SUBSTANTIAL EFFECT: WHAT *UNITED STATES V. SCHAEFER* REVEALS ABOUT CONGRESS'S POWER TO REGULATE LOCAL ACTIVITY UNDER THE COMMERCE CLAUSE

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I. INTRODUCTION

On September 5, 2007, the Tenth Circuit Court of Appeals handed down its decision in *United States v. Schaefer*.[1] The decision reversed the District Court and acquitted Mr. Schaefer, who had been convicted for receipt and possession of images involving the sexual exploitation of minors, which was made a federal crime under 18 U.S.C. §§ 2252(a)(2) and (a)(4)(B).[2] The Tenth Circuit overturned the conviction based on the fact that the Government could not prove that any of the images had traveled in interstate commerce, despite the fact that the images were sent using the internet.[3] The court reasoned that Congress had not exercised its full authority under the Commerce Clause to ban child pornography that had a substantial effect on interstate commerce and had, instead, only banned child pornography that had traveled across state lines.[4] The court intimated, however, that Congress could in fact ban purely intrastate child pornography if it wished to amend the statute.[5] On October 8, 2008,[6] President George W. Bush signed the Effective Child Pornography Prosecution Act of 2007.[7] The Act was a direct response to *United States v.*

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[1] 501 F.3d 1197, 1197 (10th Cir. 2007).

[2] *Id.* at 1198.

[3] *Id.*

[4] *Id.* at 1201.

[5] *Id.* ("Congress' use of the 'in commerce' language, as opposed to phrasing such as 'affecting commerce' or a 'facility of interstate commerce,' signals its decision to limit federal jurisdiction and require actual movement between states to satisfy the interstate nexus.").

[6] Pub. L. No. 110-358, 122 Stat. 4001, 4003 (2008).

[7] H.R. 4120, 110th Cong. (2007) (enacted).

Schaefer.[8] Essentially, the Act is an effort by Congress to fully exercise its power under the Commerce Clause by banning child pornography that has a substantial effect on interstate commerce.[9] Few people would question Congress's good intentions in doing everything within its power to prosecute and hopefully deter those that would take advantage of children. Yet, this raises a very significant question: is Congress acting within its power? The Act raises some very serious questions about how far Congress may reach under the Commerce Clause.[10] This Article will focus on the constitutionality of the Act under the Commerce Clause and attempt to determine exactly how far Congress may reach when regulating activities that are local in nature. To do this, we will need to understand both the history of 18 U.S.C. § 2251 *et seq.*, and the current state of Commerce Clause jurisprudence.

II. HISTORY OF 18 U.S.C. § 2251 *ET SEQ.*

The genesis for the current law came in 1977, when Congress passed the Protection of Children Against Sexual Exploitation Act.[11] The law was part of a "comprehensive scheme developed by Congress to eliminate the production, possession, and dissemination of child pornography."[12] As part of the Act's passage, Congress noted that child pornography "[has] become [a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale . . . and [that] the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce."[13]

The law was amended in 1984 to "eliminate the requirement that the production, receipt, transportation, or distribution of child pornography be for a 'pecuniary profit.'"[14] This amendment came as a result of an enforcement gap that was discovered in the statute.[15] As Congress noted, "[m]any of the individuals who distribute materials covered by [the statute]

[8] 153 CONG. REC. H13,592 (daily ed. Nov. 13, 2007) (statement of Rep. Conyers).

[9] 18 U.S.C.A. § 2251 (West 2000 & Supp. 2009).

[10] U.S. CONST. art. I, § 8, cl. 3.

[11] Pub. L. No. 95-225, 92 Stat. 7 (1978); *see also* United States v. Jeronimo-Bautista, 425 F.3d 1266, 1269–70 (10th Cir. 2005).

[12] *Jeronimo-Bautista*, 425 F.3d at 1269.

[13] S. REP. NO. 95-438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 42–43.

[14] United States v. Morales-De Jesus, 372 F.3d 6, 11 (1st Cir. 2004).

[15] *Id.*

do so by gift or exchange without any commercial motive and thus remain outside the coverage of this provision."[16]

Congress amended the statute again in 1996 in regards to the electronic creation of child pornography.[17] Congress noted that the mere existence of child pornographic images "inflames the desires of child molesters, pedophiles, and child pornographers who prey on children" and that possession of such images "increas[es] the creation and distribution of child pornography . . . ."[18] Congress went on to note that "prohibiting the possession of and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping . . . eliminate the market for the sexual exploitative use of children . . . ."[19]

Prior to 2008, the most recent amendment to the statute came in 1998, when Congress added a jurisdictional element to cover child pornography that had been created "using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means."[20] This amendment was intended to address situations in which the defendant had created child pornography but did not actually transport, nor intend to transport, the images through interstate commerce.[21] A situation such as this had effectively prevented federal law enforcement from prosecuting the case.[22]

Since its inception, the law has been challenged on many different constitutional grounds. The statute has withstood Equal Protection,[23]

[16] H.R. REP. NO. 98-536, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 493; *see also* H.R. REP. NO. 99-910, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952, 5954 (noting that the 1984 amendments sought to "eliminate the requirement that interstate distribution be for the purpose of sale; experience revealed that much if not most child pornography material is distributed . . . on a non-commercial basis, and thus no sale is involved.").

[17] *See Morales-De Jesus*, 372 F.3d at 11.

[18] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26, 27.

[19] *Id.*

[20] 18 U.S.C. § 2251(a) (Supp. 2009); *see also* United States v. Jeronimo-Bautista, 425 F.3d 1266, 1269–70 (10th Cir. 2005).

[21] H.R. REP. NO. 105-557, at 27 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 695.

[22] *Id.*

[23] *See, e.g.*, United States v. Freeman, 808 F.2d 1290, 1292–93 (8th Cir. 1987) (upholding defendant's prosecution under the statute, which defined "minor" as a person under 18 years of age, even though the conduct prosecuted was allegedly legal under the applicable state law, which defined "child" as a person under 16 years of age).

Freedom of Speech,[24] and Due Process challenges.[25] For the purposes of this article, however, the most important challenges are those grounded in the Commerce Clause, and that is where we will turn next.

A. United States v. Schaefer

As a general rule, courts have almost universally upheld the § 2251 against Commerce Clause challenges.[26] Even before the current version of the statute went into effect in 2008, very few courts had held that Congress had exercised less than its full authority under the Commerce Clause.[27] When the statute has been held to be unconstitutional, the decisions were based solely on the facts of the specific situation without regard to the statute as a whole.[28] It is against this backdrop that the Tenth Circuit decided *United States v. Schaefer*. The government had charged Mr. Schaefer in the District of Kansas with one count of receiving child pornography (which violated § 2252(a)(2)) and one count of possession of

[24] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that prosecutions under the statute were not subject to the obscenity standard enunciated in *Miller v. California*, 413 U.S. 15 (1973)); United States v. Reedy, 845 F.2d 239, 240–41 (10th Cir. 1988) (holding that the statute was not impermissibly overbroad in violation of the Federal Constitution's First Amendment).

[25] *See, e.g.*, United States v. Esch, 832 F.2d 531, 536 (10th Cir. 1987) (holding that the statute was not unconstitutional even though it lacked an express mens rea requirement); United States v. Fenton, 654 F. Supp. 379, 380 (E.D. Pa. 1987) (noting that the statute might not violate due process by creating a strict-liability serious felony).

[26] *See* United States v. Cramer, 213 F. App'x 138, 142–43 (3d Cir. 2007), *cert denied*, 550 U.S. 949 (2007); United States v. Croxford, 170 F. App'x 31, 45 (10th Cir. 2006); United States v. Tashbook, 144 F. App'x 610, 615 (9th Cir. 2005); United States v. Morales-De Jesus, 372 F.3d 6, 17 (1st Cir. 2004); United States v. Holston, 343 F.3d 83, 90 (2nd Cir. 2003); United States v. Buculei, 262 F.3d 322, 330 (4th Cir. 2001); United States v. Hoggard, 254 F.3d 744, 746 (8th Cir. 2001); United States v. Kallestad, 236 F.3d 225, 231 (5th Cir. 2000); United States v. Angle, 234 F.3d 326, 338 (7th Cir. 2000).

[27] *See, e.g.*, United States v. Andrews, 383 F.3d 374, 378 n.1 (6th Cir. 2004) ("Congress, in an attempt to halt interstate trafficking [of child pornography], can prohibit local production that feeds the national market and stimulates demand, as this production substantially affects interstate commerce.").

[28] *See* United States v. Smith, 402 F.3d 1303, 1322 (11th Cir. 2005) (finding § 2251(a) and § 2252(a)(5)(B) unconstitutional as applied), *vacated*, 545 U.S. 1125 (2005); United States v. McCoy, 323 F.3d 1114, 1133 (9th Cir. 2003) (finding § 2252(a)(4)(B) unconstitutional as applied); United States v. Corp, 236 F.3d 325, 332 (6th Cir. 2001) (concluding "that Corp's activity was not of a type demonstrated *substantially* to be connected or related to interstate commerce on the facts of [the] case.").

child pornography (which violated § 2252(a)(4)(B)).[29] The defendant had used his computer and credit cards to subscribe to websites that contained images of child pornography.[30] Government agents also found computer disks with images of child pornography on them.[31] However, the government was unable to prove that the images on the computer disks had been downloaded from the internet or, more importantly, that any of the images purportedly sent through the internet had originated from outside the defendant's home state.[32] Despite these issues, the District Court convicted the defendant and sentenced him to seventy months imprisonment on each count, with the sentences to run concurrently.[33]

On appeal, Mr. Schaefer argued that "the complete absence of proof at trial that the images he possessed and received traveled across state lines require[d] an acquittal, as the jurisdictional nexus is an essential element of the statute."[34] In other words, the fact that the government did not prove that the images had traveled in interstate commerce meant that Mr. Schaefer's activities were not covered by the statute. To accept this argument, the Tenth Circuit would have to find both that (1) transmission of images using the internet did not necessarily mean that the images traveled across state lines and that (2) Congress had not exercised their full power under the Commerce Clause to reach intrastate possession of child pornography. That is exactly what they did.

First, the court held that the government must prove that the images were transferred across state lines.[35] The court recognized that "many, if not most," internet transmissions will involve the movement of information across state lines.[36] However, this fact alone, according to the court, does not absolve the government of its duty to prove that the images were in fact sent across state lines.[37] Second, the court found it "apparent that Congress elected not to reach all conduct it could have regulated under § 2252(a)."[38] The court noted that "Congress's use of the 'in commerce' language, as

[29] United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1199.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 1201.

[36] *Id.*

[37] *Id.*

[38] *Id.*

opposed to phrasing such as 'affecting commerce' or a 'facility of interstate commerce,' signals its decision to limit federal jurisdiction and require actual movement between state to satisfy the interstate nexus."[39] Based on this reading of the statute Congress had chosen not to regulate or prohibit the purely local production and possession of child pornography. Therefore, since the government could not prove that the images had traveled across state lines and since Congress had apparently chosen not to use its full power under the Commerce Clause to regulate intrastate child pornography with a substantial impact on interstate commerce, the defendant's conviction was reversed and the case remanded to the District Court for an entry of an order of acquittal.[40]

B. Congress Responds

The ink on *United States v. Schaefer* was barely dry when H.R. 4120[41]

[39] *Id.* at 1201–02. *Compare* Russell v. United States, 471 U.S. 858, 859 (1985) (noting term "affecting interstate or foreign commerce" conveys Congress's intent to exert full Commerce Clause power), *with* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115–16 (2001) (noting "in commerce" language limits Congress's reach).

[40] *Schaefer*, 501 F.3d at 1207.

[41] H.R. 4120 provides, in relevant part:

> (a) SECTION 2252.—Section 2252 of title 18, United States Code, is amended—
>
> (1) in subsection (a)(1), by inserting "or affecting" after "ships in";
>
> (2) in subsection (a)(2), by striking "knowingly" and all that follows through "mails" and inserting "knowingly receives, distributes, or reproduces for distribution, in or affecting interstate or foreign commerce, any visual depiction";
>
> (3) in subsection (a)(3)(B), by inserting "or affecting" before "interstate"; and
>
> (4) in subsection (a)(4)(B)
>
> (A) by inserting "in or affecting interstate or foreign commerce" after "possesses"; and
>
> (B) by striking "that has been" and all that follows through "by computer".
>
> (b) SECTION 2252A. —Section 2252A of title 18, United States Code, is amended—
>
> (1) in paragraphs (1) through (4) and (6) of subsection (a), by inserting "or affecting" before "interstate or foreign commerce" each place it appears; and
>
> (2) in subsection (a)(5)(b)

was introduced in the United States House of Representatives.[42] Several Representatives rose to speak on the House floor to address the decision by the Tenth Circuit. None of them had anything positive to say about the court's decision. Indeed, one Representative called the decision "wrongly decided"[43] and the bill's author, Nancy Boyda, said that the court's opinion created a "judicial loophole that allowed a guilty man who hurt our children . . . to go free."[44] Representative Conyers minced no words when he said, "So let there be no mistake that Congress intends to use its full commerce clause authority to reach activities concluded by this odious business. And we want to make it so clear that even the 10th Circuit Court of Appeals cannot be mistaken by that."[45] The bill was quickly passed by the House by a vote of 409 to 0.[46] In September 2008, the Senate passed the bill, with only minor amendment, by unanimous consent.[47] Two weeks later, President Bush signed the bill into law.[48] Given that the legislative process is generally characterized by delay, obfuscation, and compromise,[49] the fact that H.R. 4120 was signed into law less than a year after its introduction in Congress shows how important fighting child pornography is to the American people.

Indeed, the speed with which Congress and the President acted on the matter should be applauded wholeheartedly. However, the goal of this article is to determine whether the law can be read consistently with previous Commerce Clause jurisprudence or whether Congress has stepped beyond its powers. The intent of Congress could not be clearer. Congress wishes to exercise its "full authority" under the Commerce Clause and

> (A) by inserting "in or affecting interstate or foreign commerce" after "possesses"; and
>
> (B) by striking "that has been" and all that follows through "by computer" the second place it appears.

H.R. 4120, 110th Cong. (2007) (enacted).

[42] *United States v. Schaefer* was handed down on September 5, 2007 and H.R. 4120 was introduced on November 8, 2007. *Schaefer*, 501 F.3d at 1197; H.R. 4120 (introduced).

[43] 153 CONG. REC. H13,591 (daily ed. Nov. 13, 2007) (statement of Rep. Conyers).

[44] *Id.* at H13,592 (statement of Rep. Boyda).

[45] *Id.*

[46] *Id.* at H13,593.

[47] *Some Coburn–Blocked Bills Now Approved by Senate*, GALLERYWATCH, Sept. 24, 2008; 154 CONG. REC. S9343 (daily ed. Sept. 23, 2008).

[48] Pub. L. No. 110-358, 122 Stat. 4001, 4003 (2008).

[49] ROGER H. DAVIDSON ET. AL., CONGRESS & ITS MEMBERS 303 (11th ed. 2008).

believes that its "full authority" allows it to reach those purely local activities that have an effect on interstate commerce.[50] To determine whether or not Congress is acting within its power by passing H.R. 4120, we must next turn to the Supreme Court's interpretation of the Commerce Clause.

III. COMMERCE CLAUSE JURISPRUDENCE

Since 1937, the Commerce Clause has provided Congress with a vast source of power.[51] From the United States Supreme Court's 1937 decision in *Wickard v. Filburn*[52] until its 1995 decision in *United States v. Lopez,*[53] the Court almost universally upheld every act of Congress that was challenged on Commerce Clause grounds.[54] The Court's decision in *Wickard v. Filburn* interpreted the Commerce Clause very broadly to allow Congress to regulate purely intrastate activity, so long as such local activity has a "substantial effect" on interstate commerce when considered in the aggregate.[55] Over the next 58 years, Congress used this broad interpretation of the Commerce Clause to regulate intrastate coal mining,[56] intrastate extortionate credit transactions,[57] and attempted to ban racial discrimination by regulating hotels that sought and received business from interstate travelers[58] and restaurants that used supplies that had traveled interstate.[59]

[50] 153 CONG. REC. H13, 592 (daily ed. Nov. 13, 2007) (statement of Rep. Conyers).

[51] United States v. Lopez, 514 U.S. 549, 556 (1995) (noting that many of the cases handed down by the Court "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.").

[52] *See generally* 317 U.S. 111 (1942).

[53] *See generally* 514 U.S. 549 (1995).

[54] *E.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 304–05 (1981); Perez v. United States, 402 U.S. 146, 147 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964); Katzenbach v. McClung, 379 U.S. 294, 305 (1964). *But see* Nat'l League of Cities v. Usery, 426 U.S. 833, 851–52 (1976) (holding that the 1974 amendments to the Fair Labor Standards Act exceeded Congress's authority under the Commerce Clause), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (holding that the 1974 amendments to the Fair Labor Standards Act were constitutional and noting that it was "apparent that [*National League of Cities*] ha[d] departed from a proper understanding of congressional power under the Commerce Clause").

[55] *Wickard*, 317 U.S. at 125–28.

[56] *Hodel*, 452 U.S. at 268–83.

[57] *See generally Perez*, 402 U.S. 146.

[58] *See generally Heart of Atlanta Motel*, 379 U.S. 241.

[59] *See generally Katzenbach*, 379 U.S. 294.

However, in *United States v. Lopez*, the Rehnquist Court began reigning in Congress's power under the Commerce Clause. For instance, the Rehnquist Court held that Congress may not ban guns in school zones[60] or create a private cause of action for violence against women.[61] On the other hand, the Court held that Congress can regulate the purely local production and consumption of illicit drugs.[62] Why can Congress regulate some intrastate activities but not others? What meaningful limit is there to the Commerce Clause and how does 18 U.S.C. 2251 *et seq*. fit into current Commerce Clause jurisprudence? To answer these questions, we must take a look at Commerce Clause jurisprudence as it stands after *United States v. Lopez*, *United States v. Morrison*, and *Gonzales v. Raich*.

A. End of an Era: United States v. Lopez

In *United States v. Lopez*, the Supreme Court was confronted with the constitutionality of the Gun-Free School Zones Act, which made it a federal crime to "knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[63] The Court, in an opinion by Chief Justice Rehnquist, harkened back to the language of the watershed case of *NLRB v. Jones & Laughlin Steel Corp.* to help determine the "outer limits" of Congress's power under the Commerce Clause.[64] In *Jones & Laughlin Steel*, the Court stated:

> Undoubtedly the scope of [the interstate commerce] power must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.[65]

[60] *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (holding 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.").

[61] United States v. Morrison, 529 U.S. 598, 617–19 (2000).

[62] Gonzales v. Raich, 545 U.S. 1, 22 (2005).

[63] 514 U.S. 549, 551 (1995); 18 U.S.C. § 922(q)(1)(A) (Supp. II 1990).

[64] *Lopez*, 514 U.S. at 556–57.

[65] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

The *Lopez* Court went on to note that "the power to regulate commerce, though broad indeed, has limits."[66] One of those limits, the Court said, was that any general regulatory statute must bear a substantial relation to commerce.[67] Based upon its prior precedent, the Court "identified three broad categories of activity that Congress may regulate under" the Commerce Clause.[68] First, Congress may regulate the use of the channels of interstate commerce.[69] This broad category of power allows Congress to keep the channels of interstate commerce free from immoral and injurious uses.[70] Second, Congress has the power to regulate and protect the instrumentalities of interstate commerce, or persons or things therein, even though the threat may come only from intrastate activities.[71] Third and finally, Congress's power under the Commerce Clause includes the power to regulate those activities having a substantial relation to interstate commerce (i.e., those activities that substantially affect interstate commerce).[72] This final category is reserved for those activities that are purely local in nature, yet have a substantial effect on interstate commerce.[73]

In applying the facts of *Lopez* to the structure that it had just set forth, the Court concluded that for the Gun-Free School Zones Act to be constitutional it would have to fit into the third category and be a regulation substantially affecting interstate commerce.[74] Although the Court did not explicitly define what regulation would satisfy the third category, it did note that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[75] Applying this test, the Court held that the Act did not substantially affect interstate commerce,

[66] *Lopez*, 514 U.S. at 557 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).

[67] *See id.* at 558.

[68] *Id.*

[69] *Id.*

[70] Caminetti v. United States, 242 U.S. 470, 491 (1917); s*ee, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); United States v. Darby, 312 U.S. 100, 114 (1941); Champion v. Ames (The Lottery Case), 188 U.S. 321, 356–58 (1903).

[71] *Lopez*, 514 U.S. at 558 (citing Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases), 234 U.S. 342, 351–52 (1914) and S.R. Co. v. United States, 222 U.S. 20, 24, 26–27 (1911)).

[72] *Id.* at 558–59.

[73] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 118–29 (1942) (providing perhaps the most extreme example of the reach of Congress over purely intrastate activity).

[74] *Lopez*, 514 U.S. at 559.

[75] *Id.* at 560.

either standing alone or in the aggregate.[76] The Court set forth three reasons why the Act did not substantially affect interstate commerce.[77] First, the Act was a criminal statute that had nothing to do with commerce or any sort of economic enterprise.[78] The Court also noted that the Act was not an essential part of a larger regulatory scheme that could be undercut unless the intrastate activity was regulated.[79] Therefore, the Act did not qualify for the exception that had been set forth previously by the Court.[80] Second, the Court noted that the Act "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[81] In other words, the Court found no nexus between the activity being regulated and interstate commerce.[82] Third, the Court pointed out that Congress had made no formal findings as to the substantial burden that guns in school zones would have on interstate commerce.[83] Although the Court noted that such findings were not necessarily required, their absence prevented the Court from evaluating "legislative judgment that the activity in question substantially affected interstate commerce."[84]

The Court's opinion in *Lopez* was significant since it marked an important change in Commerce Clause jurisprudence.[85] However, it was yet to be seen whether *Lopez* indicated a permanent shift in the Court's interpretation of the Clause or if it was simply an outlier. The Court would answer the question only five years later.[86]

B. The Court Strikes Again: United States v. Morrison

In 1994, Congress created the Violence Against Women Act (VAWA)

[76] *Id.* at 567.

[77] *Id.* at 561–63.

[78] *Id.* at 561.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 562.

[83] *Id.*

[84] *Id.* at 563.

[85] Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 751 (1996) (noting that *Lopez* marked the "first time in almost sixty years . . . the Court had actually found a federal statute to exceed the scope of federal legislative authority.").

[86] *See* United States v. Morrison, 529 U.S. 598, 617–18 (2000).

to provide an injured party with an opportunity to obtain damages and other compensatory relief by using a private right of action in the statute.[87] In *United States v. Morrison*, a female plaintiff brought suit under VAWA against two men that she claimed had assaulted and raped her.[88] In another opinion authored by Chief Justice Rehnquist, the Court applied the reasoning of *Lopez* and invalidated VAWA.[89] The Court stated first and foremost that "[g]ender-motivated crimes of [violence] are not, in any sense of the phrase, economic activity."[90] This characterization proved to be important since it allowed the Court to sidestep the aggregation principle set forth by *Wickard*.[91] Next, the Court determined that, like the Gun-Free School Zones Act in *Lopez*, VAWA was devoid of a "jurisdictional element [that] would lend support to the argument that § 13981 is sufficiently tied to interstate commerce."[92] Instead, Congress was attempting to reach a "purely intrastate" body of crime.[93] Finally, the Court turned to the issue of congressional findings.[94] It quickly became apparent that Congress had read the *Lopez* decision, and this time Congress supported its legislation with "numerous" findings detailing the impact of gender-motivated violence.[95] Congress supported VAWA with findings that gender-motivated violence affects interstate commerce by "deterring potential victims from traveling interstate," by diminishing national productivity, and by increasing medical and other costs.[96] But what the Court gave with one hand in *Lopez*, it took away with the other in *Morrison*.[97] The Court

[87] 42 U.S.C. § 13981 (2006).

[88] *Morrison*, 529 U.S. at 602, 604.

[89] *Id.* at 617–18.

[90] *Id.* at 613.

[91] Wickard v. Filburn, 317 U.S. 111, 125 (1942) (setting forth the aggregation principle). It should be noted, however, that while the Court explicitly declined to adopt a "categorical rule against aggregating the effects of any [non-economic] activity" it mentioned that previous cases have upheld Commerce Clause regulation only where the interstate activity was "economic in nature." *Morrison*, 529 U.S. at 613.

[92] *Morrison*, 529 U.S. at 613.

[93] *Id.*

[94] *Id.* at 614.

[95] *Id.*

[96] H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.).

[97] *Compare* United States v. Lopez, 514 U.S. 549, 563 (1995) (stating that although particularized findings are not necessary to legislate, "to the extent that congressional findings would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . . they are lacking here."), *with Morrison*, 529 U.S. at

brushed the legislative findings aside by saying that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[98] The Court once again noted that "[t]he Constitution requires a distinction between what is truly national and what is truly local" and that there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[99]

C. What is Old is New Again: Gonzales v. Raich

After *Lopez* and *Morrison*, it was left to the lower federal courts to apply the new structure that the Supreme Court had given to Commerce Clause jurisprudence. Of course, this left lower federal court judges with the unenviable task of trying to determine exactly what the new structure was and how to apply it to any given case. The fact that the Supreme Court had left more than a few questions unresolved served as a complicating factor. For instance, what types of activities are "non-economic" in nature and how is that determined? The Supreme Court had given no answers to questions of this kind. Perhaps unsurprisingly, it did not take long for these issues to surface.

1. *Gonzales* at the Ninth Circuit

In October, 2002, four Californians brought suit in federal court seeking to resolve a conflict between California's Compassionate Use Act[100] and the federal Controlled Substances Act (CSA).[101] Both plaintiffs were using marijuana legally under California law to treat medical conditions.[102] However, under the CSA marijuana is a Schedule I controlled substance,[103] and it is therefore illegal to "manufacture, distribute or dispense, or possess

614 (holding that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

[98] *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557 n.2).

[99] *Id.* at 617–18.

[100] CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007) (permitting the use of marijuana for medical purposes if recommended by licensed physician).

[101] Controlled Substances Act, 21 U.S.C. §§ 801–971 (2006); Raich v. Ashcroft, 352 F.3d 1222, 1224 (9th Cir. 2003).

[102] *Raich*, 352 F.3d at 1225–26.

[103] 21 U.S.C. § 812(c).

with the intent to manufacture, distribute, or dispense" marijuana.[104] On appeal to the Ninth Circuit, the plaintiffs challenged Congress's power under the Commerce Clause to regulate their activity, which they characterized as being purely intrastate in nature.[105] The Ninth Circuit, applying the structure from *Lopez* and *Morrison*, held that the CSA was likely unconstitutional as applied to the marijuana users in this case.[106] The court decided that the local growth and consumption of marijuana was a "not commercial" activity and therefore the aggregation principle of *Wickard* was avoided.[107] Next, the court addressed whether the CSA contained a jurisdictional nexus that would limit its reach.[108] Without elaboration, the court concluded that "[n]o such jurisdictional hook exists . . . ."[109] The court then turned to address the legislative findings that Congress had provided.[110] The court was forced to admit that the findings that accompanied the CSA weighed in favor of its constitutionality,[111] but then noted that congressional findings were to be taken "with a grain of salt."[112] Finally, the Ninth Circuit expressed its view that any link between the local growth and consumption of marijuana for medical purposes and a substantial effect on interstate commerce was "attenuated."[113] Since the Ninth Circuit had just dealt Congress's ability to fight the "drug war" a major blow, it is perhaps none too surprising that the Supreme Court granted certiorari on the case.

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[104] *See id.* § 841(a)(1).

[105] *Raich*, 352 F.3d at 1227. Indeed, the suppliers of the marijuana for Raich contended that they only used soil, water, nutrients, growing equipment, supplies, and lumber originating from or manufactured within California. *Id.* at 1225. If true, this fact would mean that Congress would have to reach farther under the Commerce Clause to regulate locally grown marijuana than it did to regulate the barbeque sold by Ollie. *See generally* Katzenbach v. McClung, 379 U.S. 294 (1964) (concluding that purchases of supplies from outside the state brought the restaurant within Congress's reach under the Commerce Clause). U.S. CONST. art. I, § 8, cl. 3.

[106] *Raich*, 352 F.3d at 1235.

[107] *Id.* at 1230.

[108] *Id.* at 1231.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 1232.

[112] *Id.* (citing United States v. Morrison, 529 U.S. 598, 614 (2000)).

[113] *Id.* at 1233.

2. *Gonzales* at the Supreme Court

In an opinion authored by Justice Stevens, the Supreme Court vacated the decision of the Ninth Circuit.[114] Justice Stevens spent virtually no time going through the analysis that the Court had labored over in *Lopez* and *Morrison*.[115] Justice Stevens pointed out that the similarities between the facts in this situation and the facts in *Wickard v. Filburn* were "striking."[116] Justice Stevens noted that in both cases there was someone "cultivating, for home consumption, a fungible commodity for which there is an . . . established . . . market."[117] Justice Stevens went on to state that the Court did not have to determine whether or not the local growth and consumption of marijuana substantially affects interstate commerce in fact, but only whether a "rational basis" exists for Congress's conclusion that it does.[118] The Court had no difficulty in concluding that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[119] In essence, Congress had set forth a comprehensive regulatory scheme, which would allow them to regulate purely intrastate activities (whether economic or non-economic).[120]

The Court then distinguished the statute here from the ones in *Lopez* and *Morrison* in two important ways. First, the medical marijuana users wanted the Court to "excise individual applications of a concededly valid statutory scheme."[121] In both *Lopez* and *Morrison*, the parties had challenged the entire statutory scheme as beyond the power of Congress under the Commerce Clause.[122] The Court noted that this distinction is "pivotal."[123] Second, the Court noted that, "[u]nlike [the activities] at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially

[114] Gonzales v. Raich, 545 U.S. 1, 9 (2005).

[115] *Id.* at 23–26.

[116] *Id.* at 18.

[117] *Id.*

[118] *See id.* at 22.

[119] *Id.*

[120] *Cf.* United States v. Lopez, 514 U.S. 549, 561 (1995) (concluding that Congress through a comprehensive regulatory scheme could regulate purely intrastate activities of an economic nature).

[121] *Gonzales*, 545 U.S. at 23.

[122] *Id.*

[123] *Id.* at 23.

economic."[124] Here, unlike in previous cases, the Court seeks a definition of "economic" and says that it "refers to 'the production, distribution, and consumption of commodities.'"[125]

3. Justice Scalia's Concurrence

Perhaps the most articulate analysis of the Commerce Clause was provided by Justice Scalia in his concurrence. In fact, it is his concurrence that gives us the best framework with which to analyze the constitutionality of the amended version of 18 U.S.C. § 2251 and to make sense of the current state of Congress's power under the Commerce Clause.

Justice Scalia begins by repeating the three categories that are subject to congressional regulation under the Commerce Clause: "(1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that 'substantially affect' interstate commerce."[126] Justice Scalia notes that the first two categories are "self-evident, since they are the ingredients of interstate commerce itself."[127] However, Justice Scalia notes that the third category is misleading and incomplete unless further explanation is added:

> It is *misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of "activities that substantially affect interstate commerce" is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate

[124] *Id.* at 25.

[125] *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

[126] *Id.* at 33–34 (Scalia, J., concurring).

[127] *Id.* at 34 (citing Gibbons v. Ogden, 22 U.S. 1, 189–90 (1824)).

> activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.[128]

Of course, Justice Scalia's observation that Congress must use the Necessary and Proper Clause,[129] coupled with the Commerce Clause,[130] means that congressional regulation under the third category must now qualify as constitutional under both a Commerce Clause test and yet another, separate test for the Necessary and Proper Clause.[131] Justice Scalia next explains that congressional regulation of intrastate activities may be "necessary to and proper for the regulation of interstate commerce in two general circumstances."[132] First, the Commerce Clause permits Congress to devise rules to govern commerce between the States, to facilitate interstate commerce by eliminating potential obstructions, and to restrict interstate commerce by eliminating potential stimulants.[133] This power is limited, of course, by the fact that Congress may not "obliterate the distinction between what is national and what is local"[134] by trying to "regulate [non-economic] activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences."[135] This is not to say that Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is limited to those laws that are "directed against economic activities that have a substantial effect on interstate

[128] *Id.* (citations omitted) (quoting United States v. Lopez, 514 U.S. 549, 559 (1995)).

[129] U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[130] U.S. CONST. art. I, § 8, cl. 3.

[131] The power of Congress under the Necessary and Proper Clause is determined by Chief Justice Marshall's famous test: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

[132] *Gonzales*, 545 U.S. at 35 (Scalia, J., concurring).

[133] *Id.*

[134] *Id.* at 35–36 (quoting United States v. Lopez, 514 U.S. 549, 564–66 (1995)).

[135] *Id.* at 35–36 (citing United States v. Morrison, 529 U.S. 598, 617–18 (2000); *Lopez*, 514 U.S. at 564–66).

commerce."[136] Second, the Commerce Clause permits Congress to regulate intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power."[137] Justice Scalia notes that the power to make a regulation effective often overlaps with the basic power to actually regulate.[138] However, the two powers are distinct.[139] Under this reasoning, Congress is empowered to regulate non-economic local activity if the regulation is "a necessary part of a more general regulation of interstate commerce."[140]

IV. DETERMINING THE CONSTITUTIONALITY OF COMMERCE CLAUSE LEGISLATION

When Congress wishes to regulate an intrastate activity that has a substantial effect on interstate commerce, the law must survive both a Commerce Clause analysis and a Necessary and Proper Clause analysis.[141] The Commerce Clause analysis that is applicable would appear to be the structure that the Court set forth in *Lopez* and *Morrison*.[142] The legislation generally needs to be aimed at economic activity (although non-economic activity is not beyond regulation), there must be a jurisdictional nexus, congressional findings are (potentially) helpful, and there must be more than an attenuated effect between the activity regulated and a substantial effect on interstate commerce.[143] Assuming the law survives the Commerce Clause test, the law would also be subjected to analysis under the Necessary and Proper Clause.[144] As noted previously, to satisfy this test the "end" must be constitutional and legitimate.[145] In other words, Congress must legislate pursuant to some power granted by the Constitution. Yet, even when the end is constitutional and legitimate, the means must be both "appropriate" and "plainly adapted to that end."[146] Furthermore, Congress

[136] *Id.* at 36.

[137] *Id.* (citing United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

[138] *Id.* at 37.

[139] *Id.*

[140] *Id.*

[141] *See id.* at 33–37.

[142] *See id.*

[143] *See* United States v. Lopez, 514 U.S. 549, 559–63 (1995).

[144] *See Gonzales*, 545 U.S. at 37 (Scalia, J., concurring).

[145] McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

[146] *Id.*

may not act in contravention to the Constitution while using the Necessary and Proper Clause and the means must be consistent "with the letter and spirit of the constitution."[147] As noted by Justice Scalia, the phrases that set out the test "are not merely hortatory."[148] "For example, . . . a law is not [necessary and] 'proper for carrying into Execution the Commerce Clause' 'when it violates a constitutional principle of state sovereignty.'"[149]

With an overview of current Commerce Clause jurisprudence and the structure given by the Court to guide us, we will now turn our attention to determining the constitutionality of 18 U.S.C. § 2251 *et seq*. and what that says about the power of Congress.

V. 18 U.S.C. § 2251 *ET SEQ.* WITHIN THE COMMERCE CLAUSE FRAMEWORK

Congress has prohibited all production of child pornography with intent to distribute that affects interstate commerce[150] and has also prohibited possession of child pornography in the home.[151] Therefore, at its maximum the statute could reach persons that use purely local equipment to take sexually-explicit pictures of a minor and then keep the pictures in their homes.[152] Would the statute be constitutional in such an as-applied situation? To determine this, we must turn to the Commerce Clause framework the Court has provided.

A. The Lopez-Morrison *Analysis*

First, we must determine which of the three categories this particular situation would fall into. If the person was truly acting in an intrastate

[147] *Id.*

[148] *Gonzales*, 545 U.S. at 39 (Scalia, J., concurring).

[149] *Id.* (quoting Printz v. United States, 521 U.S. 898, 923–924 (1977)); *see also* New York v. United States, 505 U.S. 144, 166 (1992).

[150] 18 U.S.C. § 2252A(a)(7) (2006).

[151] *See id.* § 2252A(a)(5)(B). The Supreme Court has held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults. *Compare* Osborne v. Ohio, 495 U.S. 103, 111 (1990), *with* Stanley v. Georgia, 394 U.S. 557, 568 (1969).

[152] It is arguable, of course, whether or not a person could use only purely local equipment to take pictures of any kind, given the fact that virtually all technology travels in interstate commerce at some point.

manner, then only the third category would be applicable.[153] Therefore, only the analysis for the "substantially affecting" category needs to be considered. Here we are faced with two possible analyses. First, the framework provide by the Court in *Lopez* needs to be applied.[154] Second, the basic analysis from *Gonzales v. Raich* should also be considered,[155] especially the concurrence by Justice Scalia.[156]

In applying the framework of *Lopez*, we must first determine if the activity being regulated is economic or non-economic.[157] Of course, possession of obscene, locally-produced pictures is probably not an "economic" activity. However, Congress could surely conclude that failure to ban the possession of child pornography would leave a gaping hole in its fight against the exploitation of the Nation's children. Further, much like the regulation of locally grown marijuana in *Gonzales*, the production and distribution of child pornography is a quintessentially economic activity.[158] Pornography is a major industry,[159] and it is easy to analogize child pornography to the illicit drug trade that was held to be economic in *Gonzales*.[160] Next, the statute does contain a jurisdictional nexus.[161] The statute specifically requires proof that the defendant affected interstate commerce.[162] Third, we must look to the legislative findings.[163] In this case, Congress provided numerous findings detailing the threat posed to the

[153] *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).

[154] *See id.* at 558–62.

[155] *See* Gonzales v. Raich, 545 U.S. 1, 17–22 (2005).

[156] *See id.* at 35–37 (Scalia, J., concurring).

[157] *See Lopez*, 514 U.S. at 560–61.

[158] *See Gonzales*, 545 U.S. at 30–32.

[159] Dan Ackman, *How Big is Porn?*, FORBES, May 25, 2001, http://www.forbes.com/2001/05/25/0524porn.html (estimating that pornography is a $2.6–$3.9 billion industry in the United States as of 2001). Other sources estimate that the pornography industry in the United States had revenues of $13.33 billion in 2006. Family Safe Media, *Pornography Statistics*, http://www.familysafemedia.com/pornography_statistics.html (last visited Jan. 9, 2010).

[160] *Gonzales*, 545 U.S. at 30–32 (concluding that personal production and use of marijuana was economic).

[161] *See, e.g.*, 18 U.S.C. § 2252A(a)(1) (2006) (requiring the defendant to "affect[] commerce . . . by any means.").

[162] *Id.*

[163] United States v. Lopez, 514 U.S. 549, 562 (1995) (stating that "as part of [the Court's] independent evaluation of constitutionality under the Commerce Clause [the Court] of course consider[s] legislative findings.").

Nation's children by the growth of child pornography.[164] Therefore, even though congressional findings are not dispositive,[165] they do at least show a link between child pornography and interstate commerce. Given that this statute is part of a larger regulatory scheme, it would seem that it would pass constitutional muster under the *Lopez-Morrison* analysis.

B. The Gonzales *& Necessary and Proper Clause Analysis*

Next, we turn to an analysis of the statute based upon *Gonzales v. Raich* and Justice Scalia's concurrence therein. It would appear that one could simply delete "marijuana" and insert "child pornography" into the *Gonzales* opinion and achieve the same result. Indeed, there is an established market for child pornography and Congress could certainly make a rational conclusion that the local production and possession of child pornography substantially affects interstate commerce. It is easy to imagine the "purely local" pornography making its way in the market and further fueling the demand for the illicit product. Further, 18 U.S.C. § 2251 *et seq.* is part of

[164] H.R. 4120, 110th Cong. (2007), provides:

> Congress finds the following:
>
> (1) Child pornography is estimated to be a multibillion dollar industry of global proportions, facilitated by the growth of the Internet.
>
> (2) Data has shown that 83 percent of child pornography possessors had images of children younger than 12 years old, 39 percent had images of children younger than 6 years old, and 19 percent had images of children younger than 3 years old.
>
> (3) Child pornography is a permanent record of a child's abuse and the distribution of child pornography images revictimizes the child each time the image is viewed.
>
> (4) Child pornography is readily available through virtually every Internet technology, including Web sites, email, instant messaging, Internet Relay Chat, newsgroups, bulletin boards, and peer-to-peer.
>
> (5) The technological ease, lack of expense, and anonymity in obtaining and distributing child pornography over the Internet has resulted in an explosion in the multijurisdictional distribution of child pornography.
>
> (6) The Internet is well recognized as a method of distributing goods and services across State lines.
>
> (7) The transmission of child pornography using the Internet constitutes transportation in interstate commerce.

[165] United States v. Morrison, 529 U.S. 598, 614 (2000).

comprehensive regulatory scheme and not banning the purely local production and possession of child pornography would almost assuredly make the regulatory scheme much less effective. And again, child pornography, like all pornography, is an economic commodity.

We must also remember that the statute must also pass the test under the Necessary and Proper Clause. As noted, the "end" is legitimate since the statute passes the *Lopez-Morrison* and *Gonzales* analysis.[166] Further, the means are seemingly "appropriate" and "plainly adapted" to achieve the legitimate and constitutional objective that Congress has set forth. Finally, the statute seems to be fully consistent with the Constitution.[167]

Yet how can 18 U.S.C. § 2251 *et seq.* and *Gonzales* be squared with *Lopez* and *Morrison*? All of the statutes were concerned with criminal activity. All were attempts by Congress to regulate purely intrastate activity. The true distinction that can be made is that the Gun-Free School Zones Act and the Violence Against Women Act both regulated intrastate activities that could not fairly be said to have a substantial relationship with interstate commerce. It is true that guns in school zones and violence

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[166] *See supra* Part VI.A.

[167] Of course, whether or not such truly local regulation by Congress is consistent with the letter and spirit of the Constitution is debatable. A reading of the Federalist Papers would seem to indicate that the Framers did not think of Congress's power under the Commerce Clause in the same way that the Court has interpreted that power over the last half-century. *See* THE FEDERALIST NO. 42 (James Madison). In The Federalist No. 42, James Madison addressed the reason and necessity for the Commerce Clause:

> The defect of power in the existing Confederacy, to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added, that without this supplemental provision, the great and essential power of regulating foreign commerce, would have been incomplete and ineffectual. A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen, that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured, by past experience, that such a practice would be introduced by future contrivances and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility.

Id.

against women have potentially negative impacts on commerce within the Nation. However, any causal connection is only "but for" and could not said to be "proximate."[168] Growing marijuana and child pornography, on the other hand, are indeed economic activities. Their relationship to interstate commerce is much more direct and therefore proximately connected to commerce through the nation. Guns in school zones and violence against women are activities that can impact interstate commerce. However, growing marijuana and child pornography are economic activities in and of themselves and are therefore a direct part of interstate commerce.

VI. CONCLUSION

In conclusion, it appears that 18 U.S.C. § 2251 *et seq*., as amended by H.R. 4120, is consistent with the power given to Congress by the Commerce Clause. The law does not appear to suffer the same defects that the Court found dispositive in *Lopez* and *Morrison*. In light of *Gonzales*, it seems that it would be difficult indeed to find the law unconstitutional. Whether or not the Court's current interpretation of the Commerce Clause is consistent with the intent of the Framers is another matter entirely. As previously noted, the current state of the law gives Congress the power to ban the purely local production and possession of child pornography. It is unclear whether or not the Framers would have envisioned Congress creating such laws in 1790. Under the current state of the law, Congress essentially has the power to engage in an area of lawmaking that has traditionally been left to the States.[169] However, the *Lopez* and *Morrison* decisions cannot be overlooked. Those decisions have placed a limit on the power of Congress to legislate using the Commerce Clause. Maybe the true limit on the Commerce Clause depends on American society itself. Perhaps society is uneasy allowing Congress to act as a substitute for State legislatures in many matters. But perhaps society is more comfortable when Congress uses its power to combat illegal narcotics or child pornography. Only time will tell.

[168] If some degree of proximate causal connection was not required then there would be "no part of the conduct of life with which . . . Congress might not interfere." N. Sec. Co. v. United States, 193 U.S. 197, 402–03 (1904) (Holmes, J., dissenting).

[169] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (defining the traditional police power of the States as "the authority to provide for the public health, safety, and morals.").