Between Scylla and Charybdis: the Disagreement Among the Federal Circuits Over Whether Federal Law Criminalizing the Intrastate Possession of Child Pornography Violates the Commerce Clause

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Between Scylla and Charybdis: The Disagreement Among the Federal Circuits Over Whether Federal Law Criminalizing the Intrastate Possession of Child Pornography Violates the Commerce Clause
Susanna Frederick Fischer

Introduction

Like Homer's hero Odysseus, who was confronted with the impossible challenge of safely navigating between Scylla, a terrifying monster, and Charybdis, a gigantic whirlpool, federal appeals courts are caught between two conflicting legal principles in cases involving the constitutionality of federal child pornography statutes. The United States Supreme Court unanimously held in *New York v. Ferber* that the First Amendment did not prohibit the regulation of child pornography even if it was not obscene under the famous standard set out in *Miller v. California.*

Child pornography is one of the most difficult problems facing judges today, both for those who are concerned about

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upholding First Amendment protections and for those who are concerned about protecting children from exploitation and abuse. Child pornography is on the increase in American society today. New digital technologies have made it simple and cheap to produce, disseminate, and receive still images and video. Digital technologies also make it easier for producers, purchasers and users of child pornography to remain anonymous. As a result, the availability of child pornography on the Internet has exploded in recent years.\(^2\)

In this essay, I assume, without attempting to prove, that child pornography is a serious social problem that the law should combat.\(^3\) My focus here is on the constitutional parameters of that fight: whether the Commerce Clause authorizes the application of federal law to the wholly intrastate possession of child pornography.

Since the 1970s, Congress has enacted and amended several child pornography laws, which now ban, among other things, the knowing transportation or shipment of child pornography in interstate or foreign commerce; the knowing receipt or distribution of child pornography in interstate or foreign commerce; and the knowing sale of child pornography that has been shipped in interstate or foreign commerce.\(^4\) These federal statutes also criminalize the knowing possession of child pornography in certain circumstances.\(^5\) For material to be treated as child pornography, current federal law requires a visual depiction of a minor under the age of eighteen engaging in sexually explicit conduct, a digital or computer generated image that is indistinguishable from a visual depiction of a minor engaging in such conduct, or a “morphed” image created, adapted, or modified to make it look like an identifiable minor is engaging in such conduct.\(^6\)

The Court underscored its differing treatment of obscenity and child pornography in its rulings in two cases involving the individual possession of such materials. In *Stanley v. Georgia*, the Court held that a state or federal government cannot constitutionally criminalize possession or viewing of obscene material by an individual at home, because “[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”\(^7\) However, in *Osborne v. Ohio*, the Court refused to extend its holding in *Stanley* to the possession of child pornography, finding that the state’s compelling interest in protecting the physical and psychological well-being of minors trumped the individual’s right to receive information in the privacy of his or her home.\(^8\)

*Osborne v. Ohio* involved the constitutionality of a state law. But as a result of *Osborne*, Congress enacted federal legislation criminalizing the possession of child pornography.\(^9\) Current federal law provides for federal jurisdiction over possession offenses, even where the connection to interstate commerce is much more remote than the child pornography itself traveling across state lines. Two different statutory provisions prohibiting the knowing possession of child pornography, 18 U.S.C. § 2252 and 18 U.S.C. § 2252A, contain virtually identical jurisdictional elements (at 18 U.S.C. § 2252(a)(4)(B) and 18 U.S.C. § 2252A(a)(5)(B), respectively). Both provide for federal jurisdiction where child pornography has been produced using materials, such as film or cameras, which have been transported across state lines by any
means including, by computer. The courts have interpreted the term “produced” to include not only the original creation of child pornography, but also the copying or downloading of a pornographic image. These “jurisdictional hooks” are often termed the “materials-in-commerce prongs.” There is also a virtually identical materials-in-commerce prong in the “manufacturing” provision of 18 U.S.C. § 2251(a), which prohibits manufacturing child pornography using materials transported in interstate commerce. Another manufacturing provision, 18 U.S.C. § 2251(b), which prohibits parents and guardians from manufacturing child pornography using such materials, also has the same jurisdictional hook. The constitutionality of these materials-in-commerce prongs under the Commerce Clause of the United States Constitution is currently open to debate. A number of federal circuit courts of appeals have disagreed as to whether federal law can constitutionally be applied to the intrastate possession and viewing of child pornography where the pornography did not enter into interstate commerce and where the government did not prove that the possessor of the pornography intended to sell it. Some of these courts have taken a different approach to the possession of homemade pornography and that of commercial pornography. However, none of them has upheld a facial challenge to the materials-in-commerce prongs.

Recent Supreme Court decisions have placed federal courts of appeals in an impossible situation when ruling on Commerce Clause challenges to the materials-in-commerce prongs. Like Odysseus facing the dilemma of sailing safely between the six-headed monster, Scylla, who could simultaneously snatch six crewmen from a passing ship in her jaws, and the whirlpool Charybis, powerful enough to suck down his ship, these federal appeals courts are caught between two jurisprudential dangers that the Court’s recent precedent directs them to avoid. One danger, often called the “non-infinity principle,” is of harm to federalism and state sovereignty caused by judicial failure to respect constitutional limits on the commerce power by giving the federal government unlimited power to regulate all activity, including activity that has historically been the province of the states, such as criminal conduct. The other danger, posed by an overly constrained judicial interpretation of the commerce power, threatens the separation of powers. This is the risk that courts will fail to accord appropriate deference to the judgment of the legislative branch of government by violating the “aggregation principle.” Under this principle, courts traditionally have upheld regulation of intrastate activity lacking any individual effect on interstate commerce if Congress has a rational basis for its belief that the activity forms part of a general practice that has a substantial effect on interstate commerce.

The Supreme Court has recently attempted to steer safely between these dangers by finding that the power to aggregate is generally limited to intrastate activity that is economic or commercial. But the Court has not succeeded. It has not yet provided clear guidance as to the meaning of economic or commercial, nor has it overruled prior precedent that seems clearly inconsistent with this limitation.

The Supreme Court’s recent Commerce Clause jurisprudence has led to predictably unfortunate consequences. Since the course charted by the Supreme
Court is both unclear and difficult to reconcile with its prior precedent, it is not surprising that federal courts have disagreed over the extent to which the application of the materials-in-commerce prongs to the intrastate possession of pornography is a valid exercise of commerce power. This essay will examine this disagreement in more depth after considering the climate of "new federalism" in which it has arisen. It will compare and contrast the different ways these courts have attempted to reconcile the aggregation and non-infinity principles, starting by considering the most recently decided case at the time of writing, United States v. Maxwell, in which the Eleventh Circuit upheld an as-applied commerce clause challenge to a federal child pornography possession statute. It will compare and contrast Maxwell's reasoning with circuits that rejected similar challenges, as well as the two circuits that have also upheld similar as-applied challenges. It will conclude by contending that, as Odysseus learned to his dismay, there is no really safe middle course that does not violate either the aggregation principle or the non-infinity principle. Like Odysseus, the Supreme Court needs to choose one principle over the other. The Court has the opportunity to make such a choice in a case pending before the Court at the timing of this writing, Raich v. Ashcroft, involving a Commerce Clause challenge to the enforcement of federal law against the users and producers of medical marijuana. Although the subject matter of Raich is different than the child pornography cases, it involves similar legal principles. The Court's decision in Raich has the potential to resolve the dilemma faced by federal appeals courts caught between the non-infinity and aggregation principles.

I. The "New Federalist" Context

The scope and interpretation of the commerce power has been the subject of heightened debate over the past decade as a result of two highly controversial Supreme Court decisions, United States v. Lopez and United States v. Morrison. The Commerce Clause is one of the enumerated powers that give Congress the authority to legislate in certain limited areas. The clause itself provides that Congress has the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As the Eleventh Circuit has recently commented, "[t]ime has borne out that the text of the Commerce Clause is no model of clarity."

Although for many decades of the twentieth century the Supreme Court imposed virtually no restrictions on congressional authority to legislate under the Commerce Clause, in 1995 the Supreme Court announced in Lopez that there are limits. In Lopez, the Supreme Court invalidated a federal statute (barring the knowing possession of firearms in a school zone) as an unconstitutional exercise of commerce power for the first time in six decades. According to Lopez, there are only three areas of activity that Congress can constitutionally regulate under the Commerce Clause. First, Congress can validly regulate the persons or things that travel in interstate commerce; and second, Congress can regulate the channels of interstate commerce. Finally, Congress can regulate intrastate activity that bears a substantial
relationship to interstate commerce, or, in other words, any activity that “substantially affects interstate commerce.”

Prior to Lopez, the Court upheld many pieces of federal legislation on the basis of the aggregation principle, including regulations of intrastate coal mining, intrastate extortionate credit transactions, intrastate hotels catering to interstate travelers, restaurants using interstate supplies, and, in perhaps the most extreme example of a broad construction of the commerce power, a farmer’s wholly intrastate growth and consumption of wheat in Wickard v. Filburn. Pre-Lopez cases tested the constitutionality of such legislation under rational basis review, which requires courts to defer to legislative findings that a regulated activity affects interstate commerce if there is any rational basis for such findings.

In Lopez, while the Court announced limits on the commerce power, it did not overrule this category of cases, despite Justice Thomas’ contention in a concurring opinion, that it should have done so. Nor did it provide clear guidelines for determining when intrastate activity could be aggregated to meet the substantial effects test.

Morrison, however, provided some further guidance in holding that a part of the Violence Against Women Act (VAWA) that created a civil remedy for victims of violent crimes motivated by gender violated the commerce power. In Morrison, the Court enumerated four factors for determining whether intrastate activity meets the substantial effects test: (1) whether the statute regulates commercial activity “or any sort of economic enterprise”; (2) whether the statute has any “express jurisdictional element which might limit its reach to a discrete set [of cases] that additionally have an explicit connection with or effect on interstate commerce”; (3) whether the statute or its legislative history includes “express congressional findings regarding the effects upon interstate commerce” of the intrastate activity; and (4) whether the link between the intrastate activity “and a substantial effect on interstate commerce was attenuated.”

Morrison clarified Lopez to some extent, though not enough. For example, Morrison made clear that the mere existence of congressional findings setting out a connection between the regulated activity and an effect on interstate commerce would not automatically render a federal statute a constitutional exercise of the commerce power. The Court reiterated an earlier statement that “[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” Additionally, it emphasized the importance of the economic or commercial character of the activity, stating “[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” The Court also stated “the dissent cannot persuasively contradict Lopez’s conclusion that, in every case where we have sustained federal legislation under Wickard’s aggregation principle, the regulated activity was of an apparent commercial character.”

Lopez and Morrison, both 5-4 decisions, are generally viewed as part of a series of “New Federalist” decisions in
which a consistent group of five current Supreme Court justices, Scalia, Thomas, Rehnquist, Kennedy, and O'Connor, have sought to uphold what they term the “first principles” of federalism underlying a constitutional system with dual federal and state sovereignty. The remaining four justices, Stevens, Breyer, Ginsburg, and Souter, have criticized this approach as a misguided return to the “formalistically contrived confines of commerce power” applied by the Court prior to the New Deal, as well as endangering the ability of the political branches of government to govern effectively in a modern era.

Both *Lopez* and *Morrison* prompted a storm of academic commentary, some, not surprisingly, lambasting the decisions as misguided, excessively activist, unprincipled, and setting out unworkable standards. Others praised the decisions as reasonable and likely to safeguard individual liberty. Still other academic critics, while agreeing with the outcome of *Lopez* and *Morrison*, criticized the Court’s reasoning in those cases as flawed.

Despite this outpouring of criticism of *Lopez* and *Morrison*, the Supreme Court unanimously accepted the existence of substantive limits on the commerce power in *Jones v. United States*, narrowly interpreting a federal criminal arson statute that had a jurisdictional hook prohibiting arson of property “used in interstate commerce” in order to avoid “grave and doubtful constitutional questions.”

Although they clearly establish that limits on the commerce power do exist, *Lopez*, *Morrison*, and *Jones* left a large number of unanswered questions about these limits. Among these are the following: how should courts construe commercial or economic activity when deciding whether the substantial effects test of *Lopez* is met? When does Congress have constitutional authority to aggregate intrastate activities to meet the substantial effects test? To what extent can the presence of a jurisdictional element in a statute save that statute from unconstitutionality where it limits the statute’s reach to activities with only a minimal, as opposed to substantial, effect on interstate commerce? How much weight should courts give to whether the activity being regulated is traditionally an area of state concern, such as the states’ police power with respect to criminal activity? How should the four *Morrison* factors be weighed against each other? Since *Lopez* did not defer to the government’s judgment that the activity at issue affected interstate commerce, and *Morrison* went even further in this direction by refusing to defer to congressional findings (stating “whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court”), is rational basis review still the test for constitutionality under the commerce power?

In a 2003 case, *The Citizens Bank v. Alafabco*, the Supreme Court, in a *per curiam* decision, reaffirmed the validity of the aggregation principle set out in *Wickard* in the context of determining whether a debt-restructuring agreement had a sufficient nexus with interstate commerce such that an arbitration provision in the agreement would be enforceable under the Federal Arbitration Act. In *Alafabco*, the Court criticized the lower court for its “improperly cramped view” of the
commerce power, noting that although this power had limits, Lopez did not “purport to announce a new rule governing Congress’ Commerce Clause power over concededly economic activity.”44 The Court held that “Congress’ Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice...subject to federal control.’”45 In such a circumstance, “[o]nly that general practice need bear on interstate commerce in a substantial way.”46 Alafabco, however, did not shed any light on how courts should draw the line between economic and non-economic activity in future cases where that was an issue.

In these circumstances, the predictable result has been inconsistency among the federal courts of appeals. In a number of cases involving the validity of convictions for intrastate possession of pornography, federal appeals courts have differed as to the applicability of the aggregation principle. They have also differed over the constitutional effect of the jurisdictional hook. The next three sections examine these differences, starting with the latest decision.

II. United States v. Maxwell: The Most Recent Federal Court of Appeals Decision on a Commerce Clause Challenge to a Federal Child Pornography Possession Statute

The most recent federal circuit court of appeals ruling on a Commerce Clause challenge to a federal law prohibiting the possession of child pornography was United States v. Maxwell, decided on October 1, 2004.47 Maxwell provides a good example of a court confronted with the dilemma posed by the non-infinity and aggregation principles. In Maxwell, the Eleventh Circuit reversed defendant James Maxwell’s convictions for knowingly possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).48 Although Maxwell had mounted both facial and as-applied challenges to the statute in the district court, his appeal was limited to an as-applied challenge.49

Maxwell’s landlord, Alberta Wallace, had given him permission to use her computer.50 When Maxwell moved out to serve a prison sentence for an unrelated state offence, he gave Wallace power of attorney over his affairs for the period when he would be gone.51 He also gave her permission to access his e-mail accounts.52 When Wallace did so, she found messages about homosexuality and teenagers that caused her to suspect that Maxwell had been accessing, and might possess, child pornography.53 Maxwell’s angry reaction to her questions did not allay her suspicions, and she contacted the police.54 When the FBI searched her apartment, they seized more than one hundred items, including a zip disk that held several hundred images of child pornography.55 Wallace later found, in Maxwell’s room, a floppy disk which contained fifteen images of child pornography and she sent that to the FBI.56 Maxwell was indicted on two counts of possessing child pornography, one predicated on the zip disk and the other on the floppy disk.57 Although the FBI seized other storage media, including additional zip and floppy disks that also contained images of child pornography, this evidence was not
charged against Maxwell in his indictment.\textsuperscript{58}

The government prosecuted Maxwell for intrastate activity, namely his knowing possession of pornography within Florida.\textsuperscript{59} The government presented no evidence that Maxwell had acquired the pornographic images outside Florida.\textsuperscript{60} Nor did the government establish that the disks containing the images traveled across state lines after the images were stored on them, although Maxwell stipulated that the disks had been manufactured outside Florida and had been mailed, shipped, or transported in interstate commerce.\textsuperscript{61}

The government had thus not established that the images of child pornography were objects in interstate commerce that, according to Lopez, Congress could regulate.\textsuperscript{62} Nor did the possession statute concern the channels of interstate commerce.\textsuperscript{63} So the crucial question was whether Maxwell's possession, entirely within Florida, of pornographic images stored on computer disks that had previously traveled across state lines, was an activity that fell into the third Lopez category permitting federal regulation: intrastate activity that "substantially affects" interstate commerce.\textsuperscript{64}

Writing for a three-judge panel of the Eleventh Circuit, former Chief Judge Gerald Tjoflat found that 18 U.S.C. § 2252A(a)(5)(B) was unconstitutional as applied. The court reached its conclusion on the basis of a detailed analysis of the applicability of the four Morrison factors discussed above.\textsuperscript{65}

First, the Eleventh Circuit panel found that Maxwell's possession of child pornography wholly within the state of Florida was not commercial or economic activity: "[t]he act of possession alone - the only act for which Maxwell was charged - entails no transactions, no consumption of goods or services, and no necessary resort to the marketplace."\textsuperscript{66} In so ruling, the panel distinguished Wickard v. Filburn, one of the pre-Lopez cases that Lopez had not overruled, and Morrison also left standing.\textsuperscript{67} In Wickard, the Court had found that a piece of New Deal legislation, the Agricultural Adjustment Act, could constitutionally be applied to penalize a farmer for growing more wheat than the law permitted to be sold and consumed on a farm.\textsuperscript{68} The Court focused on the economic purpose of this federal legislation, which was to increase the market price of wheat by reducing the supply for sale in the national marketplace, and concluded that even local production and consumption of wheat would adversely affect this goal.\textsuperscript{69}

In Maxwell, the Eleventh Circuit sought to distinguish Wickard on two related grounds. The Court determined that the federal child pornography statute at issue lacked the clear economic purpose that the Agricultural Adjustment Act had. Child pornography law was not designed to encourage the trade in pornography at an increased price.\textsuperscript{70} Since its purpose was to criminalize the possession of child pornography, the provision at issue in Maxwell was essentially a regulation of criminal conduct that, like the noneconomic criminal conduct at issue in Lopez, was the province of the states rather than of the federal government.\textsuperscript{71} Child pornography, unlike the wheat at issue in Wickard, was a "nonrival" good. The mere possession of child pornography did not reduce the overall supply of such material.\textsuperscript{72} The second ground the Court cited was that the statute at issue was not an attempt to
reduce interstate trade in materials used to produce pornography, such as disks, cameras, and film.

The Eleventh Circuit disagreed with other Circuits that had found the aggregation principle applicable to the intrastate possession of child pornography, since such possession was not economic in nature. Citing Morrison and Lopez, the Eleventh Circuit contended that although the Supreme Court had not adopted a categorical rule against aggregating the effects of any non-economic activity, federal regulation of intrastate activity under the commerce power had only been upheld by the Court where the regulated activity was economic or commercial in nature. It concluded that Congress had the power to regulate interstate child pornography only because that pornography was a thing in interstate commerce, not because such pornography had a substantial effect on interstate commerce in the aggregate.

The Eleventh Circuit also reasoned that if the aggregation principle could be applied to the intrastate possession of child pornography, there would be no need for any jurisdictional hooks in the statute. Jurisdictional hooks would be superfluous if intrastate possession of pornography was always deemed to have a substantial economic effect on interstate commerce. Additionally, the Eleventh Circuit noted the risk that aggregation would encourage overregulation "with a fatter regulatory brush."

A second Morrison factor was whether the federal legislation at issue lacked a jurisdictional hook that ensured that the intrastate activity it was regulating had a sufficient connection to interstate commerce. The possession statute at issue in Maxwell did have a jurisdictional hook allowing the government to prosecute the possession of child pornography where it had been produced using materials that had been transported in interstate commerce. But because virtually all child pornography would be produced using materials like film, video, and cameras that had traveled in interstate commerce, this jurisdictional hook did not require the prosecution to prove that the possession substantially affected interstate commerce and was thus not sufficiently limited to establish, on its own, that that the statute was constitutional as applied to convict Maxwell.

A third Morrison factor the Court considered was whether the legislation contained express congressional findings as to the effects on interstate commerce of the activity being regulated. The Eleventh Circuit pointed out that the Morrison Court had made clear that the mere existence of such findings did not definitively establish the legislation's constitutionality under the Commerce Clause. In any event, the Eleventh Circuit concluded that the congressional findings for the original version of section 2252A did not support the conclusion that the intrastate possession of child pornography had a sufficient effect on interstate commerce such that its regulation, as applied to Maxwell, was a valid exercise of the commerce power. Although these findings included the finding that child pornography "inflames the desires of child molesters, pedophiles, and child pornographers who prey on children" and thus "increas[es] the creation and distribution of child pornography," there was no evidence that Maxwell was a child molester or that his individual possession of pornography would directly or substantially encourage the interstate
market for child pornography and interstate commerce generally.\textsuperscript{84} Additionally, although there was a finding in the legislative history of 18 U.S.C. § 2252, a similar child pornography possession statute, that “[c]hild pornography and child prostitution have become highly organized multimillion dollar industries that operate on a nationwide scale[, and] such prostitution and 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,” the Eleventh Circuit discounted this finding as focusing only on interstate child pornography but saying nothing about the effects of intrastate or noncommercial child pornography on the interstate market.\textsuperscript{85}

Considering the final \textit{Morrison} factor, the Eleventh Circuit also found that the effect of Maxwell’s mere possession of two disks containing child pornography on interstate commerce was “attenuated to say the least” where the only connection between Maxwell’s activity and interstate commerce was that the disks had originally come from out of state.\textsuperscript{86} The Eleventh Circuit stated “[t]he causal chain necessary to link his activity with any substantial impact on interstate commerce might be long enough to reach the outer limits of the solar system.”\textsuperscript{87} The Eleventh Circuit therefore concluded that Maxwell’s possession of child pornography was quintessentially local in character since the government had not established that he had obtained it through any channel of interstate commerce, or that he had distributed any pornography in the interstate market.\textsuperscript{88} Furthermore, when Maxwell’s possession was viewed on its own, there was no evidence that it encouraged others to seek more pornography and thereby increased the demand for such pornography in the interstate market.\textsuperscript{89} The mere fact that the two charged disks had traveled interstate prior to Maxwell storing pornography on them was simply insufficient to make his possession of pornography the constitutionally appropriate subject of Commerce Clause regulation.\textsuperscript{90}

\section*{III. Federal Circuits Differing from \textit{Maxwell} in Rejecting Constitutional Challenges to Federal Child Pornography Laws Under the Commerce Clause}

The approach of \textit{Maxwell} differed from that taken by some other federal circuit courts of appeals in rejecting as-applied and facial challenges to federal child pornography law under the Commerce Clause.\textsuperscript{91} The vast majority of these courts did not assess the constitutionality of the materials-in-commerce prong in the provision at issue in \textit{Maxwell}, 18 U.S.C. § 2252A(a)(5)(B), Most of them considered its virtually identical counterpart in the alternate possession statute at 18 U.S.C. § 2252(a)(4)(B). A few analyzed the constitutionality of the materials-in-commerce prongs in the manufacturing provisions in 18 U.S.C. § 2251(a) and (b).

The reasoning of these federal circuit courts of appeals differed from that of \textit{Maxwell} in two main ways. First, a few of these courts, most notably in the Eighth Circuit, considered the existence of the jurisdictional hook to be a far more persuasive factor in favor of constitutionality than the Eleventh Circuit had found in \textit{Maxwell}.\textsuperscript{92} Second, some other courts disagreed with the
first group's assessment of the significance of the jurisdictional hook, but nevertheless upheld the constitutionality of the statutes on the basis of the aggregation principle. The Fourth Circuit has used reasoning combining elements of both approaches, apparently basing a finding of constitutionality in one case on both the existence of the jurisdictional hook and the aggregation principle, although the precedential value of this decision is questionable since it is unpublished. The remainder of this section considers this case law in more detail.

A. Circuits Ruling that the Jurisdictional Hook Rendered the Materials-in-Commerce Prongs Constitutional

A relatively small number of courts have held that the mere existence of the jurisdictional hooks in sections 2252(a)(4)(B), 2251(a), and 2251(b) rendered these provisions constitutional. For example, in United States v. Robinson, one reason given by the First Circuit for finding section 2252(a)(4)(B) facially constitutional was that, unlike the statute at issue in Lopez, section 2252(a)(4)(B) has a jurisdictional element which "requires an answer on a case-by-case basis to the question whether the particular possession of child pornography affected interstate commerce." In United States v. Bausch, the only reason given for the Eighth Circuit's holding that section 2252(a)(4)(B) was not facially unconstitutional under the Commerce Clause was the presence of a jurisdictional element ensuring "through a case-by-case inquiry, that each defendant's pornography possession affected interstate commerce."

Although both Robinson and Bausch were decided before Morrison, two other Eighth Circuit decisions after Morrison, United States v. Hoggard and United States v. Hampton, relied on similar reasoning in rejecting Commerce Clause challenges to the materials-in-commerce prongs in 18 U.S.C. §§ 2251(a), 2251(b), and 2252(a)(4)(B). These courts considered themselves to be bound by the reasoning in Bausch. In Hoggard, a case involving photographs depicting the defendant's wife and small children engaging in sexual activity, the Eighth Circuit found the materials-in-commerce prong in section 2251(b) to be constitutional because it has an "explicit jurisdictional nexus." It distinguished both Morrison and Lopez on the basis that the statute at issue in both those cases had no jurisdictional hook "requiring the government to prove, in each case, a concrete connection with interstate commerce." In Hampton, a case involving the production and possession of homemade child pornography, the Eighth Circuit found the materials-in-commerce prongs in section 2251(a) and 2252(a)(4)(B) survived constitutional attack on the basis that Bausch, as affirmed by Hoggard, was controlling authority. The Eighth Circuit cited to Lopez and Morrison but did not analyze either case, simply stating "[s]ince those cases were decided... we have held that Bausch continues to control the constitutionality of federal criminalization of child pornography produced with materials that have traveled in interstate commerce and accordingly affirmed a conviction under § 2251(b)."
B. Circuits Doubting the Sufficiency of the Jurisdictional Hook to Render the Materials-in-Commerce Prongs Constitutional but Upholding Them on the Basis of the Aggregation Principle

A second group of courts, including the Second, Third, and Fifth Circuits, as well as a First Circuit decision after both Robinson and Morrison, seriously doubted that the mere existence of the jurisdictional hook, considered on its own, was sufficient to automatically render the materials-in-commerce prongs in the federal child pornography possession and manufacturing statutes constitutional. Nevertheless, these courts sustained the materials-in-commerce prongs in 18 U.S.C. §§ 2252(a)(4)(B) and 2251(a) against a number of facial and as-applied constitutional challenge on the basis of the aggregation principle. The Seventh Circuit also has expressed its essential agreement with this reasoning, although without actually ruling on the jurisdictional hook issue.

For example, in United States v. Rodia, which was decided after Lopez but prior to Morrison, the Third Circuit found that it was constitutional under the Commerce Clause for Congress to enact the materials-in-commerce prong in 18 U.S.C. § 2252(a)(4)(B) and apply it to convict Rodia. Rodia, a very unsavory defendant who had a prior conviction for endangering the welfare of a child, was convicted under section 2252(a)(4)(B) for his wholly intrastate possession of numerous Polaroid photos of child pornography where the film used to create the pornography had traveled in interstate commerce. He argued that the statute’s regulation of purely intrastate possession of pornography was unconstitutional based on the non-infinity principle. Rodia also contended that the possession statute’s jurisdictional hook was insufficient to ensure that it would be applied to activities with a sufficient nexus to interstate commerce.

The Third Circuit agreed with Rodia that this jurisdictional hook was probably not sufficiently limited that it could, by itself, render the statute constitutional under the Commerce Clause, since virtually all child pornographers would use materials that had traveled in interstate commerce, like film or cameras. It stated:

[as a practical matter, the limiting jurisdictional factor is almost useless here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute. At all events, 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.]

However, the Third Circuit disagreed with Rodia as to whether there was a sufficient nexus between intrastate possession and interstate commerce, finding, though “not without misgivings in view of the breadth of the regulation at issue” that “Congress rationally could have believed that child pornography that did not itself travel in interstate commerce has a substantial effect on interstate commerce, and is thus a valid subject of regulation under the Commerce Clause.” In other words, Congress could have rationally believed
that the possession of homemade (or, using terminology evoking *Wickard*, "home-grown") pornography would stimulate the demand for pornography from other sources and thus affect the interstate pornography market.\textsuperscript{108}

The Third Circuit applied Congressional findings in the legislative history of previous versions of section 2252 to the amended version at issue, finding that these findings supported the reasonable conclusion that a substantial national market in child pornography existed.\textsuperscript{109} The Third Circuit also found support in the legislative history relating to subsequent amendments to section 2252.\textsuperscript{110} According to the Third Circuit, there was support in this legislative history that pornography was addictive, which led to the rational belief that even wholly intrastate possession of child pornography would have substantial effects on the interstate market for child pornography.\textsuperscript{111}

The *Rodia* court did not rule that intrastate possession of child pornography was itself economic or commercial activity, but took the view that the aggregation principle articulated by the Court in *Wickard* permitted Congress to regulate non-commercial intrastate activity if "such events, taken in the aggregate, might ultimately have a substantial effect on interstate commerce."\textsuperscript{112} In support of this approach, the Third Circuit cited the following passage from *Wickard*: "[e]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."\textsuperscript{113} The Third Circuit considered this aggregation principle to be a generic principle that was not limited to situations like *Wickard* where the intrastate activity, the production and consumption of wheat, was substituting for wheat purchased in interstate commerce.\textsuperscript{114} According to the Third Circuit, the aggregation principle thus also applied to cases of "supply-affecting situations," even if the effect on interstate commerce was more speculative than in a substitution situation, "requir[ing] a greater number of assumptions before the connection between intrastate and interstate activity becomes clear."\textsuperscript{115}

Even though the *Rodia* decision predated *Morrison*, the Third Circuit endorsed its reasoning after *Morrison* in *United States v. Galo*. This case involved dozens of home-grown images of child pornography in the possession of another highly unsavory defendant who had previously been convicted of state law offenses of corruption of minors, endangering the welfare of children, and indecent assault arising from his sexual activity with his niece and nephews.\textsuperscript{116} The Third Circuit rejected Galo's facial and as-applied constitutional challenges to the materials-in-commerce prongs in 2252(a)(4)(B) and 2251(a), finding itself bound by *Rodia* and refusing to accept Galo's argument that *Rodia* was wrongly decided, although it did not cite or discuss *Morrison*.\textsuperscript{117} Instead, the court followed the reasoning of *Rodia* that the jurisdictional hook was not sufficiently limited to automatically render the statute constitutional, but Congress could criminalize purely intrastate possession with no direct link to interstate commerce when Congress could have rationally believed that the intrastate activity created a demand for pornography that substantially affected interstate commerce.\textsuperscript{118} The Court held that the same reasoning applied to the production of homemade pornography.
since both statutes had the same jurisdictional hook.119 Another very recent Third Circuit decision, United States v. Randolph, a case involving the production of homemade pornography by a defendant with a history of criminal sexual acts, viewed Galo as binding authority and therefore rejected both facial and as-applied constitutional challenges to 18 U.S.C. § 2251(a).120 The Third Circuit did not cite either Lopez or Morrison in its opinion in Randolph.

In finding that the aggregation principle permitted Congress to regulate the intrastate possession of child pornography, the Third Circuit in Rodia had relied on the First Circuit's decision in United States v. Robinson.121 After the defendant in Robinson was convicted under section 2252(a)(4)(B) of possessing fifty apparently home-grown instant photographs of teenage boys engaging in sexual conduct, he challenged his conviction on the basis that the statute was an unconstitutional exercise of the commerce power.122 As well as reasoning that the existence of a jurisdictional hook rendered the statute constitutional, the First Circuit also relied on a market theory to support its conclusion that Congress had the power to enact section 2252(a)(4)(B) to regulate activity with a substantial effect on interstate commerce.123 Relying on some of the same legislative history as Rodia, the First Circuit concluded that possession of child pornography, “through repetition elsewhere, . . . helps to create and sustain a market for sexually explicit materials depicting minors” and thus substantially affects the instrumentalities of interstate commerce.” 124 It distinguished Lopez as not involving possession that affected interstate commerce.125

Although the First Circuit decided Robinson prior to Morrison, it also relied on the aggregation principle in its post-Morrison decision in United States v. Morales-De Jesus, in which it upheld the constitutionality of the materials-in-commerce prong of 18 U.S.C. § 2251(a) against both facial and as-applied challenges.126 The defendant in Morales-De Jesus was another unsavory person who, after luring his thirteen-year old god-daughter to a motel and videotaping her engaging in sexual conduct with him on several occasions, was convicted for his manufacture of homemade pornography.127

In Morales-De Jesus, the First Circuit specifically considered the applicability of the four Morrison factors, agreeing with the Third Circuit in Rodia that the jurisdictional element was likely not sufficient, on its own, to render the statute constitutional under the Commerce Clause.128 However, the First Circuit found that the general sphere of activity being regulated by the statute, the production of child pornography, was unquestionably an economic activity, even if the defendant’s individual intrastate activity did not itself affect interstate commerce.129 The defendant's activity thus fell into the class of activity that Congress could properly regulate.130

According to the First Circuit, producing child pornography fueled the supply side of the market, following the reasoning of Robinson that possessing it affected demand.131 It ruled that federal regulation of intrastate production of pornography could be sustained under the aggregation principle, reasoning that because much of this home-grown pornography would surreptitiously enter the national market and would be impossible to trace, Congress had authority to regulate intrastate
production in order to reduce the supply of pornography in the interstate market.\textsuperscript{132} The First Circuit suggested that not all as-applied challenges would be ruled out by this approach. In some circumstances, the production or possession of child pornography might not be within the sphere of activity that Congress sought to regulate.\textsuperscript{133} The First Circuit found that there was legislative history indicating that Congress had chosen to regulate the production and possession of child pornography because of its concerns about the exploitation of children.\textsuperscript{134} If, in the circumstances of a particular case, there was no exploitation, an as-applied challenge could be successful.\textsuperscript{135} Relevant facts could include the age of the minor and the relationship between the defendant and the minor.\textsuperscript{136}

After Morrison, the Second Circuit also upheld a conviction under 18 U.S.C. § 2251(a) in United States v. Holston on the basis of the aggregation principle, rejecting the defendant’s facial and as-applied challenges to the constitutionality of section 2251(a)’s materials-in-commerce prong in a case involving the production of homemade child pornography, namely several videos depicting the defendant engaging in sexual activity with the ten-year-old and fourteen-year-old daughters of a neighbor.\textsuperscript{137} The Second Circuit specifically considered the Morrison factors, and cited Rodia in support of its doubts as to whether the jurisdictional hook was sufficiently limited in its application to render the provision constitutional.\textsuperscript{138} But the Second Circuit concluded that the materials-in-commerce prong was constitutional, both on its face and as applied to defendant’s intrastate conduct, because the activity that was being regulated (producing child pornography) was an economic and commercial activity.\textsuperscript{139} Additionally, the Second Circuit found that there were ample legislative findings that there was an extensive national market in child pornography that relied on the instrumentalities of interstate commerce.\textsuperscript{140} It concluded that Congress could rationally have determined that it was necessary to regulate intrastate activity to effectively regulate that national market.\textsuperscript{141} Although the Second Circuit did not cite the Wickard decision, it was clearly applying the aggregation principle in finding that it was not necessary for the defendant’s individual activity to itself affect interstate commerce for it to be validly regulated, as long as Congress was regulating a class of activities that substantially affected interstate commerce.\textsuperscript{142} In a subsequent decision, United States v. Harris, the Second Circuit rejected as-applied and facial challenges to the materials-in-commerce prong in 18 U.S.C. § 2252A(a)(5)(B), the same possession statute that was at issue in Maxwell, on the basis that Holston was binding precedent that could not be distinguished “in any meaningful way, but without describing the defendant’s precise activities.”\textsuperscript{143}

In another post-Morrison case, a Fifth Circuit panel, 2-1, rejected facial and as-applied challenges to section 2252(a)(4)(B) in United States v. Kallestad, a case involving the defendant’s possession of a large number of sexually explicit images, some of minors, that he had made in his home after advertising in a newspaper for participants.\textsuperscript{144} Applying the Morrison factors, the Fifth Circuit found that the jurisdictional hook in section 2252(a)(4)(B) was insufficient on its own
to render the statute constitutional, effectively following Rodia in this regard, although without citing it in support of this contention.\textsuperscript{145} The Fifth Circuit did find the jurisdictional hook to be more useful than the Rodia court in that it “limit[s] prosecutions under section 2252(a)(4)(B) to a smaller universe of provable offenses” and “reflects Congress’s sensitivity to the limits on its commerce power.”\textsuperscript{146}

However, the Fifth Circuit concluded in Kallestad that the statute was constitutional, employing reasoning similar to the market theory of Rodia and Robinson. The Fifth Circuit found that the defendant’s activity being regulated was economic in nature, when “viewed broadly,” citing in support Wickard’s statement that “when a person produces for their own consumption a product that is traded in an interstate market, his conduct is economic in character.”\textsuperscript{147} Relying on congressional findings that it viewed as supporting the existence of a substantial national market in child pornography, the Fifth Circuit therefore found that Congress could have rationally concluded that it needed to regulate intrastate possession to regulate the national market for interstate pornography.\textsuperscript{148} In dissent, Judge E. Grady Jolly argued that the simple possession at issue, which did not involve buying or selling, was not sufficiently economic or commercial to be aggregated under Morrison and Lopez.\textsuperscript{149}

The reasoning of the Seventh Circuit in United States v. Angle was also quite similar to that of Rodia. The defendant in Angle was a purchaser of commercial pornography with prior convictions for child molestation and sodomy, who had used the Internet to have sexually explicit conversations with an undercover FBI agent posing as a child.\textsuperscript{150} In rejecting a facial challenge to 18 U.S.C. §2252(a)(4)(B), the Seventh Circuit doubted, but found it unnecessary to rule on, the issue of whether the jurisdictional hook is sufficient to render the statute constitutional.\textsuperscript{151} The remainder of the Seventh Circuit’s opinion endorsed the market theory of Rodia and Robinson. The Seventh Circuit agreed with the First Circuit in Robinson and the Third Circuit in Rodia that there were congressional findings supporting the existence of a large national market for child pornography and that Congress had a rational basis for believing that the intrastate possession of child pornography bore a substantial relationship to interstate commerce by stimulating demand for interstate pornography.\textsuperscript{152} The Seventh Circuit stated “there is a nexus, via a market theory, between interstate commerce and the intrastate possession of child pornography.”\textsuperscript{153} The Seventh Circuit distinguished Lopez and (in a footnote) Morrison for the reason that the statutes at issue in those cases were “directed only to noneconomic criminal activity.”\textsuperscript{154}

C. The Fourth Circuit Combines Elements of Both of the Above Approaches

In an unpublished per curiam opinion after Morrison in United States v. Harden, the Fourth Circuit used reasoning combining elements of both the approach in Bausch and Rodia in an appeal involving a conviction for intrastate possession of over 100 photographs of young boys, some as young as eleven.\textsuperscript{155} Rejecting a facial challenge to section 2252(a)(4)(B), the Fourth Circuit simply stated without explanation that it was following
This seems to amount to an endorsement of the reasoning in Bausch that the mere existence of the jurisdictional hook is sufficient to protect the statute from a facial challenge. In its ruling, the Harden court inaccurately stated that the First and Eighth Circuits were the only ones to have yet addressed this issue. But at the time that Harden was decided, several other circuits had in fact addressed the issue, namely the Third Circuit in Rodia and Galo, the Fifth Circuit in Kallestad, and the Seventh Circuit in Angle. They were all critical of the approach of the First and Eighth Circuits. Moreover, the Fourth Circuit failed to note in Harden that, in United States v. Corp, the Sixth Circuit had preferred the approach of Rodia to that of the First and Eighth Circuits’ reasoning of the jurisdictional hook, despite the fact that Harden actually cited Corp on a different issue.

Additionally, in rejecting an as-applied challenge to the same provision, the Fourth Circuit found that the government had established a sufficient nexus to interstate commerce due to the large amount and type of pornographic images at issue, the youth and number of the boys depicted in the images, and the fact that the defendant had admitted to sexual conduct with multiple young boys. The analysis in Harden did not discuss the Morrison factors, but this part of its opinion referred to Corp, a case that did include a full analysis of these factors. The reasoning of the Harden Court is sketchy, but it appears to follow the reasoning of Corp, though distinguishing it on the facts. Corp in turn relied on the reasoning in Rodia, but distinguished it on the basis that where there was no exploitation on the facts, the possession at issue could not be viewed as connected to interstate commerce. By relying on and distinguishing Corp, Harden was implicitly following the reasoning in Rodia.

In an earlier unpublished per curiam decision after Morrison, United States v. White, a case involving the downloading of hundreds of pornographic images from the Internet (and thus, according to the Court, the pornography itself moved across state lines), the Fourth Circuit had also rejected the argument that the materials-in-commerce prong in section 2252A(a)(5)(B), the provision at issue in Maxwell, did not satisfy the Commerce Clause, citing Bausch and Robinson in support but not mentioning any of the other child pornography cases, Lopez, or Morrison.

IV. Circuits Aligned with Maxwell in Upholding Constitutional Challenges Under the Commerce Clause

The Eleventh Circuit is not the only federal appeals court to uphold a constitutional challenge to the materials-in-commerce prongs. Two other federal circuits have upheld as-applied challenges to the constitutionality of these provisions. Both appeals concerned the materials-in-commerce prong of 18 U.S.C. § 2252(a)(4)(B). No facial challenges to the materials-in-commerce prongs in the child pornography possession or manufacturing statutes have been upheld to date.

Maxwell invoked the reasoning of the Ninth Circuit, in United States v. McCoy, a case involving the possession of a single family photograph taken by a drunken mother of her daughter, which
was not intended for economic or commercial use and had not been transported across state lines. The defendant was prosecuted under section 2252(a)(4)(B), and federal jurisdiction was premised on the fact that the camera and film used to take the picture had traveled in interstate or foreign commerce from their places of manufacture. A majority of a three-judge Ninth Circuit panel found that section 2252(a)(4)(B) could not be constitutionally applied under the Commerce Clause to the defendant's intrastate possession of this photograph because it did not satisfy the substantial effects test. Judge Stephen Reinhardt, writing for the majority, found that the defendant's activity failed to satisfy what he deemed the two most important Morrison factors, namely whether the interstate possession was commercial or economic and whether the connection between such possession and interstate commerce was too attenuated. Nor could section 2252(a)(4)(B) be constitutionally applied to "others similarly situated, whose non-commercial, non-economic possession of a prohibited photograph is entirely intrastate in nature." In McCoy, the Ninth Circuit agreed with the Third Circuit's reasoning in Rodia that the jurisdictional hook was, practically speaking, useless as a guarantee that the statute was constitutional as applied. But the Ninth Circuit was critical of much of the other reasoning in Rodia. It condemned Rodia's addiction theory as "not only rhetorically unpersuasive, but premised upon a legal analysis that can no longer be sustained after Morrison", castigating it as being overly speculative and "piling inference upon inference." It also criticized the Third Circuit's reliance on subsequent legislative history. The Ninth Circuit also disagreed with Rodia's implicit assumption that child pornography was a fungible good, because, on the facts of McCoy, it was not intended for exchange in the marketplace.

Considering the defendant's intrastate activity on its own, the Ninth Circuit found that there was no proof that the defendant would enter the interstate child pornography market, stating

[w]e see no more justification for assuming that a possessor of a 'home-grown' photograph of one's own child will ultimately enter the interstate pornography market as an addict than there is to assume that the possessor of a single marijuana cigarette will inevitably turn into a full-time heroin junkie. It found no support in the legislative history for a sufficiently direct or substantial relationship between the intrastate noncommercial possession of pornography and a national market in commercial child pornography to validate congressional regulation of intrastate possession. The Ninth Circuit concluded that "simple intrastate possession of home-grown child pornography not intended for distribution or exchange is not, in any sense of the phrase, economic activity" and found that Wickard's aggregation principle was therefore inapplicable to it.

In dissent, Judge Stephen Trott preferred to follow the market theory of Rodia, contending that even though the defendant's individual conduct had no effect on interstate commerce, Congress could regulate it on the basis of the aggregation principle. The reasons for this were that the statute could be characterized as regulating commercial or economic activity, namely the massive
national industry of child pornography; it had an express jurisdictional element restricting its application to activities that had an explicit connection with, or effect on interstate commerce; congressional findings existed to support the judgment that purely local possession impacted interstate commerce; and Congress could have rationally concluded that the regulated activity had a substantial effect on interstate commerce.176 In Judge Trott's opinion, no as-applied challenge could be successful where the defendant's conduct, like McCoy's, fell within the plain language of the statute.177

In another Ninth Circuit decision that followed McCoy, United States v. Adams, a different three judge panel ruled unanimously that section 2252(a)(4)(B) was facially constitutional.178 This Ninth Circuit panel found that the jurisdictional hook violated the non-infinity principle, citing in support a statement in the majority opinion in McCoy that it "not only fails to limit the reach of the statute to any category or categories of case that have a particular effect on interstate commerce, but, to the contrary, it encompasses virtually every case imaginable, so long as any modern-day photographic equipment or material has been used."179 But the Ninth Circuit also found that the defendant's possession of commercial child pornography, namely images downloaded from a website (in contrast to the home-grown pornography at issue in McCoy) did have a nexus to interstate commerce and that link was not so attenuated as to preclude congressional power to regulate intrastate activity.180

The only other circuit to sustain an as-applied challenge to the constitutionality of section 2252(a)(4)(B) is the Sixth Circuit. In United States v. Corp, the circuit ruled that the section was unconstitutional as applied to the defendant's possession of homemade pornographic images.181 These images showed the defendant engaged in sexual conduct with a sixteen-year-old who was very close to the age of majority and who did not want the defendant prosecuted.182 Applying the Morrison factors, the Sixth Circuit agreed with the reasoning of the Third Circuit in Rodia that the mere existence of the jurisdictional hook is not enough to automatically render the statute constitutional.183 But the Sixth Circuit did not follow Rodia's reasoning on aggregation, distinguishing it on the facts. It stated that "we do not determine the aggregate effect on interstate commerce of the purely intrastate dealing in child pornography. Instead, we conclude that Corp's activity was not of a type demonstrated substantially to be connected or related to interstate commerce on the facts of this case."184 This conclusion was based on the facts that the defendant was not engaged in sexual activity with a young child and was not using the images for abusive or commercial or semi-commercial purposes.185 Given this finding, the Sixth Circuit declined to decide whether the defendant's activity was "commercial" within Morrison and did not opt to strike down the statute as facially unconstitutional.186 But in order to come to the conclusion that aggregation was inappropriate, the Sixth Circuit must have impliedly determined that defendant's conduct was noneconomic and non-commercial.

In Corp, the Sixth Circuit suggested that in determining whether there was a sufficient nexus with interstate commerce, courts should consider the factual circumstances carefully, and ask whether
[t]he activity in this case related to explicit and graphic pictures of children engaged in sexual activity, particularly children about fourteen years of age or under, for commercial or exploitive purposes? Were there multiple children so pictured? Were the children otherwise sexually abused? Was there a record that defendant repeatedly engaged in such conduct or other sexually abusive conduct with children? Did defendant move from place to place, or state to state, and repeatedly engage in production of such pictures of children?¹⁸⁷

The Court specified that “[t]hese question are relevant to a determination on a case-by-case basis about whether the activity involved in a certain case had a substantial effect on commerce.”¹⁸⁸ This part of the decision is not at odds with the approach of the Rodia line of authority on aggregation. In Morales-De Jesus, a decision that endorsed Rodia’s market theory on aggregation, the First Circuit took the view that some types of non-exploitative intrastate possession or production of pornography could be the subject of a successful as-applied challenge, because such activity was outside the “class of activity which bears the substantial relationship to interstate activity that justifies action by Congress under the Commerce Clause.”¹⁸⁹

V. The Significance of the Disagreement: Choosing Between Scylla and Charybdis

To summarize, there is disagreement among the federal circuit courts of appeals on two primary issues: (1) whether the mere existence of the jurisdictional hook automatically renders the materials-in-commodity provisions constitutional under the Commerce Clause; and (2) when the aggregation principle permits congressional regulation of wholly intrastate possession of child pornography under the commerce power. For both issues, the disagreement can be viewed as the product of some judicial misreading of the majority opinions of the Supreme Court in Lopez and Morrison. However, simply exhorting courts to more carefully apply precedent will not enable them to steer a safe course between the Scylla of violating the non-infinitude principle and the Charybdis of violating the aggregation principle. The middle course charted by the Supreme Court, which generally limits aggregation to economic or commercial intrastate activity, is flawed. It is inconsistent with prior Supreme Court precedent, and also fails to provide lower courts with guidance on how economic and commercial activity should be construed.

A. Disagreement Over the Effect of the Jurisdictional Hook

The disagreement over the effect of the jurisdictional hook is clearly attributable to misreading or ignoring of the Court’s majority opinions in Lopez and Morrison. As discussed above, after both Lopez and Morrison, the Eighth Circuit rejected facial Commerce Clause challenges to materials-in-commodity provisions in child pornography possession and production statutes where the possession and manufacturing at issue was wholly intrastate, based on the mere presence of the jurisdictional hook.¹⁹⁰ This approach was also taken after Morrison in an unreported Fourth Circuit decision, as well as before Morrison by the Eighth Circuit and First Circuit.¹⁹¹ However, most other circuits (the Second, Third, Fifth, Sixth, Ninth, and Eleventh, and the First after Morrison) have not followed the Eighth
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Circuit’s approach in cases involving various facial and as-applied challenges to the materials-in-commerce provisions in the child pornography possession and production statutes. Rather, they have preferred the approach of the Third Circuit in Rodia on this issue, which found that the mere presence of a jurisdictional hook did not automatically render a statute constitutional unless it actually limited the statute’s reach to activities that substantially affected interstate commerce. The Rodia court found it doubtful that the jurisdictional hook in these statutes actually provided such a guarantee. As the Eleventh Circuit noted in Maxwell, it is not permissible for Congress to achieve power beyond its constitutional reach simply by uttering pretextual incantations evoking the phantasm of commerce. It follows that Congress cannot guarantee the proper use of its authority by creating jurisdictional hooks that relate to interstate commerce in some way but fail in all cases to confine the scope of its regulation to Constitutional boundaries. This fact is obvious to the point of tautology: if a statute’s jurisdictional element is not sufficiently restrictive to cabin the statute’s reach to permissible applications, then the element is no guarantee of constitutional application.

The Rodia approach is more consistent with Morrison than the Eighth Circuit’s approach, since Morrison did not state that the mere presence of a jurisdictional element in a statute will automatically render that statute constitutional under the Commerce Clause (nor would the absence of a jurisdictional hook render the statute automatically unconstitutional). Rather Morrison, citing Lopez, held that the presence of a jurisdictional hook may (as opposed to must) render a statute constitutional under the Commerce Clause where that jurisdictional element “might limit [the statute’s] reach to a discrete set . . . of [intrastate] possessions that additionally have an explicit connection with or effect on interstate commerce.” Additionally, Morrison also stated that such a jurisdictional element will only “lend support” to the argument that the statute is constitutional, but will not definitively establish its constitutionality. Lopez also indicated that what is crucial for a jurisdictional element is that it “ensure[s], through case by case inquiry,” that the possession at issue affects interstate commerce. Although neither Lopez nor Morrison made clear how much weight should be afforded to the existence of a jurisdictional hook, both decisions do plainly establish that it is crucial for constitutionality under the Commerce Clause that a jurisdictional element actually limit the statute’s regulation to activities that have an “explicit connection with or effect on interstate commerce.”

It is true that by using the adjective “explicit”, neither Lopez nor Morrison made clear whether such a connection must be substantial or can only be minimal. Since the existence of a jurisdictional hook is a factor in support of the substantial effects test, it seems to follow that the word “explicit” is being used synonymously with “substantial” (as Rodia required). But even if the nexus need not be substantial, the materials-in-commerce prongs would still not satisfy the requirements of Lopez and Morrison. The activity that these child pornography statutes are regulating is the possession or production of pornographic images, not the materials that are used to make such pornography. But the jurisdictional nexus is based on
the effect of such materials on interstate commerce, not on the effect of the pornography made out of those materials on interstate commerce. These jurisdictional hooks therefore do not operate to limit the activity being regulated to activity with an effect on interstate commerce, whether substantial or otherwise.

An additional problem with these jurisdictional hooks, from the point of view of *Lopez* and *Morrison*, is that they do not comport with the “non-infinitude principle” that warns that the commerce power cannot constitutionally “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.”

As *Rodia* noted, since it is virtually impossible for child pornography to be made using no material that has ever crossed state lines, the jurisdictional hooks in the federal child pornography possession statutes do not contain any effective limits. Thus, they cannot be enough to render these statutes constitutional on their own.

According to the Fourth Circuit in *Harden*, decided after *Morrison*, the jurisdictional hook in section 2252(a)(4)(B) was sufficient to render the statute facially constitutional, but not necessarily constitutional as applied. But, as noted above, not only is *Harden* an unreported *per curiam* decision, but its reasoning is open to criticism because it completely ignored several prior decisions in other circuits that addressed the same issue in a very different way in the context of both facial and as-applied challenges (including *Rodia*, *Galo*, *Corp*, *Kallestad*, and *Angle*). Moreover, *Harden*’s reasoning that the Eighth Circuit approach applies to facial challenges is not consistent with *Lopez* and *Morrison* for the same reasons that the Eighth Circuit’s approach is problematic.

In a survey of lower court decisions on the constitutionality of federal regulations under the commerce power, Professors Brannon Denning and Glenn Reynolds concluded that “[i]t is evident from the lower courts’ opinions that they are still reluctant to take *Lopez* seriously, even after *Morrison*’s clarifying opinion.”

The Eighth and Fourth Circuit decisions on the effect of the jurisdictional hook are examples of the type of sloppy reasoning that Denning and Reynolds have described as “*per curiam* or unpublished opinions that simply refer to post-*Lopez* cases” or “published decisions that merely announce the conclusion that nothing in the Supreme Court’s post-*Lopez* cases affects the reviewing court’s earlier decision, often with little or no analysis.”

Denning and Reynolds think misreading of *Morrison* is not so much attributable to judicial ideology as it is the tendency of overburdened federal judges using “shortcuts to decision making” in an effort to clear their dockets quickly, particularly of appeals by unsavory defendants like child pornographers. It is true that the defendants whose convictions for child pornography possession have been upheld can be viewed as generally more unsavory than those whose Commerce Clause challenges were upheld. Many of the unsuccessful appeals were mounted by defendants who had previous convictions involving some type of sex crime, especially crimes against children, or who were in possession of large
amounts of pornography depicting multiple children, or who engaged in sexual activity with young children. In contrast, all three of the successful as-applied challenges involved cases with significant mitigating facts, including a very small number of images in the possession of the defendant, a lack of evidence that the defendants were child molesters or were likely to enter the interstate pornography market, and, in one case, images depicting sexual activity with a minor who was very close to majority. But since the jurisdictional hooks in each case were identical, these factual differences do not justify taking a different approach to the effect of the jurisdictional hook.

If this disagreement over the effect of the jurisdictional hook was all there was to the Circuit split, it would seem easy enough to resolve by simply urging courts to more carefully apply the Court's precedent and avoid the non-infinity danger. But it is not so simple to resolve the split since it also includes disagreement over when aggregation is constitutionally valid.

B. Disagreement Over Aggregation and Economic Activity

The disagreement over aggregation and economic activity has also resulted from judicial misreading or, in some cases, ignoring of Lopez and Morrison. Morrison emphasized the importance of economic activity to aggregation, contending that prior Supreme Court precedent uniformly supports limiting the permissible scope of regulation under the commerce power to intrastate activity that is "economic in nature" or of an "apparent commercial character," though declining to set out a categorical rule absolutely banning aggregating the effects of any non-economic activity. Two (Ninth and Eleventh) of the three circuits (Sixth, Ninth, and Eleventh) which have upheld as-applied challenges to the constitutionality of the materials-in-commerce prongs in section 2252(a)(4)(B) found aggregation inappropriate because they concluded that the intrastate possession at issue was not economic or commercial in nature. In the view of the Ninth and Eleventh Circuits, the market theory of Rodia, endorsed by the Second, Third, Fifth, and Seventh Circuits, as well as the First Circuit following Morrison, which was the basis for their findings that the aggregation principle was applicable to purely intrastate possession or production of pornography, violates Morrison's restriction of aggregation to intrastate economic activity as well as the non-infinity principle.

But the disagreement over aggregation is in reality more complicated than just a misreading of Morrison; it is also attributable to Morrison's own misreading of earlier authority. Morrison cited an earlier case, Wickard, in support of its general limitation of aggregation to intrastate activity that is economic in nature. But a close reading of Wickard does not seem to support this restriction. The Court in Wickard stated:

"[b]ut even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"

This passage from Wickard was cited in Lopez, which Morrison purported to endorse and apply, but, on its plain
meaning, does not support the limitation to economic intrastate activity posited by Morrison.

An additional difficulty with Morrison’s purported limitation of aggregation to economic or commercial activity is that the Court provided no guidance as to how lower courts are to determine when activity is economic or commercial. As many critics of Morrison (including Justice Breyer in his dissenting opinion joined, in relevant part, by Justices Stevens, Souter, and Ginsburg) have charged, this economic or commercial test sets an unworkable standard because it is too difficult to apply and does not comport with much of the Court’s prior precedent that was endorsed by the majority.213

As a result of these difficulties, the Court has made it impossible for lower courts to steer a safe course between Scylla, demanding respect for the non-infinity principle, and the Charybdis, demanding respect for the aggregation principle. Supreme Court review has unsuccessfully been sought for a number of the federal appeals courts’ decisions on the constitutionality of the materials-in-commerce prongs of the federal child pornography laws. But at the time of this writing, the Supreme Court has a case under review that supplies the opportunity to resolve the tension between the non-infinity principle and the aggregation principle, and to thus better guide courts faced with future challenges to the constitutionality of child pornography possession statutes.

VI. An Opportunity for Resolving the Commerce Clause Dilemma in Federal Child Pornography Cases: Ashcroft v. Raich

This case, Ashcroft v. Raich, does not involve child pornography, but even so, offers the opportunity to resolve the Commerce Clause dilemma in federal child pornography cases. Rather, it concerns Commerce Clause challenge to the federal Controlled Substances Act (CSA) as applied to the intrastate possession, cultivation, or use of cannabis for medical treatment. The Supreme Court was asked to rule on the government’s appeal against the Ninth Circuit’s ruling that the respondents, patients who are using and/or growing cannabis entirely within the State of California to treat or alleviate their serious medical conditions, are entitled to preliminary injunctive relief preventing enforcement of the CSA against them.214

At first glance, the Raich case might be seen as giving rise to more serious federalism or state sovereignty concerns than the child pornography cases discussed above. There is a direct clash between state and federal policy with respect to medical marijuana, but this is not the case for the intrastate possession of child pornography. All states have criminalized such possession, and virtually all have done so without any requirement of distribution or the intent to distribute the child pornography.215 But as Justice Kennedy pointed out in his concurring opinion in Lopez, even where the states and federal government have shared policy goals, they may disagree about how to carry out such goals.216 Justice Kennedy stated “[i]n this circumstance, the theory and utility
of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."\textsuperscript{217}

In \textit{Raich}, the government argued that \textit{Wickard} is controlling authority because the respondents are engaged in "economic activity" that is analogous to the home-grown production of wheat in \textit{Wickard}, in that respondents "are producing a fungible commodity for which there is an established market."\textsuperscript{218} The government pointed out in its written submissions to the Court that, in \textit{Wickard}, the Court upheld congressional regulation of intrastate wheat production even though such activity "may not be regarded as commerce" and the wheat was not "sold or intended to be sold."\textsuperscript{219}

Respondents countered that \textit{Wickard} is distinguishable because the wheat at issue in that case was produced as part of the "quintessentially economic activity" of a commercial farming operation, and most of the excess production was used to support that activity by feeding livestock rather than the farmer's family, whereas the cannabis at issue in \textit{Raich} was cultivated entirely for non-commercial reasons.\textsuperscript{220} Echoing the reasoning of the Ninth Circuit in \textit{Raich}, the respondents contended that whether the commodity at issue can be freely exchanged or sold is less significant than whether it is meant entirely for personal use with no intention to trade it in the marketplace.\textsuperscript{221}

Moreover, respondents suggested that if \textit{Wickard} is held to be controlling, it should be reconsidered to ensure that the principles of federalism and state sovereignty are respected.\textsuperscript{222} They warned that to find for petitioners would unconstitutionally permit the federal government to exercise a general police power, and render the \textit{Lopez} and \textit{Morrison} decisions "dead letters."\textsuperscript{223} In contrast, the government urged the Court to focus on the need for stability and predictability, citing the statement of Justice Kennedy in his concurring opinion in \textit{Lopez} that "the Court as an institution and the legal system as a whole have an immense stake in the stability of [the Court's] Commerce Clause jurisprudence as it has evolved to this point."\textsuperscript{224}

The Court had not yet handed down its ruling in \textit{Raich} at the time this article was written and I find myself in the awkward position of speculating in writing about a ruling that may have been delivered by the time my words are published. At the time that I am writing, it seems quite possible that the Court will dodge the difficult question of whether \textit{Wickard}'s aggregation principle is inconsistent with \textit{Lopez/Morrison}'s non-infinity principle. It could do so by deciding \textit{Raich} on very narrow grounds. For example, one way to evade the issue would be to distinguish \textit{Wickard} on its facts, as respondents urged in their merits brief and Justice O'Connor appeared to support during oral argument.\textsuperscript{225} Another way would be to distinguish \textit{Morrison} and \textit{Lopez} on their facts and find the intrastate activity at issue in \textit{Raich} to fall "on the constitutional side of the line that separates the \textit{Lopez} and \textit{Morrison} case," as the government contended during oral argument and Justice Breyer seemed, at that time, to support.\textsuperscript{226} But for the Court to rule so narrowly would be regrettable, because this would fail to assist lower courts in future cases who find themselves in the impossible situation of attempting to respect the
non-infinity principle and the aggregation principle. It would be more likely to perpetuate the Circuit split than to lead the Circuits toward a uniform approach to aggregation.

To assist future courts, the Court needs to clarify the meaning of “economic” and “noneconomic”, a crucial distinction according to Lopez and Morrison, but one that the Court left vague in those decisions. The respondents in Raich advocated narrowly construing economic activity as requiring some act that amounts to, or gives rise to sale, barter, or exchange. In contrast, the government argued that economic activity is not so limited, but includes the possession or use of any fungible product for which there is a market.

If the Court is true to Morrison’s economic or commercial limitation on aggregation, then it cannot accept the government’s broader construction of “economic” because to do so would effectively collapse the Morrison majority’s distinction between the nature of the effects on interstate commerce and the causes of those effects. But, as Justices Breyer and Souter both pointed out in separate dissenting opinions in Morrison, this distinction does not sit comfortably with the Court’s prior Commerce Clause jurisprudence, such as the Wickard case, nor with the concept of a substantial effects test. As Justice Souter pointed out, “if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial?” Justice Breyer asked, “why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-effecting cause?” Breyer contended that the Court’s prior precedent made clear that “only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant.”

According to Justice Thomas in his concurring opinion in Lopez, which he later reiterated in Morrison, the aggregation principle is flawed because it “has no stopping point”, and thus violates the non-infinity principle. Justices Breyer and Souter also recognized that there was a conflict between the aggregation principle and the non-infinity principle. However, they disagreed that the substantial effects test needed to be reconsidered. Instead, Breyer and Souter contended that the scope of the commerce power was plenary, or virtually plenary, and thus it was the non-infinity principle that should be jettisoned, not the aggregation principle. In support of this contention, Breyer described the modern American economy as one in which, in “practical reality... virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State.”

Justices Breyer and Souter argued that it was for Congress, not the courts, to determine the proper federal-state balance, and thus traditional rational basis scrutiny was all that was required as a test for whether legislation is constitutional under the commerce power.

Hopefully, in its ruling in Raich, the Court will recognize that the unworkability of the majority’s effort in Morrison to preserve both the aggregation principle and the non-infinity principle. It is also to be hoped that it will realize that it must choose to favor one of these principles over the other. In fact, Homer tells us that this was Odysseus’s situation.
Odysseus’ travel advisor, the goddess Circe, gave him the unwelcome news that he would not, in any circumstances, be able to steer safely past both Scylla and Charybdis. She told him that he could either steer close to Charybdis, in which case his ship would be entirely sucked into the whirlpool’s raging waters, or close to Scylla, in which case he would lose at least a half dozen of his crew to the monster’s snapping heads. When Homer asked, “Is there no way . . . of escaping Charybdis, and at the same time keeping Scylla off when she is trying to harm my men?,” the goddess responded, “You dare-devil, you are always wanting to fight somebody or something: you will not let yourself be beaten, even by the immortals.” But she went on to inform him that there was no safe course that could avoid both dangers.

The same lesson applies to the Court’s Commerce Clause jurisprudence. Like Odysseus, the Lopez and Morrison majorities have sought to avoid both the dangers of failing to comport with the non-infinity principle and the aggregation principle. But as Odysseus learned to his dismay, this middle course is not really possible. If the Supreme Court does not face the fact that it can choose only one danger to completely avoid, the likely result will be continued disagreement among the circuits in Commerce Clause challenges to the materials-in-commerce prongs of the child pornography possession and manufacturing statutes. Raich offered the Court the opportunity to face reality and deliver a landmark ruling that will clarify the law. Certainly, from a Homeric perspective, the timing of this choice would be appropriate. Odysseus’ famous journey lasted for ten years and it has been almost ten years since the Court’s decision in Lopez.

NOTES

1 New York v. Ferber, 458 U.S. 747, 756-764 (1982) (unanimously finding that child pornography could be regulated even where it was not obscene because there was a compelling State interest in protecting the physical and psychological well-being of minors and the distribution of child pornography was “intrinsically related to the sexual abuse of minors,” advertising and selling child pornography provided an economic motive for the production of such material, and there was limited or no social value in live performances or photographic images of children engaging in sexual conduct; also holding that the test for child pornography differed from the test for obscenity in the following ways: (1) a trier of fact did not have to prove that the work appealed to the prurient interest; (2) the work did not need to portray sexual content in a patently offensive manner; and (3) the work need not be considered as a whole); Miller v. California, 413 U.S. 15, 24 (1973) (setting out a three-part test for obscenity, namely: "(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically described by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value").

2 See, e.g., Department of Justice, Child Exploitation and Obscenity Section, Child Pornography website, at http://www.usdoj.gov/criminal/ceos/childporn.html (claiming that the market for child pornography had almost been wiped out by the 1980s, but digital technologies reversed this trend, leading to massive growth in the production of and trafficking in child pornography).

3 While I believe that most people would be comfortable with this assumption, there has been some scholarly criticism of child pornography laws. See, e.g., Amy Adler, The Perverse Law of Child Pornography, 101 COLUM. L. REV. 209 (2001) (suggesting that child pornography laws may have unintended consequences, such as increasing
pedophilic desire, though accepting that such laws also have social benefits).


5 See infra note 10.

6 18 U.S.C. § 2256(8)(A)-(C) (2004). The original section 2256(8)(B), which prohibited a visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct", and another original provision, section 2256(8)(D), which barred images of sexually explicit conduct that were "advertised, promoted, presented, depicted, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct", were found overbroad and unconstitutional under the First Amendment. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

7 Stanley v. Georgia, 394 U.S. 557, 565 (1969) (stating "[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch").


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”) and 18 U.S.C. § 2252A(a)(5)(B) (2004) (providing: “Any person who . . . B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; . . . shall be punished as provided in subsection (b)”). Section 2252A was added by the Child Pornography Prevention Act of 1996, see supra note 4, which sought to redress the problem of new computer technologies being used by child pornographers to shield themselves from federal child pornography prosecutions. See David T. Cox, Litigating Child Pornography and Obscenity Cases in the Internet Age, 4 J. TECH L. & POL’Y 1, 23-33 (Summer, 1999).

Whereas section 2252 requires a visual depiction of an actual minor engaging in sexual conduct, section 2252A sought to expand child pornography to also include computer manipulated or generated images that appeared to be of minors engaging in sexual conduct, but were not really of minors. See supra note 4. To this end, section 2252A added a new definition of “child pornography” to the definitions section in 18 U.S.C. §2256. Section 2252A also added “computer disk” to the types of media specifically listed in section 2252 as triggering a violation for their possessor if they contain child pornography.

11 See United States v. Maxwell, 386 F.3d 1042, 1052 (11th Cir. 2004); United States v. Angle, 234 F.3d 326, 341 (7th Cir. 2000).

12 18 U.S.C. §§ 2251(a)-(b) (2004). 18 U.S.C. § 2251(a) provides: “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.” 18 U.S.C. § 2251(b) provides: “Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or 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.”


17 See infra notes 30-34 and accompanying text.

18 Lopez, 514 U.S. at 549.


20 United States Constitution Art. I § 8 cl. 3.
and Breyer, JJ.) (likening the reasoning of the
(Souter, J., dissenting, joined by Stevens, Ginsburg,
Mining & Reclamation Ass'n, Inc., 452 U.S. 264,
1, 3 (2004).

The New Federalism in Perspective,
also quoted in
311 (1981) (Rehnquist, J., concurring), which was

be).

shed any further light on what this standard might
Commerce Clause jurisprudence", but he did not
Clause without totally rejecting our more recent
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should "further reconsider our "substantial effects"
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extreme, would give Congress a 'police power' over
substantial effects test, "taken to its logical
caused by racial discrimination).

eliminating obstacles to interstate commerce
racial discrimination affected interstate commerce
and the statute was a reasonable means for
Title II of the Civil Rights Act on the grounds that
Congress had a rational basis for concluding that
racing discrimination affected interstate commerce
and the statute was a reasonable means for
elimitating obstacles to interstate commerce
cased by racial discrimination).

28 Lopez, 514 U.S. at 584-85 (Thomas, J.,
concurring.) (Thomas voiced concern that the
substantial effects test, “taken to its logical
would give Congress a ‘police power’ over
all aspects of American life”. Thomas recommended
that the Court, in an appropriate future case,
should “further reconsider our "substantial effects"
test with an eye toward constructing a standard
that reflects the text and history of the Commerce
Clause without totally rejecting our more recent
Commerce Clause jurisprudence”, but he did not
shed any further light on what this standard might
be).

29 United States v. Morrison, 529 U.S. 598
(2000).

30 Id. at 610-13.

31 Id. at 614-15.

32 Id. (quoting Hodel v. Virginia Surface Mining &
Reclamation Ass'n, Inc., 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring), which was
also quoted in Lopez, 514 U.S. at 557).

33 Id. at 613.

34 Id. at 611 n. 4.

35 See, e.g., Mark R. Killenbeck, In(re)Dignity:

36 See, e.g., Morrison, 529 U.S. at 642-43
(Souter, J., dissenting, joined by Stevens, Ginsburg,
and Breyer, JJ.) (likening the reasoning of the
Lopez majority to the “formalistcally contrived
confines of the commerce power” adhered to in
decisions like A.L.A. Schechter Poultry Corp. v.
U.S., 295 U.S. 495 (1935), in which, in striking
down regulations fixing hours and wages of the
employees of an intrastate business, the Court
drew a distinction between direct effects of
intransact transactions on interstate commerce,
which could be regulated under the Commerce
Clause, and indirect effects of such transactions on
instate commerce, which could not be.) In
Schechter Poultry, the Court stated that this
distinguion was “a fundamental one, essential to the
maintenance of our constitutional system”, basing
it on a fear now often termed the “non-infinity
principle”, that without drawing this distincion
“there would be virtually no limit to the federal
power and for all practical purposes we should have
a completely centralized government.” Id. at 548.
See also Killenbeck, supra note 35, at 4.

37 See, e.g., Daniel A. Farber, The
Constitution’s Forgotten Cover Letter: An Essay on
the New Federalism and the Original
Understanding, 94 MICH. L. REV. 615 (1995)
(criticizing New Federalist view of the original
understanding of the Framers as the first
principles of federalism); Herbert Hovenkamp,
Judicial Restraint and Constitutional Federalism:
The Supreme Court’s Lopez and Seminole Tribe
(criticizing New Federalists for reliance on public
choice theory and warning of social dangers should
the Court choose to follow Justice Thomas’s
concurrence in Lopez); Erwin Chemerinsky,
Formalism and Functionalism in Federalism
(criticizing the New Federalist approach as overly
formalistic and “misguided”); The Federalism
Revolution, Erwin Chemerinsky, 31 N.M.L. REV. 7
(2001) (predicting many challenges to federal laws
following Morrison); Elizabeth S. Saylor,
Federalism and the Family After Morrison: An
Examination of the Child Support Recovery Act, the
Freedom to Access the Clinic Entrances Act, and a
Federal Law Outlawing Gun Possession by
Domestic Violence Abusers, 25 HARV WOMEN’S L.J.
57, 141 (2000) (criticizing Morrison as wrongly
decided; warning that the constitutionality of
various specific pieces of federal legislation relating
to the family, including the Child Support Recovery
Act and the Freedom of Access to Clinic Entrances
Act, were open to question after Morrison; and
commenting that “it is difficult to disentangle what
aspects of the federalism revolution hope to legitimately protect state interests from federal overreach and what aspects are motivated largely (or entirely) by a hostility to women's rights, or the rights revolution in general); Jesse Choper, Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?, 55 ARK L. REV. 731, 739 (2003) (stating that "the Court has not carefully delineated the boundary for when the underlying activity is economic or noneconomic in character, and its plasticity seems to show that it provides neither a workable nor meaningful standard for judicial review"); Donald H. Zeigler, The New Activist Court, 45 AM. U. L. REV. 1367 (1996) (accusing the Court of being judicially activist and ignoring precedent).

38 See, e.g., Charles Fried, Foreword: Revolutions?, 109 HARV. L. REV. 13, 34 (1995) (seeking to counter the view that Lopez was a revolutionary case by arguing that it was a piece of "judicature that, by its modesty of statement, meticulousness of reasoning, and plausibility of result, fulfills the constitutional function of providing the regularity, definiteness, continuity and textuality that are the indicia of the rule of law to which the public is probably more devoted than to any specific constitutional doctrine or ruling"); Steven Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 830-31 (1995) (defending federalism as a "good thing" that "greatly increases the likelihood of future peace, free trade, economic growth, respect for social and cultural diversity, and protection of individual human rights" and should not be left to the political branches of government to enforce; also arguing that the Court should not concentrate on enforcing Fourteenth Amendment while ignoring enumerated powers); Ronald D. Rotunda, The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?, 55 ARK. L. REV. 795 (2003).


41 See Brannon P. Denning & Glenn H. Reynolds, Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts, 55 ARK. L. REV. 1253, 1262 n.62 (2003), Saylor, supra note 37, at 77-82, Choper, supra note 37, at 739, 743-44 (noting questions about the boundary between economic and noneconomic activities as well as the scope of the aggregation principle), Kmiec, supra note 39, at 558.


44 Id. at 58.

45 Id. at 56-57 (citations omitted).

46 Id. at 57 (citations omitted).

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

48 Id. Maxwell had also sought reversal of his conviction on three other grounds, which were all rejected. These were: (1) that uncharged evidence and images had wrongly been admitted into evidence; (2) that the evidence was insufficient to establish the required element of knowledge that the charged disks contained child pornography; and (3) that the disk did not produce pornographic images where Maxwell did not create the child pornography but only stored it. Id. at 1049-53.

49 Id. at 1053 n.12.

50 Id. at 1046.

51 Id.

52 Id.

53 Id.

54 Id.

55 Id. at 1045.

56 Id. at 1045-46.

57 Id. at 1046.

58 Id. at 1048.

59 Id. at 1045.

60 Id.

61 Id. at 1049, 1052.

62 Id. at 1055.

63 Id.

64 Id. at 1055-56.

65 Id. at 1056-68. See supra note 30 and accompanying text.

66 United States v. Maxwell, 386 F.3d 1042, 1056 (11th Cir. 2004). A footnote notes that no judgment was being made "as to whether the distinct acts of producing, buying, selling, trading, warehousing, distributing, or marketing child pornography constitute economic or commercial activity." Id. at 1056 n.15.
NEXUS

69 Id. at 128-29.
70 Maxwell, 386 F.3d at 1057.
71 Id. at 1058.
72 Id. at 1057.
73 Id. at 1058-59.
75 Id. at 1059.
76 Id. at 1058-61.
77 Id.
78 Id. at 1060-61.
79 See Morrison, 529 U.S. at 611-12.
80 Maxwell, 386 F.3d at 1062-63 (not commenting on the sufficiency of the other jurisdictional hook in 18 U.S.C. § 2252A(a)(5)(B), that the charged child pornography "has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer").
81 See Morrison, 529 U.S. at 612.
82 Maxwell, 386 F.3d at 1064. This clarified a question left open by Lopez. See Denning & Reynolds, supra note 41, at 1260.
83 Maxwell, 386 F.3d at 1064-65.
84 Id. at 1058-59, 1061.
85 Id. at 1066.
86 Id. at 1058. See Morrison, 529 U.S. 612.
87 Maxwell, 386 F.3d at 1058.
88 Id. at 1067-68.
89 Id. at 1068.
90 Id.
91 Id. at 1068 n.25.
92 See infra notes 95-100 and accompanying text.
93 See infra notes 101-154 and accompanying text.
94 See infra notes 155-162 and accompanying text. The Fourth Circuit's rules no longer bar citation to unpublished decisions, though this is "disfavored". See 4th Cir. R. 36(c).
95 United States v. Robinson, 137 F.3d 652, 656 (1st Cir. 1998).
98 Hoggard, 254 F.3d at 746.
99 Id.
100 Hampton, 260 F.3d at 834-35.
102 Id. at 469.
103 Id. at 471.
104 Id.
105 Id. at 468, 473. In a concurring opinion, Judge Roth disagreed with the majority's separate consideration of the jurisdictional element and the effect of child pornography on interstate commerce, believing they should be considered together. Id. at 482.
106 Id. at 473.
107 Id. at 468, 479.
108 Id. at 477.
109 Id. at 474-75, 477.
110 Id. at 478.
111 Id.
112 Id. at 475.
113 Id. (citing Wickard v. Filburn, 317 U.S. 111, 125 (1942)).
114 Id. at 477.
115 Id. at 476-77.
117 Id. at 574-76.
118 Id. at 575-76.
119 Id. at 575.
120 United States v. Randolph, 364 F.3d 118, 120-21, 125 (3d Cir. 2004). See also Doe v. Chamberlin, 299 F.3d 192 (3d Cir. 2002).
121 See Rodia, 194 F.3d at 476; see supra note 95 and accompanying text.
122 United States v. Robinson, 137 F.3d 652, 653 (1st Cir. 1998).
123 See id. at 656; supra note 95 and accompanying text.
124 Robinson, 137 F.3d at 656 (citation omitted).
125 Id.
126 United States v. Morales-De Jesus, 372 F.3d 6 (1st Cir. 2003). There were two concurring opinions. The first, by Judge Lynch, found it unnecessary to rule on the facial challenge since
the panel was bound by Robinson to rule against defendant on his as-applied challenge. Id. at 22. The second, by Judge Oberdorfer, stated that the majority decision did not foreclose other appropriate as-applied challenges. Id.

127 Id. at 7-8.
128 Id. at 20-21.
129 Id. at 12, 17-18, 20.
130 Id. at 17-18
131 Id. at 16.
132 Id. at 16-17.
133 Id. at 18.
134 Id.
135 Id.
136 Id.
137 See United States v. Holston, 343 F.3d 83-91 (2d Cir. 2003).
138 Id. at 89.
139 Id. at 88-91.
140 Id. at 89.
141 Id. at 89-91.
142 Id. at 90-91.
143 United States v. Harris, 358 F.3d 221 (2d Cir. 2004).
144 United States v. Kallestad, 236 F.3d 225, 226, 231 (5th Cir. 2000).
145 Id. at 229.
146 Id.
147 Id. at 228.
148 Id. at 226, 230.
149 Id. at 231-33.
151 Id. at 337.
152 Id. at 337-38.
153 Id. at 338.
154 Id.
156 Id. at 241.
157 See supra note 96 and accompanying text.
158 See supra notes 105-106, 145-46, 151 and accompanying text.
159 See Harden, 45 Fed. Appx. at 241; see infra note 183 and accompanying text.
160 Harden, 45 Fed. Appx. at 241.
161 Id.
162 United States v. Corp, 236 F.3d 325, 332 (6th Cir. 2001).
165 Id. at 1116 (The defendant was originally charged with violating 18 U.S.C. § 2251(a) and (b). After her husband's acquittal under a charge of violating 18 U.S.C. § 2251(b), the government filed a superseding information charging her with one count of possessing child pornography under 18 U.S.C. § 2252(a)(4)(B).
166 Id. at 1118-33.
167 Id. at 1119-24.
168 Id. at 1131.
169 Id. at 1125-26.
170 Id. at 1121-22.
171 Id. at 1121
172 Id. at 1122.
173 Id.
174 Id. at 1127.
175 Id. at 1120, 1122-23 (citation omitted).
176 Id. at 1133-1141.
177 Id. at 1140.
178 United States v. Adams, 343 F.3d 1024, 1026, 1030 n.3, 1033-34 (9th Cir. 2003), cert. denied, 159 L.Ed.2d 779 (2004).
179 Id. at 1031 (citing McCoy, 323 F.3d at 1124).
180 Id.
181 United States v. Corp, 236 F.3d 325, 326 (6th Cir. 2001).
182 Id. at 326.
183 Id. at 331.
184 Id. at 332.
185 Id.
186 Id. at 332-33.
187 Id. at 333.
188 Id.
189 United States v. Morales-De Jesus, 372 F.3d 6, 20-21 (1st Cir. 2004).
190 See supra notes 97-100 and accompanying text.
191 See supra notes 95-96, 157 and accompanying text.
192 See supra notes 80, 105-106, 118, 128, 138, 145, 169, 179, 183 and accompanying text.
193 United States v. Maxwell, 386 F.3d 1042, 1062 (11th Cir. 2004).
194 See, e.g., United States v. Morales-De Jesus, 372 F.3d 6, 14 (1st Cir. 2003).


196 Id. at 613.


198 Morrison, 529 U.S. at 611-12 (citing Lopez, 514 U.S. at 562).

199 See supra note 107 and accompanying text.

200 Morrison, 529 U.S. at 608 (citing Lopez, 514 U.S. at 556-57).

201 See supra notes 156-159 and accompanying text.

202 See Denning & Reynolds, supra note 41, p. 1256. See also Glenn H. Reynolds & Brannon P. Denning, Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?, 2000 Wis. L. Rev. 369 (2000).

203 See Denning & Reynolds, supra note 41, p. 1297.

204 Id. at 1303-1305.

205 See supra notes 102, 116, 122, 127, 137, 144, 150, 155, 163 and accompanying text.

206 See supra notes 84, 164, 182 and accompanying text.

207 See, e.g., United States v. Maxwell, 386 F.3d 1042, 1061 (11th Cir. 2004), United States v. McCoy, 323 F.3d 1114, 1130 (9th Cir. 2002).


209 See supra notes 66, 175 and accompanying text.

210 See supra notes 73-75, 170-175 and accompanying text.

211 Morrison, 529 U.S. 598 at 610.


213 Morrison, 529 U.S. at 656 (Breyer, J., dissenting).


217 Id.

218 Petitioners’ Brief at 21-22, Raich (No. 03-1454).

219 Reply Brief for the Petitioners at 7, Raich (No. 03-1454) (citing Wickard v. Filburn, 317 U.S. 111, 119, 125).

220 Brief for Respondents at 15-16, Raich (No. 03-1454). The respondents also make several other
arguments for distinguishing Wickard, including pointing out that the regulation at issue in Wickard, the Agricultural Adjustment Act, had an exemption for small farming operations, unlike the CSA. Id. at 14-15. The government counters in reply that this issue was not discussed in the Commerce Clause part of the Court's ruling in Wickard. Reply Brief at 9, Raich (No. 03-1454).

221 Respondents' Brief at 16, Raich (No. 03-1454), Raich v. Ashcroft, 352 F.3d 1222, 1231 (9th Cir. 2003).

222 Respondents' Brief at 13, Raich (No 03-1454).

223 Id. at 20, 25-26.


226 Id. at 17, 39.

227 Respondents' Brief at 24, Raich (No. 03-1454).

228 Transcript of Oral Argument at 18, Raich (No. 03-1454), Reply Brief at 1, Raich (No. 03-1454).


230 Id. at 644 (Souter, J., dissenting).

231 Id. at 657 (Breyer, J., dissenting).

232 Id. at 657-58 (Breyer, J., dissenting).

233 Lopez, 514 U.S. at 600 (Thomas, J., concurring). Morrison, 529 U.S. at 627 (Thomas, J., concurring).

234 Morrison, 529 U.S. at 659-60 (Breyer, J., dissenting). 643 (Souter, J., dissenting).

235See id. at 660 (Breyer, J., dissenting). 640-44 (Souter, J., dissenting).

236 Morrison, 529 U.S. at 660 (Breyer, J., dissenting). See also id. at 647 (Souter, J., dissenting).

237 Id. at 660, 663-64 (Breyer, J., dissenting). 649 (Souter, J., dissenting).

238 HOMER, supra note 14, at 251.

239 Id.

240 Id.