fifth, classifying child pornography as a category of content outside the

---

56. 167 F.3d 61, 70 (1st Cir. 1999).
57. 458 U.S. 747 (1982).
58. *Id.* at 750.
59. *Id.* at 753.
60. *Id.* at 756.
61. *Id.* at 756-57. The Court noted that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* In *Ginsberg v. New York*, 390 U.S. 629, 637-41 (1968), the Court had also held that states had a special interest in protecting youth and elevated the state's role in protecting children through regulation of pornographic material above the state's role in regulating exposure to the same content for consenting adults.
62. *Ferber*, 458 U.S. at 759.
63. *Id.* The Court also noted that the network for the dissemination of child pornography must be closed in order for the market for the exploitative images to be eliminated. *Id.*
64. *Id.* at 761.
65. *Id.* at 762.

protection of the First Amendment was not contrary to the Court's precedent.[66]

Although the Court broadly stated that child pornography was a category of speech outside protection of the First Amendment, the Court cautioned that legislation should be "adequately defined."[67] Because the New York statutes at issue clearly specified the applicable age of the image's subject and defined what constituted "sexual conduct," the statute was adequately defined.[68]

Eight years later, in *Osborne v. Ohio*,[69] the Court was confronted with a state statute that banned the possession and viewing of child pornography, rather than its commercial dissemination. The Ohio statute banned the possession of any material that showed a minor, who was not the person's child, in a state of nudity unless the material was for a statutorily defined bona fide purpose or the child's parents consented in writing to the image's production.[70] In a prior case, *Stanley v. Georgia*,[71] the Court struck down a Georgia statute that outlawed the private possession of obscene material because the statute unduly infringed upon an individual's right to receive information in the privacy of the individual's home.[72]

The defendant in *Osborne* argued that *Stanley* limited the state's ability to outlaw the possession of child pornography.[73] The Court distinguished *Stanley* and upheld Ohio's ban on the possession of child pornography.[74] The protection of children through further efforts to eradicate the market for child pornography justified Ohio's ban.[75] Reaffirming the state's compelling interest in protecting children from sexual exploitation, the Court noted that banning possession was a reasonable method of attempting to reduce the demand for child pornography.[76] The Court could not "fault Ohio for attempting to stamp out this vice at all levels in the distribution chain."[77] The ban on possession was further supported by evidence that, since the *Ferber* decision, the child pornography market had been driven underground, and so further regulation of commercial production

66. *Id.* at 763. The Court noted that in other contexts, it had evaluated the content of speech and determined whether, based on the content, the speech was entitled to First Amendment protection. For instance, "fighting words" are unprotected. *Id.* (citing Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 66 (1976)).

67. *Id.* at 764.

68. *Id.* at 765-66.

69. 495 U.S. 103 (1990).

70. *Id.* at 106-07.

71. 394 U.S. 557 (1969).

72. *Id.* at 564-68.

73. *Osborne*, 495 U.S. at 108.

74. *Id.*

75. *Id.* at 109.

76. *Id.* at 109-10.

77. *Id.* at 110.

and distribution had little effect.[78] By banning possession, Ohio's law encouraged persons possessing child pornography to destroy the images, thus ending the lasting injury to the child that the image represented.

The strength of the state's compelling interest and the Court's recognition that child pornography is a category of speech wholly outside First Amendment protection buttresses the constitutionality of the ban on the electronic transmission of child pornography that SB 144 establishes in section 847.0137. The legislative findings accompanying the substantive provisions of SB 144 specifically incorporate the constitutional justifications in *Ferber*.[79] Moreover, just as child pornographers went underground subsequent to the *Ferber* decision, they are using today's technology to anonymously propagate exploitative images on the Internet in even greater quantities.[80] Digital imaging technology allows child pornographers to cheaply develop and mass distribute images with little trace of their identity. The significant government interest in addressing the issue probably weighs in favor of finding that section 847.0137 does not violate the First Amendment.

2. State Regulation of Transmission of Images "Harmful to Minors"

Whether the provisions of SB 144 that regulate the transmission of images "harmful to minors" violate the First Amendment presents a much closer question. Section 847.0138 proscribes the transmission of images "harmful to minors" to children in Florida. Section 847.001 defines the term "harmful to minors" by incorporating the standard for obscenity established by the Supreme Court in *Miller v. California*.[81] For an image to meet the three-part codified *Miller* standard, it must: (1) predominantly appeal to the prurient, shameful, or morbid interest of minors; (2) be patently offensive to prevailing standards in the adult community as to what is suitable material for minors; and (3) when taken as a whole, be without serious literary, artistic, political, or scientific value for minors.[82] Note that the focus of the inquiry is on whether the material is suitable for minors, rather than for the adult community or for society as a whole. Such an analysis is constitutionally appropriate because, in *Ginsberg v. New York*,[83] the Court

78. *Id.*

79. *See* Act effective July 1, 2001, 2001 Fla. Laws ch. 54, at 345-46.

80. For instance, the *Sarasota Herald-Tribune* reported on April 19, 2001, that a Venice, Florida, public library employee was arrested for using library computers to download more than 190 computer disks of child pornographic images. Henry, *supra* note 24.

81. *See* 413 U.S. 15, 25 (1973).

82. FLA. STAT. § 847.001(6)(a)-(c) (2001).

83. 390 U.S. 629 (1968).

upheld a statute that prohibited selling minors materials considered obscene to minors even though the material was not obscene to adults.[84] However, the Court has also said that the First Amendment prevents the government from banning the purchase or viewing of adult pornographic images by adults.[85]

If adult pornographic images are protected by the First Amendment with respect to adults but not protected with respect to minors, how does this constitutional dichotomy affect the government's ability to restrict access to pornographic images on the Internet? In *Reno v. ACLU*,[86] (*Reno*) when scrutinizing the CDA, the Supreme Court began to address this issue. Recall that the CDA prohibited the transmission of harmful images to minors and the display of harmful images in a way that could be accessed by minors.[87] In attempting to determine what level of First Amendment scrutiny applied to the Internet, the *Reno* Court made extensive findings about the nature of the Internet[88] and struggled to analogize traditional communications systems to the Internet.

In evaluating the breadth of the CDA's prohibitions, the *Reno* Court distinguished *Ginsberg*. The Court first noted that the statute at issue in *Ginsberg* did not bar parents from purchasing pornographic magazines for their children.[89] The CDA's proscriptions, however, applied regardless of whether or not the parents consented to the Internet communications.[90] Second, while the New York statute in *Ginsberg* applied only to commercial transactions, the CDA applied to all Internet communications.[91] Third, the CDA did not properly incorporate the *Miller* standard, as done by the statute in *Ginsberg*.[92] Finally, while the New York statute only applied to minors under age seventeen, the CDA applied to all those under age eighteen, thus including those minors nearest to the age of majority.[93] After distinguishing *Ginsberg*, the Court held that prior cases were also distinguishable from the constitutional analysis necessary to evaluate the CDA. Specifically, the Court stated that its prior obscenity cases on administrative regulation of broadcast content[94] and

---

84. *Id.* at 633-34. Indeed, the New York statute at issue in *Ginsberg* contained exactly the same standard for determining whether material is "harmful to minors" as that currently embodied in section 847.001(3).

85. Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

86. 521 U.S. 844 (1997).

87. *See supra* note 10 and accompanying text.

88. Reno v. ACLU, 521 U.S. at 849-53.

89. *Id.* at 865 (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 865-66.

94. FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding a declaratory order of the FCC that stated that a broadcast containing repetitive use of words referring to excretory

zoning ordinances[95] did not prevent the application of strict scrutiny to the CDA.[96]

Once the Court determined that precedent did not prevent the application of strict scrutiny, the Court began the search for the best analogy to the Internet. To begin its analysis, the Court stated that each medium of expression presents its own unique circumstances that must be independently analyzed.[97] The Court noted that, unlike traditional broadcast media, Internet content had not been subject to historical regulation.[98] Additionally, according to the Court, unlike the more "invasive" broadcast media, Internet communications did not appear on a person's computer screen unbidden, and Internet users rarely came across Internet content accidentally.[99] Finally, the Court noted that the Internet was a much more readily available expressive commodity than the more limited broadcast spectrum.[100] Thus, the practical aspects of the Internet provided no basis for qualifying the level of First Amendment scrutiny that content-based Internet restrictions received.[101]

Determining that neither precedent nor the practicalities of the Internet justified a less restrictive First Amendment analysis, the Court applied strict scrutiny to the CDA and determined that the CDA was unconstitutionally vague. Because the CDA was a content-based regulation of speech that provided for criminal penalties, the Court rigidly scrutinized the CDA's provisions. The Court stated, "The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words,

---

and sexual activities scheduled for viewing during a time when children were the target audience was subject to administrative sanctions).

95. Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (upholding a zoning ordinance that kept adult movie theaters out of residential neighborhoods).

96. Reno v. ACLU, 521 U.S. at 866-68 ("These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions." *Id.* at 868).

97. *Id.* at 868.

98. *Id.* at 868-69. This argument seems specious because widespread public use of the Internet has only come about in the last decade.

99. *Id.* at 869 (citing findings by the district court in the case below). The Court also analogized the Internet to the dial-a-porn medium previously addressed by the Court in *Sable Communications, Inc. v. FCC*. *Id.* In *Sable*, the Court noted that "the dial-it medium requires the listener to take affirmative steps to receive the communication [and placing] a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message." 492 U.S. 115, 127-28 (1989). The Court's logic here seems to be contrary to the findings of the *Online Victimization Report*, which stated that 25% of the 1501 youths surveyed had an unwanted exposure to pictures of naked people or people having sex in the previous year. *Online Victimization Report*, *supra* note 1, at ix. Additionally, new technology allows pop-up windows to appear on a user's computer without the user's initiation. Many of these pop-up windows are geared toward advertisements but could easily contain pornography.

100. Reno v. ACLU, 521 U.S. at 870.

101. *Id.*

ideas, and images."[102] The Court flatly rejected the government's argument that the CDA was no more vague than the *Miller* standard.[103] However, the CDA's restrictions on "patently offensive" material did not fully incorporate the other two parts of the *Miller* standard. The Court indicated that to pass constitutional muster, incorporation of the full *Miller* standard was necessary to prevent the statutory restrictions from unduly impinging on protected speech.[104]

Despite the rigid analysis of the CDA's provisions, the *Reno* Court reaffirmed the state's interest in protecting children from harmful material.[105] However, *Reno* stands for the proposition that even statutes motivated by this compelling government interest must be carefully drawn so as not to place burdens on protected speech.[106] The *Reno* Court was particularly concerned by the impact the CDA's ban on transmission of indecent materials to minors would have on adult-to-adult Internet communications. The government apparently argued that, by only prohibiting transmissions where the sender had knowledge that one of the recipients was a minor, the CDA did not burden communications between adults.[107] However, the Court called this assumption an "incorrect factual premise [that was] untenable."[108] More importantly, the Court lamented the inability of Internet users to verify the age of message recipients:

> Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be a minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.[109]

---

102. *Id.* at 872.
103. *Id.*
104. *Id.* at 873-74.
105. *Id.* at 875.
106. Indeed the Court stated, "[i]t is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute." *Id.* at 878.
107. *Id.* at 876.
108. *Id.*
109. *Id.*; *see also id.* at 855-57. Later in the opinion, the Court again rejected the government's argument that the "knowledge" and "specific person" requirements of the CDA adequately limited the law's scope. *Id.* at 880. The Court hypothesized that a person could manufacture knowledge and the existence of a specific person in a chat room where permissible adult communications were occurring by entering the chat room and announcing that they were seventeen years old. *Id.* Thus, the person would be able to enter the chat room and censor all of the protected adult communications by saying they were a minor without any way for other users to verify their age. The Court was troubled by the apparent ability of one Internet user to use the criminal sanctions of the CDA to shut down legitimate adult communications between other users.

The Court also cited with approval the findings of the district court that existing technology made it both unfeasible and commercially impractical to determine the age of users accessing material through e-mail, newsgroups, and chat rooms.[110] The practical technical limitations of age verification led to the conclusion that the CDA, in banning transmissions to minors, unduly burdened protected communications between adults.

Finding that the CDA was substantially overbroad to accomplish its purported purpose, the Court gave some examples raised by the litigants of less intrusive means that might legitimately accomplish the government's goals:

> [t]he arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial Web sites—differently from others, such as chat rooms.[111]

In sum, *Reno* recognizes that government regulation of Internet content, even when motivated by the state's compelling interest in protecting children from harmful materials, will be strictly scrutinized. Measures must be narrowly tailored to ensure they do not unnecessarily impinge on the rights of adult users. In the absence of genuine age verification technology to ensure users that those to whom they are communicating are not minors, merely banning transmission to minors of harmful materials without protections for adult communications exceeds the boundaries of the government's interests.[112] The Court's dictum clearly favors self-regulation by parents over criminal laws.

In *ACLU v. Johnson*,[113] another case invalidating a state statute whose provisions are closely analogous to section 847.0138, the Tenth Circuit applied the reasoning of the Supreme Court in *Reno* to a New Mexico statute.[114] The statute outlawed the knowing initiation of communication with a person under eighteen by means of a computer when the communication depicted material harmful to minors.[115] Applying strict scrutiny, the *Johnson* court noted the state's compelling interest but stressed that regulation could only be accomplished by

---

110. *Id.* at 876.

111. *Id.* at 879.

112. A recent article criticizes the assumption that age verification on the Internet is impossible. *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 809-10 (2001).

113. 194 F.3d 1149 (10th Cir. 1999).

114. *See id.* (invalidating N.M. STAT. ANN. § 30-37-3.2(A) (Michie 1998)).

115. *Id.* at 1152.

the least restrictive means.[116] Attempting to address concerns about the statute's effect on adult communications, the state argued that the statute only restricted communications made solely to an individual minor recipient.[117] According to the state, group communications were not included within the statute's proscription. The court rejected this argument both because it was not founded in the statute's language and because it would achieve the absurd result of allowing a sender to escape criminality by sending the same harmful material to two minors instead of to one.[118] The *Johnson* court also rejected the state's argument that the knowledge requirement limited the statute's applicability, citing the same reasons used by the Supreme Court in *Reno*.[119] Because the statute unconstitutionally burdened adult communications, the court found the statute violated the First Amendment.[120]

Section 847.0138, by prohibiting the transmission of materials "harmful to minors," raises many of the constitutional concerns addressed by the Court in *Reno* and by the Tenth Circuit in *Johnson*. Unlike both the CDA and the New Mexico statute in *Johnson*, section 847.0138 contains no good-faith defenses; however, because section 847.0138 only applies to transmissions via electronic mail communications, it is significantly more narrow in the range of communications it restricts. Although the term "electronic mail" is not defined in the statute, it would presumably only include e-mail, and not other types of communications such as chat rooms, newsgroups, or postings on web pages. Thus, section 847.0138 contemplates the Court's statement in *Reno* that different types of content sources can be regulated differently.

Despite the statute's focused regulation of e-mails, the scope of the content prohibition on e-mails is fairly broad. Section 847.0138 applies to defendants who "knew or believed" they were transmitting an image harmful to minors "to a specific individual known by the defendant to be a minor" in Florida.[121] Thus, if a person either knew or had the subjective belief that they were sending a pornographic image to a minor, they would run afoul of the statute. The overbreadth of this mens rea requirement is potentially problematic. Given the Supreme Court's assumption that knowledge of a recipient's age could be easily attributed to any person in a large chat room, knowledge could be similarly imputed to any adult who is

116. *Id.* at 1156.
117. *Id.* at 1159.
118. *Id.*
119. *Id.*; *see also* Reno v. ACLU, 521 U.S. 844, 873-74 (1997).
120. *Johnson*, 194 F.3d at 1160. The court also found the statute violated the Commerce Clause. *See* discussion *infra* Part V.B.
121. FLA. STAT. § 847.0138(2) (2001).

sending an e-mail to a large list of recipients. Just as the knowledge requirement in *Reno* and *Johnson* could not effectively limit the unconstitutional chilling effect on legitimate adult-to-adult communications, a court might also find that the knowledge requirement here does not save section 847.0138.[122]

Even broader than the knowledge requirement criticized in both *Reno* and *Johnson*, section 847.0138 also allows prosecution if the defendant *believed* he was sending the image to a minor. While permitting prosecution for subjective beliefs may help the enforceability of the statute, an adult sender may self-censor rather than send legitimate pornographic communications for fear that they may later be imputed with belief that a recipient was a minor. Further, the state's compelling interest in protecting children is significantly weaker when applied to a situation where the recipient was not a minor even though the sender believes the recipient to be. Taken in this context, the belief standard appears to have an even broader chilling effect on adult-to-adult communications than the knowledge standard. Given the strict scrutiny likely to be applied to the statute, the belief standard will be difficult to uphold.

The requirement that the defendant have "actual knowledge" or "believe" that the e-mail recipient is a minor seems either utterly unenforceable or constitutionally problematic. The *Reno* court noted the near technological impossibility of identifying and verifying the age of a particular Internet user.[123] While credit card verification could be used by commercial Web sites to restrict access to pornography, such an option is not available for e-mail. There is virtually no way for an individual sending an e-mail to verify the age of the recipient prior to sending the message, short of sending a prior e-mail asking "Are you an adult?" A person's e-mail address provides no indication of the person's age. For the sender to have "actual knowledge" that the recipient was a minor, the sender would practically have to know the physical identity of the recipient. At the other end of the spectrum, the belief standard is overinclusive. If the defendant is charged with "believing" the recipient was a minor, then the lack of age verification could create the belief that the recipient is a minor in almost every instance when the sender did not know the physical identity of the recipient. In every instance when an adult sends a pornographic

122. Indeed the requirement that the e-mail be sent to a specific individual known to be a minor is likely to be criticized for the same reasons stated by the courts in *Johnson* and *Reno*. Unlike *Johnson*, however, the requirement that the communication be directed at a specific individual exists plainly in the statute. When defending section 847.0138, the state may argue that this provision limits the statute to e-mails only sent to a single minor. However, such an argument could significantly undercut the statute's enforcement because a person could just send a copy of the e-mail to a minor and another person and escape the statute's purview.

123. Reno v. ACLU, 521 U.S. at 876-77.

e-mail, the adult will be forced to verify the recipient's age prior to sending the e-mail. The effect is to impose an age verification requirement on all pornographic e-mails, a result that is a potentially overbroad restriction of constitutionally protected adult-to-adult communications. Such a standard is unlikely to survive strict scrutiny.

B. The Dormant Commerce Clause Implications of SB 144

Despite the potential First Amendment problems imposed by SB 144, an even more damaging constitutional infirmity may prohibit the enforcement of both sections 847.0137 and 847.0138 altogether. Although the Supreme Court has not addressed the issue, several courts have held that state statutes functionally equivalent to those created by SB 144 violate the dormant Commerce Clause. This constitutional theory, rooted in notions of federalism, presents a court with a choice between federal and state regulation of a particular subject matter. A holding that a statute violates the dormant Commerce Clause precludes state regulation in the area altogether. Thus, if SB 144 were found to violate the dormant Commerce Clause, there is virtually no legislative cure for the constitutional infirmity. At least one commentator has referred to dormant Commerce Clause jurisprudence as "'a nuclear bomb of a legal theory' against state Internet regulations."[124]

Dormant Commerce Clause analysis is a judge-made doctrine with a long history and a focus on principles of federalism. Article I, Section 8 of the Constitution authorizes Congress to regulate commerce "among the several States."[125] While the Commerce Clause is an affirmative grant of power to Congress, courts have invalidated state laws that are either facially discriminatory[126] or that unduly burden[127] interstate commerce, even where Congress has not taken action in the field. The analysis focuses on whom, Congress or the states, has the power to regulate in a particular area.

There are generally four independent legal theories by which a state law may be invalidated on dormant Commerce Clause grounds. While any of these theories could be grounds for unconstitutionality, courts typically use several of the theories as support for their holdings.[128] Which analysis is applicable in a given case depends on the nature of the state regulation. The first two theories have been said

---

124. Goldsmith & Sykes, *supra* note 112, at 787 (quoting Declan McCullagh, *Brick by Brick*, TIME DIGITAL DAILY (Jan. 31, 1997), *at* http://www.onmagazine.com/on-mag/reviews/article/0,9985,11738,00.html).

125. U.S. CONST. art. I, § 8, cl. 3.

126. Philadelphia v. New Jersey, 437 U.S. 617 (1978).

127. Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981).

128. *See, e.g.*, Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997).

to form "the core of dormant Commerce Clause jurisprudence."[129] First, the central prohibition of dormant Commerce Clause cases is on protectionist state regulation that discriminates against out-of-state actors.[130] State regulation that facially discriminates against out-of-state actors is strictly scrutinized and will only be upheld if there is a substantial local purpose and no available nondiscriminatory alternative.[131] Under the second theory, where a state law is facially neutral but nevertheless burdens interstate commerce, courts balance the burden imposed on interstate commerce against the local benefit to a legitimate local public interest. Facially neutral statutes having a legitimate public interest and only incidental impacts on interstate commerce are usually upheld unless the burden is "clearly excessive" in relation to the benefits.[132]

While the first two theories form "the core" of dormant Commerce Clause analysis, the latter two analyses are particularly important in the Internet context, though they are not as well defined. Under the third theory, an unconstitutional "extraterritorial effect" arises where state legislation has the practical effect of regulating conduct beyond the state's borders. If the statute attempts to substantially regulate conduct beyond the state's borders, the statute violates the Commerce Clause.[133] This formulation of the Commerce Clause is also supported by the Full Faith and Credit and Due Process Clauses, which prohibit state regulation of out-of-state conduct unless it creates a "significant contact" with the state.[134] Finally, under the fourth theory, the dormant Commerce Clause prevents states from creating regulations that "adversely affect interstate commerce by subjecting activities to inconsistent regulations."[135] While the scope of the inconsistent-regulations analysis is unclear, this analy-

---

129. Goldsmith & Sykes, *supra* note 112, at 789.

130. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987).

131. *See* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979). The practical effect of this standard is that statutes facially discriminating against out-of-state actors are virtually per se invalid.

132. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

133. Healy v. Beer Inst., 491 U.S. 324, 336 (1989). In *Healy*, the Court stated that "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Id.* (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982)). Some commentators have stated that this formulation of the dormant Commerce Clause analysis is "clearly too broad." Goldsmith & Sykes, *supra* note 112, at 790. Professors Goldsmith and Sykes propose a balancing test where the benefits to the regulating jurisdiction would be weighed against the overall burden on commerce. *Id.* at 802-03. This approach adopts the economic philosophy that societal utility is increased where the overall benefits of regulation exceed the burdens.

134. Goldsmith & Sykes, *supra* note 112, at 789 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985)).

135. *CTS Corp.*, 481 U.S. at 88.

sis has been used as support by courts analyzing legislation similar to SB 144.[136]

1. Case Law Applying the Dormant Commerce Clause to Similar Legislation

A number of courts have struck down state legislation prohibiting the transmission of images harmful to minors to persons under age eighteen, similar to section 847.0138, as a violation of the dormant Commerce Clause.[137] *American Libraries Ass'n v. Pataki* was the first case to apply the dormant Commerce Clause analysis and has been followed by several courts in striking down similar legislation.[138] In *American Libraries Ass'n*, a number of organizations sought a preliminary injunction to prevent the enforcement of a New York statute that made it a crime for an individual, knowing a communication's content was harmful to minors, to use any electronic device to initiate or engage in a communication with a minor.[139] The statute appears to have been broadly drafted to include display of images harmful to minors on a Web site as well as person-to-person communications. The statute provided four affirmative defenses to prosecution: (1) the defendant made a reasonable effort to determine the age of the recipient but was prevented from doing so by the minor; (2) the defendant made a good-faith effort to restrict access to the harmful materials; (3) the defendant restricted access by requiring a credit card or adult personal identification number prior to use; and (4) the defendant reasonably segregated harmful material allowing it to be blocked by PC user-based screening software.[140]

After discussing the various types of Internet communications, the court noted the significant federalism concerns raised by deciding who properly should regulate Internet content.[141] However, the court reasoned that the New York statute should be properly analyzed under the dormant Commerce Clause.[142] The court stated:

> I find . . . that the Internet is analogous to a highway or railroad. This determination means that the phrase "information superhighway" is more than a mere buzzword; it has legal significance,

---

136. Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 181 (S.D.N.Y. 1997).

137. *See* ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); PSINet Inc. v. Chapman, 108 F. Supp. 2d 611 (W.D. Va. 2000); Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999); *Am. Libraries Ass'n*, 969 F. Supp. at 167.

138. *See id.*

139. *Am. Libraries Ass'n*, 969 F. Supp. at 163 (citing N.Y. PENAL LAW § 235.21). Additionally, New York Penal Law section 235.20(6), quoted in *id.*, defined "harmful to minors" in a way nearly identical to Florida's definition found in section 847.001.

140. *Id.* at 163-64.

141. *Id.* at 167-68.

142. *Id.* at 167 ("The Internet fits easily within the parameters of interests traditionally protected by the Commerce Clause.").

> because the similarity between the Internet and more traditional instruments of interstate commerce leads to analysis under the Commerce Clause.[143]

The court found the New York law violated the Commerce Clause for three reasons. First, the law unconstitutionally projected New York law into conduct that occurred wholly outside New York's borders.[144] Second, the law, despite its legitimate purpose, imposed burdens on interstate commerce that "clearly exceed[ed]" the local benefits.[145] Third, according to the court, the Internet had to be set aside as a "national preserve" to protect users from inconsistent state regulations.[146]

When determining the statute unconstitutionally projected New York law into other states, the court found that the inability of Internet users to reliably verify either the geographic location or age of persons with whom they are communicating made the statute constitutionally problematic.[147] The court did not fully address its concerns about the problems of age verification.[148] Because geographic locations were largely irrelevant on the Internet, the court found that most users neither knew nor cared about the physical geographic location of the Internet resources they used.[149] Additionally, e-mail addresses provided no clear indication of a user's geographic location.[150] Even where a person's e-mail address might give an indication of the geographic location of the computer where they maintain an e-mail

---

143. *Id.* at 161.

144. *Id.* at 169.

145. *Id.*

146. *Id.* Specifically the court stated:

> [T]he Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether. Thus, the Commerce Clause ordains that only Congress can legislate in this area, subject, of course, to whatever limitations other provisions of the Constitution (such as the First Amendment) may require.

Id.

147. *Id.* at 167.

148. For a more detailed treatment of the problem of age verification on the Internet, see Reno v. ACLU, 521 U.S. 844, 855-56 (1997). For a contrary view that age verification procedures can be reasonably implemented, see Goldsmith & Sykes, *supra* note 112, at 815-16. However, note that Professors Goldsmith and Sykes never squarely address the issue of the cost of compliance to an *individual citizen* who must verify the age, geographic location, and controlling law of the recipient of a pornographic e-mail prior to sending the e-mail. Rather, Professors Goldsmith and Sykes note that, "[b]ecause there is no cost-effective way (at present) to identify e-mail addresses by geography, [the sender] must take these steps for e-mail recipients in jurisdictions where these steps are not required." *Id.* at 813. This observation strikes to the core of the overbreadth and extraterritoriality problems posed by state regulation.

149. *Am. Libraries Ass'n*, 969 F. Supp. at 170.

150. In fact, URLs and e-mail addresses are translated into Internet Protocol (IP) addresses by the Domain Name System (DNS). For a more detailed discussion of the DNS, see *infra* note 169 and accompanying text.

account, it still did not clearly indicate the geographic location of the person receiving the e-mail.[151] According to the court, the New York law could not be construed in a way to limit it purely to intrastate communications because an Internet user could not reliably restrict their communications solely to New York recipients.[152] Because the law would apply more broadly to Web site postings by New Yorkers, the court also noted that a person who posts information to a Web site could not, because of difficulties identifying web users, prevent users from a specific state from accessing the Web site.[153] The fact that Internet users in other states would self-censor themselves to avoid violating the statute, even in communications with non-New Yorkers, projected the New York law onto citizens in other states and regulated conduct wholly outside New York—both direct violations of the Commerce Clause.[154]

The court also found that the law was an invalid indirect regulation of interstate commerce because it imposed excessive burdens on interstate commerce when compared to the local benefits.[155] Accepting the state's legitimate interest in protecting minors from harmful material, the court found that the local benefits from the law were "not overwhelming."[156] The court specifically cited the unenforceability of the law against foreign entities, the source of a majority of the regulated communications, and the difficulty with asserting criminal jurisdiction over violators.[157] The court also noted that other laws adequately protected children and that no criminal prosecutions had been successfully brought under the statute.[158] In contrast, the court found the burden on interstate commerce to be extreme because the category of harmful materials was wider than the state suggested and individuals would be forced to self-censor themselves to avoid the risk of prosecution.[159] The resulting chilling effect posed an unreasonable burden on interstate commerce in comparison to the marginal local benefits.

---

151. *Am. Libraries Ass'n*, 969 F. Supp. at 171. Since the court's opinion in 1997, this phenomenon has only increased. Today, web-based e-mail allows a user to maintain an e-mail account on a particular server and easily receive e-mails from that account, through the World Wide Web, from any computer anywhere in the world.

152. *Id.*

153. *Id.* Even if a content provider could maintain parallel sites for each state, as many providers maintain multilingual sites, the compliance costs could be unduly burdensome.

154. *Id.* at 177, 180. The court's analysis is a classic example of the application of the extraterritorial aspect of the Commerce Clause. The court properly stated that the foundation of the extraterritorial analysis lies in "a recognition that true protection of each state's respective authority is only possible when such limits are observed by all states." *Id.* at 176.

155. *Id.* at 177.

156. *Id.* at 178.

157. *Id.*

158. *Id.* at 179.

159. *Id.* at 180.

Finally, in its most sweeping statement, the *American Libraries Ass'n* court found that the New York statute would unconstitutionally subject Internet users to inconsistent state regulations. Specifically, the court stated:

> The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations. Without the limitation's [sic] imposed by the Commerce Clause, these inconsistent regulatory schemes could paralyze the development of the Internet altogether.[160]

The court analogized the Internet to the rail and highway systems the Supreme Court had previously stated were subject to national regulation. For instance, in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*,[161] the Supreme Court struck down an Illinois statute purporting to establish interstate railway rates and held that railway rates were of a general and national character, subject only to regulation by Congress.[162] Similarly, in *Southern Pacific Co. v. Arizona ex rel. Sullivan*,[163] the Court struck down an Arizona statute that limited the length of trains for the same reason.[164] The *American Libraries Ass'n* court found that the Internet, like the rail and highway systems, necessitated a single, cohesive scheme of national regulations in order to prevent users from becoming subject to innumerable and conflicting local regulations.[165]

2. The Correctness of the American Libraries Ass'n v. Pataki *Court's Approach to State Internet Regulation*

If taken literally, the *American Libraries Ass'n* decision would seem to preclude states from regulating *any* type of Internet communication because of the Commerce Clause implications. The breadth of this result has been the subject of debate among commentators.[166] Both the mechanical construct of the Internet and the practical realities of Internet use support the court's factual findings about the Internet and the court's transportation analogy.

---

160. *Id.* at 181.
161. 118 U.S. 557 (1886).
162. *Id.* at 574-75.
163. 325 U.S. 761 (1945).
164. *Id.* at 767.
165. *Am. Libraries Ass'n*, 969 F. Supp. at 182.
166. *Compare* Goldsmith & Sykes, *supra* note 112, *with* Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889 (1998).

The Internet looks a lot like a highway or railroad system, except that it moves bits instead of people or goods. The Internet is a vast, decentralized network of computers that is not controlled by any central authority. High speed communications networks are the backbones of the Internet that link regional computer networks, such as Internet service providers (ISPs), together making a network of networks.[167] Every computer attached to the Internet is uniquely identified by an Internet Protocol (IP) address, a series of four numbers separated by dots, such as 123.45.67.89.[168] The Domain Name System (DNS) uses a hierarchy to convert IP addresses into more easily recognizable words.[169] Each domain maintains a list matching textual names and IP addresses of computers in the domains below it, and subordinate domains can develop below.[170] When an e-mail is sent, the DNS converts the textual name into its corresponding IP address so the Internet communications protocol knows the destination of a packet of information. When dissecting an e-mail address, the portion of the address to the left of the "@" sign is the username and the portion to the right identifies the specific computer where the recipient has an e-mail account. None of these aspects of the Internet give any consistently reliable indication of either the age or geographic location of an Internet user. For instance, I could set up a server named "florida.com." While persons sending me e-mail at rmartin@florida.com might assume that I am in Florida, I could just as easily set the server up with the same domain name in Idaho. The DNS assigns the ".com," ".edu," or ".gov" based on a categorization of the function of the domain rather than its physical location. Identification becomes even more ambiguous when the recipient's name is something more generic like mel84@aol.com. Thus, neither the DNS nor the structure of a recipient's e-mail address provides a clear indication of, and may even give false indications of, the recipient's geographic location.

Once one understands exactly *how* information travels across the Internet, it becomes clear that the Internet is even more an instrument of interstate commerce than the railroad and highway networks analogized by the *American Libraries Ass'n* court. Information travels across the Internet like cars and railcars travel on highways and railroads. The Internet uses two communications protocols: Transmission Control Protocol (TCP) and Internet Protocol (IP), commonly referred to as TCP/IP. TCP/IP uses a packet switched network with no direct connection between the sending and receiving

167. *See* PRESTON GRALLA, HOW THE INTERNET WORKS 7 (Millennium ed. 1999).
168. *Id.* at 17.
169. *Id.*
170. *Id.*

computers.[171] Instead, every piece of information, no matter how large or small, is broken into one or more numbered packets that are sent over many different routes at the same time and reassembled at the destination.[172] As a packet travels, it passes through routers that examine the packet's destination IP address.[173] Each router determines the most efficient path for sending the packet to the next closest router to the packet's destination.[174] Fluctuating traffic loads might mean that packets might be sent along different routes and may arrive out of order.[175] Indeed the random nature of the routing process means that the same packets of an e-mail message, if sent several times, would probably travel different routes each time. Any packet that was corrupted in transmission is discarded by the destination computer and the destination computer asks the sending computer to retransmit the corrupted packet.[176] When all noncorrupt packets are received by the destination computer, the message is reassembled.[177] Imagine a twenty-car train leaving New York bound for Los Angeles. Using TCP/IP to determine the train's path, each car would be sent separately and would have no predetermined route. Instead, at each town, the car would decide the quickest way to the next closest town. When all the cars finally arrived at the station, they would be reassembled shortly before the train entered the station in Los Angeles.

Just as the national railroad and highway networks are fundamentally the channels of interstate commerce, so is the national network of information. Instead of railcars or semi-trucks carrying goods, the Internet is a network of computers carrying packets of information. Even more significantly, the road signs[178] on the Internet provide no information about physical location. Indeed, due to the location of the sending and receiving computers, communications that seem to be between persons in the same state might actually travel through several different states to reach their destination.[179] In an

171. *Id.* at 13.
172. *Id.*
173. *Id.* at 15.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. That is, computer and user names and IP addresses.
179. *See* ACLU v. Johnson, 194 F.3d 1149, 1161 (10th Cir. 1999) ("Even if [the statute] is limited to one-on-one e-mail communications . . . there is no guarantee that a message from one New Mexican to another New Mexican will not travel through other states en route."); *see also* Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 171 (S.D.N.Y. 1997) (finding that a New York statute "cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist"). In an even more interesting case, *United States v. Kammersell*, a bomb threat sent via AOL instant message by a Utah teenager to get his Utah girlfriend out of work was deemed a threat transmitted

economy based on the flow of information rather than the flow of goods, the necessity for uniform nationwide regulations is fundamental to national prosperity. Just as the Commerce Clause prevents states from unreasonably restricting the flow of legitimate goods through their territory, the same analysis should prevent states from unreasonably restricting the flow of constitutionally protected information amongst the states. The geographic anonymity of Internet communications causes citizens in states with no regulation or different regulations than Florida to be forced to comply with Florida's regulation for fear that the person with whom they are communicating might be a Florida resident. The result is that Internet users will be forced to comply with the most stringent state's regulations in order to ensure they do not break any state's law. The potential for conflicting regulations was a concern of the court in *American Libraries Ass'n*. The compliance costs placed on out-of-state actors is typical extraterritorial regulation[180] and would result in dysfunctionally inconsistent state regulations[181] that the Supreme Court has said violates the Commerce Clause. Further, even if geographic location were readily identifiable, forcing Internet users to determine the locale of the recipient of their communication and the applicable state regulatory prohibitions on Internet communications would reduce the now instantaneous communication process to a crawl. Such compliance costs cannot be in the nation's best interests.

Additionally, Congress has already attempted to address the issue. Congress, which the Constitution explicitly authorizes to regulate interstate commerce, is not restrained by the dormant Commerce Clause. Although Congress's power is limited by other constitutional provisions, such as the First Amendment, Congress alone has the power to craft national regulations guaranteeing some measure of consistency for Internet users. The Child Online Protection Act (COPA) is Congress's most recent attempt to do just that. While COPA is limited to commercial speech, it represents a first step in attempting to address the issue of access to harmful material by minors on the Internet. The legal challenges to COPA currently working their way to the Supreme Court[182] will clarify the scope of Congress's power in this area. State laws, such as SB 144, only add to the growing regulatory inconsistency that Internet users face.

---

through interstate commerce because the message was sent through America Online's instant message server in Virginia. 196 F.3d 1137 (10th Cir. 1999).

180. *See* Healy v. Beer Inst., 491 U.S. 324, 336 (1989).

181. *See* S. Pac. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 773-74 (1945) (deciding that Arizona train length law unconstitutionally burdened interstate commerce because it effectively controlled the length of trains across entire interstate train line); Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 574-75 (1886).

182. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom.* Ashcroft v. ACLU, 121 S.Ct. 1997 (2001).

The Florida Legislature was certainly aware of the dormant Commerce Clause implications of SB 144 and attempted to narrowly draft the bill to avoid constitutional infirmity.[183] As enacted, a person only "transmits" a prohibited image under section 847.0138 when the person sends an e-mail "to a specific individual known by the defendant to be a minor"[184] in Florida. Apparently, to commit the crime, the sender must have knowledge that the recipient is in Florida.[185] However, this provision may be so narrowly drafted as to render it difficult to enforce. Because of the geographic anonymity of Internet communications, the defendant could plausibly raise the defense that he or she did not know the recipient was in Florida. Further, even where the e-mail address may give some indication of Florida residence, though they rarely do, the defendant could argue that he or she thought the e-mail address did not correspond to the recipient's physical location. Thus, unless there is some clear, objective manifestation of the defendant's knowledge that the recipient is in Florida, the prosecution will be faced with the more difficult task of proving the defendant's subjective beliefs.

In the old economy, dormant Commerce Clause jurisprudence prevented states from adopting regulations that unduly restricted the interstate flow of goods. In an economy based on the free flow of information, state laws that unduly restrict information flows should be stringently scrutinized. The Commerce Clause envisions a national marketplace, whether for goods or information. Even though SB 144 may have a legitimate purpose in protecting children from adult pornography, it will likely face the same dormant Commerce Clause scrutiny that similar laws in other states have faced. Further, a national scheme of regulation is currently in its formative stages, and Congress can effectively shape national policy that protects children and guarantees at least a degree of uniformity to Internet users.

VI. CONCLUSION

SB 144 is likely to face significant judicial scrutiny. Because child pornography receives virtually no constitutional protection, the parts of SB 144 dealing with child pornography are much more likely to withstand constitutional attack than the parts prohibiting transmis-

183. In fact, the bill analysis for the House companion measure, HB 203, warned of the dormant Commerce Clause implications. *See* Staff Analysis for HB 203, 2001 Leg., Reg. Sess. (Fla. 2001), *available at* www.leg.state.fl.us (last visited July 21, 2001).

184. FLA. STAT. § 847.0138(1)(b) (2001).

185. The belief standard that also exists in the statute could arguably punish a person for sending an e-mail to a minor he believed was in Florida even though the minor was actually in another state. While Florida may have a legitimate interest in protecting children in its own state, its interests most likely do not extend to protection of children outside its borders.

sion of images harmful to minors. The provisions of SB 144 prohibiting e-mails containing images "harmful to minors" may run afoul of the First Amendment. Both provisions may violate the dormant Commerce Clause. Nobody denies that the anonymity provided by technology has made the Internet a mechanism for sexual exploitation of children. The questions that must be answered are which government entity is going to regulate the conduct and how those regulations are going to be tailored to protect constitutional freedoms. While protecting children from online exposure to adult pornographic materials is laudable, the inability for Internet users to determine the age and geographic location of the recipient of their communications could make Internet users in other states unknowingly run afoul of Florida's law. As other states respond to political pressures to pass similar laws, the multiplicity of regulations over the same national information network could frustrate legitimate information flows in a way that is contrary to the nation's best interests. Comprehensive national regulation of Internet transmission of adult and child pornography is currently being addressed by Congress and the federal courts. The Supreme Court's scrutiny of these laws will likely shape the boundaries of government's ability to regulate in this area. Until these areas have been more fully addressed by the federal courts, states should resist the temptation to pass laws that broadly prohibit this type of Internet conduct.