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United States v. Corp: Where to Draw the Interstate Line on Congress' Commerce Clause Authority to Regulate Intrastate Possession of Child Pornography

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I. Introduction

Some crimes kill the spirit, while letting the body live. Maybe that's why they seem the most vicious. Child pornography is that kind of crime, an assault on the soul as much as the flesh. Many of the victims live in darkness before finding the light again. Some never do.¹

Traditionally, child molesters, pedophiles and child pornographers had to cruise the streets and visit parks or playgrounds where children play in order to locate a victim and satisfy their urges.² Some child exploiters are highly esteemed members of the community in positions that provide easy access to children.³ Regardless of how they find their victims, child exploiters have communicated with one another through secret underground clubs

¹. It's Not So New; The new child pornography, ARK. DEMOCRAT-GAZETTE, Jan. 16, 2001, at B4 [hereinafter It's Not So New] (stating that stepdaughter in psychiatric hospital and stepfather in jail, after stepfather raped her and took photos of her); see also Frontline, Innocence Lost the Plea, at http://www.pbs.org/wgbh/pages/frontline/shows/innocence (last visited Jan. 4, 2002) (providing summary of how seven defendants, who ran Little Rascals Day Care in Edenton, N.C., ruined lives of twenty-nine children and were charged with 429 counts of heinous sexual abuse).


³. See Doyle, supra note 2, at 122 (stating that U.S. Customs officials arrested minister, church choir leader, pediatrician and former head of child abuse unit for New Orleans Police Department, all on child pornography charges).
and networks. The advent of the Internet, however, has radically changed these traditional networks.

The continual expansion of the Internet has revolutionized communication and interpersonal relations throughout the world. This revolution in technology has also "turned out to be the greatest single advancement in the history of pedophilia." The Internet provides child exploiters with unique opportunities.

Now, the child exploiter has something that before the Internet Age he could only dream about - unlimited and unrestricted access to vulnerable children and a limitless source of child pornography. For example, chat rooms allow child exploiters to lure vulnerable children to meet them, talk with other child exploiters or trade sexually explicit photographs of children. Other sites allow users to download pictures or order child pornography merchandise. "At any given time, there are, on average, around one million sexually explicit pictures of children on the Internet." In response, the federal and state governments developed legislation that prohibited the production, sale and distribution of

4. See id. (stating that child exploitation "business transactions" were difficult due to secretive nature and interested persons either belonged to child sex rings or knew someone who did); see also Gado, supra note 2 (stating child exploiters relied on newspaper ads, sex clubs and prison contacts to communicate).

5. See Doyle, supra note 2, at 125 (stating that anyone with computer, modem and scanner can produce, access and distribute child pornography around world via Internet).


8. See It's Not So New, supra note 1 (commenting that e-pornography business thriving and Internet removed all obstacles and borders for child pornography).

9. See US Spins Wider Web to Halt Child Porn On-line, CHRISTIAN SCI. MONITOR, Oct. 5, 2000, at 3. U.S. Customs official logged onto Internet chat room and found sixty to seventy men trading child pornography. See id.; see also Gado, supra note 2. "The Seattle Times reported that by 1998, over 1,500 suspected pedophiles in [thirty two] states have been identified through various chat rooms on America's most popular [I]nternet service (October 26, 1999)." Id.

10. See David Harper, Ruling Said No Obstacle, TULSA WORLD, Feb. 6, 2000. Officials detected two computer disks containing fifty-seven child pornography images. See id. "Common sense would tell you that what was on those disks came from the Internet . . . ." Id. Separate defendant pled guilty for possessing four computer disks containing downloaded images of child pornography from the Internet. See id.; see also Gado, supra note 2 (stating searches for child pornography in popular browsers quickly returned results to numerous disturbing websites).

child pornography. This Comment narrowly focuses on the impact of the Protection of Children Against Sexual Exploitation Act of 1977 ("CASE"), as amended. More specifically, this Comment focuses on the judicial interpretation of section 2252(a)(4)(B), which Congress added as part of the amendments contained in the Child Protection Restoration and Penalties Enhancement Act of 1990 ("CPRPE Act"). This particular section of the CPRPE Act allows the federal government to punish those in possession of child pornography that crossed interstate borders.

Section II of this Comment provides the legislative history of the CPRPE Act. Additionally, this section provides recent U.S. Supreme Court caselaw concerning the Commerce Clause. Section II also provides the various circuit court cases that interpret Congress' authority to regulate possession of child pornography under the Commerce Clause. Section III considers the various courts' holdings examining intrastate possession of child pornography. Section IV analyzes the courts' opinions in light of the Commerce Clause precedent. Finally, Section V summarizes the varying


13. For a discussion of CASE, see infra notes 21-39 and accompanying text.

14. See 18 U.S.C. § 2252 (2001). The relevant portion of this child pornography statute reads as follows:

   knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

   (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

   (ii) such visual depiction is of such conduct.

   § 2252(a)(4)(B); see also 18 U.S.C. § 2256(1) (2001). For purposes of § 2252, a "minor" is "any person under the age of eighteen years." 18 U.S.C. § 2256(1).

15. For a discussion of the legislative history, see infra notes 21-39 and accompanying text.

16. For a discussion of the recent U.S. Supreme Court cases concerning the commerce clause, see infra notes 40-57 and accompanying text.

17. For a discussion of the cases concerning Congress' authority to regulate child pornography under the CPRPE Act, see infra notes 58-101 and accompanying text.

18. For a discussion of the different courts' holdings regarding Congress' authority to regulate child pornography under the CPRPE Act, see infra notes 102-161 and accompanying text.

19. For an evaluation of the different courts' holdings under the CPRPE Act, see infra notes 162-186 and accompanying text.
courts' decisions, their impact and concludes in favor of the Sixth Circuit's interpretation of the CPRPE Act. 20

II. BACKGROUND

A. History of 18 U.S.C. § 2252

Congress, in 1978, enacted section 2252 of CASE. 21 Congress enacted this section after finding that child pornography represented "a large industry – representing millions of dollars in annual revenue – that operates on a nationwide scale and relies heavily on the use of the mails and other instrumentalities of other state and foreign commerce." 22 Congress enacted CASE to fill gaps in current federal laws that protected the health and welfare of children in the United States. 23 At the time of its enactment, section 2252 only prohibited the sale, distribution or transportation of child pornography that moved in interstate or foreign commerce. 24 Additionally, the original statute required that the child pornography be

20. See infra notes 187-193 and accompanying text.

Any person who –
(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any, obscene visual or print medium, if –
(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
(B) such visual or print medium depicts such conduct; or
(2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if –
(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
(B) such visual or print medium depicts such conduct; shall be punished as provided in subsection (b) of this section.
§ 2(a), 92 Stat. at 8 (1978). For purposes of § 2253, a "minor" was originally defined as a person under the age of sixteen. See 18 U.S.C. § 2253 (1978).
obscene. Congress also believed CASE would help eliminate the close connection between child pornography and child prostitution.

The Child Protection Act of 1984 ("CPA") substantially amended section 2252 to improve the federal government's ability to investigate and prosecute violations. The 1984 amendments eliminated the "for the purpose of sale or distribution for sale," "pecuniary profit" and "obscene" requirements. Furthermore, the CPA amendments added a prohibition on the reproduction of child pornography for distribution and raised the age of majority to eighteen. Finally, the CPA amendments substantially increased the monetary fines imposed for child pornography possession violations.

Later, the Child Abuse Victims' Rights Act of 1986 ("CAVRA") strengthened the overall law and directly amended section 2252(b) by increasing the minimum sentence for repeat offenders from two to five years. The CAVARA included legislative findings that stated: "[c]hild exploitation has become a multi-million dollar industry, infiltrated and operated by elements of organized crime, and by a nationwide network of individuals openly advertising their desire to exploit children." Furthermore, the Child Protection and Obscenity Enforcement Act of 1988 amended section

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28. See § 4, 98 Stat. at 204-05; see also H.R. Rep. No. 98-536, at 1-2 (noting recent U.S. Supreme Court case eliminated First Amendment requirement of showing obscenity as condition precedent in government's interest in protecting children).


30. See § 4, 98 Stat. at 204-05 (raising maximum fine for first offense from $10,000 to $100,000 and subsequent offense from $15,000 to $200,000).


32. § 702, 100 Stat. at 3341-74 (including legislative findings of "physiological, psychological, and emotional harm caused by the production, distribution, and display of child pornography . . . .").
2252(a)(1) to expressly prohibit the movement of child pornography "by any means including by computer." 33

The statute, however, failed to address local possession, until the Messes Commission extensively investigated the national commercial nature of child pornography. 34 The CPRPE Act added the presently challenged section 2252(a)(4)(B). 35 The new paragraphs (a)(3) and (a)(4) now contain a broadened jurisdictional element that includes child pornography "produced using materials" that moved in interstate or foreign commerce, and an alternative jurisdictional element that is based on the location of the sale or possession of the child pornography. 36

The Protection of Children From Sexual Predators Act of 1998 added the latest amendment to section 2252 by increasing the penalties for child pornography offenses. 37 The amendment reduced, from three or more to one or more, the required number of child pornography materials required for a conviction. 38 Additionally, the amendment created an affirmative defense for defendants possessing less than three such materials whom "promptly and in good faith . . . took reasonable steps to destroy each such visual depiction; . . . or reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction." 39

B. Recent Developments in Commerce Clause Litigation

Notwithstanding previous Commerce Clause precedent, United States v. Lopez 40 is a starting point for determining whether a particular statute is an unconstitutional exercise of Congress’ Commerce

34. See U.S. DEP’T OF JUSTICE Attorney General’s Commission on Pornography: Final Report 406, 475 (1986) (stating that child pornography "involves photographs taken by child abusers themselves, and then either kept or informally distributed to other child abusers").
35. See Child Pornography Act Amendments, Pub. L. No. 101-647, §§ 323(a), (b), 104 Stat. 4816, 4818 (1990); Pub. L. No. 101-647, § 1, 104 Stat. 4789, 4789 (1990). The CPRPE Act was enacted as part of the Crime Control Act of 1990. See § 1, 104 Stat. at 4789; see also United States v. Rodia, 194 F.3d 465, 481 (3d Cir. 1999) (finding that before 1990 Amendment "it was costly for pornographers to traffic in pornography across state lines, though it was costless (at least under federal law) to manufacture and use pornography intrastate").
36. See § 323(a), 104 Stat. at 4818.
Clause authority.\textsuperscript{41} In \textit{Lopez}, the Supreme Court determined that the Gun-Free School Zones Act ("GFSZA"), which punished those who knowingly possessed a firearm within a designated school zone, was an unconstitutional regulation.\textsuperscript{42} The Court held that "[t]he Act neither regulate[d] a commercial activity nor containe[d] a requirement that the possession be connected in any way to interstate commerce."\textsuperscript{43} In reaching its decision, the Court was concerned with granting Congress excessive power that would allow them to regulate any type of activity remotely associated with economic productivity.\textsuperscript{44} The \textit{Lopez} Court held that the Commerce Clause permitted Congress to regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce.\textsuperscript{45}

The Court evaluated the GFSZA under the third prong.\textsuperscript{46} The majority of the Court held that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might... substantially affect any sort of interstate commerce."\textsuperscript{47} Additionally, the Court noted that the GFSZA contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."\textsuperscript{48}

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\textsuperscript{41} See U.S. CONST. art. I, § 8, cl. 3. "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." \textit{Id.}
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\textsuperscript{42} See \textit{Lopez}, 514 U.S. at 551; see also 18 U.S.C. § 922(q)(2)(A) (2000). "[F]or any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone" is a federal offense. § 922(q)(2)(A).
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\textsuperscript{43} See \textit{id.} at 551.
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\textsuperscript{44} See \textit{id.} at 564. If the Government's viewpoint was accepted, "Congress could regulate any activity... related to economic productivity of individual citizens" and that "it [would be] difficult to perceive any limitation on federal power." \textit{Id.}
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\textsuperscript{45} See \textit{id.} at 558-59.
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\textsuperscript{46} See \textit{id.} at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); see also \textit{id.} at 559 (finding that GFSZA did not regulate use of channels of interstate commerce nor protect instrumentality of interstate commerce).
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\textsuperscript{47} \textit{Id.} at 567. The Court rejected the government's argument that violent crimes affected the national economy through the cost of insurance that ultimately spreads to everyone, and that violent crimes deterred people from traveling to areas they believed were unsafe. See \textit{id.} at 568-64. But see Glen H. Reynolds & Brannon P. Denning, \textit{Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came}, 2000 Wis. L. Rev. 369, 374 (2000) (noting that four dissenters in \textit{Lopez} accepted government's "national productivity" argument).
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\textsuperscript{48} \textit{Lopez}, 514 U.S. at 561.
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The Supreme Court further articulated the proper Commerce Clause review by applying the *Lopez* factors in *United States v. Morrison*. The Court, in *Morrison*, struck down 42 U.S.C. § 13981 as unconstitutional. This statute, also known as the Violence Against Women Act ("VAWA"), provided a federal civil remedy for the victims of gender-motivated crimes. In *Morrison*, Christy Brzonkala alleged that two members of the varsity football team assaulted and repeatedly raped her when all three were students at Virginia Tech. After school administrative remedies proved futile, Brzonkala brought suit in federal court under VAWA, *inter alia*, against her assailants and the university. In determining the Commerce Clause controversy, the Court posed four questions in addition to the *Lopez* factors:

1. Is the prohibited activity commercial or economic in nature?
2. Is there an express jurisdictional element involving interstate activity which might limit the statute's reach?
3. Did Congress make findings about the effects of the prohibited conduct on interstate commerce?
4. Is the link between the prohibited activity and the effect on interstate commerce attenuated?

First, the court noted that the conduct being controlled by section 13981 [gender-motivated violence] was "not, in any sense of the phrase, economic activity." Second, the Court found that, like the GFSZA, the statute contained no explicit jurisdictional ele-

49. 529 U.S. 598 (2000).
50. *See Morrison*, 529 U.S. at 617, 627 (rejecting government's argument that Congress authorized to regulate noneconomic, violent conduct based on aggregate effect on interstate commerce).
51. *See 42 U.S.C. § 13981* (2001). "A person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured." § 13891(c). Congress limited § 13891 by stating "nothing in this section entitles a person to a cause of action . . . for random acts of violence unrelated to gender or for acts that can not be demonstrated . . . to be motivated by gender." *Id.* at § 13891(e)(1). Furthermore, the statute did not cover state-law claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." *Id.* at § 13891(e)(4).
52. *See Morrison*, 529 U.S. at 602-03 (stating that attack caused Brzonkala to become severely depressed and ultimately withdraw from university).
53. *See id.* at 604 (stating that previous school-conducted hearing that found Morrison guilty of sexual assault and sentenced him to two semester suspension was subsequently reduced to "using abusive language" and school repealed his sentence).
54. *Id.* at 610-11.
55. *Id.* at 613 (stating that cases upholding Commerce Clause regulation of intrastate activity have been "only where the activity is economic in nature").
Third, in contrast to *Lopez*, the Court acknowledged that numerous congressional findings showed that gender-motivated violence had serious impacts on the victims and their families; however, the congressional findings alone were insufficient to sustain the constitutionality of the legislation under the Commerce Clause.\(^{57}\)

C. Circuit Courts’ Decisions Regarding Section 2252(a)(4)(B)

In recent years, numerous federal appellate courts have upheld Congress’ Commerce Clause authority to regulate the possession of child pornography under the CPRPE Act. The circuit courts have developed two distinct methods of judicial interpretation: 1) objective and narrow and 2) subjective and broad. For instance, the First and Eighth Circuits, in *United States v. Robinson*\(^{58}\) and *United States v. Bausch*,\(^{59}\) respectively, have held that the presence of a jurisdictional element, or “hook,” is alone sufficient to constitutionally allow Congress to regulate, through interstate commerce, the purely intrastate possession of child pornography.\(^{60}\) Conversely, the Third, Fifth and Seventh Circuits in *United States v. Rodia*,\(^{61}\) *United States v. Kallestad*\(^{62}\) and *United States v. Angle*,\(^{63}\) respectively, used a different theory to uphold Congress’ Commerce Clause authority. These courts determined that Congress could rationally conclude that possession of child pornography “substantially affected” interstate commerce and the means were rationally related to a legitimate government interest. The courts evaluated the specific facts of each defendant’s possession and source of ille-

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56. See id. at 611-12.

57. See *Morrison*, 529 U.S. at 614 (“Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”) (internal quotations omitted) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 311 (1981)).

58. 137 F.3d 652 (1st Cir. 1998).

59. 140 F.3d 739 (8th Cir. 1998).

60. See *United States v. Harrington*, 108 F.3d 1460, 1465 n.2 (D.C. Cir. 1997). A jurisdictional element or “hook” refers to a provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute. See id.; see also *United States v. Pierson*, 139 F.3d 501 (5th Cir. 1998). A jurisdictional element expressly requires a nexus between the activity regulated and interstate commerce, thus ensuring Congress exercised its Commerce Clause authority to reach a discrete set of criminal acts that have an explicit connection with or effect on interstate commerce. See *Pierson*, 139 F.3d at 553.

61. 194 F.3d 465 (3d Cir. 1999).

62. 236 F.3d 225 (5th Cir. 2000).

63. 234 F.3d 326 (7th Cir. 2000).
gal child pornography to determine if the materials, in any way, affected interstate commerce.\(^{64}\)

1. **Narrow, Strict Holdings**

In *Bausch*, the defendant James Donald Bausch took pictures of two girls, aged fifteen and sixteen with a camera made in Japan.\(^{65}\) The girls posed nude and in sexually suggestive scenes.\(^{66}\) The district court convicted Bausch for possessing photographs of the minor girls engaged in sexually explicit conduct.\(^{67}\)

Bausch appealed the district court's sentence on grounds that Congress exceeded its authority to regulate commerce by making intrastate possession of child pornography a federal crime.\(^{68}\) The Eighth Circuit held that section 2252(a)(4)(B) was a proper exercise of Congress' commerce power and therefore, was not facially unconstitutional.\(^{69}\) Because the defendant took the photos, with a camera made in Japan and shipped to the United States, he directly affected interstate commerce.\(^{70}\)

In *Robinson*, the district court convicted defendant Gilbert A. Robinson for possessing fifty photographs depicting boys in their mid to late teens in nude poses.\(^{71}\) The court convicted Robinson for violating 18 U.S.C. § 2252(a)(4)(B) and sentenced him to eighteen months imprisonment, followed by three years of supervised

\(^{64}\) For an explanation of the facts of these cases and the courts' holdings, see infra notes 76-96 and accompanying text.

\(^{65}\) See United States v. Bausch, 140 F.3d 739, 740-41 (8th Cir. 1998) (stating that use of camera made in foreign country satisfies Commerce Clause).

\(^{66}\) See id. at 740. Bausch was convicted of possessing three or more photographs of minors engaged in sexually explicit conduct under § 2256(2)(A), and "lascivious exhibition of the genitals or pubic area" under § 2256(2)(E). See id.; see also 18 U.S.C. § 2252(a)(4)(B)(1994).

\(^{67}\) See Bausch, 140 F.3d at 740 (stating that district court sentenced defendant to probation).

\(^{68}\) See id. at 740-41 (arguing that Congress lacks power to regulate possession when photographs have not traveled in interstate commerce and were never intended to be placed in commerce).

\(^{69}\) See id. at 741 (holding Congress properly exercised commerce clause power by regulating activities that substantially affected interstate commerce).

\(^{70}\) See id. at 741. The statute contained an express jurisdictional element that required interstate travel of either the photographs or material used to produce the photographs. See id. Therefore, if the jurisdictional "hook" was triggered, the defendant had directly affected interstate commerce. See id.

\(^{71}\) See United States v. Robinson, 137 F.3d 652, 653 (1st Cir. 1998) (describing that search of defendant's house revealed photos containing handwritten descriptive information regarding boys' names, ages and date photos were taken).
release. He appealed claiming that section 2252(a)(4)(B) exceeded Congress’ commerce regulating authority.

The First Circuit Court of Appeals upheld the application of the jurisdictional “hook” in section 2252(a)(4)(B) because the defendant used a Kodak instant camera and Kodak instant film to take the photographs. Therefore, Robinson directly affected interstate commerce, even though the possession of the pictures was purely intrastate.

2. Broad, Discretionary Holding

The Third Circuit, in Rodia, held that a jurisdictional element alone could not render a statute per se constitutional. Rodia pled guilty to intrastate possession of child pornography. The defendant triggered the jurisdictional hook by taking the photographs with Polaroid film manufactured outside of New Jersey. Rodia appealed the district court’s sentence of a twenty-one month prison term, followed by three years of parole with special conditions.

The Third Circuit stated that in completing the proper review they must first “ascertain whether Congress ‘could rationally conclude that the regulated activity substantially affects interstate commerce.’ If the facts affirmatively supported this conclusion, then they “must consider whether ‘the means chosen by Congress [were] reasonably adapted to the end permitted by the Constitution.’”

72. See id.
73. See id. at 653, 655-56 (arguing that intrastate photo possession did not fall within Lopez factors and therefore did not trigger Commerce Clause).
74. See id. at 653 (stating Eastman Kodak Company manufactured both camera and film outside of Massachusetts).
75. See id. at 656. “By outlawing the purely intrastate possession of child pornography . . . Congress can curb the nationwide demand for these materials.” Id.
77. See id. at 469 (stating that defendant knowingly possessed numerous child pornography photographs).
78. See id. (stating that district court denied Rodia’s motion in limine that Congress had exceeded its power under Commerce Clause because § 2252(a)(4)(B) regulated purely intrastate possession).
79. See id. (noting that by entering guilty plea, defendant did not preserve right to appeal and appellate court had jurisdiction).
80. Id. (quoting United States v. Rybar, 103 F.3d 273, 278 (3d Cir. 1996)).
81. Rodia, 194 F.3d at 49. (quoting Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 276 (1981)).
During the first inquiry, the Third Circuit considered the existence of significant congressional findings and legislative history prompting the enactment of CASE, and concluded that intrastate possession of child pornography substantially impacted interstate commerce. 82 Furthermore, the court held section 2252(a)(4)(B) was a reasonable regulatory exercise of Congress' Commerce Clause power that rationally related to the reduction of the overall national child pornography market. 83

The Seventh Circuit used similar judicial review in Angle. 84 The court convicted the defendant, inter alia, for possession of child pornography in violation of section 2252(a)(4)(B). 85 After a period of surveillance, the FBI confiscated a videotape cassette, computer diskettes and zip disks containing child pornography from Angle's residence. 86 The jurisdictional hook applied to Angle because the videotape cassette and computer diskettes were not manufactured in the State of Indiana, and the zip disks were assembled in Taiwan. 87 The district court sentenced the defendant to 325 months of imprisonment, followed by five years of supervised release. 88

Angle appealed arguing, inter alia, that Congress exceeded its Commerce Clause authority and the government failed to satisfy the jurisdictional element. 89 The Seventh Circuit rejected the strict reasoning adopted in Bausch and Robinson and agreed with Rodia by determining that section 2252(a)(4)(B) regulated an activity that substantially affected interstate commerce. 90

Two recent circuit court cases concerning intrastate possession of child pornography highlighted the subjective and inconsistent problems that may arise when applying the Commerce Clause pre-
While both cases upheld the constitutionality of the CPRPE Act, the courts disagreed regarding what exactly affects interstate commerce.

First, in *Kallestad*, the district court convicted the defendant for possessing numerous photographs and films of nude minor women. The defendant photographed girls who responded to his add in a local newspaper for "slender female nude models." The film used to produce the photos was manufactured outside of Texas. The court held the jurisdictional element alone was not sufficient to uphold the CPRPE Act as constitutional. The court then applied the *Lopez* and *Morrison* factors to determine whether Congress could rationally regulate local possession in order to curb interstate possession of child pornography. Although the defendant never intended to sell the pictures, the self-generated pornography was sufficiently linked to the national market that Congress was attempting to eliminate.

Finally, in *United States v. Corp*, the Sixth Circuit reversed the defendant's conviction and sentence under section 2252(a)(4)(B) by holding there was an insufficient nexus with interstate commerce. The police recovered, from Corp's house, photographs depicting pornographic shots of young females and women engaged in sexual acts. Ultimately, the photos depicted only one seventeen-year-old minor, Sandra Sauntman, nude and/or engaged

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91. See *United States v. Kallestad*, 236 F.3d 225, 226 (5th Cir. 2000) (stating that nude photos found in Austin, Texas home contained notes regarding women’s names, addresses and phone numbers).
92. *Id.* (stating that several girls responding to defendant's “model” ad were sixteen to seventeen-year-old high school students).
93. See *id.* at 226. No evidence, however, was introduced proving any of the pictures traveled through interstate commerce. See *id.* at 229.
94. See *id.* at 229 (rejecting government's arguments and holding that when relationship between interstate activity and local activity is too attenuated, jurisdictional hook will be insufficient to justify aggregating effects upon interstate commerce).
95. See *id.* at 229-30 (focusing inquiry on whether local child pornography market was interdependent and interacted with national market).
96. See *Kallestad*, 263 F.3d at 230-31 (noting that local possession must be eliminated due to impossibility of determining where child pornography originated).
97. See 236 F.3d 325, 326 (6th Cir. 2001).
98. See *id.* at 326 (stating one of females was Corp’s twenty-six-year-old wife, Heather).
in sexual activity. Additionally, the film Corp used was manufactured in Germany.

The Sixth Circuit applied the *Lopez* framework in conjunction with the *Morrison* analysis to the facts in this case and determined that Corp was not a "typical offender," and that the government failed to prove his activity substantially affected interstate commerce.

### III. Analysis

The impetus of CASE, as amended, is to punish pedophiles and reduce the resulting harm to children. The goal of the CPRPE Act section 2252 (a)(4)(B) was to allow Congress to regulate the purely intrastate possession of child pornography. The U.S. Constitution, however, grants the federal government limited and enumerated powers. To act in accordance with the Constitution, Congress' authority cannot exceed these limitations.

In the context of the CPRPE Act, the courts applied the *Lopez* and *Morrison* framework to determine if Congress enacted a constitutional regulation. This section explains the rationale the courts used in upholding the constitutionality of section 2252(a)(4)(B).

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99. *See id.* at 326-27. Corp began dating Sauntman when she was seventeen, and Sauntman voluntarily posed for the pictures and engaged in sexual acts with Corp’s wife. *See id.* at 326. Sauntman believed she had been “showcased as a victim by the FBI, but not treated like a victim... she denie[d] she ha[d] suffered any psychological harm as a result of the offense” and this incident “was strictly some-thing personal.” *Id.* at 326 n.5 (citations omitted in original).

100. *See id.* at 336-37 (discussing that despite no allegation that defendant distributed, gave copies or invited others to view photographs, origin of film had sufficient nexus to interstate commerce).

101. *See id.* at 333.

102. For a discussion detailing the legislative findings regarding child pornography and the effects of sexual exploitation of children, see *supra* notes 21-26 and accompanying text.

103. For a discussion of the CPRPE Act's purpose, see *supra* notes 35-36 and accompanying text.

104. *See Marbury v. Madison*, 5 U.S. 137, 176 (1803). “The powers of the legis-lature are defined and limited; and that those limits may not be mistaken or for-gotten, the constitution is written.” *Id.*

A. Narrow, Strict Holdings

The courts’ analyses in Robinson and Bausch were straightforward and simple. Both courts compared the present facts of their case against the Supreme Court’s decision in Lopez. The courts acknowledged that Congress could regulate three types of activities. These courts determined that section 2252(a)(4)(B) allowed Congress to properly exercise their commerce power under the third category, i.e., activities that substantially affect interstate commerce.

The courts acknowledged that CPRPE Act contained an explicit jurisdictional element, something that the statute at issue in Lopez did not. Therefore, the courts reasoned that each defendant’s pornography possession affected interstate commerce due to the fact that they used materials that crossed state boundaries to produce the photographs. The jurisdictional element allowed the courts to avoid any in-depth economic investigation and overlook the severity of the defendant’s conduct. For instance, in Robinson, the defendant used a Kodak instant camera and Kodak instant film, both manufactured out-of-state, to produce all the photographs. Additionally, in Bausch, the defendant used a camera made in Japan to take the photographs of nude minor girls.

106. For a discussion on Lopez, see supra notes 40-48.
107. To determine the scope of these activities, see supra notes 44-45 and accompanying text.
108. See, e.g., United States v. Robinson, 137 F.3d 652, 656 (1st Cir. 1998) (noting such possession perpetuated national market for sexually explicit materials depicting minors).
109. See 18 U.S.C. § 2252(a)(4)(B) (2001) (requiring that visual depictions, or material used to create depictions, be “mailed, . . . shipped, or transported in interstate or foreign commerce”).
110. See Robinson, 137 F.3d at 656. “The jurisdictional element in § 2252 (a)(4)(B) requires an answer on a case-by-case basis to the question whether the particular possession of child pornography affected interstate commerce.” Id.; United States v. Bausch, 140 F.3d 739, 741 (8th Cir. 1998). “The statute contains an express jurisdictional element requiring the transport in interstate or foreign commerce of the visual depictions or the materials used to produce them.” Bausch, 140 F.3d at 741.
111. See Bausch, 140 F.3d 739, 741. The Eighth Circuit acknowledged that the jurisdictional element ensured, through a case-by-case inquiry, that the defendant’s conduct affected interstate commerce. See id. However, the focus was on the items used to produce the materials, rather than determining whether the product traveled over interstate borders or was used in an economic manner. See id.
112. See Robinson, 137 F.3d at 653 (noting that Eastman Kodak Company produced both items outside of Massachusetts).
113. See Bausch, 140 F.3d at 741 (noting that use of camera and film manufactured in other state satisfies Commerce Clause) (citing Robinson, 137 F.3d 652, 653).
The courts looked no further than the jurisdictional element to uphold the regulation. First, the courts acknowledged the economic nature of child pornography, thus allowing possession to fall under the third *Lopez* prong.\(^{114}\) Then, the court applied the jurisdictional hook in a strict liability manner.\(^{115}\) In both instances, the defendants used materials that traveled across state lines and therefore, their actions triggered the jurisdictional hook.\(^{116}\) The courts held that the Commerce Clause applied and the statute was a proper regulation over intrastate activity.\(^{117}\)

The only significant difference between the two earlier cases, applying the jurisdictional hook, and the later cases, inquiring whether the defendants' local possession influenced the national market, is that the earlier two were decided prior to the Supreme Court's decision in *Morrison*.\(^{118}\) This difference may explain the courts' shift from holding defendants criminally liable based merely on the presence of a jurisdictional element and their shift towards an economic analysis of the defendant's conduct.

**Broad, Discretionary Holdings**

The courts' logic in the cases decided after *Morrison* involved a more thorough analysis of the facts and all held that the presence of a jurisdictional hook alone was insufficient to uphold the constitutionality of the statute.\(^{119}\) This more thorough examination

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114. See Robinson, 137 F.3d at 656 (distinguishing between uneconomic nature of gun possession in *Lopez* and nationwide multi-million dollar child pornography industry).

115. RANDOM HOUSE WEBSTER'S LEGAL DICTIONARY 154 (2d ed. 1996). Defining strict liability as "civil or criminal liability imposed upon a person without regard to whether the person intentionally or knowingly did anything wrong or was in any way reckless or negligent." Id.

116. To determine the defendant's action in each case, see supra notes 112-13 and accompanying text.

117. See Bausch, 140 F.3d at 741 (holding that interstate or foreign transportation of camera triggered express jurisdictional element of § 2252, therefore defendant's conviction affirmed); Robinson, 137 F.3d at 656 (holding that when express jurisdictional element triggered, Congress can regulate purely intrastate possession of child pornography, therefore defendant's conviction affirmed).

118. See United States v. Morrison, 529 U.S. 598, 600-04 (2000). The Court acknowledged, like *Lopez*, the present statute contained no jurisdictional hook. See id. Unlike *Lopez*, legislative history contained congressional findings that violence against women affected interstate commerce. See id. at 601. However, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." Id. at 601. To prevent Congress from obliterating the constitutional limitations and shifting the proper state and federal power balance, the regulated activity must be economic in nature and truly affect interstate commerce. See id. at 602-04.

opened the door to ambiguity. The courts all mentioned the extensive documentation concerning the commercial nature of child pornography and how intrastate possession contributed to the overall evil.\textsuperscript{120} The following text emphasizes how a particular case can present the courts with a varying degree of complexity when trying to ascertain whether a defendant’s activity substantially affected interstate commerce. Some cases clearly illustrate that the CPRPE Act directly applies to a defendant’s conduct and goes to the heart of the statute by punishing pedophiles, while other cases are less certain.\textsuperscript{121}

\textit{Angle} is a paradigm case illustrating the CPRPE Act’s effectiveness for punishing pedophiles that directly contribute to and perpetuate the national child pornography market. The defendant, Ralph Angle, was convicted of several crimes relating to his interest in child pornography and his pursuit of a minor for sexual gratification.\textsuperscript{122} For instance, Angle, who lived in Indiana, used the Internet to engage in sexually explicit conversations with minors and attempted to meet with the children he contacted.\textsuperscript{123} The FBI traced the computer screen name, “Butch 8003,” to Angle.\textsuperscript{124} Angle continued to converse with the FBI, who was disguised as “Jeff/Wolf One.”\textsuperscript{125} Angle offered money and gifts in exchange for personal information regarding “Jeff/Wolf One.”\textsuperscript{126} During a telephone conversation, Angle told “Jeff/Wolf One” that he wanted to

\textsuperscript{120} For a detailed discussion of the legislative findings, see supra notes 22-39 and accompanying text.

\textsuperscript{121} Compare \textit{United States v. Angle}, 234 F.3d 326, 329-30 (7th Cir. 2000) (prosecuting pedophile that attempted to use Internet to lure young boys to meet with him), with \textit{United State v. Corp}, 236 F.3d 325, 326 (6th Cir. 2001) (prosecuting an adult who took pictures of his girlfriend that was three to five months short of majority age of eighteen).

\textsuperscript{122} See \textit{Angle}, 234 F.3d at 329, 345-47 (stating that Seventh Circuit vacated and remanded district court’s sentence of approximately twenty-seven years imprisonment due to failure to explain sentencing enhancements and upward departure from applicable guidelines).

\textsuperscript{123} See \textit{id}. at 326-27, 330 n.1. After investigating his children’s use of the computer, the father reported to the FBI several computer screen names of individuals contacting his children. See \textit{id}. at 329. The father logged on to the computer using children’s screen name, “Wolf One 676,” and created an electronic profile of a thirteen year-old boy named Jeff. See \textit{id}. at 330 n.1.

\textsuperscript{124} See \textit{id}. at 329-30 (stating that FBI conducted nationwide investigation against individuals that used Internet to lure children into sexual relationships).

\textsuperscript{125} See \textit{id}. at 330 (stating that FBI undercover agent used “Jeff/Wolf One” to converse with defendant and indicated he was from troubled home).

\textsuperscript{126} See \textit{id}. Angle requested “Jeff/Wolf One’s” telephone number and address in Colorado and indicated that he wanted to visit him and take him shopping. See \textit{id}. Angle also told “Jeff/Wolf One” that he loved him. See \textit{id}.
purchase a camera so that "Jeff/Wolf One" could send pictures of himself to Angle.\textsuperscript{127}

In addition to his interest in "Jeff/Wolf One," Angle corresponded via e-mail with a Colorado-based child pornography distributor attempting to purchase five videotapes of child pornography.\textsuperscript{128} Angle mailed a money order to the distributor and several instructional e-mails regarding the tapes delivery.\textsuperscript{129} Angle sent a final e-mail confirming the delivery date and reiterating his vacation plans to Mexico where he "[had] boys lined up . . . and waiting for [his] arrival."\textsuperscript{130}

The United States Customs Service stopped Angle as he attempted to re-enter the United States from Mexico and searched his luggage.\textsuperscript{131} A few days later, federal and state law enforcement officers executed a search warrant at Angle's residence seeking child pornography in various forms.\textsuperscript{132}

In upholding Angle's conviction under section 2252(a)(4)(B), the Seventh Circuit disagreed with the outcome reached solely by use of the jurisdictional element in \textit{Robinson} and \textit{Bausch}.\textsuperscript{133} Instead, the court formatted the analysis as whether Congress could ration-

\begin{footnotes}
\item 127. \textit{See Angle}, 234 F.3d at 330.
\item 128. \textit{See id.} The FBI previously closed this distributor and began using it for an undercover operation. \textit{See id.} at 330 n.2. Angle's name appeared on the distributor's customer membership list. \textit{See id.} at 330 n.3. The FBI targeted people that previously purchased child pornographic material. \textit{See id.} at 330 n.2.
\item 129. \textit{See id.} at 330-32. Angle mailed a money order payable to the distributor for $161. \textit{See id.} at 330. A subsequent e-mail confirmed that money was for tapes depicting children under the age of seventeen engaged in graphic sexual activity. \textit{See id.} at 331. An additional e-mail delayed the delivery date because Angle planned a vacation to Mexico to "play with the boys." \textit{See id.} at 332.
\item 130. \textit{Id.} at 330; \textit{see also} Doyle, \textit{supra} note 2, at 125-26 (noting that child pornography is global problem including countries like England, Germany, Netherlands, Hungary, Czech Republic and others in Southeast Asia, with United States as largest consumer market).
\item 131. \textit{See Angle}, 234 F.3d at 331 (indicating that Customs agents found video camcorder and at least one tape containing child pornography images).
\item 132. \textit{See id.} at 331-32. The officers found a videotape titled "Jap Boys/Mexican Boys" depicting boys between the ages of ten and fifteen. \textit{See id.} at 331. The officers also found a large quantity of diskettes and zip disks containing child pornography. \textit{See id.} at 331-32.
\item 133. \textit{See id.} at 336. The court, agreeing with the Third Circuit, reasoned that: A jurisdictional element is only sufficient to ensure a statute's constitutionality when the element either limits the regulation to interstate activity or ensures that the intrastate activity to be regulated falls within one of the three categories of congressional power. 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. \textit{Id.} (citations omitted in original).
\end{footnotes}
ally believe that the intrastate possession of child pornography had a substantial effect on interstate commerce; and further, that the regulatory means chosen were reasonably adapted to the end. Therefore, the court upheld the statute as a category three regulation by finding an economic nexus, via the market theory, between interstate commerce and the intrastate possession of child pornography. The court reasoned that Congress needed to curb the intrastate possession of child pornography in order to eliminate the multimillion-dollar nationwide industry.

This case illustrated how "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." Angle also clearly fit the description of a pedophile by preying on the vulnerable. The CPRPE Act, however, can also punish defendants whose actions, while still unacceptable, are less shocking and apprehensive than those of a pedophile. The following two cases illustrate how the CPRPE Act can be overinclusive if applied improperly.

134. See id. at 337. The court again agreed with the Third Circuit that Congress could have rationally believed the following: Some pornographers manufacture, possess, and use child pornography exclusively within the boundaries of a state, and often only within the boundaries of their own property. It is unrealistic to think that those pornographers will be content with their own supply, hence they will likely wish to explore new or additional pornographic photographs of children. Many of these pornographers will look to the interstate market as a source of new material, whether through mail order catalogs or through the Internet. Therefore, the possession of "home grown" pornography may well stimulate a further interest in pornography that immediately or eventually animates demand for interstate pornography. It is also reasonable to believe the related proposition that discouraging the intrastate possession of pornography will cause some of these child pornographers to leave the realm of child pornography completely, which in turn will reduce the interstate demand for pornography. Id. at 337-38 (quoting United States v. Rodia, 194 F.3d 465, 477 (3d Cir. 1999)).

135. See id. at 338. The court distinguished the gun control law at issue in Lopez by finding that the regulation of child pornography was "an essential part of a larger regulation of economic activity... that arises out of or [is] connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Id. (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)). The court also distinguished the CPRPE Act from Morrison by emphasizing that the VAWA was directed only to noneconomic criminal activity. See id. at 338 n.13.


137. See Angle, 234 F.3d at 330-31 (noting defendant's use of Internet to lure children, collection of child pornography videos, current attempts to purchase more videos to supplement collection and vacation plans in Mexico to "play with the boys").
In *Kallestad*, the defendant, Charles Kallestad, advertised for "slender female nude models" in Austin, Texas newspapers. The defendant, Charles Kallestad, advertised for "slender female nude models" in Austin, Texas newspapers. Government agents found a large number of nude photos and films of women. Several of the women responding to the advertisements were sixteen to seventeen years old and were filmed or photographed while engaging in sexually explicit conduct.

The Fifth Circuit upheld his conviction under the CPRPE Act by finding that Congress could rationally believe that local possession of child pornography was necessary to regulate the national market. Kallestad argued that the purely intrastate possession, like the crime of possessing a gun near a school zone, is non-economic in nature and does not substantially affect interstate commerce. Under the first *Morrison* factor, the majority responded by stating the conduct here, defined broadly, was commercial in nature. The court analogized *Wickard v. Filburn* to affirm that, when a person produces a product for his own consumption that is traded in an interstate market, his conduct becomes economic in nature. As for the second *Morrison* factor, the court acknowl-

138. See United States v. Kallestad, 236 F.3d 225, 226 (5th Cir. 2000) (stating that some advertisements indicated that model age unimportant).

139. See id. (stating that film used to make photos and films manufactured outside of Texas).

140. See id. (noting that several girls told defendant their age and that they were high school students).

141. See id. at 226-28. The court applied the *Lopez* and *Morrison* framework to uphold the constitutionality of the CPRPE Act.

142. See id. at 228. Judge Jolly, as indicated in his dissent, found merit in Kallestad's assertion. See id. at 231-33 (Jolly, J., dissenting). "Kallestad's non-commercial, local possession of child pornography, where no interstate transportation or commercial transacting occurred, had at most an insubstantial affect on the interstate market for child pornography." Id. at 233.

143. See *Kallestad*, 236 F.3d at 228. The court noted that most of the nationally distributed child pornography is produced by child exploiters themselves. See id. These materials are then distributed to others through the mails, computers or submitted to commercial magazines. See id.

144. See id. at 228; see also *Wickard*, 317 U.S. 111, 128 (1942). The act of possessing and consuming wheat directly affected the national market price of wheat, and Congress was justified in regulating the private wheat consumption because: It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flows into the market and check price increases . . . . Home-grown wheat in this sense competes with wheat in commerce.

*Wickard*, 317 U.S. at 128. But see *Kallestad*, 236 F.3d at 233 (Jolly, J., dissenting). The dissent believed the application of *Wickard* was overextended because the local possession of self-generated child pornography does not have a direct and substantial effect on the national market. See id. The evidence showed that the defendant did not, nor had any intention to purchase, trade, sell or barter the pornography. See id.
edged that section 2252(a)(4)(B) contained a jurisdictional hook. The court held, however, that the jurisdictional hook alone could not constitutionally validate section 2252(a)(4)(B). In response to the third Morrison factor, the court determined that ample congressional findings supported the proposition that local possession impacted interstate commerce. Finally, the court found that Congress must regulate purely intrastate possession in order to eradicate the national market.

A national market for child pornography exists, and the local possession affects the supply and demand aspects of this market. The court summarized by stating that Congress had no interest in Wickard’s wheat, but confiscated it in an effort to eliminate the potential aggregate private supply. Similarly, Congress rationally could confiscate self-generated pornography to diminish the supply and hopefully eliminate the defendant’s desires to supplement his own collection through the national market. The dissent in Kallestad, however, emphasized the non-economic nature of self-generated child pornography produced for private use.

The Sixth Circuit, in Corp, used an analogous argument to reverse the lower court’s conviction under the CPRPE Act. After

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145. See Kallestad, 236 F.3d at 228 (noting that no evidence proved that Kallestad’s pictures moved through interstate commerce, but film did). For explanation of jurisdictional hook, see supra note 60.

146. See Kallestad, 236 F.3d at 229. “Where the relationship between the interstate and local activity is attenuated, a jurisdictional hook alone cannot justify aggregating effects upon interstate commerce to find Congressional power under the Commerce Clause.” Id.

147. See id. at 229. These findings indicate that child pornography is a growing, predatory business. See id. To examine the congressional findings, see supra notes 22-39 and the accompanying text.

148. See Kallestad, 236 F.3d at 231. “[W]here the product is fungible, such that it is difficult if not impossible to trace, Congress can prohibit local possession in an effort to regulate product supply and demand and thereby halt interstate trade.” Id.

149. See id. (stating intention was regulation of national market).

150. See id. But see id. at 232 (Jolly, J., dissenting) (stating that Constitution requires distinction between what is truly national and truly local).

151. See id. at 232 (Jolly, J., dissenting) (stating that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation if intrastate activity only where that activity is economic in nature” and therefore, majority opinion unconstitutionally applied § 2252(a)(4) to Kallestad’s conduct).

152. See United States v. Corp, 236 F.3d 325, 327 (6th Cir. 2001). The district court, citing Bausch and Robinson, convicted Corp based on the strict liability imposed by the jurisdictional element. See id. The district court, in agreement with the prosecution, imposed the lowest sentence within the guideline range and commented:

You know, I tend to agree with your gut reaction to this. This is an awful stretch, it seems to me, of the interstate commerce clause. And I don’t think it would hurt anyone to get that clarified . . . . I think all the parties
developing pornographic shots of young females, the Southland Pharmacy reported Corp to the local police. However, officials discovered that only one minor, Sandra Sauntman, was photographed approximately three to five months before she attained the majority age of eighteen.

The court addressed the proper Commerce Clause framework by providing an overview of the Supreme Court’s analysis in *Lopez* and *Morrison*. Next, the court addressed other circuits’ decisions, particularly *Robinson, Bausch* and *Rodia* from the First, Eighth and Third Circuits, respectively. The court rejected the strict jurisdictional approach used in *Robinson* and *Bausch*, while agreeing with *Rodia* that:

A hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce.

The Sixth Circuit reasoned that by applying the jurisdictional hook approach, the CPRPE Act had an extremely wide sweep. Furthermore, the court declined to use the *Wickard* approach by considering the aggregate effect of the purely intrastate possession on interstate commerce. By applying the Commerce Clause pre-agree that the case is outside the heartland of the statute which is intended to punish people who engage in sexual abuse of minors by either abusing the minors or having pictures of such activity or sexual acts by minors.

*Id.* at 326 (stating that Corp made derogatory remarks about photos when he presented film).

For additional information regarding Sauntman’s voluntary participation, see *supra* note 99 and accompanying text.

*See Corp*, 236 F.3d at 328-31 (describing facts and legal analysis of Commerce Clause precedent).

For a discussion of the courts’ holdings, see *supra* notes 83 and 117 and accompanying text.


*See Corp*, 236 F.3d at 331 (illustrating point through example of “[a] painter using a model who was just under eighteen, even if it was his wife, would fall afoul of the statute if the paints, brushes, or canvas had traveled in interstate commerce”).

*See id.* at 332 (rejecting, although not expressly, approach adopted by Fifth Circuit in *Kallestad*).
cedent and addressing additional relevant questions, the court concluded that Corp's activities were neither substantially related nor connected to interstate commerce. The court surmised that Corp was not the typical offender feared by Congress that would become addicted to pornography and perpetuate the industry.

IV. CIRCUIT COURT CRITIQUE

The Circuits developed three completely different interpretations of Congress' authority to regulate child pornography under section 2252(a)(4)(B). First, Bausch and Robinson supported the strict jurisdictional hook. These courts reasoned that the defendants triggered the Commerce Clause when the items themselves or the materials used to produce the items crossed state borders.

Second, Angle and Kallestad supported the "Wickard market theory." The courts disagreed that a jurisdictional hook alone can render section 2252(a)(4)(B) constitutionally valid. In these cases, the court determined that, regardless of the defendant's motive, intrastate possession perpetuates the national market of child pornography. The courts' inquiry focused on the national mar-

160. See id. In determining whether Corp's conduct had an effect on interstate commerce, the court posed the following questions:

Was the 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?

Id. at 333.

161. See id. The court noted that Corp did not intend to use the photos in a commercial nature. See id. at 332. Sauntman was neither an "exploited child" nor a victim and was mere months away from majority. See id.

162. For the facts and courts' analyses in these two cases see supra notes 65-75 and accompanying text.

163. For the facts and courts' analyses in these two cases, see supra notes 121-51 and accompanying text.

164. See United States v. Angle, 234 F.3d 326, 337 (7th Cir. 2000) (doubting whether jurisdictional hook alone guaranteed that intrastate possession substantially affected interstate commerce); United States v. Kallestad, 236 F.3d 225, 229 (5th Cir. 2000) (stating when "relationship between the interstate and local activity is attenuated, a jurisdictional hook alone cannot justify . . . Congressional power under the Commerce Clause.").

165. See Angle, 234 F.3d at 338 (finding that aggregated private use was reasonably connected and essential part of larger economic and commercial child pornography industry).
ket, rather than the individual offender's non-commercial private use.\footnote{166}

Third, \textit{Corp} held that the defendant's conduct must be examined to determine if the individual substantially affected interstate commerce.\footnote{167} \textit{Corp} addressed the statutory language, congressional intent and commerce clause precedent most accurately.\footnote{168}

\section*{A. Strict Jurisdictional Hook}

First, the strict jurisdictional hook method is contrary to commerce clause precedent because it does not ensure that the activity at issue substantially affects interstate commerce or is economic in nature.\footnote{169} The jurisdictional hook is appropriate only when it imposes limits on interstate regulations or guarantees that the intrastate activity will fall within the three permissible \textit{Lopez} factors.\footnote{170} As applied in \textit{Bausch} and \textit{Robinson}, the jurisdictional hook poses no limit on interstate regulations.\footnote{171} Furthermore, the jurisdictional element in no way guarantees the intrastate activity is economic in nature.\footnote{172} Under this approach, the federal government could reg-
ulate nearly everything. The courts overlook the "case-by-case basis" requirement that the particular possession of child pornography affect interstate commerce. This approach is also contrary to the ideals framed in our Constitution regarding federalism.

B. Wickard Market Theory

Next, the Wickard market theory is also contrary to the purpose of the CPRPE Act. Under this approach, the extremely broad constitutional sweep of the CPRPE Act poses no limit to Congress' regulations. The courts framed the judicial review as whether Congress could have rationally believed that intrastate possession of child pornography substantially affected interstate commerce, and if so, that the regulatory means were reasonably adapted to a permissible end. There is no question that intrastate possession can affect interstate commerce. The fault, however, is that the courts applied a blanket "Wickard market theory" to determine that all pornography." Id. (emphasis added); see also Corp, 236 F.3d at 331 (indicating that despite foreign camera used to photograph minor, non-economic, private use of photos contributes in no way to interstate commerce).

173. Compare United States v. Bausch, 140 F.3d 739, 741 (8th Cir. 1998) (affirming defendant's conviction based on fact that camera traveled through interstate commerce, even though defendant's photographs of minors were not intended to be placed in commerce and never traveled in interstate commerce), with Corp, 236 F.3d at 332-33 (reversing defendant's conviction by not applying jurisdictional hook and determining that, on facts of case, defendant's activity was not substantially connected or related to interstate commerce).

174. See U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id.; see also United States v. Morrison, 529 U.S. 598, 644-45 (2000) (stating that federalism "is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit").

175. See United States v. Angle, 234 F.3d 326, 338 (holding that punishing intrastate possession (regulatory means) rationally connected to prohibiting interstate commerce of child pornography (asserted ends)).

176. See Rodia, 194 F.3d 465, 474-80 (providing detailed review of legislative findings and evaluating individual's role in national market under Wickard).
trastate possession effects the national market.\textsuperscript{177} \textit{Corp} proves that this assertion is simply not true.\textsuperscript{178}

The Third Circuit, in \textit{Rodia}, admitted that courts have abused the \textit{Wickard} principle by applying it to economically distinct cases and non-economic cases.\textsuperscript{179} The statute is overinclusive under this application and is essentially analogous to strict liability.\textsuperscript{180}

C. Sixth Circuit \textit{Corp} Analysis

The Sixth Circuit, in \textit{Corp}, reached the correct decision by evaluating the defendant's behavior and personal impact on the national child pornography market in light of the \textit{Lopez} factors framework. This approach applies the same judicial review requiring a rational connection between the interstate activity and interstate affect, however does not apply the strict \textit{Wickard} market theory.\textsuperscript{181} Instead, this approach properly focuses on the defendant's conduct on a "case-by-case basis."\textsuperscript{182} Thus, this analysis ensures that the intrastate possession of child pornography has in fact substantially affected interstate commerce.\textsuperscript{183} When comparing the facts of the cases reviewed in this Comment, this judicial review

\textsuperscript{177} See \textit{Morrison}, 529 U.S. at 608.

\textsuperscript{178} See \textit{Corp}, 236 F.3d at 332 (finding defendant's purely private use of photograph of minor was not a commercial activity and did not substantially affect interstate commerce).

\textsuperscript{179} See \textit{Rodia}, 194 F.3d at 476-77 (stating courts glossed over fact that \textit{Wickard} applies to only economic activities and that courts have stretched true intrastate and interstate connection).

\textsuperscript{180} See \textit{id.} at 479. The court acknowledged this approach supported the broad proposition that Congress could regulate any intrastate activity when a large national market existed for it. See \textit{id.} The court justified their rationale by presenting two factors that limited the holding. See \textit{id.} First, this regulation does not constitute a "sharp break" in federal legislation because federal statutes have addressed child pornography for over twenty years. See \textit{id.} Second, Congress added § 2252(a)(4)(B) to close the loophole in the legislation and improve its overall effectiveness. See \textit{id.}

\textsuperscript{181} See \textit{Corp}, 236 F.3d at 330-31 (citing cases that support argument that presence of jurisdictional hook alone, does not automatically deem activity had substantial affect on interstate commerce or activity was commercial in nature).

\textsuperscript{182} See \textit{id.} at 332 (stating that government failed to meet burden that \textit{Corp}'s activity substantially affected interstate commerce).

\textsuperscript{183} See \textit{id.} (rejecting application of aggregate effect on interstate commerce and notion that child pornography addiction causes all possessors to seek more perverse materials).
clearly does not impose a high burden of proof, merely one that is fair and just.

After all, the purpose of the statute is to eradicate the child pornography industry by punishing actual child pornography addicts and individuals that perpetuate the industry.\textsuperscript{184} This approach also guarantees the defendant's conduct falls within the permissible \textit{Lopez} factors, specifically, a commercial and economic activity.\textsuperscript{185} The child exploiter/abuser or the child pornographer that shares or trades material will be punished. Various other laws are available to punish defendants that fall outside the scope of section 2252(a)(4)(B).\textsuperscript{186}

\textbf{V. Conclusion}

Child pornography is a multi-million dollar nationwide industry that can destroy children and families.\textsuperscript{187} Congress enacted 18 U.S.C. § 2252, specifically, section 2252(a)(4)(B), to eradicate this industry and punish individuals that perpetuate the industry. Congress' ability to regulate intrastate possession of child pornography is confined to its enumerated powers in the Constitution.\textsuperscript{188} When the courts properly enforce section 2252(a)(4)(B), the CPRPE Act is a legitimate exercise of Congress' Commerce Clause authority.

The circuit courts, applying the \textit{Lopez} and \textit{Morrison} framework, have reached different rationale in upholding Congress' power to regulate purely intrastate possession of child pornography.\textsuperscript{189} First, the First and Eighth Circuits applied the strict jurisdictional element to ensure that each defendant's actions directly affected interstate commerce.\textsuperscript{190} Second, the Fifth and Seventh Circuits applied

\begin{itemize}
\item \textsuperscript{184} See Rodia, 194 F.3d at 474-77 (providing legislative history that led to promulgation).
\item \textsuperscript{185} For a listing of the \textit{Lopez} factors, see \textit{supra} note 45 and accompanying text.
\item \textsuperscript{186} For examples of laws that punish individuals involved in child pornography, see \textit{supra} note 12.
\item \textsuperscript{187} See Doyle, \textit{supra} note 2, at 125. Children tend to be coerced into the production of pornography with gifts, affection, kindness and attention. See \textit{id}. Victims usually have been carefully seduced and often do not realize they are victims, thereby these individuals repeatedly and voluntarily return to the offender until it is too late. See \textit{id}.
\item \textsuperscript{188} For an enumeration of Congress' authority to regulate interstate commerce, see \textit{supra} note 41 and accompanying text.
\item \textsuperscript{189} For a discussion of the different courts' holdings regarding Congress' authority to regulate child pornography under the CPRPE Act, see \textit{supra} notes 58-101 and accompanying text.
\item \textsuperscript{190} For an analysis of a strict jurisdictional hook application, see \textit{supra} notes 169-74 and accompanying text.
\end{itemize}
the *Wickard* market theory rationalizing that the only way to eradicate the national market was to eliminate the aggregated affect of individual's supply and demand.\textsuperscript{191} The Sixth Circuit correctly refused to extend the rationales that the jurisdictional element was alone sufficient and intrastate possession, regardless of commercial or non-commercial nature, posed an aggregate effect on interstate commerce.\textsuperscript{192}

The Sixth Circuit in *Corp* properly framed the issue as whether Congress had a rational basis for believing that the intrastate possession of child pornography had a substantial effect on interstate commerce. Furthermore, the court noted that the jurisdictional element required, on a case-by-case basis, that the particular activity at issue had a substantial impact on commerce.\textsuperscript{193} This judicial review limits the potentially broad sweep of the statute, upholds the values of the Constitution and nonetheless provides Congress with an effective weapon to combat the evil that is child pornography.

*Dean C. Seman*

\textsuperscript{191} For a *Wickard* Market Theory application analysis, see *supra* notes 175-80 and accompanying text.
\textsuperscript{192} For a discussion of the Sixth Circuit's proper analysis application, see *supra* notes 181-86 and accompanying text.
\textsuperscript{193} For an account of the type of questions that need to be analyzed to determine if a particular activity had a substantial impact on commerce, see *supra* note 160.