

***Gonzalez v. Raich* and the Federal Child Pornography Statutes: Balancing the Commerce Clause and State Sovereignty**

Sarah J. Farley[†]

Introduction.....	622
I. History of Child Pornography Legislation	623
A. Brief History of Commerce Clause Jurisprudence	623
B. The Federal Child Pornography Statutes	626
II. The Circuit Split.....	629
A. Circuits that Upheld the Child Pornography Statutes as Constitutional.....	629
B. Circuits that Struck Down the Statutes	635
C. Analysis of Circuit Decisions.....	638
1. Circuits that Upheld the Statutes.....	638
2. Circuits that Struck Down the Statutes	641
III. <i>Raich</i> and Other Recent Commerce Clause Decisions	644
A. The <i>Raich</i> Decision.....	644
B. Post- <i>Raich</i> Jurisprudence	651
IV. Analysis of the Circuits after <i>Raich</i>	652
A. Analysis of the Circuits that Upheld the Statutes	652
B. Analysis of Circuits that Struck Down the Statutes	653
C. Are the Child Pornography Statutes Constitutional?	654
V. The Future of the Child Pornography Acts.....	655
A. Government Support for the Acts	655
B. Future of the Acts and the Commerce Clause.....	656
C. The Slippery Slope Problem	657
Conclusion	658

[†] J.D. Candidate, 2007, Seton Hall University School of Law; B.A., 2004, College of the Holy Cross. I would like to thank Professor Thomas Healy for his guidance and advice throughout the process of writing this Comment.

INTRODUCTION

“The task is to identify a mode of analysis that allows Congress to regulate more than nothing . . . and less than everything”¹ Justice O’Connor’s succinct summary of the nature of the commerce power recognizes its seeming simplicity and the underlying difficulties of determining the appropriate balance between the power of the federal government to effectively regulate and the sovereignty of the states. This problem is compounded when the courts face controversial issues, such as child pornography, because as citizens we want our government to be powerful enough to catch and prosecute pedophiles who threaten our children, while we want also to be free of an overly-encroaching government. The United States circuit courts have discussed this issue in many cases, resulting in a split among the courts of appeals as to whether the federal government’s regulation of child pornography is a constitutional exercise of the commerce power or invades the sphere traditionally controlled by the states.² This comment explores judicial treatment of the Federal Child Pornography statutes, specifically 18 U.S.C. § 2251(a) and § 2252(a)(4)(B), which regulate the production and possession of child pornography.

Part One offers a brief history of the relevant Supreme Court Commerce Clause jurisprudence and explains the legislative history of the child pornography statutes and their multiple amendments over the years. Part Two introduces the circuit split, briefly explains representative cases from each side of the debate, and analyzes the decisions. Part Three discusses *Gonzales v. Raich*,³ the recent Supreme Court case which dealt with Congress’s use of the Commerce Clause in regulating medicinal marijuana. Part Three also discusses the Court’s subsequent vacation of *United States v. Smith*⁴ and *United States v. Maxwell*,⁵ two Eleventh Circuit decisions declaring the child pornography statutes unconstitutional. Finally, Part Three discusses how the circuit courts have interpreted *Raich*. Part Four analyzes the circuit split in light of the Supreme Court’s decision in *Raich*, the relative strengths and weaknesses of each side, and discusses the constitutionality of the statutes. Part Five concludes the comment and discusses the future of the Child Pornography statutes and the Commerce Clause.

¹ *Gonzales v. Raich*, 125 S. Ct. 2195, 2223 (2005) (O’Connor, J., dissenting).

² *See infra* Part II.

³ 125 S. Ct. 2195 (2005).

⁴ 402 F.3d 1303 (11th Cir. 2005).

⁵ 386 F.3d 1042 (11th Cir. 2004).

I. HISTORY OF CHILD PORNOGRAPHY LEGISLATION

A. Brief History of Commerce Clause Jurisprudence

Article I, Section 8 of the Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁶ The Commerce Clause has often been the subject of heated litigation, and the Court’s interpretation of it has been inconsistent.

While an exhaustive history of the Commerce Clause is outside of the scope of this comment, a discussion of certain seminal cases in Commerce Clause jurisprudence is required to put the issue in context. In addition, special attention is paid to *Wickard v. Filburn*,⁷ *United States v. Lopez*,⁸ and *United States v. Morrison*.⁹

One of the earliest cases in which the Supreme Court addressed the scope of the Commerce Clause was *Gibbons v. Ogden*.¹⁰ In *Gibbons*, a New York law gave a steamboat operation monopoly to two men, who in turn licensed Ogden to run a ferry company.¹¹ *Gibbons*, who ran a rival ferry company, violated this law by competing with Ogden.¹² *Gibbons*, however, claimed that his federal ferry license pre-empted New York’s law.¹³ The Supreme Court, in an opinion by Chief Justice Marshall, determined that the federal law did in fact pre-empt New York law and that the federal law was constitutional under the Commerce Clause, holding that “the opinion is unequivocally manifested that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.”¹⁴ Therefore, most commentators have interpreted *Gibbons* to stand for the proposition that “Congress has complete authority to regulate all commerce among the States.”¹⁵

After this decision, the Court slowly began to retract the broad power it had given to Congress. In 1869, the Court overturned a federal law passed under the Commerce Clause for the first time in *United States v. Dewitt*.¹⁶ That case, involving a federal ban of certain illuminating oils,

⁶ U.S. CONST. art. I, § 8, cl. 3.

⁷ 317 U.S. 111 (1942).

⁸ 514 U.S. 549 (1995).

⁹ 529 U.S. 598 (2000).

¹⁰ 22 U.S. 1 (1824).

¹¹ *Id.* at 1.

¹² *Id.* at 1-2.

¹³ *Id.* at 2.

¹⁴ *Id.* at 206.

¹⁵ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 241 (2d Ed. 2002).

¹⁶ 76 U.S. 41 (1869).

found that issues of internal trade among the states were not proper exercises of the commerce power.¹⁷ Between 1870 and 1937 the Commerce Clause was litigated numerous times. For example, *United States v. E.C. Knight*¹⁸ struck down the use of the Sherman Antitrust Act to regulate sugar manufacturing because manufacture was considered a separate activity from commerce.¹⁹ However, the *Shreveport Rate Cases*²⁰ upheld the Interstate Commerce Act's ability to set railroad rates because they *directly* affected interstate commerce—drawing a distinction between direct and indirect effects.²¹

In 1937, amid the pressure of the Great Depression and President Roosevelt's court-packing scheme, the Court abruptly reversed its decades long history of limiting the commerce power. The Court began this reversal in *NLRB v. Jones & Laughlin Steel Corp.*²² which centered on the National Labor Relations Act ("the Act"). The Act, among other things, granted collective bargaining power to labor employees.²³ The Court upheld the act, finding a strong relationship between labor and commerce. Chief Justice Hughes reasoned that:

[t]he fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement,' 'to adopt measures' to 'promote its growth and insure its safety,' 'to foster, protect, control, and restrain.' That power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it.²⁴

During this era, the Court also decided *Wickard v. Filburn*.²⁵ In *Wickard*, a wheat farmer was charged with violating the Agricultural Adjustment Act of 1938 ("AAA")²⁶ for exceeding his acreage allotment provided by the statute.²⁷ Filburn, the farmer, argued that since he used

¹⁷ *Id.* The Court held that "[b]ut this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *Id.* at 43-44.

¹⁸ 156 U.S. 1 (1895).

¹⁹ *Id.*

²⁰ *Houston, E. and W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

²¹ *Id.* Other important cases of the era include *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²² 301 U.S. 1 (1937).

²³ *Id.* at 22-25.

²⁴ *Id.* at 37.

²⁵ 317 U.S. 111 (1942).

²⁶ 7 U.S.C. § 1281 (1938).

²⁷ 317 U.S. at 114-15.

his wheat only for home consumption, his use did not affect interstate commerce and the act was unconstitutional as applied to him.²⁸ The Court determined, however, that the act was constitutional and that Filburn's wholly intrastate activity was within the scope of congressional authority.²⁹ The Court explained that "the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."³⁰ Thus, the Court followed a theory in which the de minimus activities of an individual, engaged solely in intrastate use, could readily be regulated by the Commerce Clause for its aggregate effect on interstate commerce.

Between 1942 and 1995, few people disputed Congress's ability to regulate under the Commerce Clause. During this time, the courts applied a rational basis test.³¹ This test allowed Congress to regulate anything that had any rationally conceived relationship to commerce. For example, in *Hodel v. Indiana*, the Court declared that "[a] court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."³²

The Supreme Court continued to defer to Congress's expansive use of the Commerce Clause until 1995 when *United States v. Lopez*³³ was decided. In *Lopez*, a high school student was charged with carrying a gun to school, in contravention of the Gun-Free School Zone Act of 1990.³⁴ The Court, reversing its decades-old deference, found that the Act exceeded Congress's commerce power because it "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power."³⁵

Reviewing prior cases, the *Lopez* Court explained that Congress can regulate three types of activities: (1) channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) activities having a substantial effect on interstate commerce.³⁶ The Court quickly

²⁸ *Id.* at 118.

²⁹ *Id.* at 128-29.

³⁰ *Id.* at 124 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

³¹ See Chemerinsky, *supra* note 15, at 253.

³² 452 U.S. 314, 323-24 (1981).

³³ 514 U.S. 549 (1995).

³⁴ *Id.*

³⁵ *Id.* at 580.

³⁶ *Id.* at 558-59.

determined that the Act did not fall under categories one or two.³⁷ Chief Justice Rehnquist then analyzed the Act under category three and declared that “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”³⁸ Thus, the Court laid the foundation for a stricter interpretation of the Commerce Clause, demanding a more serious look at the nature of the activity to be regulated.

Finally, in *United States v. Morrison*,³⁹ a female student at Virginia Polytechnic Institute claimed she was raped and sued her assailants under the Violence Against Women Act of 1994.⁴⁰ The Court elaborated upon *Lopez* and articulated four factors that were useful in analyzing category three: they were (1) if the statute regulates commerce or is an economic activity; (2) whether the statute has an express jurisdictional element;⁴¹ (3) whether congressional findings support the belief that the activity has a substantial effect on commerce; and (4) if the offense has an attenuated relationship to that substantial effect on interstate commerce.⁴² The Court, relying on these factors, “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce,” and found the VAWA unconstitutional.⁴³

Through *Lopez* and *Morrison*, the Court diluted Congress’s Commerce Clause power. In doing so, the Supreme Court protected the constitutionally drawn boundaries between the states’ police power and the federal government’s ability to regulate interstate commerce. The above decisions emphasized the Federalist belief that the prosecutions of criminals are a state matter, not a federal matter. However, this did not compel Congress to stop trying to pass laws pursuant to its power under the Commerce Clause. In fact, Congress has tried harder.

B. The Federal Child Pornography Statutes

Before discussing the circuit decisions, it is important to understand the language and context of the child pornography statutes. Section

³⁷ *Id.* at 559.

³⁸ *Id.* at 567.

³⁹ 529 U.S. 598 (2000).

⁴⁰ *Id.* at 601-603.

⁴¹ A jurisdictional element is a clause in an act that limits the reach of that statute, to ensure that each violation of the act is actually substantially related to interstate commerce. *See, e.g.*, *United States v. Morrison*, 529 U.S. at 611-12.

⁴² *See Morrison*, 529 U.S. at 610-12.

⁴³ *Id.* at 617.

2251(a) of the Protection of Children Against Sexual Exploitation Act of 1977 states that:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, *if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.*⁴⁴

The Act, as it is currently written, regulates the production of child pornography if the producer either knew or had reason to know that the pornography was made using any materials that moved through interstate commerce at any point in time. The original version of the Act in 1977, however, required that the pornography itself be transported in interstate commerce, which was substantially more difficult to prosecute.⁴⁵ At its original passage, Congress supported the statute with extensive legislative findings, stating that child pornography is a “highly organized, multimillion dollar industry that operates on a nationwide scale.”⁴⁶

Congress amended the Act in 1984, renaming it the Child Protection Act of 1984.⁴⁷ The amended Act eliminated the previously required provision that the child pornography be produced or distributed for “pecuniary profit,” because Congress was concerned with the inability to prosecute pornographers who make and distribute pornography “without any commercial motive.”⁴⁸ Despite this removal of any commercial intent requirement, the Act was still founded in the Commerce Clause. In 1986 Congress passed the Child Abuse Victim’s Rights Act, which further amended the Act to include new civil remedies.⁴⁹ In the following years, Congress made four more minor

⁴⁴ 18 U.S.C. § 2251(a) (2006) (emphasis added).

⁴⁵ See *United States v. Morales-De Jesus*, 372 F.3d 6, 8-9 (1st Cir. 2004).

⁴⁶ SEN. REP. NO. 95-438, at 5 (1977).

⁴⁷ See *Morales-De Jesus*, 372 F.3d at 11 (citing the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204; H.R. REP. NO. 98-536 at 10 (1993)).

⁴⁸ *Id.*

⁴⁹ *Id.*

amendments, in 1988, 1990, 1994, and 1996.⁵⁰ The most relevant amendment came in 1998, when Congress changed the jurisdictional element to include the “materials-in-commerce” provision, so that only the materials used to create the pornography need ever travel through interstate commerce in order to be regulated.⁵¹ Congress offered two justifications for this amendment. The first was to make § 2251(a) mirror its sister statute, § 2252(a)(4)(B) (“the Possession Statute”).⁵² Second, Congress wanted to reach a larger number of child pornographers, who slipped through the cracks of the older statute.⁵³

The parallel possession statute, 18 U.S.C. § 2252(a)(4)(B) states that:

Any person who . . . knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.⁵⁴

This statute also merely requires that the production materials move through interstate commerce for the jurisdictional element to be met. Therefore, the two sections have nearly identical jurisdictional elements. Both are extremely broad and enable the federal government to prosecute wholly intrastate child pornography, since almost all commercial products are shipped across state lines at some point.

The Possession Statute has no independent congressional findings or amendments, but because the statutes are so similarly worded and are located within the same statutory framework, it is likely that the findings were intended to apply to both sections. Moreover, some circuit decisions, in discussing the Possession Statute cite to those congressional findings, lending additional support for this contention.⁵⁵ From this, it is safe to assume that these statutes were intended to be paired as the

⁵⁰ 18 U.S.C. § 2251(a).

⁵¹ See *Morales-De Jesus*, 372 F.3d at 11.

⁵² *Id.* at 11-12.

⁵³ *Id.*

⁵⁴ 18 U.S.C. § 2252(a)(4)(B) (2000 & Supp. 2005).

⁵⁵ See, e.g., *United States v. Robinson*, 137 F.3d 652, 656 (1st Cir. 1998). Also, the court in *Morales-De Jesus* found the statutes to be “analogous.” 372 F.3d at 15. The court in *United States v. Holston* described them as “nearly identical” and “equivalent.” 343 F.3d 83, 89 n.2 (2d Cir. 2003).

production and possession elements of one over-arching child pornography statute. Therefore, when scrutinizing the cases below, the two sections will be considered the same for purposes of the analysis.

II. THE CIRCUIT SPLIT

The history of the commerce power demonstrates the confusion Congress faces as it attempts to exert its power within constitutional bounds. Many recent decisions, such as *Lopez*, have declared *Wickard* to be “the most far reaching example of Commerce Clause authority”⁵⁶ and obviously the trend after *Lopez* and *Morrison* was to be much more conservative with the commerce power. Under *Wickard*, nearly any activity that is even remotely economic is within the scope. However, neither *Lopez* nor *Morrison* overruled *Wickard*. Instead, the Rehnquist Court attempted to synthesize them by using the *Lopez* categories and *Morrison* factors to weaken *Wickard* without expressly overruling it.

A. Circuits that Upheld the Child Pornography Statutes as Constitutional

Because of this uncertainty, it is no surprise that a judicial consensus has not emerged regarding the constitutionality of the federal Child Pornography Statutes. Some courts have upheld the statutes in their entirety. Others have struck them down. And still others have upheld the statutes, but conveyed a sense of uncertainty in this decision. Because child pornography is neither an instrumentality nor a channel of interstate commerce, the only way these statutes could be considered constitutional is through the third *Lopez* category—activities that substantially affect interstate commerce.⁵⁷

The First Circuit has examined the statutes twice, looking first at the Possession Statute in *United States v. Robinson*⁵⁸ and then at the Production Statute in *United States v. Morales-De Jesus*.⁵⁹ In *Robinson*, the court reviewed the conviction of Gilbert Robinson, who was found in possession of fifty sexually explicit photographs of teenage boys.⁶⁰ The statute applied, since Robinson freely admitted using Kodak film and cameras to take the pictures, both of which were manufactured outside his home state of Massachusetts.⁶¹

⁵⁶ *Lopez*, 514 U.S. at 560.

⁵⁷ See, e.g., *United States v. Robinson*, 137 F.3d 652, 656 (1st Cir. 1998).

⁵⁸ 137 F.3d 652 (1st Cir. 1998).

⁵⁹ 372 F.3d 6 (1st Cir. 2004).

⁶⁰ See *Robinson*, 137 F.3d at 653.

⁶¹ *Id.*

Robinson challenged his conviction based on *Lopez* only, as *Morrison* had not yet been litigated.⁶² The court found that Robinson's conduct fell within the third category, holding that localized child pornography could rationally be considered an activity that substantially affects interstate commerce. It therefore upheld the statute.⁶³ In doing so, the court relied heavily on the "explicit jurisdictional element," which limits the reach of the statute to pornography produced with materials that had been transported in interstate commerce. The jurisdictional element saved the statute, the court held, because it "requires an answer on a case-by-case basis."⁶⁴

The First Circuit reviewed *Robinson*, post-*Morrison*, in *United States v. Morales-De Jesus*.⁶⁵ Elvin Tomas Morales-De Jesus was convicted under the Production Statute for seducing his thirteen year old god-daughter on at least five separate occasions, and videotaping two of them.⁶⁶ In his facial and as-applied challenges, Morales-De Jesus claimed that under both *Lopez* and *Morrison*, the Production Statute was an unconstitutional exercise of the commerce power.⁶⁷

The court applied the four *Morrison* factors and found that Congress supported the acts with clear legislative findings that child pornography was "a highly organized, multimillion dollar industry that operates on a nationwide scale."⁶⁸ The court also defined child pornography as commercial because "there are large markets for child pornography . . . [t]here can be no doubt that the production of visual depictions of minors engaging in sexually explicit conduct, i.e., child pornography is economic in nature."⁶⁹

The First Circuit was less confident in the jurisdictional element than it had been in *Robinson*. Citing the Third Circuit decision of *United States v. Rodia*,⁷⁰ the court found that "as a practical matter, the limiting jurisdictional factor is almost useless here"⁷¹ and feared that the materials-in-commerce jurisdictional hook "has the kind of flaw so worrisome" that it should not be upheld.

⁶² *Id.* at 655.

⁶³ *Id.* at 656.

⁶⁴ *Id.*

⁶⁵ 372 F.3d 6 (1st Cir. 2004).

⁶⁶ *Id.* at 8.

⁶⁷ *Id.*

⁶⁸ *Id.* at 10 (quoting S. REP. NO. 95-438, at 5 (1977)).

⁶⁹ *Id.* at 12 (quoting *United States v. Buculei*, 262 F.3d 322, 329 (4th Cir. 2001)).

⁷⁰ 194 F.3d 465 (3d Cir. 1999).

⁷¹ 372 F.3d at 13 (quoting *Rodia*, 194 F.3d at 473).

⁷² However, after analyzing the fourth *Morrison* factor, the link between the activity and interstate commerce, the court upheld the statute.⁷³ The court concluded that “producing child pornography is an economic activity because it creates a product for which there is an extensive national market.”⁷⁴ In addition, “a significant portion of the child pornography about which Congress is concerned ‘is homegrown, untraceable, and enters the national market surreptitiously.’”⁷⁵

The First Circuit then analyzed Morales-De Jesus’s as-applied claim that his individual production of child pornography for his own use was outside the scope of the commerce clause.⁷⁶ The court quickly rejected this argument, finding that “[t]his claim fails because Congress’s power to criminalize this conduct pursuant to the *Commerce Clause* turns on the economic nature of the class of conduct defined in the statute rather than the economic facts (such as sale or distribution) of a single case.”⁷⁷ Therefore, the court, relying more on *Wickard’s* aggregation principle than on the Rehnquist Court’s recent preference for a limited commerce power, upheld both provisions of the child pornography statutes.

The Second Circuit, in *United States v. Holston*,⁷⁸ also found the Production Statute to be constitutional. In that case, Eric Holston was convicted of producing several videotapes of his neighbor’s young children engaged in various sexual activities.⁷⁹ The materials used to make the videos were manufactured in Japan.⁸⁰ The court, like the First Circuit, applied the *Morrison* factors and questioned the validity of the jurisdictional element, finding it only “superficially met.”⁸¹ Despite the weakness of the jurisdictional element, the Second Circuit ruled that it was “not determinative” because the other *Morrison* factors were satisfied.⁸² Finally, in looking at Holston’s as-applied challenge, the court quickly established that his “de minimus” activity was covered because of the aggregation principle. Since child pornography in general was commercial in nature, the character of Holston’s own use was irrelevant.⁸³

⁷² *Id.* at 14.

⁷³ *Id.* at 16.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 17.

⁷⁷ *Id.* at 18.

⁷⁸ 343 F.3d 83 (2d Cir. 2003).

⁷⁹ *Id.* at 84.

⁸⁰ *Id.*

⁸¹ *Id.* at 89.

⁸² *Id.*

⁸³ *Id.* at 91.

In *United States v. Rodia*,⁸⁴ the Third Circuit aligned with the prior circuits and upheld Joseph Rodia's conviction under the possession statute for having Polaroid pictures of a young child.⁸⁵ The court found dispositive the fact that the Polaroid film was manufactured outside of New Jersey, where Rodia lived.⁸⁶ Unlike the First and Second Circuits, the Third Circuit expressed "misgivings" about its decision but nonetheless found in favor of the government.⁸⁷

The *Rodia* court clearly found the statute's jurisdictional element to be weak at best, stating that "it is at least doubtful in this case that the jurisdictional element adequately performs the function of guaranteeing that the final product regulated substantially affects interstate commerce."⁸⁸ However, the court also concluded that "[t]here is no dispute" that child pornography is a commercial activity⁸⁹ and reasoned that:

Some pornographers manufacture, possess, and use child pornography exclusively within the boundaries of a state, and often only within the boundaries of their own property. It is unrealistic to think that those pornographers will be content with their own supply, hence they will likely wish to explore new or additional pornographic photographs of children Therefore the possession of 'homegrown' pornography may well stimulate a further interest in pornography that immediately or eventually animates demand for interstate pornography.⁹⁰

The Third Circuit, in essence, articulated an "addiction theory." The court used this theory as justification that Congress could reasonably have believed that the possession of homemade child pornography, while not necessarily affecting interstate commerce, would likely create a desire for the pornographer to enter the national market for child pornography. Therefore, intrastate child pornography is a gateway into the commercial market. In reaching this conclusion, the court relied on a Senate Report which stated that "[p]ornography 'is an addiction that escalates, requiring more graphic or violent material for arousal . . . thereby increasing the creation and distribution of child pornography.'"⁹¹

⁸⁴ 194 F.3d 465 (3d Cir. 1999).

⁸⁵ *Id.* at 469.

⁸⁶ *Id.*

⁸⁷ *Id.* at 468.

⁸⁸ *Id.* at 473.

⁸⁹ *Id.* at 474.

⁹⁰ *Rodia*, 194 F.3d at 477.

⁹¹ *Id.* at 478 (quoting S. REP. NO. 104-358 at 13 (1996)).

The court then applied this addiction principle to limit the statute's enforcement. The court explained that the close link between homemade pornography and the desire for more "provides a limiting principle of the type sought in *Lopez*."⁹² That nexus made this statute different from unconstitutional ones such as "criminal regulations that attempt to limit or ban behavior that does not involve an exchange of goods, such as murder or assault."⁹³

The Third Circuit concluded by asserting that Congress was "effectively entitled to regulate any intrastate activity involving a good when there is a larger interstate market for it."⁹⁴ Because child pornography does have an interstate market and because it is a fungible product that "cannot be effectively regulated without federal control over both the interstate and local versions of the activity" this statute was distinguishable from the ones struck down in *Lopez* and *Morrison*.⁹⁵ So, despite the fact that the Third Circuit was "troubled by the lack of express congressional findings about the effect of intrastate possession of child pornography on interstate commerce,"⁹⁶ the court upheld the statute.

The Fourth Circuit, in *United States v. Buculei*⁹⁷ considered the constitutionality of the statute where there was obvious interstate activity. Catalin Buculei, from New York, met a thirteen year old girl living in Maryland online and convinced her to meet him.⁹⁸ Buculei took the girl to a motel where he gave her a drink and raped her.⁹⁹ He attempted to tape the encounter, but failed to rewind his tape enough.¹⁰⁰ The Fourth Circuit, basing its opinion on *Lopez* and *Morrison*, found the statute to be constitutional. "[T]his case is distinguishable from *Lopez* and *Morrison*" the court held, because those cases involved the attempt to regulate activities that would themselves affect another market while the statute at issue attempted to regulate the product itself.¹⁰¹ Unlike the first three circuits, the Fourth Circuit found the jurisdictional element to be perfectly valid because it limited jurisdiction to "a discrete set of

⁹² *Id.* at 479.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 482.

⁹⁷ 262 F.3d 322 (4th Cir. 2001).

⁹⁸ *Id.*

⁹⁹ *Id.* at 325-26.

¹⁰⁰ *Id.* at 325 & 328 n.5.

¹⁰¹ *Id.* at 330. *Lopez* and *Morrison* attempted to regulate activities related to the statute, such as regulating gun possession near school, rather than gun possession itself, whereas this statute regulates the product of child pornography itself.

activities,”¹⁰² rather than functioning merely as lip-service to the decision in *Lopez*, as the other circuits seemed to interpret it.

The Fifth, Seventh, Eighth, and Tenth Circuits have found at least one of the two child pornography statutes constitutional under the Commerce Clause. The Fifth Circuit, in *United States v. Kallestad*,¹⁰³ found that because “it may often be impossible to determine whether a specific piece of child pornography has moved in interstate commerce” Congress could use its commerce power to regulate all child pornography, not just that which is definitively commercial.¹⁰⁴

In *United States v. Angle*,¹⁰⁵ the Seventh Circuit upheld Ralph Angle’s conviction for possessing fourteen diskettes that had been erased but still contained recoverable images of child pornography, despite Angle’s contention that he neither knew that the images were recoverable nor how to go about recovering them.¹⁰⁶ The court decided that, in the aggregate, local child pornography substantially affects interstate commerce and that Angle’s own use was immaterial to that decision.¹⁰⁷

The Eighth Circuit in two decisions, one pre- and one post-*Morrison*, also upheld the statutes as constitutional. The court, in *United States v. Bausch*¹⁰⁸ found that a man using a Japanese camera to photograph two teenage girls was within the reach of the Possession Statute based on the express jurisdictional element as required by *Lopez*.¹⁰⁹ In *United States v. Hoggard*,¹¹⁰ the defendant was arrested for possessing photographs of his wife engaged in sexual activity with their young children.¹¹¹ The case, despite being decided after *Morrison* did not consider any of the factors set out by the Supreme Court and based the holding solely on its jurisdictional element and its prior decision in *Bausch*.¹¹²

Finally, the Tenth Circuit considered the constitutionality of the Possession Statute in *United States v. Riccardi*.¹¹³ In this as-applied challenge, the court used the *Morrison* factors and discussed the circuit split on the issue.¹¹⁴ In determining that this case was distinguishable

¹⁰² *Id.* at 329.

¹⁰³ 236 F.3d 225 (5th Cir. 2000).

¹⁰⁴ *Id.* at 230. The court characterized this as the “Market Theory.”

¹⁰⁵ 234 F.3d 326 (7th Cir. 2000).

¹⁰⁶ *Id.* at 332-33.

¹⁰⁷ *Id.* at 338.

¹⁰⁸ 140 F.3d 739 (8th Cir. 1998).

¹⁰⁹ *Id.*

¹¹⁰ 254 F.3d 744 (8th Cir. 2001).

¹¹¹ *Id.*

¹¹² *Id.* at 746.

¹¹³ 405 F.3d 852 (10th Cir. 2005).

¹¹⁴ *Id.* at 866-68.

from those in which the statute was struck down, the court looked at the facts of the case and found Riccardi's own activity to be economic because he paid the children he photographed.¹¹⁵ The court also found his activities to be interstate in nature because he transported the boys across state lines on a few occasions.¹¹⁶ Although the court ultimately upheld the statute, the Tenth Circuit reviewed the facts of the case itself in making that determination, despite the fact that most other circuits found the "de minimus" actions of the particular defendant to be wholly irrelevant.¹¹⁷

B. Circuits that Struck Down the Statutes

Like the Tenth Circuit, three other circuits questioned the constitutionality of the child pornography statutes based on facts of the particular case. Each circuit found that the as-applied challenge contained facts that put the defendant outside the reach of the federal government.

The Sixth Circuit's decision in *United States v. Corp*¹¹⁸ is illustrative of this point. Patrick Corp dropped off a set of film to be developed at his local pharmacy.¹¹⁹ When he did, he commented to the cashier that "these are sick" and when they were developed, the photos contained pornographic shots of what appeared to be teenage girls.¹²⁰ The police investigated and discovered that one female was a local seventeen year old, but that the other was Corp's twenty-six-year-old wife, who engaged in consensual sexual activity.¹²¹ Corp was charged under the Possession Statute because the photo paper used was manufactured in Germany, and he was convicted by the Western District of Michigan.¹²²

The Sixth Circuit cited heavily from *Lopez*, *Morrison*, and the Third Circuit's decision in *Rodia* (specifically *Rodia*'s criticism of the jurisdictional element) to determine that Corp's own activity did not have a substantial effect on interstate commerce. The court wrote that "Corp was not involved, nor intended to be involved, in the distribution or sharing with others of the pictures in question."¹²³ The court also concluded that a seventeen-year-old woman, apparently a willing

¹¹⁵ *Id.* at 868-69.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 869-70.

¹¹⁸ 236 F.3d 325 (6th Cir. 2001).

¹¹⁹ *Id.* at 326.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 332.

participant, was not an “exploited child,” and that Corp himself did not appear to be a pedophile that was a danger to children.¹²⁴ Using a factual analysis, the Sixth Circuit differentiated between the activities Congress intended to cover in the child pornography statutes and those of Patrick Corp. However, the court failed to explain why it ignored the “de minimus” character of Corp’s activity. Instead, the court simply found that his activity did not “substantially affect interstate commerce.”¹²⁵

In *United States v. McCoy*,¹²⁶ the Ninth Circuit also focused on the facts of the case to determine that the Possession Statute was unconstitutional as applied to the situation.¹²⁷ Rhonda McCoy and her husband were not great parents and while preparing for Easter in 2000, McCoy posed for semi-nude photographs with her ten year old daughter.¹²⁸ The government again based jurisdiction on the fact that the Kodak film and Canon camera used that night were both manufactured outside of California and transported through interstate commerce.¹²⁹ Following *Lopez* and *Morrison*, the court explained that “*Wickard*’s ‘aggregation principle’ does not determine the question here. In both *Lopez* and *Morrison*, the Supreme Court carefully limited the reach of *Wickard*.”¹³⁰

The Ninth Circuit then had little trouble concluding that McCoy’s homemade pornography was “purely non-economic and non-commercial, and had no connection with or effect on any national or international child pornography market, substantial or otherwise.”¹³¹ Going through the four *Morrison* factors, the court dismissed all of them, including the congressional findings that had been so relevant in other circuit decisions. The court wrote, reminiscent of *Rodia*, that “no legislative findings exist with respect to the interstate effect of intrastate, non-commercial possession of the prohibited materials here.”¹³²

The dissenting opinion, written by Judge Trott, vehemently disagreed with the logic of the majority.¹³³ Judge Trott reiterated the opinions of the other circuits and commented that “. . .the Supreme Court appears under such circumstances to have ruled out ‘as applied’

¹²⁴ *Id.* at 332-33.

¹²⁵ *Id.* at 333.

¹²⁶ 323 F.3d 1114 (9th Cir. 2003).

¹²⁷ *Id.*

¹²⁸ *Id.* at 1115.

¹²⁹ *Id.* at 1116.

¹³⁰ *Id.* at 1120.

¹³¹ *Id.* at 1122.

¹³² 323 F.3d at 1129.

¹³³ *Id.* at 1133 (Trott, J., dissenting).

challenges in *Commerce Clause* cases.”¹³⁴ Judge Trott, unlike the majority, found that McCoy’s conduct “clearly falls within the purview of the plain language of the statute under any statutory construction of it, including the jurisdictional element *To the statute*, it is immaterial that the particular child pornography under scrutiny was not produced for sale or trade.”¹³⁵ Judge Trott’s dissent lined up exactly with the logic employed by the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, all of which found the individual activity wholly irrelevant to the constitutionality of the statute.

Finally, the Eleventh Circuit issued two opinions on the child pornography statutes in close succession. *United States v. Maxwell*¹³⁶ and *United States v. Smith*,¹³⁷ both found the federal statutes unconstitutional. *Maxwell* involved the Possession Statute.¹³⁸ James Maxwell rented a room from his ex-girlfriend, Wallace, and was allowed access to her computer and the internet.¹³⁹ When she grew suspicious of Maxwell’s use of her computer, Wallace called the FBI, who then discovered “several hundred images of child pornography.”¹⁴⁰

The Eleventh Circuit applied the *Morrison* factors and posited that the materials-in-commerce jurisdictional element was not adequate because it did not relate to child pornography itself. The court held that “nor does it seem that § 2252A represents a federal effort to reduce the trafficking of cameras, computers, staples, blank paper, film, or disks in interstate commerce.”¹⁴¹ With this hook, the government was able to regulate Maxwell’s conduct when “as far [as] interstate commerce is concerned, Maxwell has done nothing more than possess two disks that traveled from out-of-state.”¹⁴² In applying the factors, the court concluded that there was “no rational basis” for the federal government to regulate Maxwell’s individual conduct and based its holding on the weakness of the jurisdictional element, which attached to Maxwell simply because of his use of out-of-state disks.¹⁴³

¹³⁴ *Id.*

¹³⁵ *Id.* at 1140-41.

¹³⁶ 386 F.3d 1042 (11th Cir. 2004).

¹³⁷ 402 F.3d 1303 (11th Cir. 2005).

¹³⁸ 386 F.3d at 1045. The court repeatedly refers to § 2252(a)(5)(B), but as there is no such section in the statute and their statutory definition refers to § 2252(a)(4)(B), I assume they made a typographical error.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1057.

¹⁴² *Id.* at 1058.

¹⁴³ *Id.* at 1067-68.

United States v. Smith,¹⁴⁴ decided only months after *Maxwell*, not surprisingly held that both the Possession and Production Statutes of the child pornography acts were unconstitutional.¹⁴⁵ In *Smith*, the Tampa Police Department searched the defendant's home because Smith's brother allegedly possessed drugs.¹⁴⁶ The police discovered a lockbox of Smith's, which contained 1,768 pictures, several of them depicting "very, very young girls having sex . . . with a male who [was later] identified as the defendant."¹⁴⁷ Even though Smith was convicted under both provisions of the statute, the Eleventh Circuit applied the same reasoning as *Maxwell* and concluded that "[a]s in *Maxwell*, 'we believe *Morrison*'s framework produces the correct result in this case."¹⁴⁸ The Eleventh Circuit in fact did not even apply a true factual analysis as it had in *Maxwell*. The court relied mostly on *Maxwell* to determine that almost any homemade pornography will be outside the jurisdiction of the federal government.¹⁴⁹

C. Analysis of Circuit Decisions

1. Circuits that Upheld the Statutes

The majority of circuits have found that the child pornography statutes are constitutional exercises of the commerce power. This does not mean, however, that those circuits are automatically correct. Of the ten cases where the statutes were upheld by the various circuits, three occurred between *Lopez* in 1995 and *Morrison* in 2000: *United States v. Robinson*,¹⁵⁰ *United States v. Rodia*,¹⁵¹ and *United States v. Bausch*.¹⁵² Of course these cases were decided without the *Morrison* factors and, thus, may not align with the Supreme Court's analysis. But all three do apply the *Lopez* Category Three analysis and the Court's discussion of explicit jurisdictional elements to determine that the Gun-Free School Zone Act could be distinguished from the federal Child Pornography Statutes. Despite being pre-*Morrison* and therefore possibly reversible on that basis, it is not likely that these cases will be overturned for that reason. For example, the First Circuit in *Morales-De Jesus* declared that *Robinson* had "essentially anticipated all four of the *Morrison* factors"

¹⁴⁴ *United States v. Smith*, 402 F.3d 1303 (11th Cir. 2005).

¹⁴⁵ *Id.* Again the court mistakenly refers to § 2252(a)(5)(B).

¹⁴⁶ *Id.* at 1310.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1328 (quoting *Maxwell*, 386 F.3d at 1067).

¹⁴⁹ *Id.*

¹⁵⁰ *United States v. Robinson*, 137 F.3d 652 (1st Cir. 1998).

¹⁵¹ *United States v. Rodia*, 194 F.3d 465 (3d Cir. 1999).

¹⁵² *United States v. Bausch*, 140 F.3d 739 (8th Cir. 1998).

and was still good law.¹⁵³ Furthermore, *Rodia*'s analysis of the jurisdictional element has been cited with approval by several of the post-*Morrison* cases.¹⁵⁴ The cases that followed *Morrison* nearly all applied its factors, to varying degrees, to find that the statutes were constitutional.¹⁵⁵

However, it is interesting to note that despite the circuits' lip service to the Court's decisions, all of those circuits ultimately found that the holdings of *Lopez* and *Morrison* did not require them to declare the Production and Possession Statutes unconstitutional. If the circuits had truly followed the messages of those decisions they likely would have determined that the Supreme Court was drastically limiting Congress's power, not expanding it. It seems odd that in a period of extreme Supreme Court deference to the states that the circuit courts would not follow this lead.

Moreover, many of the circuits after *Rodia* found that the jurisdictional element, requiring only that the raw materials used to make the child pornography pass through commerce, was not valid because it failed to truly limit Congress's reach.¹⁵⁶ There would be no basis for those courts to uphold the statutes if they failed to satisfy the *Morrison* factors, and it seems more that the circuits disregarded the weakness of the jurisdictional element in favor of the other three factors. This is troubling because in *Lopez* the lack of a jurisdictional element was a key factor in the Court's decision to strike down the statute.¹⁵⁷ Even though these statutes are different from *Lopez* because they did actually include a jurisdictional element, this is merely semantics because the jurisdictional elements at issue are negligible in their ability to rein in the statutes' reach.

Despite these failings, the decisions were correctly determined. The courts, for the most part did apply the *Morrison* test and used it to determine the outcome. Even if the circuits disagreed with the holdings of the Supreme Court, they still followed the guidelines set up and were able to determine the constitutional boundaries of the child pornography statutes from that. As well, several of the circuits also determined additional bases for Congress's power—such as the *Rodia*¹⁵⁸ court's

¹⁵³ *United States v. Morales-De Jesus*, 372 F.3d 6, 15 n.6 (1st Cir. 2004).

¹⁵⁴ *See, e.g., Morales-De Jesus*, 372 F.3d 6 (1st Cir. 2004); *United States v. Holston*, 343 F.3d 83 (2d Cir. 2003); *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000).

¹⁵⁵ With the exception of *United States v. Riccardi*, 405 F.3d 852 (10th Cir. 2005) and *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000). Both of these cases merely touch on *Morrison* without giving a real analysis of that decision.

¹⁵⁶ *See, e.g., Morales-De Jesus*, 372 F.3d 6 (1st Cir. 2004).

¹⁵⁷ *United States v. Lopez*, 514 U.S. 549, 561-21 (1995).

¹⁵⁸ *United States v. Rodia*, 194 F.3d 465 (3d Cir. 1999).

creation of the “addiction test” and the “market theory” put forth by the Fifth Circuit.¹⁵⁹

These circuits also apparently anticipated the shift that the Court itself would take, in preferring the *Wickard* aggregation theory over *Lopez* or *Morrison*.¹⁶⁰ Nearly all of the circuits stated their preference for *Wickard*'s strong reach to *Lopez* and *Morrison*, and found a way to follow all three—by applying the aggregation theory as a way to circumvent the strictness of *Morrison*'s factors. In choosing to follow *Wickard*, the courts deferred to the long standing precedent that Congress has a broad range of power under the Commerce Clause.

Because of this preference, “the judiciary has largely ‘declined to read *Morrison* to require that earlier cases be overruled or even seriously reexamined’”¹⁶¹ or even that current cases need strict adherence to the holding of *Morrison*. Another commentator noted that to follow *Lopez* would be tantamount to returning to the pre-New Deal era of Commerce Clause jurisprudence.¹⁶² He noted that Justice Souter commented in his *Lopez* dissent that “the distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly.”¹⁶³ It is possible that the circuit courts recognized the artificiality of the *Lopez* Court's distinctions between things that substantially affect interstate commerce and those which for some reason do not, and found that categorization was unworkable.

Ultimately, in the years between *Morrison* and *Raich*, the circuit courts were forced to determine the constitutionality of the child pornography statutes for themselves, with little clear guidance from the Supreme Court. “[I]t is important to keep in mind that *Morrison*'s four factors do not provide a bright-line test, and an affirmative or negative answer on any or all of the factors will not guarantee a particular outcome.”¹⁶⁴ Commentators have noted that “the new Commerce Clause analysis has been haphazardly applied by the lower courts” because of

¹⁵⁹ United States v. Kallestad, 236 F.3d 225, 231 (5th Cir. 2000).

¹⁶⁰ See *infra* Part III, which discusses *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

¹⁶¹ Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge ‘On Its Face’*: *Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161, 206 (2004) (quoting Brandon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256 (2003)).

¹⁶² Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719 (2003).

¹⁶³ *Id.* at 1755.

¹⁶⁴ Stewart, *supra* note 161, at 171.

the lack of clear guidelines.¹⁶⁵ Because of this ambiguity, the courts were awash with precedence tending towards broad congressional power and the newer decisions that purported to rectify this, but left the lower courts in greater confusion.

2. Circuits that Struck Down the Statutes

The Sixth, Ninth, and Eleventh Circuits all struck down the federal Child Pornography Statutes as applied to the cases before their courts. Those circuits found that the statutes could not reach the insulated, intrastate activities of child pornographers who did not share or sell their product. The courts in general made several good points in their analysis, especially about the weakness of the jurisdictional element, a line of reasoning for the most part accepted by the other circuits as well. In particular, the *Maxwell* court pointed out that the materials-in-commerce hook was probably not adequately related to child pornography, and that there was no suggestion that “Congress was concerned about the materials used to produce pornography or how those materials would impact interstate commerce.”¹⁶⁶ The implication that the jurisdictional element does not, in any practical way, limit the reach of the statutes is valid and most other circuits have accepted this logic.

The *Maxwell* court made another compelling argument, namely that the statutes at issue, especially the Possession Statute, do not prohibit trade or sale of child pornography, but the simple possession or home production.¹⁶⁷ If the government was truly concerned with the interstate market for child pornography, it seems more likely that the statutes would be aimed at catching those people who are actively involved in that market, not people who are simply making their own pornography, for their own use.¹⁶⁸ Rodia’s “addiction theory” only goes so far—a “successful” child pornographer might never need to enter the national market, and none of the circuit cases suggest that any of these defendants attempted to.

Notwithstanding the legitimate claims of these circuits, there are far more criticisms of the analyses. First, all of the circuits that struck down the statutes did so only on an as-applied challenge, after a factual

¹⁶⁵ Paul Tzur, Comment, *I Know Economic Activity When I See Economic Activity: An Operational Overhaul of the Measure by Which Federal Criminal Conduct is Deemed “Economic,”* 94 J. CRIM. L. & CRIMINOLOGY 1105, 1108 (2004).

¹⁶⁶ *United States v. Maxwell*, 386 F.3d 1042, 1057 (11th Cir. 2004).

¹⁶⁷ *Id.* at 1069.

¹⁶⁸ This is not always the case however. The government has, in the past, criminalized mere possession in order to dry up the market for production of the item. *See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990) (holding that Ohio’s child pornography statute was constitutional because it destroyed the market for that product).

analysis of the case. The *Raich* decision, as well as prior precedent suggested that as-applied challenges are inappropriate in Commerce Clause litigation. Judge Trott's dissent in *McCoy* recognized this problem and wrote that "it is immaterial" that the child pornography at issue did not itself affect interstate commerce, so long as it was within the class of child pornography which, in the aggregate, does have such an effect.¹⁶⁹ Despite the majority's contention that wholly intrastate child pornography was a separate and distinct class of activities, commentators have noted that "both the Sixth and Ninth Circuits in *Corp* and *McCoy* attempted to restrict their findings to the *de minimus* facts of a particular case."¹⁷⁰

But, as *Lopez* demonstrated, this question is entirely irrelevant for determining the constitutionality of a commerce-based statute. Asking whether the defendant did anything prohibited by the statute is not a constitutional question. Answering that question is necessary, of course, for sustaining a conviction and applying the weight of the law to the claimant; but mounting a *constitutional* challenge to a Commerce Clause statute first requires the court to determine 'whether the class is within the reach of the federal power'; then, where the class of activities is constitutionally regulated, 'the courts have no power to excise, as trivial, individual instances of the class.'¹⁷¹

Thus, the Sixth, Ninth, and Eleventh Circuits were wrong to attempt to remove *Corp*, *McCoy*, *Maxwell*, and *Smith* from the reach of the child pornography statutes because of the facts of their cases. The exact nature of an individual's activities is wholly irrelevant to determining the constitutionality of those statutes.

Furthermore, as noted above, these circuits questioned the validity of the jurisdictional element, but unlike the other circuits, they relied heavily on the jurisdictional element's weakness to find the statutes unconstitutional. However, commentators have suggested that the weakness or nonexistence of one of the *Morrison* factors is not only not dispositive, it is almost irrelevant to the determination.¹⁷² The courts, dependant on *Lopez*, took the materials-in-commerce hook very strongly, and used this to strike down the statutes without proper attention to the other factors.

¹⁶⁹ *United States v. McCoy*, 323 F.3d 1114, 1141 (9th Cir. 2003) (Trott, J., dissenting).

¹⁷⁰ Stewart, *supra* note 161, at 186.

¹⁷¹ *Id.* at 183 (Internal citations omitted).

¹⁷² See Stewart, *supra* note 161 and accompanying text.

Another critique of these courts was their failure to recognize the potency of *Wickard* as precedent for the child pornography statutes. The Sixth Circuit did not even mention *Wickard* in its analysis, preferring to base its decision wholly on *Lopez* and *Morrison*.¹⁷³ The other courts, while they did mention *Wickard*, relegated it to an ineffective position, dominated by more recent jurisprudence. For example, the Ninth Circuit, in *McCoy*, found that “*Wickard*’s ‘aggregation principle’ does not determine the question here. In both *Lopez* and *Morrison*, the Supreme Court carefully limited the reach of *Wickard* . . .,”¹⁷⁴ finding that while *Wickard* had never been specifically overruled, the Rehnquist Court’s intention was to dilute its status as precedent.

The Eleventh Circuit echoed this feeling in *Maxwell* and *Smith*, holding that the child pornography statutes “can be sharply distinguished from the activity the Supreme Court found subject to *Commerce Clause* regulation in *Wickard v. Filburn*.”¹⁷⁵ All three circuits rejected the idea that *Wickard*’s broad reach was still good law in light of *Lopez* and *Morrison*, despite the fact that *Wickard* had never been overruled. The circuits chose to ignore a long-standing and persuasive argument in favor of expansive *Commerce Clause* regulation, in some instances not even mentioning the landmark decision.

The final critique of these cases is their creative manipulation of the facts. The courts chose to highlight certain facts and ignore others so that the statute seemed less appropriate in those cases. In *Corp*, the court noted early in its decision that the photographs Corp had developed contained shots of his seventeen-year-old lover *and* “another younger female.”¹⁷⁶ At the end of the decision however, the court claimed that “Corp was not alleged to be a pedophile nor was he alleged to have been illegally sexually involved with minors other than Sauntman, who was merely months away from reaching majority.”¹⁷⁷ In making this assertion, the court conveniently overlooked that he photographed at least one other minor child. This could lead a reasonable person to assume that he had done such things before and to the presume that Corp was in fact a pedophile or child pornographer.

Another strong example of this is James Maxwell, whom the Eleventh Circuit found was beyond the reach of the child pornography statutes because “it is difficult to imagine an activity more local in character than Maxwell’s private possession of images within the

¹⁷³ *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001).

¹⁷⁴ 323 F.3d at 1120.

¹⁷⁵ *United States v. Maxwell*, 386 F.3d 1042, 1056 (11th Cir. 2004).

¹⁷⁶ *Corp*, 236 F.3d at 326.

¹⁷⁷ *Id.* at 333.

confines of a single state (and perhaps, moreover, within a single home).”¹⁷⁸ In making this determination, the Eleventh Circuit conveniently forgot that among the disks and pictures Maxwell possessed, FBI witnesses identified some of the children as “minor children, one from Florida and the other from Texas.”¹⁷⁹ It is illogical of the Eleventh Circuit to claim Maxwell’s activity was confined to one home when he either took the photos himself or entered the national, interstate market and purchased or traded for the photographs. Either way, the government’s case certainly hinged on more than a claim of Maxwell’s use of blank disks from out of state. Of all the defendants, his activity appeared to be among the most obviously interstate. Maxwell obtained pornographic pictures of children from out of state using some forum of interstate commerce, and like the Sixth Circuit, the court ignored this obvious use and found Maxwell’s activities wholly intrastate.

III. RAICH AND OTHER RECENT COMMERCE CLAUSE DECISIONS

A. *The Raich Decision*

The Supreme Court has yet to review any of the circuit decisions on the federal Child Pornography Statutes, leaving the circuits to decide for themselves how best to apply those laws under the foggy guidance of *Wickard*, *Lopez*, and *Morrison*. However, in the 2004-2005 Court Term, the Court did revisit its Commerce Clause jurisprudence in *Gonzales v. Raich*,¹⁸⁰ a case regarding California’s Compassionate Use Act (“CUA”)¹⁸¹ for medicinal marijuana and the federal government’s own Controlled Substances Act (“CSA”).¹⁸² The Court considered whether the commerce power included the power “to prohibit the local cultivation and use of marijuana in compliance with California law.”¹⁸³ Justice Stevens, writing for the majority, concluded that the CSA was constitutional under the Commerce Clause and that it pre-empted California’s law.

Justice Stevens began by explaining that the CUA was designed to make medicinal marijuana available for “seriously ill” residents without the fear of prosecution.¹⁸⁴ The respondents, Raich and Monson, were

¹⁷⁸ *Maxwell*, 386 F.3d at 1067-68.

¹⁷⁹ *Id.* at 1047.

¹⁸⁰ 125 S. Ct. 2195 (2005).

¹⁸¹ Cal. Health & Safety Code Ann. § 11362.5 (2005).

¹⁸² 21 U.S.C. § 841 (2006).

¹⁸³ *Gonzalez*, 125 S. Ct. at 2199.

¹⁸⁴ *Id.* at 2199.

both California residents who used the CUA to obtain the marijuana they needed for their respective illnesses.¹⁸⁵ Raich and Monson brought suit against the Attorney General and the Drug Enforcement Administration (DEA) after the DEA destroyed Monson's supply of cannabis plants.¹⁸⁶ The respondents claimed that the CSA violated the Commerce Clause, the Due Process Clause, and the Ninth and Tenth Amendments.¹⁸⁷ The district court denied their motion for a preliminary injunction, finding that the respondents could not demonstrate the requisite "likelihood of success on the merits of their legal claims."¹⁸⁸ The Ninth Circuit reversed, finding that the "intrastate, noncommercial" use of medicinal marijuana was outside the scope of the Commerce Clause.¹⁸⁹ The Ninth Circuit focused on the idea of a "separate and distinct class of activities," applying *Lopez* and *Morrison* to find that such limited use for medical purposes was not a commercial activity.¹⁹⁰ Justice Stevens then briefly stated the holding that despite *Lopez* and *Morrison*, the CSA was a valid federal law under the Commerce Clause, "even as applied to the troubling facts of this case."¹⁹¹

After discussing the extensive history of drug regulation, Justice Stevens returned to the CSA.¹⁹² The Court examined the congressional findings of the CSA, in particular the findings that local production and possession of drugs affect interstate commerce and that controlled substances are fungible products which cannot be differentiated between local and interstate items.¹⁹³ These findings are remarkably similar to the ones used by many circuits to defend the child pornography statutes. Finally, Justice Stevens explained that Congress classified marijuana as a Schedule I drug, meaning it had a "high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment."¹⁹⁴ In choosing to place marijuana in this class, Congress signaled that it found no medicinal value in the drug and mandated that all marijuana use (like all other Schedule I drugs) was totally prohibited, except in an FDA research study.¹⁹⁵ The Court also noted that the CSA allows for the reclassification of all drugs and that

¹⁸⁵ *Id.* at 2199-2200.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 2200.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 2200-01.

¹⁹⁰ 125 S. Ct. at 2201 (quoting *Raich v. Ashcroft*, 352 F.3d 1222, 1228 (9th Cir. 2003)).

¹⁹¹ *Id.*

¹⁹² *Id.* at 2203.

¹⁹³ *Id.* at 2203 n.20.

¹⁹⁴ *Id.* at 2204.

¹⁹⁵ *Id.*

despite several attempts by lobbyists, marijuana remained a Schedule I drug, with all the restrictions.¹⁹⁶

The Court then rejected each argument put forth by the respondents, starting with the claim that the CSA's prohibition of intrastate manufacture and possession of medical marijuana exceeded the constitutional limits of the Commerce Clause.¹⁹⁷ Justice Stevens explained how *Wickard* was of "particular relevance," in that it granted Congress the power to regulate an entire class of activity under the aggregation theory, meaning that "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class."¹⁹⁸

The Court relied heavily on a comparison between the CSA and the Agricultural Adjustment Act ("AAA") in *Wickard*, giving two parallels. First, the respondents, as in *Wickard*, were cultivating a fungible commodity for personal, not commercial use.¹⁹⁹ Justice Stevens clarified that here, as in *Wickard*, "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would affect price and market conditions."²⁰⁰ The second comparison was that both homegrown wheat during the Great Depression and homegrown medicinal marijuana in today's thriving drug market may be drawn into the interstate market because of the huge demand for those products.²⁰¹ Because of the strong similarities between the CSA and the AAA, and between the products' demand, Justice Stevens held that *Wickard*'s aggregation theory controlled the Court's analysis.

The Court also rejected the argument that, as in *Lopez* and *Morrison*, the lack of particularized congressional findings rendered the CSA unconstitutional. But Justice Stevens explained that "while congressional findings are certainly helpful . . ." their absence does not per se make a statute unconstitutional.²⁰² Justice Stevens explained that requiring "a new and heightened burden on Congress" to include expansive congressional findings would be "unprecedented" and "impractical."²⁰³

Finally the Court refused to "excise individual components of that larger scheme," of drug regulation, and would not grant the as-applied challenge the respondents sought, relying once again on the rational-

¹⁹⁶ *Id.* at 2204 n.23.

¹⁹⁷ *Id.* at 2205.

¹⁹⁸ *Id.* at 2206.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2207.

²⁰¹ *Id.*

²⁰² *Id.* at 2208.

²⁰³ *Id.* at 2208 n.32.

basis test.²⁰⁴ Using this test, Justice Stevens explained that because the CSA specifically designated Schedule I drugs as having no medical uses, the respondents could not argue that they were different from other drug users.²⁰⁵ Furthermore, the Supremacy Clause precluded California from circumventing federal laws banning marijuana simply by passing its own law.²⁰⁶

The Court also had to distinguish *Raich* from *Lopez* and *Morrison*. To begin, the Court explained that the respondents relied too heavily on *Lopez* and *Morrison*, rather than “the larger context of modern-era *Commerce Clause* jurisprudence.”²⁰⁷ Justice Stevens then explained that in both *Lopez* and *Morrison* the Court saw facial challenges to the statutes, while the respondents here sought to overturn only a part of the statute, adding that “[t]his distinction is pivotal.”²⁰⁸

To show how *Raich* differed from *Lopez* and *Morrison*, Justice Stevens explored the economic activity involved in medicinal marijuana use. The Court defined “economics” as “the production, distribution, and consumption of commodities”²⁰⁹—an extremely broad definition that would allow Congress to regulate nearly any activity involving any product, and which did allow Congress here to regulate the intrastate possession of medicinal marijuana.

Justice Stevens then addressed the contention that medicinal marijuana was a totally distinct class that could be separated from general drug use.²¹⁰ Justice Stevens first explained that while Congress could have chosen to exempt this class, it did not. Hence, the real issue should be whether Congress’s decision was justified.²¹¹ Justice Stevens explained that “[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and more importantly, one that Congress could have rationally rejected.”²¹² Supported heavily by the precedence of *Wickard*, Justice Stevens and the majority thus diluted *Lopez* and *Morrison* in favor of a return to a more powerful Commerce Clause, which could in turn lead to a more powerful and regulatory central government. However, Justice Stevens suggested that respondents should seek the reclassification of marijuana into a lower

²⁰⁴ *Id.* at 2209.

²⁰⁵ *Id.* at 2212.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 2209.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2211.

²¹⁰ *Id.* at 2211-12.

²¹¹ *Id.* at 2211.

²¹² *Id.* at 2213.

schedule, saying that “[u]nder the present state of the law” that the Court had no option but to follow the Constitution.²¹³

Given the controversy surrounding the issue, it is not surprising that the Court failed to achieve unanimity. Justice Scalia concurred, to make the valid point that the majority was “misleading” in that it was based solely on the Commerce Clause.²¹⁴ According to Justice Scalia, a more accurate holding would have explained that the true power derived from the Necessary and Proper Clause as well because category three, unlike the other two, did not derive from interstate commerce itself.²¹⁵

Justice Scalia also countered the dissenters’ claim that the majority opinion would render *Lopez* a blip in the overall scheme of Commerce Clause jurisprudence.²¹⁶ Justice Scalia wrote that even *Lopez* asserted that intrastate activities could be regulated if the failure to do so could hamper the overall attempt to regulate the market.²¹⁷ The real difference was that in neither *Lopez* nor *Morrison* did Congress attempt to regulate “in connection with a more comprehensive scheme of regulation.”²¹⁸ Ultimately, Justice Scalia explained how the Necessary and Proper Clause, which requires that the means of regulation be “appropriate and plainly adapted” to the ends sought, would limit the application of the Commerce Clause.²¹⁹ In the context of the CSA, since “it is impossible to distinguish ‘controlled substances manufactured and distributed intrastate’ from ‘controlled substances manufactured and distributed interstate,’” it is appropriate for the government to regulate both.²²⁰ Based on this rationalization, Justice Scalia agreed with the majority’s holding that the CSA was a valid exercise of congressional power under both the Commerce Clause *and* the Necessary and Proper Clause.

Justices O’Connor and Thomas wrote separate dissents.²²¹ Justice O’Connor’s dissent, joined by Chief Justice Rehnquist and Justice Thomas, fervently disagreed with the majority and argued that the majority decision invaded the sovereign sphere of states’ rights.²²² In Justice O’Connor’s view, the majority’s holding is “irreconcilable” with both *Lopez* and *Morrison*²²³ and relegated *Lopez* to “nothing more than a

²¹³ *Id.* at 2215. This could imply that under different circumstances, the Court would have preferred not to rule this way.

²¹⁴ *Id.* at 2215 (Scalia, J., concurring).

²¹⁵ *Id.* at 2215-16.

²¹⁶ *Id.* at 2218.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 2219.

²²⁰ *Id.*

²²¹ *Id.* at 2220.

²²² *Id.* at 2220-21 (O’Connor, J., dissenting).

²²³ *Id.* at 2221.

drafting guide.”²²⁴ Under the majority’s newest shift, Congress is able to wield an almost tyrannical power, allowed to “regulate intrastate activity without check.”²²⁵ Justice O’Connor’s dissent also pointed out the flaws of the majority’s approach. The critique focused mainly on how the majority condoned Congress’s attempt to control medicinal marijuana use “without any proof” of its connection to the larger market.²²⁶ By doing this, Congress “stifles an express choice” of the states and imposed its own will on them.²²⁷

To come to this conclusion, Justice O’Connor explained that the holdings of *Lopez* and *Morrison* were “materially indistinguishable” from *Raich*.²²⁸ Moreover, Justice O’Connor determined that the conduct of cultivating and possessing medicinal marijuana was totally intrastate and that upholding the CSA in this regard “is tantamount to removing meaningful limits on the *Commerce Clause*.”²²⁹ Justice O’Connor explained that “[e]ven if intrastate cultivation and possession of marijuana for one’s own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce.”²³⁰ Arguing that “there is simply no evidence” that medicinal marijuana use could affect the market in a similar manner to homegrown wheat during the Great Depression, Justice O’Connor distinguished *Wickard* and claimed that the majority placed too much importance on the existence of unspecified congressional findings to uphold the CSA.²³¹ Finally, Justice O’Connor urged the majority to remember the federal system, which was designed to protect the sovereignty of the states and to keep the federal government from encroaching on local matters.²³²

Justice Thomas echoed many of Justice O’Connor’s concerns about state sovereignty, writing that “the Court abandons any attempt to enforce the Constitution’s limits on federal power.”²³³ Justice Thomas would have held that the CSA was unconstitutional, concluding that never before had commerce included “the mere possession of a good or some purely personal activity that did not involve trade or exchange for

²²⁴ *Id.* at 2223.

²²⁵ *Id.* at 2222.

²²⁶ *Id.* at 2221.

²²⁷ *Id.* at 2229.

²²⁸ *Id.* at 2222.

²²⁹ *Id.*

²³⁰ *Id.* at 2224.

²³¹ *Id.* at 2224-29.

²³² *Id.* at 2229.

²³³ *Id.* (Thomas, J., dissenting).

value.”²³⁴ Justice Thomas also rebutted Justice Scalia’s contention that the majority’s approach was consistent with the Necessary and Proper Clause. He found instead that California’s internal controls on the medicinal marijuana market would not affect the CSA.²³⁵ Moreover, Justice Thomas held that “[e]nforcement of the CSA can continue as it did prior to the Compassionate Use Act,” because California’s law would not contradict the CSA but merely exclude an extremely minor subclass whose personal drug use barely affected the larger market.²³⁶

Finally, Justice Thomas declared that the majority’s use of the “substantial effects test” is easily manipulable, because “[t]o evade even that modest restriction on federal power, the majority defines economic activity in the broadest possible terms” and could just as easily redefine the test at any time.²³⁷ Relying heavily on the theory of federalism and state sovereignty, Justice Thomas strongly criticized the majority’s “rush to embrace federal power” and urged the Court to allow the states to make such decisions for themselves.²³⁸

Because *Raich* is the most recent Commerce Clause decision, it presumably represents the Court’s current opinion on the range of power that Congress may wield. However, it leaves many unanswered questions in its wake. The majority’s opinion did not attempt to overrule or explain *Lopez* or *Morrison*, yet it completely stripped both of them of their influence. Moreover, the *Raich* Court did not even bother to apply the *Morrison* factors in its decision to uphold the statute—in fact, the majority did not even discuss the jurisdictional element at all.²³⁹ This begs the question of what the lower courts are supposed to do with these three decisions. As Justice O’Connor pointed out, these decisions do not create a coherent rule for the courts to follow, but rather generate a situation where the district courts are certainly going to disagree on which precedent is more appropriate in a particular case.

Another question created by the Court is how to apply its definition of “economics.” The Court used an extremely broad dictionary definition that appears to encompass all possible products in any sort of commerce.²⁴⁰ But merely describing economics as “production, distribution, and consumption of commodities”²⁴¹ does not give any sort of guidelines for how courts should apply this. The Court also failed to

²³⁴ *Id.* at 2230.

²³⁵ *Id.* at 2231-32.

²³⁶ *Id.*

²³⁷ *Id.* at 2236.

²³⁸ *Id.* at 2238-39.

²³⁹ *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

²⁴⁰ *Id.* at 2211.

²⁴¹ *Id.*

point out the difference between intrastate and interstate economics and seemed to suggest that in fact Congress can regulate either because to do otherwise would cripple the government's ability to regulate effectively.

Finally, the Court boldly stated that "when Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class."²⁴² This declaration appears to firmly establish that "as-applied" challenges to federal statutes will not be entertained by the Court, as if this was a settled point. However, every circuit that struck down the child pornography statutes did so on an as-applied basis, thus it may not be as simple as the Court makes it out to be. While "no Supreme Court decision has ever purported to carve a singular litigant's activity from an otherwise rationally and constitutionally defined class,"²⁴³ it seems that all circuits will at least entertain the idea of an as-applied challenge, and without the Court's clear guidance on this point, it is more than likely that circuit decisions will continue to turn on this challenge.

B. Post-Raich Jurisprudence

In the wake of *Raich*, the Eleventh Circuit's two child pornography decisions, *Smith* and *Maxwell* went before the Supreme Court on petitions for certiorari. On June 20, 2005, only two weeks after *Raich* was announced, the Court granted certiorari on *United States v. Smith*, and vacated the Eleventh Circuit's decision.²⁴⁴ The Court, however, did not hear the case. It simply remanded to the Eleventh Circuit "for further consideration in light of *Gonzales v. Raich*."²⁴⁵

At the start of the October 2005 term, the Court returned to consider *Maxwell* and ordered the same remand to the Eleventh Circuit, to again reconsider its position based on *Raich*.²⁴⁶

The Ninth Circuit has also been forced to reconsider its position on the Production Statute in *United States v. Tashbook*.²⁴⁷ In that case, the Ninth Circuit seemingly reversed its prior position, articulated in *McCoy*, and upheld Tashbook's conviction.²⁴⁸ However, the court did not overrule *McCoy*; rather the Ninth Circuit merely distinguished *Tashbook* from *McCoy*, finding that Tashbook's de minimus activities were by nature interstate because he advertised through the internet and used

²⁴² *Id.* at 2206.

²⁴³ Stewart, *supra* note 161, at 212.

²⁴⁴ *United States v. Smith*, 125 S. Ct. 2938 (2005).

²⁴⁵ *Id.*

²⁴⁶ *United States v. Maxwell*, 126 S. Ct. 321 (2005).

²⁴⁷ *United States v. Tashbook*, 114 F. App'x 610 (9th Cir. 2005).

²⁴⁸ *Id.* at 613.

email and telephone conversations to lure victims.²⁴⁹ The court also relied on the difference between the Production and Possession Statutes. To the Ninth Circuit, the Production Statute was more related to interstate commerce because it regulates production, not “mere” possession as the Possession Statute does.²⁵⁰ Because the Ninth Circuit specifically distinguished *Tashbook* from other Commerce Clause challenges, the court astutely avoided the *Raich* issue, determining that “we need not address any effect *Raich* may have on the current case.”²⁵¹

Since the Court avoided the child pornography statutes in favor of remanding them to the circuits to tackle, and because (at least) the Ninth Circuit continues to allow as-applied challenges to the statutes it is unclear what effect *Raich* will have on this circuit split. *Raich*, however has already been cited in at least three new Supreme Court decisions,²⁵² and thirteen lower court decisions.²⁵³

IV. ANALYSIS OF THE CIRCUITS AFTER *RAICH*

A. Analysis of the Circuits that Upheld the Statutes

After the Court decided *Raich*, it is easy to assume that the circuits upholding the child pornography statutes were correct—it would seem that because the *Raich* decision recommends an expansive commerce power that the Court would apply this principle to the Federal Child Pornography Statutes. However, this is far from certain. One could argue that the Court, in deciding *Raich*, legislated from the bench based on the Justices’ personal beliefs regarding the medicinal purposes of marijuana rather than their concern for Congress’s Commerce Power. This is a powerful supposition, but it makes sense considering the Court’s drastic reversal in *Lopez* was decided only ten years ago and there have been no changes in the makeup of the Court during that time.

However, based on the Court’s decision in *Raich*, whatever its motivation, certainly the circuit court decisions upholding the statutes would be affirmed. Notably the *Morrison* Court referred to legislative findings as a factor, but the *Raich* Court characterized them as merely

²⁴⁹ *Id.* at 614. The Ninth Circuit distinguished *Tashbook*’s activity based on his e-mail and telephone use, because both are “interstate instrumentalities of commerce,” *Lopez*’s Category Two, unlike all other Commerce Clause cases which relied on Category Three.

²⁵⁰ *Id.* at 613.

²⁵¹ *Id.* at 614 n.2.

²⁵² See *Klinger v. Dir., Dep’t of Revenue*, 125 S. Ct. 2899, 2899 (2005); *United States v. Stewart*, 125 S. Ct. 2899, 2899 (2005); *Kelo v. City of New London*, 125 S. Ct. 2655, 2681 (2005) (Thomas, J., dissenting).

²⁵³ See, e.g., *United States v. Logan*, 419 F.3d 172 (2d Cir. 2005); *United States v. Scull*, No. 05-2061, 2005 U.S. App. LEXIS 19111 (10th Cir. Sept. 1, 2005).

“helpful” and further stated that “the absence of particularized findings” would not damage a statute’s constitutionality.²⁵⁴ This helps the constitutionality of the child pornography statutes because there is no mention of how intrastate, homemade child pornography affects the commercial interstate market, as several circuits pointed out.

There is one large criticism of upholding the child pornography statutes as written: They could basically obliterate any remaining state right to police such obvious criminal activity. Many commentators have been critical of such usurpation, saying “the Founders ‘repeatedly rejected unlimited national power and emphasized that the delegated powers of the national government were specifically enumerated in the Constitution,’ condemning a sweeping congressional police power that they feared would lead again to tyranny.”²⁵⁵ The materials-in-commerce jurisdictional element is, as the *Rodia* Court noted, “almost useless” and does not seem to minimize in any way Congress’s Commerce Power.

When the Eleventh Circuit initially struck down the Possession Statute, the court noted that “[t]he regulation of criminal activity in particular has long been regarded as a role reserved primarily to the states.”²⁵⁶ It is a relevant and appropriate concern to wonder if Congress and the Supreme Court are commandeering power that was specifically set aside by the Founders for the states and taking it for the federal government. It seems not only wrong, but unconstitutional to allow such an overwhelming disregard for the intentions of the Founding Fathers of this country.

There is no way to tell at this time if the materials-in-commerce jurisdictional hook and the other weak elements of the child pornography statutes will join *Wickard* as a “high-water mark”²⁵⁷ of Commerce Clause power. Perhaps they will help usher in a new wave of judicial deference to more activities, even those that may have only at best an attenuated link to interstate commerce. If Congress can regulate wholly intrastate, homemade child pornography, then it seems likely that in time, Congress’s power to regulate all such activities will be limitless.

B. Analysis of Circuits that Struck Down the Statutes

The *Raich* Court’s decision seems to be a return to the more expansive commerce power that Congress enjoyed in the years before

²⁵⁴ *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005); 529 U.S. 598, 612 (2000).

²⁵⁵ Stewart, *supra* note 161, at 165 (quoting Anna Johnson Cramer, Note, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 276 (2000)).

²⁵⁶ *United States v. Maxwell*, 386 F.3d 1042, 1056 (11th Cir. 2004).

²⁵⁷ *See Chen*, *supra* note 162, at 1747.

Lopez—the Court has granted Congress the sort of unbridled command in that arena that it had from the New Deal through 1995. The *Raich* decision also seems to suggest an end to as-applied challenges, even when the facts are as “troubling”²⁵⁸ as those of illness-stricken medicinal marijuana users, and the less troubling scenario of child pornographers who produce or possess the pornography simply for their own benefit and who do not enter the interstate market. Under the Court’s current regime, it seems likely that Congress will not be stopped from regulating all child pornography, and that the Sixth, Ninth, and Eleventh Circuit decisions, viewed in this light, are incorrect.

Even before the Court clarified the commerce power in *Raich*, the circuit courts that analyzed the child pornography statutes under the *Lopez* and *Morrison* decisions seem to be correct. Those circuits correctly applied the *Morrison* factors and just because they concluded with a different result does not mean that *Morrison* was ignored. Rather, the framers of the child pornography statutes simply learned how to correctly write a jurisdictional element because of the guidance offered by the Court. Those circuits also correctly saw that as-applied challenges cannot be withstood and that the de minimus activities of an individual defendant are not relevant in a constitutional analysis. In addition, those circuits also recognized the continuing virility of *Wickard* as precedence. The emergence of *Lopez* and *Morrison* did not change the importance of *Wickard* in showing that Congress has broad regulatory powers under the Commerce Clause, they simply clarified it. Now, after *Raich*, the Supreme Court has shifted again, reverting to *Wickard* and to a strong central government that has the ability to regulate all economic activities, as defined by the Court. It is unlikely that the Court would strike down these acts in the near future, although with the recent change of the Court’s composition, nothing is certain.

C. Are the Child Pornography Statutes Constitutional?

The final question to ask is, of course, are these statutes constitutional? In this post-*Raich* era, the child pornography statutes almost certainly are. Because Congress can once again write broad legislation based in the Commerce Clause, it is likely that these statutes would be upheld if challenged. Moreover, an analysis of the statutes leads to this conclusion. The statutes are supported by decades of congressional findings, have a (somewhat weak) jurisdictional hook, and under *Raich*, even wholly intrastate activities can be regulated if they could affect the government’s ability to effectively regulate the activity

²⁵⁸ *Raich*, 125 S. Ct. at 2201.

as a whole. Because of the aggregation theory that *Raich* reaffirmed, wholly intrastate and noncommercial child pornography would fit under the Court's broad definition of an economic activity. Even though the statutes raise interesting issues and questions, such as whether the jurisdictional element has any true value, under current Commerce Clause jurisprudence the federal child pornography statutes are constitutional.

V. THE FUTURE OF THE CHILD PORNOGRAPHY ACTS

A. Government Support for the Acts

The federal government and governmental agencies have overwhelmingly shown their support for federal power over child pornography. The child pornography industry has entered the technological revolution of the Internet and sparked a new interest in controlling this national problem, because it is so much easier now to gain access to these things. Several of the circuit cases above included a computer or Internet element, including *United States v. Buculei*,²⁵⁹ *United States v. Angle*,²⁶⁰ and *United States v. Maxwell*.²⁶¹ Additionally, both statutes' jurisdictional elements now include transportation over state lines through the use of a computer, a feature that was added in the 1998 amendments.²⁶²

In October 2002, President Bush gave a speech on Internet safety and child pornography in an attempt to persuade the Senate to approve the House-approved Child Obscenity and Pornography Prevention Act, which makes computer-generated images of children in obscene situations illegal.²⁶³ The accompanying fact sheet from the White House Press Secretary included the statistic that "[f]ederal prosecutions for child exploitation and child pornography. . . are projected to increase 17% for [Fiscal Year] 2002 [sic] a 22% increase in the past two Fiscal

²⁵⁹ 262 F.3d at 325. Buculei lured a thirteen year old girl he met online into having a sexual encounter, which Buculei taped. *Id.* at 326.

²⁶⁰ *Id.* at 329-30. Angle used "Butch 8003" as his online screen name to engage in sexually explicit conversation with children and attempt to meet with them. *Id.*

²⁶¹ 386 F.3d at 1048-49. Maxwell had a profile of "boy_lover69_69" and was a member of online teen chat rooms. *Id.*

²⁶² See 18 U.S.C. § 2251 (2006); 18 U.S.C. § 2252 (2006).

²⁶³ President George W. Bush, Remarks by the President on Children's Online Safety Oct. 23, 2002, <http://www.whitehouse.gov/news/releases/2002/10/print/20021023-8.html> (last visited Apr. 8, 2006).

Years.”²⁶⁴ This statistic suggests either that the Internet has caused an increase in child pornography because it makes that pornography more accessible or that the Internet has caused an increase in prosecutions because it is much easier to track pornographers online than it is through traditional methods, or perhaps both.

No matter what, the advent of Internet-based child pornography has increased the attention on child pornography and made these statutes much more controversial. The ability of the government to track child pornographers is a relief to parents wanting to protect their children, but in the same sense it is terrifying to the average individual who wants the government to be a *laissez-faire* presence in their life, not monitoring the routine movements of citizens simply because it can or wants to.

The United States Post Office (“USPS”) has also become involved in the pursuit of child pornographers, and the USPS reported that “[s]ince the passage of the Child Protection Act of 1984, Postal Inspectors have conducted 4,474 child exploitation investigations, resulting in the arrests of 3,711 individuals who used the mail in violation of federal child exploitation laws.”²⁶⁵ This report certainly bolsters support for the statutes, because it shows how flagrant some pornographers can be in boldly sending child pornography through the mail but also leaves open the question of how the USPS decides how to track such pornography and under what circumstances can the USPS open private mail because of some suspicion of wrongdoing.

The information coming from the Executive Branch and the USPS suggest that the government is more focused than ever on catching child pornographers. While this is an admirable quest, it always seems to lead back to the concerns over federalism and tyranny. If the federal government can regulate an activity that does seem to be wholly intrastate, where is the logical stopping point and what keeps the government from continuing to take more and more, until there is nothing left?

B. Future of the Acts and the Commerce Clause

Since the Supreme Court has recently announced its preference for a strong commerce power in *Raich*, it seems likely that if the federal Child Pornography Acts were to come before the Court, they would be

²⁶⁴ Press Release, White House, Increasing Online Safety for America’s Children Oct. 23, 2002, <http://www.whitehouse.gov/news/releases/2002/10/print/20021023.html> (last visited Apr. 8, 2006).

²⁶⁵ United States Postal Service, *2002 Annual Report of Investigations – Child Exploitation*, http://www.usps.com/postalinspectors/ar02/ar02_06.htm (last visited Apr. 8, 2006).

upheld. It was only ten years ago that *Lopez* sent a “shockwave that swept through both the legal profession and academy”²⁶⁶ when it broke from decades of precedence to strike down the Gun-Free School Zone Act. Between these two decisions there was no change on the Court, as Justice Breyer was the last appointee in 1994.²⁶⁷

However, the political climate has drastically changed. America experienced an act of terrorism on September 11, 2001 which strongly affected Americans and our dependency on a strong government and the country has become engaged in a new war, which also threatens the lives of Americans. These fears, while not in any way related to child pornography, create a need or desire for strength from the government, and the Supreme Court probably is deferring to Congress’s wisdom in the same way it felt necessary to do so during the Great Depression and the New Deal. Rather than impede the government’s objectives, the Court might be giving Congress broad powers to do whatever is necessary in the light of terrorism and other worldly fears. Yet there is no way to be certain of any of this, especially with the death of Chief Justice Rehnquist, the retirement of Justice O’Connor, and the appointment of two new Justices. There is no telling how the newest Justices will regard the Commerce Clause or the *Raich* decision. Ultimately, only time will tell about the future of these Acts.

C. *The Slippery Slope Problem*

There is always the fear that each time the Supreme Court defines the limit of the Commerce Clause that Congress will take that limit and push it further. Michael Heimbach, chief of the FBI’s Crimes Against Children Unit, announced in 2002 the FBI’s intention to help Congress “broaden our jurisdiction to prosecute Americans who go abroad to have sex with children or pay minors for sex.”²⁶⁸ Heimbach also announced the plans to prosecute “sex tourists,” allowing the federal government to “prosecute American who go abroad and engage in statutory rape of children, without having to show the person intended the act before leaving the United States.”²⁶⁹

²⁶⁶ See Tzur, *supra* note 165, at 1105.

²⁶⁷ United States Supreme Court Website, <http://www.supremecourtus.gov/about/members.pdf> (last visited Apr. 8, 2006).

²⁶⁸ Michael J. Heimbach, *Internet Child Pornography*, May 1, 2002, <http://www.fbi.gov/congress/congress02/heimbach050102.htm> (last visited Apr. 8, 2006).

²⁶⁹ *Id.* In fact, the Ninth Circuit recently upheld a man’s conviction under 18 U.S.C. § 2423(c) for engaging in commercial sex with a minor while in Cambodia. The court found that the statute was within Congress’s Commerce Power. *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006).

At first it seems that the ability to prosecute such child sex offenders is a natural offshoot of the ability to prosecute child pornographers because both involve the serious issue of child exploitation, but in reality there is a huge leap from one to the other. Mainly, intrastate child pornography occurs in the United States, while obviously, the foreign child sex trade occurs outside the United States. If Congress were given the power to prosecute crimes that occur wholly outside its own borders, there could be no natural stopping point for any crimes, even if they are wholly intrastate or wholly foreign activities. Because Congress has been given so much leeway to legislate via the Commerce Clause, there are valid and reasonable fears that Congress is becoming the tyrant the Founders feared when they carefully drafted the Constitution.

Based on the Supreme Court's newest decision there really is no limit on Congress's ability to legislate under the Commerce Clause, because as defined, an economic activity is one that involves "the production, distribution, and consumption of commodities."²⁷⁰ There can hardly be imagined a more broadly construed definition and there is hardly any product or activity that does not have something to do with producing, distributing, or consuming a commodity. Without the valuable check provided by the Judiciary, Congress will continue to expand its jurisdiction over areas that are traditionally and constitutionally reserved for the states.

Unfortunately for the Judiciary and defendants, the *Raich* decision reiterated the belief that as-applied challenges to Commerce Clause statutes cannot be entertained, leaving the courts only facial challenges, which are "the most difficult challenge[s] to mount successfully."²⁷¹ With only this one particularly difficult challenge to statutes, presumably the courts are going to be more hesitant to strike down whole statutes and will defer more to the will of Congress, leaving Congress to stretch and manipulate the reach of the Commerce Clause unchecked.

CONCLUSION

The circuits that have upheld the child pornography statutes had a valid basis for their decisions. The supply and demand argument for child pornography and the aggregation theory are compelling concerns. Perhaps it is true that homemade pornography causes an intrastate pornographer to reach out beyond the borders of his state for a larger

²⁷⁰ *Gonzales v. Raich*, 125 S. Ct. 2195, 2211 (2005).

²⁷¹ Stewart, *supra* note 160, at 173. (quoting Stuart Buck, *Salerno v. Chevron: What to Do About Statutory Challenges*, 55 ADMIN. L. REV. 427, 430 (2003)).

variety, and under *Wickard*, the de minimus activities of a single child pornographer may not even be relevant. Furthermore, the states do not seem to have a handle on this problem and the Internet only exacerbates the issue. The child pornography market looks like it is growing, not diminishing. National control and regulation can help the problem and stem the tide of child pornography.

Finally there are legitimate ties from child pornography to commerce. Child pornography certainly is an industry that is wildly popular among a particular subculture. Moreover, it is a commercial activity as defined in *Raich*, even if it is not necessarily the same as the wheat market. The federal government had a rational basis in concluding that it needs to regulate child pornography and the circuits that upheld the statute were simply following precedent. "The realities of today's global society make it not only implausible but also normatively unacceptable to credit Roscoe Filburn's complaint that federal regulation invaded an exclusively local, even private, sphere of control."²⁷² In this modern world of Internet, wireless communications and instant access to everything, there is a strong need for a government that is able to combat these problems.

However, does this mean that the government should have unbridled power over every economic activity, no matter how attenuated the link is to interstate commerce? The *Raich* decision does to *Lopez* and *Morrison* what they did to *Wickard*. If the Supreme Court simply turns away from these concerns and completely defers to the will of Congress, not only is the Commerce Clause potentially stretched beyond its constitutional limit, but the Court's own power to check Congress is put at risk. Even if the Court and United States citizens do legitimately have fears about the ability of the federal government to protect us and our children, at some point the government crosses the line from protector to dictator.

Justice O'Connor's dissent in *Raich* explained that there must be a point at which Congress has to respect the sovereignty of the states and recognize that some things truly belong in the realm of state police power. In between regulating everything and regulating nothing, there is a middle ground in which Congress could regulate only those things that substantially relate to interstate commerce so that the constitutional bounds of federalism are protected and the balance of power does not shift too far.

²⁷² See Chen, *supra* note 162, at 1757.