

COMMENTS

HOMEGROWN CHILD PORNOGRAPHY AND THE COMMERCE CLAUSE: WHERE TO DRAW THE LINE ON THE INTRASTATE PRODUCTION OF CHILD PORNOGRAPHY

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“In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.”¹

—Justice Anthony Kennedy

“Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.”²

—Justice Clarence Thomas

INTRODUCTION

A man videotapes his sexually explicit activity with his thirteen-year-old god-daughter.³ Two football players rape a college freshman.⁴ A high school senior brings a gun to school.⁵ Two chronically ill Californians cultivate and use marijuana to help alleviate their pain.⁶ All of these activities are local in nature. Thus, it is not surprising that the actors in the first three examples face state penalties and potential jail time in state prison.⁷ The States impose these penalties because they reflect society’s judgment that such conduct should be punished and, if possible, deterred.⁸

1. *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

2. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

3. *United States v. Morales-De Jesús*, 372 F.3d 6, 8 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 2929 (2005).

4. *Morrison*, 529 U.S. at 602.

5. *Lopez*, 514 U.S. at 551.

6. *Gonzales v. Raich*, 125 S. Ct. 2195, 2199-2220 (2005).

7. *But cf. id.* (explaining that California’s Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 2005), exempts the actors in the fourth example from state criminal liability).

8. See WAYNE R. LAFAVE, CRIMINAL LAW § 1.5 (4th ed. 2003) (illustrating how criminal law aims “to prevent [people] from doing what society considers to be undesirable” in order to achieve a minimum standard of acceptable behavior). *But cf.* The North American Man/Boy Love Association, NAMBLA: Who We Are, <http://216.220.97.17/welcome.htm> (last visited Oct. 24, 2005) (arguing that sexual

A more difficult question is whether society's value judgments permit federal regulation of local behavior under the auspices of the Commerce Clause.⁹ While the Supreme Court has struck down the federal statutes prohibiting gun possession in school and providing a civil remedy for victims of gender-motivated violence,¹⁰ courts have universally upheld the constitutionality of statutes prohibiting the production of child pornography¹¹ and the cultivation and use of illicit drugs.¹² Courts disagree, however, over whether these statutes are unconstitutional as applied to particular litigants.¹³ This Comment explores where the lower courts believe these constitutional parameters should be set,¹⁴ where the Supreme Court defines them to be,¹⁵ and where they should be.¹⁶

relationships between adults and children, though criminalized by state and federal law, are not only acceptable, but aid children's development).

9. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

10. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (finding that a provision of the Violence Against Women Act of 1994, Pub. L. No. 102-322, 108 Stat. 1941 (1994), which provided a federal civil remedy to victims of gender-motivated violence, exceeded the scope of Congress's regulatory power under the Commerce Clause); *Lopez*, 514 U.S. at 567-68 (holding that a statute that proscribes gun possession in a school zone is an unconstitutional exercise of Congress's Commerce Clause power).

11. No litigant has succeeded in bringing a facial challenge to 18 U.S.C. § 2251(a) (2000), which criminalizes the sexual exploitation of minors through the creation of child pornography if either the materials used to create the pornography or the final product itself entered the flow of interstate commerce. See, e.g., *United States v. Morales-De Jesús*, 372 F.3d 6, 8, 17 (1st Cir. 2004) (finding child pornography produced for personal use to substantially affect interstate commerce and rejecting facial challenge to § 2251(a)).

12. *Gonzales v. Raich*, 125 S. Ct. 2195, 2198 (2005).

13. Compare *United States v. Smith*, 402 F.3d 1303, 1320, 1322 (11th Cir. 2005) (upholding the defendant's as-applied challenge to the same statute on the basis that the homegrown pornography was for the defendant's own consumption), *vacated*, 125 S. Ct. 2938 (2005) (remanding for reconsideration in light of *Raich*), with *Morales-De Jesús*, 372 F.3d at 17 (denying defendant's challenge that the federal statute proscribing the production of child pornography was unconstitutional as applied to his conduct since the homegrown pornography was for his own consumption). While the Supreme Court recently remanded *Smith* to the Eleventh Circuit for further consideration in light of *Raich*, 125 S. Ct. at 2199-2220 (2005), it is worth discussing because the court's approach has been used in other cases and jurisdictions. See, e.g., *United States v. Maxwell*, 386 F.3d 1042, 1067-68 (11th Cir. 2004) (employing the microcosmic approach and thus upholding the defendant's as-applied challenge to the analogous federal statute prohibiting the possession of child pornography), *cert. denied*, 126 S. Ct. 85 (2005) (denying Maxwell's petition), and *vacated*, 126 S. Ct. 321 (2005) (granting the government's petition and remanding for reconsideration in light of *Raich*); *United States v. Matthews*, 300 F. Supp. 2d 1220, 1228, 1237-38 (N.D. Ala. 2004) (upholding as-applied challenge to § 2251(a) where defendant lacked the "intention to sell, distribute, or exchange" pornographic depictions of children and thus failed to participate in commercial activity); *United States v. Jeronimo-Bautista*, 319 F. Supp. 2d 1272, 1279, 1282 (D. Utah 2004) (refusing to classify the defendant's activity as economic because he did not intend to sell, distribute, or exchange the material and consequently upholding the defendant's as-applied challenge to § 2251(a)), *rev'd*, 425 F.3d 1266, 1273-74 (10th Cir. Oct. 12, 2005) (remanding for reconsideration in light of *Raich*).

14. See *Smith*, 402 F.3d at 1316-18 (finding § 2251(a) unconstitutional as applied to defendant, who produced the pornography for his own consumption, by focusing on the defendant's noncommercial, local criminal behavior rather than what the statute regulates

Part I describes the recent trend in Commerce Clause jurisprudence—in which the Court has resurrected a reasonable limit to Congress’s regulatory power under the clause—in the decisions *United States v. Lopez*¹⁷ and *United States v. Morrison*.¹⁸ Part I further discusses how these decisions are partly responsible for the lower courts’ confusion in deciding as-applied challenges to the Commerce Clause. In holding that the statutes in question fell outside the scope of Congress’s commerce power completely,¹⁹ the Court failed to provide adequate guidance for how to resolve as-applied challenges, in which the litigant challenges the constitutionality of a statute only as applied to her and those similarly situated.²⁰

As a result, lower courts have struggled to resolve the inherent tension that as-applied challenges present.²¹ Courts cannot realistically reduce the analysis to only the particular litigants, as “individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious—that their personal activities do not have a substantial effect on interstate commerce.”²² And yet, a court essentially precludes as-applied challenges if that court does not consider the litigants’ individual

generally); *Morales-De Jesús*, 372 F.3d at 12-15 (emphasizing what the statute regulates generally rather than the defendant’s particular activity to find § 2251(a) constitutional as applied to defendant who produced a depiction of child pornography for his own consumption).

15. See discussion *infra* Part III.B (discussing the Supreme Court’s use of the macrocosmic approach in resolving an as-applied challenge to the federal Controlled Substances Act).

16. See discussion *infra* Part V (proposing limitation of federal regulation of noncommercial, intrastate criminal activity with only an attenuated connection to interstate commerce).

17. 514 U.S. 549 (1995).

18. 529 U.S. 598 (2000). At various points in this article, the author refers to both *Lopez* and *Morrison* as employing a “heightened” level of judicial scrutiny. Although neither *Lopez* nor *Morrison* explicitly states that they are employing a “heightened” level of scrutiny, most scholars have interpreted the case as implicitly requiring a stronger correlation between the statute and regulated activity than previous cases. See Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 616-17 (2001) (“The only obvious message sent out by *Lopez* and *Morrison* is that future Commerce Clause cases will be decided under a stricter standard than rational basis, although the Court did not admit that this is what it was doing.”).

19. See *Morrison*, 529 U.S. at 601-02 (striking down a provision of a federal statute that created a civil remedy for victims of gender-motivated violence); *Lopez*, 514 U.S. at 561 (striking down a federal statute that prohibited the possession of a firearm within a school zone).

20. See generally Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 873 (2005) (explaining that facial challenges, unlike as-applied challenges, attack “some general rule embodied in the statute”).

21. See generally *Gonzales v. Raich*, 125 S. Ct. 2195, 2223 (2005) (O’Connor, J., dissenting) (“The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis).”).

22. *Id.*

conduct at all.²³ This inherent tension reflects two competing principles within the larger framework of the Court's Commerce Clause jurisprudence. On the one hand, the desire to preserve the distinction between "what is national and what is local"²⁴ reflects the principle that there must be a meaningful limit on Congress's Commerce Clause power.²⁵ On the other hand is the equally significant principle that courts should employ a "practical conception" of the commerce power²⁶ to avoid "artificially . . . constrain[ing]"²⁷ Congress's ability to regulate interstate commerce effectively.²⁸

23. *Contra* United States v. Morales-De Jesús, 372 F.3d 6, 18 (1st Cir. 2004) (explaining that the Court's preclusion of "as-applied Commerce Clause challenges" that rest on the non-economic nature of an individual's specific conduct that happens to fall within a properly regulated class of economic activity does not also preclude "as-applied Commerce Clause challenges" based on non-economic issues such as "constitutional privacy concerns" or that particular facts remove the conduct from the scope of the regulation), *cert. denied*, 125 S. Ct. 2929 (2005).

24. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (warning that the commerce power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government" (citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 547 (1935))).

25. See discussion *infra* Part I (explaining that the Court in *Lopez* and *Morrison* sought to resurrect the Commerce Clause principle that there must be a reasonable limit on Congress's commerce power).

26. *United States v. Lopez*, 514 U.S. 549, 572 (1995) (Kennedy, J., concurring).

27. *Id.* at 556. Prior to 1937, the Court refused to permit federal regulation of mining, production, manufacturing, and union membership because those activities did not fit within the strictest definition of commerce. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 269-70 (1918) (striking down a prohibition on the interstate transportation of goods manufactured in violation of child labor laws because the power to regulate commerce "is directly the contrary of the assumed right to forbid commerce from moving"), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1, 3, 16 (1895) (holding the Sherman Act inapplicable to a sugar monopoly's buyout of additional refineries and reasoning that the effect on interstate commerce of any centralized "control [of an intrastate] enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages" is merely "indirect," even though the buyout completed a monopoly of ninety-eight percent of the U.S. sugar industry). In assessing the constitutionality of New Deal legislation, the Court continued to use the formalistic and impractical distinction between indirect and direct effects on interstate commerce. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 309 (1936) (striking down an act that regulated the wages and hours of miners because the Court held that the employer/employee relationship had only a "secondary and indirect" effect on interstate commerce); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935) (declining to uphold the wage and hours provision of the National Industrial Recovery Act as the employees' wages and hours had "no direct relation" to interstate commerce).

28. E.g., *Wickard v. Filburn*, 317 U.S. 111, 121-25 (1942) (repudiating the impractical classifications of the pre-1937 cases as an artificial restraint on Congress's power to regulate interstate commerce, and instead opting for a practical understanding of the commerce power); see also *id.* at 123 n.24 ("Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution . . ." (quoting *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 467 (1938))).

Part II examines two diametrically opposed approaches to resolving this tension in the particular context of as-applied challenges to the Child Pornography Prevention Act (“CPPA”),²⁹ which criminalizes the production of child pornography developed with materials that have traveled in interstate commerce.³⁰ Each approach focuses exclusively on one of the competing principles within the Court’s Commerce Clause jurisprudence to support its analysis. Focusing exclusively on the need for a practical conception of the commerce power, the macrocosmic approach places more significance on what the statute regulates generally than on the litigants’ particular conduct.³¹ Concerned with the need for a meaningful limit on Congress’s commerce power, the microcosmic approach emphasizes the litigants’ particular activity.³²

The Supreme Court has recently rendered a decision on the constitutional parameters of as-applied challenges to the Commerce Clause. Part III demonstrates how the Court opted for the macrocosmic approach in *Gonzales v. Raich*.³³ As *Raich* indicates, and as part III discusses, the macrocosmic approach will likely prevail over the microcosmic approach when deciding as-applied challenges to the intrastate production of child pornography.³⁴

While the *Raich* decision provides much needed clarification for resolving as-applied challenges, the Court’s approach is flawed. Part IV demonstrates how the Court, in focusing exclusively on the need for a

29. 18 U.S.C. § 2251(a) (2003).

30. This Comment does not explore the First Amendment implications of child pornography law. Rather, it focuses on the constitutional analysis of as-applied challenges to the intrastate, homegrown production of child pornography for the producer’s personal consumption. For cases tackling the interplay of child pornography law and the First Amendment, see *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) (finding that the ban on virtual child pornography in the Child Pornography Prevention Act of 1996 was overbroad and thus unconstitutional under the First Amendment because it restricted a substantial amount of lawful speech); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (concluding that the States may criminalize at-home possession of child pornography because a State’s compelling interest in protecting the physical and psychological well-being of minors trumps the individual’s right to receive information in the privacy of his or her home); *New York v. Ferber*, 458 U.S. 747, 758, 773 (1982) (upholding a New York law that prohibited the distribution of non-obscene child pornography because the state had a compelling interest in protecting the physical and psychological well-being of minors).

31. See discussion *infra* Part II.A (reviewing argument that Congress’s ability to regulate such a defendant’s noncommercial activity is nevertheless constitutional because the defendant’s activity falls within the broader regulatory purpose of a statute regulating commercial activity).

32. See *infra* note 114 and accompanying text (noting that a defendant’s intrastate, noncommercial conduct should be beyond Congress’s regulatory reach because the Constitution did not grant Congress a national police power).

33. 125 S. Ct. 2195 (2005).

34. See discussion *infra* Part III.C (demonstrating that a defendant will not prevail with an as-applied challenge to § 2251(a) on the basis that defendant produced the pornography for personal consumption).

practical conception of the Commerce Clause,³⁵ construed the constitutional parameters too broadly, so that little activity is actually beyond the scope of federal regulation.³⁶ Part V sets forth an alternate approach for resolving as-applied challenges that strikes a balance between the need for a practical conception of the commerce power and the need to provide a reasonable limit to what Congress may regulate, as the Court did in *Lopez* and *Morrison*.³⁷

I. IN PURSUIT OF A MEANINGFUL LIMIT TO CONGRESS'S POWER UNDER THE COMMERCE CLAUSE: *LOPEZ* AND *MORRISON*

From the New Deal constitutional revolution of 1937³⁸ until 1995, the Supreme Court placed more emphasis on the need for a practical conception of the commerce power than on the need for a meaningful limit on Congress's regulatory reach.³⁹ As a result, Congress enjoyed such unrestricted freedom in legislating under this clause that Judge Alex Kozinski wondered why "anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'"⁴⁰

35. See discussion *infra* Part III.B (analyzing the *Raich* Court's decision to uphold application of federal drug law to noncommercial cultivation and use of medical marijuana despite absence of congressional findings on impact of such activity on the national drug market).

36. See discussion *infra* Part IV.A (demonstrating that the macrocosmic approach allows federal regulation over intrastate, noncommercial criminal conduct as long as Congress drafts the statute broadly enough).

37. See discussion *infra* Part V (striking a balance between the two competing principles within the Court's Commerce Clause jurisprudence and imposing a reasonable limit on Congress's regulatory power so that it does not extend to intrastate, noncommercial, criminal conduct with only an attenuated connection to interstate commerce).

38. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3 (2d ed. 2002) (explaining that the Court's decisions in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942), "expansively defined the scope of Congress's commerce power"); *id.* (recognizing that, with these decisions, the Court formally abandoned the distinctions between "commerce and other stages of business" and between "direct and indirect effects on interstate commerce").

39. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (upholding the constitutionality of an as-applied challenge where the litigant, a loan shark, threatened to break the legs of a butcher because, as the Court held, loan sharking is part of organized crime, which substantially affects interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (finding that a federal law prohibiting racial discrimination may reach a local restaurant, even in absence of direct evidence demonstrating the connection between discriminatory restaurant service and the flow of food in interstate commerce); *Wickard*, 314 U.S. at 128-29 (determining that the Agricultural Adjustment Act could extend to a farmer in Ohio who grew wheat for personal consumption).

40. Hon. Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995); see also *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring) (lamenting that "one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress"); Mitchell S. Lustig, *Rehnquist Court Redefines the Commerce Clause*, N.Y.L.J. Aug. 28,

In the 1995 decision *United States v. Lopez*,⁴¹ however, the Supreme Court resurrected the competing principle that there must be a reasonable limit to Congress's regulatory authority under the Commerce Clause to preserve the sovereignty of the States.⁴² In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990 ("GFSZA"),⁴³ which made gun possession in a school zone a federal criminal offense.⁴⁴ The Court explained that the possession of a gun in a school zone was a criminal act that had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."⁴⁵

To restore a meaningful limit on Congress's commerce power,⁴⁶ the Court declined to extend Congress's regulatory authority to activity only remotely associated with economic productivity.⁴⁷ In striking down the

2000, at 1 (observing that during the twentieth century the Supreme Court increasingly deferred to congressional judgment "if Congress determined that there was need for legislation to remedy a problem of national concern"); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 691 (1995) (observing that "the Commerce Clause had become an intellectual joke").

41. 514 U.S. 549 (1995).

42. See *id.* at 561 n.3 (reiterating that under our dual system of government, the "States possess primary authority for defining and enforcing the criminal law" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993))); see also Linda Greenhouse, *The Rehnquist Court and Its Imperiled States' Rights Legacy*, N.Y. TIMES, June 12, 2005, § 4, at 3 (observing that the Rehnquist Court has issued "decisions that demanded a new respect for the sovereignty of the states and placed corresponding restrictions on the powers of Congress").

43. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4844-45 (1990) (codified at 18 U.S.C. § 922(q)) (1988 & Supp. V 1990), *invalidated by Lopez*, 514 U.S. 549, and *amended by* Treasury, Postal Service, and General Government Appropriations Act of 1997, Pub. L. No. 104-208, § 101(f), 110 Stat. 3009, 369-70 (1996) (limiting GFSZA in the wake of *Lopez* to guns moving in or otherwise affecting interstate commerce) (current version at 18 U.S.C. § 922(q) (2000)).

44. See *Lopez*, 514 U.S. at 561 (explaining that because the statute was "not an essential part of a larger regulation of economic activity," it could not "be sustained under [the Court's] cases upholding regulations of activities that arise out of or are connected with a commercial transaction [that] substantially affects interstate commerce").

45. *Id.*

46. Cf. *id.* at 584-85 (Thomas, J., concurring) (declaring that the Court has "always . . . rejected readings of the Commerce Clause . . . that would permit Congress to exercise a police power"); Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 694 (2005) (recognizing that because there is no "federalism" clause, the Court has used "interpretative tools" "to justify its decisions"); *id.* (arguing that "the Constitution requires a balanced approach to federalism that takes account of two countervailing principles—state sovereignty and federal supremacy," and that, in these recent cases, "the majority relies exclusively on the state sovereignty principle," while "the dissenters . . . focus solely on the federal supremacy principle").

47. See *Lopez*, 514 U.S. at 564 (declining to accept the Government's "'costs of crime' reasoning" because, if accepted, "Congress could regulate . . . all violent crime" no matter "how tenuously they relate to interstate commerce"); *id.* (rejecting the Government's "national productivity" reasoning since this would necessarily grant Congress the authority to regulate any activity, "including marriage, divorce, and child custody," if it determined that the activity affected an individual's economic productivity); see also *United States v. Wall*, 92 F.3d 1444, 1459 (6th Cir. 1995) (Boggs, J., concurring in part and dissenting in part) (arguing that the *Lopez* Court applied a higher standard of review than the typical

GFSZA, the Court provided a framework for analyzing future Commerce Clause challenges. Under this framework, Congress may regulate three broad categories under the commerce power: (1) the “channels” of interstate commerce; (2) the “instrumentalities” of interstate commerce, including persons or things in interstate commerce; and, (3) activities that “substantially affect” interstate commerce.⁴⁸

Similarly, in *United States v. Morrison*,⁴⁹ the Court held that Congress exceeded its commerce power in enacting the provision of the Violence Against Women Act⁵⁰ that created a federal civil remedy for victims of gender-motivated violence.⁵¹ Section 13981 was suspect because it did not regulate an economic activity.⁵² The Court rejected the voluminous legislative findings purporting to demonstrate the effects of gender-motivated violence on interstate commerce.⁵³ The Court feared that if it accepted Congress’s “but-for” method of reasoning and upheld the provision, Congress’s regulatory reach would inevitably extend to activities with only a tenuous connection to interstate commerce.⁵⁴ In declining to defer to Congress’s decision-making,⁵⁵ the Court remarked that “simply because Congress may conclude that a particular activity substantially

rational basis test for evaluating the constitutionality of regulating noncommercial activity under the Commerce Clause); *Dral & Phillips*, *supra* note 18, at 616 (criticizing the Court’s approach because “the majority refuses to relinquish the rational basis test, [and yet] strikes down legislation with standards that clearly are stricter than rational basis”).

48. *Lopez*, 514 U.S. at 558-59.

49. 529 U.S. 598 (2000).

50. Violence Against Women Act of 1994, Pub. L. No. 102-322, 108 Stat. 1941 (1994) (providing under § 13981(c) that “[a] person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages”) (current version at 42 U.S.C. § 13981 (2000)), *invalidated by United States v. Morrison*, 529 U.S. 598 (2000).

51. *See generally* Goldberg, *infra* note 58, at 581 (explaining that Congress enacted the civil rights provision in response to “widespread violence against women and because women were facing a pervasive inability to obtain recourse in state courts”).

52. *See Morrison*, 529 U.S. at 613 (declining to uphold the statute since gender-motivated crimes are not economic in nature).

53. *See id.* at 615; *see also* H.R. REP. NO. 103-711, pt. 4, at 385 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (finding that such violence substantially affects interstate commerce by preventing victims from traveling, lowering employment levels in interstate business, increasing medical costs, and decreasing national productivity); S. REP. NO. 103-138, at 41 (1993) (estimating the total annual cost of domestic violence in the United States at between five and ten billion dollars); S. REP. NO. 101-545, at 37 (1990) (stating that over one million women seek medical attention annually for injuries stemming from domestic abuse (citation omitted)).

54. *See Morrison*, 529 U.S. at 615-16 (declining to accept the Government’s argument because if the Court permitted federal regulation of gender-motivated violence, Congress would not only be able to regulate all violent crimes, but also family law, since the economic impact of “marriage, divorce, and childrearing on the national economy” cannot be denied).

55. *See id.* at 637 (Souter, J., dissenting) (criticizing the majority for assigning “lesser value[]” to congressional findings and for implicitly “supplanting rational basis scrutiny with a new criterion of review”).

affects interstate commerce does not necessarily make it so.”⁵⁶

After the Court’s decision in *Morrison*,⁵⁷ scholars could no longer dismiss the *Lopez* decision as an anomaly⁵⁸ within the Court’s Commerce Clause jurisprudence.⁵⁹ On the contrary, the principle that there must be a reasonable limit to Congress’s commerce power enjoyed a renewed significance.⁶⁰ *Morrison* clarified *Lopez*’s substantial effect category by providing a four-factor test.⁶¹ Arguably, the two most significant⁶² factors are whether the statute regulates economic or commercial activity, and whether the regulated activity has only an attenuated connection to interstate commerce.⁶³ The two remaining factors consider whether the statute contains an “express jurisdictional element”⁶⁴ that limits the reach of

56. *Id.* at 614 (majority opinion) (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)).

57. 529 U.S. 598 (2000).

58. Dral & Phillips, *supra* note 18, at 616; *see also id.* at 609-10 (adding that commentators disagreed on whether *Lopez* was merely a reminder that there was a limit to congressional power under the Commerce Clause or whether *Lopez* signaled “the beginning of a complete upheaval of the expansive [interpretation of the Commerce Clause] that had existed since 1937”); Jason Everett Goldberg, Comment, *Substantial Activity and Non-Economic Commerce: Toward a New Theory of the Commerce Clause*, 9 J.L. & POL’Y 563, 566 (2001) (explaining that “following *Lopez*, speculation abounded in academic journals as to whether *Lopez* was an aberration or, rather, reflected a shift from a laissez-faire Supreme Court to a more activist Court when evaluating the constitutionality of statutes enacted under the Commerce Clause”).

59. *See* Dral & Phillips, *supra* note 18, at 616-17 (observing that, with *Lopez*, the Court departed from the jurisprudential trend of judicial deference to Congress under the Commerce Clause).

60. *Cf.* Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1281 (2002) (advancing the theory that the results reached by the Rehnquist Court “are less activist than those of previous courts,” especially in the Rehnquist Court’s Commerce Clause decisions). *But see* Christopher E. Smith & Avis Alexandria Jones, *The Rehnquist Court’s Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 57 (1993) (arguing that despite the Justices’ lip service to “judicial conservatism,” the Rehnquist Court is actually an activist court).

61. *Morrison*, 529 U.S. at 610-12 (summarizing the *Lopez* analysis as focusing on: (1) whether the criminal statute has anything to do with commerce; (2) whether the statute contains a jurisdictional element establishing Congress’ regulation of interstate commerce; (3) whether the statute’s legislative history contains express congressional findings on the regulated activity’s impact on interstate commerce; and (4) whether the relationship between the regulated activity and interstate commerce is attenuated).

62. *See United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003) (beginning the analysis of an as-applied challenge based on the Commerce Clause with consideration of the commercial or economic nature of the conduct at issue and the degree of attenuation between the conduct and interstate commerce because, according to the court, conduct that fails to satisfy these two factors automatically fails the entire test, as such conduct would fall outside the scope of Congress’s commerce power).

63. *Morrison*, 529 U.S. at 610-12; *see also United States v. Visnich*, 109 F. Supp. 2d 757, 760 (N.D. Ohio 2000) (recognizing that *Morrison* placed more emphasis on the connection between the regulated activity and interstate commerce).

64. *Morrison*, 529 U.S. at 611-12 (quoting *Lopez*, 514 U.S. at 562); *see also Lopez*, 514 U.S. at 561 (explaining that the presence of a jurisdictional element in a statute would help the Court determine “through case-by-case inquiry” that the activity at issue affects interstate commerce).

its provisions,⁶⁵ and whether Congress made findings regarding the regulated activity's impact on interstate commerce.⁶⁶

The Court's decisions in *Lopez* and *Morrison* demonstrated that Congress's era of unfettered regulatory power was over.⁶⁷ Chief Justice William Rehnquist, who authored both opinions, drew a sharp distinction between economic and non-economic activity: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."⁶⁸ While Rehnquist declined to adopt a "categorical rule" against aggregating non-economic activity, he stressed that the Court has "upheld Commerce Clause regulation of [aggregated] intrastate activity only where that activity [was] economic in nature."⁶⁹

What this distinction between economic and non-economic activity meant for as-applied challenges, however, remained unclear.⁷⁰ Would it be determinative if the particular litigants' conduct was noncommercial?⁷¹ Or, would the noncommercial nature of the litigants' conduct be irrelevant as long as the statute generally regulated commercial activity?⁷² *Lopez* and *Morrison* did not say.⁷³ Consequently, lower courts did not come to a

65. *But see Morrison*, 529 U.S. at 657-59 (Breyer, J., dissenting) (criticizing the efficacy of the jurisdictional element in protecting the federalism concerns addressed in *Morrison* since most products, or their integral parts, cross interstate lines); Diane McGimsey, Comment, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1680 (2002) (providing a comprehensive discussion of the jurisdictional hook, and arguing that the "state-line crossing requirement does not impose meaningful limits on congressional regulation").

66. *Morrison*, 529 U.S. at 612.

67. *See id.* at 618 (finding "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims"); *Lopez*, 514 U.S. at 566 (recognizing that the Constitution does not grant Congress a "plenary police power"); *see also* Elizabeth S. Saylor, *Federalism and the Family After Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Abusers*, 25 HARV. WOMEN'S L.J. 57, 68 (2002) (interpreting the *Lopez* and *Morrison* decisions as attempts to establish a "limiting principle" on congressional power).

68. *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 560).

69. *Id.* at 613; *see also Lopez*, 514 U.S. at 566 (admitting that a "determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty").

70. *See Gonzales v. Raich*, 125 S. Ct. 2195, 2209 (2005) (explaining that facial challenges narrowly limited the question in *Lopez* and *Morrison* to whether a certain subject matter falls within the regulatory reach of Congress's commerce power, thereby excluding the question of whether facially valid regulations may extend to all persons that Congress intended such regulations to govern).

71. *See* discussion *infra* Part II (illustrating that the macrocosmic approach and microcosmic approach diverge on this issue).

72. *See* discussion *infra* Part II (explaining that this criteria is sufficient for finding the statute constitutional as applied to a litigant under the macrocosmic approach, but is insufficient under the microcosmic approach).

73. *See supra* text accompanying notes 19-20 (explaining that because the Court upheld the litigants' facial challenges to the statute, the Court did not provide adequate guidance for

consensus in deciding which level of generality was appropriate to evaluate the regulated activity under an as-applied challenge.⁷⁴ Some courts looked at the litigants' conduct specifically,⁷⁵ while other courts looked at the statute generally.⁷⁶

II. THE DIFFICULTY IN RESOLVING AS-APPLIED CHALLENGES AFTER *LOPEZ* AND *MORRISON*: THE CIRCUIT SPLIT REGARDING THE INTRASTATE PRODUCTION OF CHILD PORNOGRAPHY

The courts' lack of consensus in deciding which level of generality was appropriate is readily apparent in the context of as-applied challenges to CPPA, which proscribes the production of child pornography made with materials that have traveled through interstate commerce.⁷⁷ Under the macrocosmic approach, courts focused on whether the statute regulated economic activity.⁷⁸ Under the microcosmic approach, however, courts focused on whether the particular litigants' conduct was economic in nature.⁷⁹ This discrepancy led courts to reach opposite outcomes based

resolving as-applied challenges).

74. See Brief for Constitutional Law Scholars as Amici Curiae Supporting Respondents at 4, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454), 2004 WL 2336485, available at http://supreme.lp.findlaw.com/supreme_court/briefs/03-1454/03-1454.mer.ami.cls.pdf (arguing that “[t]he level of generality issue is actually a red herring, prompted by a common misinterpretation of [*Wickard*], as involving noncommercial activity”).

75. See, e.g., *United States v. Smith*, 402 F.3d 1303, 1315 (11th Cir. 2005) (declining to look beyond the defendant's intrastate, noncommercial, criminal conduct in evaluating the as-applied challenge), *vacated*, 125 S. Ct. 2938 (2005) (remanding for reconsideration in light of *Raich*); *United States v. Matthews*, 300 F. Supp. 2d 1220, 1228, 1237-38 (N.D. Ala. 2004) (holding that § 2251(a) cannot reach the defendant's intrastate, noncommercial, criminal conduct because he produced the child pornography without an “intention to sell, distribute, or exchange” the depictions); *United States v. Jeronimo-Bautista*, 319 F. Supp. 2d 1272, 1279, 1282 (D. Utah 2004) (refusing to classify the defendant's activity as economic because he did not intend to sell, distribute, or exchange the material), *rev'd*, 425 F.3d 1266 (10th Cir. 2005) (remanding for reconsideration in light of *Raich*).

76. See, e.g., *United States v. Morales-De Jesús*, 372 F.3d 6, 17 (1st Cir. 2004) (rejecting defendant's as-applied challenge on the grounds that he did not sell, distribute or exchange the child pornography because his actions fell within “a class of activities that substantially affects interstate commerce”), *cert. denied*, 125 S. Ct. 2929 (2005).

77. The Child Pornography Prevention Act of 1996 provides that:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . sexually explicit conduct for the purpose of producing any visual depiction of such conduct[] shall be punished as provided under subsection (d), . . . if that visual depiction was produced using material that have been mailed, shipped, or transported in interstate or foreign commerce by any means

18 U.S.C. § 2251(a) (2000).

78. See *Morales-De Jesús*, 372 F.3d at 17 (rejecting defendant's as-applied challenge on the grounds that he did not sell, distribute or exchange the child pornography because it is immaterial if the defendant's personal activities do not affect interstate commerce as long as his activity falls within a class of activities that substantially affects interstate commerce).

79. See, e.g., *Smith*, 402 F.3d at 1317 (declining to look beyond the defendant's intrastate, noncommercial criminal conduct in evaluating the as-applied challenge); *Matthews*, 300 F. Supp. 2d at 1228 (holding that § 2251(a) cannot reach the defendant's

upon similar facts.⁸⁰

A. *The Macrocosmic Approach*: United States v. Morales-De Jesús

Elvin Tomás Morales-De Jesús was convicted under § 2251(a) for using materials transported in interstate commerce to make a video of his sexually explicit encounters with his thirteen-year-old god-daughter.⁸¹ The defendant argued that the statute was unconstitutional as applied to his noncommercial conduct⁸² because he did not “purchase, trade, sell or barter”⁸³ the self-generated pornography.⁸⁴ Thus, the court had to decide whether Congress could reach the defendant’s noncommercial conduct by enacting a broad regulatory scheme⁸⁵ aimed at eliminating the lucrative national market in child pornography.⁸⁶

intrastate, noncommercial criminal conduct because he produced the child pornography without an intention to “sell, distribute, or exchange” the depictions); *Jeronimo-Bautista*, 319 F. Supp. 2d at 1279 (refusing to classify the defendant’s activity as economic because he did not intend to sell, distribute, or exchange the material).

80. See discussion *infra* Part II (demonstrating how the First Circuit in *Morales-De Jesús* denied the defendant’s as-applied challenge by employing the macrocosmic approach, and how the Eleventh Circuit in *Smith* upheld the defendant’s as-applied challenge by employing the microcosmic approach).

81. *Morales-De Jesús*, 372 F.3d at 7-8. During two encounters, the defendant used materials and equipment transported in interstate commerce to videotape the sexual encounters. *Id.* at 8.

82. The defendant also asserted a facial challenge to the statute, which the Court rejected. *Id.* at 8, 17.

83. *Id.* at 17.

84. Compare *id.* at 17 (announcing that the commercial requirement does not depend upon a particular defendant’s intent to introduce the child pornography into commerce), with *United States v. McCoy*, 323 F.3d 1114, 1132 (9th Cir. 2003) (upholding litigant’s as-applied challenge to part of a federal statute that proscribes the possession of child pornography because the litigant did not distribute, sell, or exchange the depiction), and *United States v. Corp.*, 236 F.3d 325, 325-26, 332 (6th Cir. 2001) (reversing defendant’s conviction because defendant was not involved, and did not intend to be involved in the distribution or sharing of pornographic photos).

85. See *Morales-De Jesús*, 372 F.3d at 17 (explaining that a defendant’s as-applied challenge that his conduct does not affect interstate commerce will fail if his activity falls within the class of activities regulated that does substantially affect interstate commerce). See generally Alex Kreit, *Why is Congress Still Regulating Noncommercial Activity?*, 28 HARV. J.L. & PUB. POL’Y 169, 172 (2004) (arguing that most lower court opinions treat a broad regulatory statute as “little more than a truism[,] if Congress has the power to enact larger scheme X and statute Y is connected to or part of that scheme, then Congress has the authority to enact statute Y”). The Second Circuit in *United States v. Holston*, 343 F.3d 83, 84-85, 90-91 (2d Cir. 2003) also employed the macrocosmic approach when dismissing the defendant’s as-applied challenge, in which the defendant argued that he had not distributed nor intended to distribute videotapes depicting sexual acts between the defendant and two girls, ages ten and fourteen. Like the First Circuit in *Morales-De Jesús*, the Second Circuit stressed that because § 2251(a) was part of a broad regulatory scheme dedicated to eliminating child pornography, it was irrelevant that the defendant did not ship the materials interstate or intend to benefit commercially from his activity. *Id.* at 90-91.

86. See *Morales-De Jesús*, 372 F.3d at 19-20 (arguing that the Sixth Circuit in *Corp* and the Ninth Circuit in *McCoy* inappropriately relied on the absence of an intent to distribute the depictions in commerce, but were correct in assessing the minor’s age and the absence of “predatory exploitation” as appropriate factors in determining as-applied challenges to

The First Circuit attempted to reconcile this position by focusing on the need for a practical understanding of the commerce power.⁸⁷ Consequently, the First Circuit adopted the macrocosmic approach, and determined that Congress's power to criminalize conduct turns on the economic nature of the "class of conduct defined in the statute" and not on the economic facts of a particular case.⁸⁸ With this premise in place, the *Morales-De Jesús* court interpreted *Lopez* and *Morrison*'s determinative distinction—that activity could be aggregated only where the conduct was commercial in nature⁸⁹—as merely requiring that the general subject of the statute⁹⁰ regulate commercial activity.⁹¹

In focusing exclusively on the principle that Congress should regulate based upon broad principles of economic practicality, the court was deferential to congressional findings⁹² purporting to show how individuals, like the defendant, affected the national child pornography market.⁹³ Under

the statute).

87. *See id.* at 17 (explaining that it is often necessary to regulate "local behavior to ensure the effectiveness of interstate regulation" (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37-38 (1937))).

88. *Id.* at 18 (emphasis added); *see id.* at 17 (finding that where "a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence" (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995) (internal citation omitted))).

89. *See Wickard v. Filburn*, 317 U.S. 111 (1942) (permitting Congress to extend reach of the Commerce Clause to a single farm's production and consumption of wheat); *see also Morales-De Jesús*, 372 F.3d at 15 (finding that *Wickard* was applicable to child pornography cases because the intrastate possession and production of child pornography "through repetition elsewhere" helps to create and sustain the child pornography market (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995))).

90. *See Morales-De Jesús*, 372 F.3d at 15 ("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" (quoting *Wickard*, 317 U.S. at 125 (1942)) (alteration in original)); *see also id.* at 16 (observing that there is a "subtle transformation at work" in applying the *Wickard* aggregation principle in contexts "where the 'homegrown' production and consumption of a commodity does not necessarily substitute for a commercially produced version that the defendant would otherwise have purchased in the marketplace" (quoting *United States v. Rodia*, 194 F.3d 465, 476 (3d Cir. 1999))).

91. *See id.* at 19-20 (drawing on *Lopez*, where the Court did not frame its analysis around a high-school student bringing a gun to school, but around firearm possession in a school zone, and *Morrison*, where the Court discussed gender-motivated crimes of violence, and not the rape of a freshman college student, to support its macrocosmic interpretation).

92. *See id.* at 11; *see also* Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341-74 (finding child pornography to be a "multi-million dollar industry"); H.R. REP. NO. 105-557, at 27 (1998), *reprinted in* 1998 U.S.S.C.A.N. 678, 695 (explaining that Congress intended the 1998 amendment to the CPPA to establish federal jurisdiction over persons producing child pornography with materials that had traveled through interstate commerce because the statute could not previously reach persons not intending to transport the resulting image in interstate commerce); H.R. REP. NO. 98-536, at 10 (1983), *reprinted in* 1984 U.S.S.C.A.N. 492, 501 (noting that many who distribute child pornography do so without any "commercial motive").

93. *See Morales-De Jesús*, 372 F.3d at 17, 20 (explaining that the Government is not required to prove that the defendant's particular actions had an effect on interstate commerce, but only that the defendant produced a depiction of child pornography that

this deferential approach, the First Circuit focused on Congress's finding that child pornography is frequently homegrown,⁹⁴ rather than on Congress's failure to provide any evidence as to how noncommercial actors who do not trade, distribute, or sell their self-generated pornography affect this national market.⁹⁵

B. The Microcosmic Approach: United States v. Smith

Alvin Smith was convicted of violating § 2251(a) for taking sexually explicit photographs of minor girls.⁹⁶ The defendant challenged the constitutionality of the statute as applied to his conduct because he had not distributed, traded, or sold the material.⁹⁷ Thus, like the First Circuit in *Morales-De Jesús*, the Eleventh Circuit had to reconcile a statute that regulates commercial activity with the defendant's noncommercial conduct.⁹⁸ Unlike the court in *Morales-De Jesús*, however, the court in *Smith* focused on the alternate Commerce Clause principle: that the preservation of our dual system of government⁹⁹ requires a meaningful limit to Congress's commerce power.¹⁰⁰ In so doing,¹⁰¹ the Eleventh

“could find its way into the national market for pornography”) (emphasis added).

94. See *id.* at 11, 16-17 (observing that “[g]enerally, the domestic material is of the ‘homemade’ variety, while the imported material is produced by commercial dealers” (quoting H.R. Rep. No. 98-536, at 17, reprinted in 1984 U.S.C.C.A.N. at 508)).

95. See *id.* at 16 (arguing that because much of the child pornography Congress seeks to regulate is homegrown and difficult to trace, Congress can proscribe the local production that feeds the national market, “as this production substantially affects interstate commerce” (quoting *United States v. Holston*, 343 F.3d 83, 90 (2d Cir. 2003))).

96. *United States v. Smith*, 402 F.3d 1303, 1315-16 (11th Cir. 2005), vacated, 125 S. Ct. 2938 (2005) (remanding the case to be considered in light of *Gonzales v. Raich*, 125 S. Ct. 2195 (2005)). Investigators were able to locate a girl who was in a number of the photos. *Id.* at 1310. At the time of the photos, she was fourteen years old. *Id.* The federal prosecutor was able to indict the defendant for his conduct under § 2251(a) because the film, photo paper, and film processor the defendant used to produce the pictures had traveled in interstate commerce. *Id.* at 1309.

97. *Id.* at 1310, 1313-14. While investigating the defendant's brother on suspicion of possession and distribution of drugs, the police uncovered a lockbox belonging to the defendant. *Id.* at 1310. The lockbox contained numerous pornographic photographs. *Id.* Although many of the pictures were of women over eighteen years of age, some pictures contained what appeared to be “very, very young girls” engaged in sexually explicit conduct with the defendant. *Id.*

98. See discussion *supra* Part II.A (describing how the *Morales-De Jesús* court employed the macrocosmic approach to address the defendant's challenge that a statute regulating commercial activity generally was unconstitutional as applied to his noncommercial conduct).

99. See *Smith*, 402 F.3d at 1328 (acknowledging that the court's holding limits the federal government's ability to prosecute intrastate producers and possessors of child pornography, defending this approach by explaining that the Constitution simply does not provide a national police power, and emphasizing that Congress's regulatory power under the Commerce Clause is limited to cases involving “[c]ommerce with foreign Nations, and among the several States” (quoting U.S. CONST. art. I, § 8, cl. 3)).

100. See *id.* at 1315-16 (prefacing its analysis with the principle that “Congress can legislate only within the ambit of the specific powers the Constitution confers on it” (quoting *United States v. Maxwell*, 386 F.3d 1042, 1053-54 (11th Cir. 2004), cert. denied,

Circuit employed the microcosmic approach by focusing on the defendant's "intrastate, noncommercial production of child pornography."¹⁰²

In framing its analysis on the principle that Congress's regulatory power should not infringe upon State sovereignty,¹⁰³ the court construed *Lopez* and *Morrison*'s determinative distinction between commercial and noncommercial activity as requiring that the defendant's individual conduct be commercial to justify aggregation under *Wickard*.¹⁰⁴ In *Wickard*, the Court upheld Congress's ability to regulate the production of wheat on a single farm because cumulatively homegrown wheat had a substantial impact on the supply and demand of the commodity in the national market.¹⁰⁵ Because the Eleventh Circuit found nothing "commercial or economic" about producing pornography for one's own consumption,¹⁰⁶ the court declined to aggregate this activity with others similarly situated.¹⁰⁷ The Eleventh Circuit supported its interpretation by emphasizing a fundamental difference between the purpose of the statute in *Wickard* and that of § 2251(a).¹⁰⁸ Although the statute in *Wickard* was concerned with controlling a national crop that had significant implications for the national economy,¹⁰⁹ § 2251(a) seeks to end the sexual exploitation of children¹¹⁰

126 S. Ct. 85 (2005) (denying Maxwell's petition), and vacated, 126 S. Ct. 321 (2005) (granting the government's petition and remanding for reconsideration in light of *Raich*)).

101. See *id.* at 1328 ("The federalist system places a vital check on the power of the central government to trespass on our freedom. Federalism ensures a role for the governments of the states and affords the voting public a more resonant voice in the debate over many legislative issues of principally local concern." (quoting *Maxwell*, 386 F.3d at 1069)).

102. *Id.* at 1316-17.

103. The court reasoned:

The real issue at this point in the case is whether Smith should remain in federal prison for committing acts that the Federal Government lacks the constitutional power to criminalize simply because we think his punishment is deserved. Ultimately, we think that it would undermine public confidence in the judicial system to so blatantly brush aside the limits our Constitution places on the Federal Government

Id. at 1328.

104. *Id.* at 1317-18.

105. *Wickard*, 317 U.S. at 127-29.

106. *Smith*, 402 F.3d at 1317 (quoting *Maxwell*, 386 F.3d at 1056).

107. See *id.* at 1318 (arguing that to aggregate the defendant's conduct would be to expand Congress's regulatory reach "beyond what the Supreme Court has suggested to be its outer limits").

108. *Id.* at 1320; see *id.* at 1318 (finding that *Wickard* was distinguishable since that statute was "far more obviously a regulation of commerce").

109. *Id.* at 1317-18 (arguing that the statute at issue in *Wickard* was far more a regulation of commerce than § 2251(a) because the consumption of homegrown wheat was "the most variable factor" affecting the national wheat market and without regulating this segment, "wheat prices would have been greatly affected by the world market" (quoting *Wickard v. Filburn*, 314 U.S. 111, 127 (1942))).

110. See *id.* at 1319 (declaring that the "vast majority" of congressional findings merely support the premise that child pornography is harmful to children (quoting *Maxwell*, 386 F.3d at 1067)).

and is not concerned with regulating the child pornography market for its interstate commercial implications.¹¹¹ In fact, because § 2251(a)'s primary purpose is to control conduct,¹¹² the court found that § 2251(a) closely resembles the statutes struck down by the Supreme Court in *Lopez* and *Morrison*.¹¹³ The Eleventh Circuit rejected the premise that Congress's regulatory reach may extend to purely local criminal conduct¹¹⁴ by enacting a sweeping regulatory scheme aimed at extinguishing the child pornography market without showing how the defendant, and others similarly situated, substantially affected this national market.¹¹⁵ By following *Lopez* and *Morrison*'s use of a heightened level of scrutiny when reviewing congressional findings,¹¹⁶ the *Smith* court declined to infer that those who produce child pornography noncommercially would sell, trade, or distribute the material so as to affect this national market.¹¹⁷

111. See *Smith*, 402 F.3d at 1318 (explaining that the statute is not interested in the "supply of child pornography for the purpose of avoiding surpluses and shortages [nor is the statute concerned with] stimulating its trade at increased prices" (quoting *Maxwell*, 386 F.3d at 1057)).

112. See *id.* (noting that Congress attempted "to regulate primary conduct directly, even within state borders" through § 2251(a) (quoting *Maxwell*, 386 F.3d at 1057)).

113. See *id.* (declaring that similar to the statutes at issue in *Lopez* and *Morrison*, § 2251(a) is not concerned with commerce "however broadly one might define [that term]" (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995))).

114. See *Smith*, 402 F.3d at 1320 (arguing that because the causal chain necessary to link the defendant's activity to a substantial impact on interstate commerce is extremely attenuated, the defendant's conduct is beyond Congress's commerce power); see also *id.* at 1328 ("[E]very guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty." (quoting *Stone v. Powell*, 428 U.S. 465, 524 (1976) (Brennan, J., dissenting))).

115. Compare *id.* at 1319 (finding that the congressional findings support nothing more than the fact that a market for child pornography exists), with *United States v. Morales-De Jesús*, 372 F.3d 6, 12 (1st Cir. 2004) (concluding that Congress made specific findings about the need to eliminate the national market in child pornography by prohibiting its production at the local level), *cert. denied*, 125 S. Ct. 2929 (2005).

116. Compare *Morrison*, 529 U.S. at 614 (dismissing the voluminous legislative findings purporting to show the effect of gender-motivated crimes on interstate commerce because the fact that Congress concludes that an activity "substantially affects interstate commerce does not necessarily make it so" (quoting *Lopez*, 514 U.S. at 557 n.2)), with *Smith*, 402 F.3d at 1323 (declining to infer that the defendant distributed the child pornography and emphasizing that the government provided no evidence that the defendant purchased, traded, or distributed the child pornography).

117. See *Smith*, 402 F.3d at 1320 (equating the congressional findings offered to support federal jurisdiction over the intrastate production and possession of child pornography for one's own consumption as the "equivalent of saying that Congress can . . . regulate backyard cookouts simply because a multibillion-dollar interstate restaurant industry exists," but accepting that the congressional findings may support the proposition that intrastate commercial producers and persons who distribute child pornography non-commercially affect interstate commerce).

III. AN UNSATISFYING SOLUTION: *GONZALES V. RAICH*

The Supreme Court recently faced the difficult issue of deciding the constitutional boundaries for as-applied challenges. In *Gonzales v. Raich*,¹¹⁸ the Court ruled on a Commerce Clause challenge to the Controlled Substances Act (“CSA”)¹¹⁹ as applied to the litigants’ intrastate possession, cultivation, and use of marijuana for medical treatment.¹²⁰ Although the Ninth Circuit in *Ashcroft v. Raich*¹²¹ took the microcosmic approach,¹²² the Supreme Court adopted the macrocosmic approach in resolving this as-applied challenge.¹²³ Shortly thereafter, the Supreme Court vacated *Smith*, remanded it for reconsideration in light of its holding in *Raich*, and made clear that the macroscopic approach employed by *Morales-De Jesús* would govern future as-applied challenges to the regulation of intrastate production of child pornography for personal use.¹²⁴

A. *Ashcroft v. Raich: The Ninth Circuit Employs the Microcosmic Approach*

In seeking to preserve as-applied challenges and the distinction between “what is national and what is local,”¹²⁵ the Ninth Circuit, like the Eleventh Circuit in *Smith*,¹²⁶ employed the microcosmic approach.¹²⁷ In so doing,

118. 125 S. Ct. 2195 (2005).

119. See 21 U.S.C. § 801 (regulating the production, distribution, and possession of controlled substances); see also *Raich*, 125 S. Ct. at 2210 (explaining that the Act is “designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I”).

120. *Raich*, 125 S. Ct. at 2199, 2201.

121. 352 F.3d 1222 (9th Cir. 2003), *vacated*, 125 S. Ct. 2195 (2005).

122. See *id.* at 1228-29 (explaining that the intrastate, noncommercial cultivation and use of marijuana for medical purposes can be properly defined as a “separate class of activity” from the conduct regulated by the statute generally since this particular class of activities does not involve “sale, exchange, or distribution”).

123. See *Raich*, 125 S. Ct. at 2209, 2213 (implying that the enforcement difficulties that may be created in providing an exemption to those who cultivate and use marijuana for medical purposes is sufficient for deferring to Congress’s conclusion that the regulation of intrastate cultivation and possession of marijuana is necessary to regulate the national market in controlled substances effectively).

124. See discussion *infra* Part III.C (explaining how future as-applied challenges to § 2251(a) will be resolved).

125. See *Raich*, 352 F.3d at 1233 (explaining that since medical marijuana cultivated and used for one’s own consumption does not have any “obvious” effect on interstate commerce, federal regulation of such conduct “considerably blur[s] the distinction between what is national and what is local” (quoting *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring))).

126. See discussion *supra* Part II.B (explaining that the issue is not whether the defendant’s conduct is deserving of punishment, but whether Congress, without a national police power, can reach the defendant’s intrastate, noncommercial criminal conduct).

127. See *Raich*, 352 F.3d at 1234 (following the principle that state power is “preeminent” in the area of criminal law and national authority in that sphere must be limited only to the areas where interstate commerce is substantially affected (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. McCoy*, 323 F.3d 1114, 1124 (9th Cir. 2003))).

the court distinguished the litigants' noncommercial cultivation, use, and possession of marijuana for medical purposes¹²⁸ from the broader drug market¹²⁹ because the litigants did not sell, exchange, or distribute the marijuana.¹³⁰

The Ninth Circuit interpreted *Lopez* and *Morrison*'s distinction between commercial and noncommercial activity as requiring that the litigants' conduct be commercial to permit aggregation under *Wickard*.¹³¹ Consequently, the court declined to aggregate the litigants' activity with others similarly situated to support the premise that the litigants' activity substantially affected the national drug market.¹³² In fact, the Ninth Circuit stressed the attenuated connection that the litigants' activity had on interstate commerce¹³³ by adhering to *Lopez* and *Morrison*'s use of a heightened level of scrutiny¹³⁴ when reviewing congressional findings¹³⁵

128. *Id.* at 1230 (relying on *McCoy*, where the court upheld an as-applied challenge to the federal statute criminalizing the possession of child pornography after finding a single photograph to be clearly distinct from the economic nature of the child pornography market, to support its conclusion that the litigants' conduct was not commercial); *see id.* at 1231 n.5 (condemning a recent district court's decision, *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192 (N.D. Cal. 2003), because the court failed to ask whether the statute, as applied to the litigant's particular class of activity, regulates commerce).

129. *See id.* at 1230 (distinguishing the medical marijuana at issue from the broader illicit drug market because the medical marijuana is never intended for, nor does it enter, the interstate drug market); *see also* *United States v. Smith*, 402 F.3d 1303, 1317 (11th Cir. 2005) (treating the non-economic, criminal nature of the defendant's behavior as central to the court's decision), *vacated*, 125 S. Ct. 2938 (2005); *McCoy*, 323 F.3d at 1115 (upholding defendant's as-applied challenge to a federal statute criminalizing the possession of child pornography because the defendant never entered nor intended to enter the depiction into the larger interstate market); *United States v. Corp*, 236 F.3d 325, 332 (6th Cir. 2001) (upholding the defendant's as-applied challenge to a statute proscribing the possession of child pornography because the defendant did not distribute nor intend to distribute the pornography).

130. *Raich*, 352 F.3d at 1230 (employing a definition of commercial activity that encompasses the "exchange of goods and services, [especially] on a large scale involving transportation between cities, states, and nations" (quoting BLACK'S LAW DICTIONARY 263 (7th ed. 1999))).

131. *See id.* at 1232 (arguing that because the aggregation principle is applied only in cases where the activity is of an apparent commercial character, it should not be employed in the instant case because the litigants' activity lacks the essential elements of commercial activity).

132. *Id.* at 1230; *see also Smith*, 402 F.3d at 1317-18 (declining to aggregate the defendant's conduct with others similarly situated as his conduct was not commercial).

133. *Compare Raich*, 352 F.3d at 1233 (acknowledging that although the intrastate cultivation, possession, and use of medical marijuana could affect interstate commerce by lowering the demand for marijuana from the interstate market, it was not at all clear that the effect would be substantial), *with Smith*, 402 F.3d at 1321-22 (describing the nexus between the intrastate, noncommercial conduct engaged in by the defendant and the impact on the interstate market of child pornography as "exceedingly attenuated").

134. *United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (citation omitted))).

135. *See Raich*, 352 F.3d at 1232 (reiterating that *Morrison* "counsels courts to take congressional findings with a grain of salt").

purporting to show a sufficient nexus between the activity regulated by the statute and interstate commerce.¹³⁶ Because Congress did not provide findings specific to marijuana,¹³⁷ including the noncommercial use of marijuana for medicinal purposes,¹³⁸ the Ninth Circuit found that the litigants' connection to interstate commerce was exceedingly attenuated¹³⁹ and thus that the CSA was "likely unconstitutional" as applied to them.¹⁴⁰

B. *Gonzales v. Raich: The Macrocosmic Approach Prevails*

Instead of striking a balance between the two competing Commerce Clause principles, the Supreme Court approached the litigants' as-applied challenge¹⁴¹ by focusing exclusively¹⁴² on the importance of sustaining federal legislation based upon broad principles of economic practicality.¹⁴³ Consequently, the Court employed the macrocosmic approach, similar to

136. *See id.* at 1230 n.4 (declining to infer that the litigants' marijuana could be sold in the marketplace and thus may have a substantial impact on the interstate drug market).

137. *See id.* at 1233 (dismissing the congressional findings as insufficient to provide the court with guidance in determining why the federal regulation should extend to the litigants).

138. *See id.* at 1232 (reasoning that Congress could not have considered the "intrastate medicinal use of marijuana that is not bought or sold" when making findings relating to the "[l]ocal distribution and possession of controlled substances").

139. *Id.* at 1233 (conceding that the intrastate cultivation and use of medical marijuana could have an effect on interstate commerce in that it may reduce the demand for marijuana that is moved interstate, but declining to find that the effect would be substantial); *see also Smith*, 402 F.3d at 1320 (equating the Government's argument that the congressional findings support federal jurisdiction over defendant's individualized conduct with saying that Congress has federal jurisdiction over "backyard cookouts simply because a multibillion-dollar interstate restaurant industry exists").

140. *Raich*, 352 F.3d at 1234.

141. *Compare* *Gonzales v. Raich*, 125 S. Ct. 2195, 2209 (2005) (arguing that the fact that the litigants ask the Court to "excise individual applications" of a valid regulatory scheme is "pivotal" because where the class of activities regulated is within the ambit of Congress's commerce power, the courts cannot exempt individuals whose conduct falls within the larger class of activities), *with* *United States v. Morales-De Jesús*, 372 F.3d 6, 17 (1st Cir. 2004) (explaining that a defendant's as-applied challenge will fail if his activity falls within a class of activities that substantially affects interstate commerce), *cert. denied*, 125 S. Ct. 2929 (2005).

142. *Compare Raich*, 125 S. Ct. at 2205 (prefacing its analysis with an explanation of the historical development and congressional expansion of the commerce power "in response to rapid industrial development and an increasingly interdependent national economy"), *and id.* at 2218 (Scalia, J., concurring) (arguing that the analysis should place significantly more weight on Congress's determination that it needs to regulate private activity than whether the statute regulates an area traditionally left to the states), *with Raich*, 352 F.3d at 1234 (prefacing its analysis with the principle that state power is "preeminent" in the area of criminal law and national authority in that sphere must be limited only to the areas where interstate commerce is substantially affected).

143. *See Raich*, 125 S. Ct. at 2210 n.35 (arguing that the precedent set by *Lopez* did not change the Court's practical understanding of the commerce power and that Congress may regulate on the "assumption that we have a single market and a unified purpose to build a stable national economy" (quoting *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring))); *see also id.* at 2206 (declaring that when Congress chooses to regulate the "total incidence" of a practice that may threaten the national market, Congress can regulate the entire class (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971))).

the First Circuit in *Morales-De Jesús*,¹⁴⁴ and held that Congress acted within its authority when it regulated the litigants' conduct as part of its power to regulate interstate markets for controlled substances.¹⁴⁵

The *Raich* Court employed an expansive definition of commercial activity. While previous Court holdings used a definition of commerce that involved "sell[ing], barter[ing], or exchang[ing],"¹⁴⁶ the majority instead opted for a much broader definition by arguing that economic activity includes the "production, distribution, and consumption of commodities."¹⁴⁷

The Court agreed with the First Circuit's decision in *Morales-De Jesús* that only the general subject of the statute need be commercial for aggregating the litigants' conduct¹⁴⁸ under *Wickard*.¹⁴⁹ Under this interpretation, Congress could reach the litigants' local and noncommercial activity since their activity was part of "an economic 'class of activities' that ha[s] a substantial effect on interstate commerce."¹⁵⁰ In fact, *Wickard* is central to the analysis under the macrocosmic approach.¹⁵¹ As noted in

144. Compare *id.* at 2206 (arguing that *Wickard* permits Congress to regulate intrastate, noncommercial activity as long as Congress concludes that the failure to regulate that activity threatens its ability to regulate the interstate market in that commodity effectively), with *Morales-De Jesús*, 372 F.3d at 17 (supporting its analysis with the principle that it is often necessary to control local behavior to regulate interstate commerce effectively).

145. See *Raich*, 125 S. Ct. at 2201 (finding that the Ninth Circuit improperly distinguished the litigants' noncommercial, intrastate cultivation and use of medical marijuana from the larger commercial market).

146. *Wickard v. Filburn*, 317 U.S. 111, 119 (1942). *Lopez* and *Morrison* both recognized that *Wickard* was "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *United States v. Morrison*, 529 U.S. 598, 610 (2000) (quoting *Lopez*, 514 U.S. at 560).

147. Compare *Raich*, 125 S. Ct. at 2211 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)), and *Morales-De Jesús*, 372 F.3d at 16 (determining that an activity is economic as long as it creates a product for which there is a national market), with *Raich*, 352 F.3d at 1228 (explaining that the cultivation and use of marijuana for medicinal purposes is not commercial activity because it lacks the essential elements of commerce, namely sale, exchange, or distribution).

148. Compare *Raich*, 125 S. Ct. at 2206 (arguing that *Wickard* stands for the notion that Congress may regulate noncommercial intrastate activity if it determines that regulating such activity is necessary in order to effectively regulate the interstate market for a product), with *Morales-De Jesús*, 372 F.3d at 20 (interpreting *Lopez* and *Morrison* as merely requiring that the general subject of the statute, and not the litigant's particular activity, be commercial in nature).

149. See *Raich*, 125 S. Ct. at 2205-06 ("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." (quoting *Wickard*, 317 U.S. at 129)).

150. *Id.* at 2205 (citing *Perez v. United States*, 402 U.S. 146, 151 (1971)). The Court further explained that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 2206 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)); see also *Morales-De Jesús*, 372 F.3d at 17 (finding that Congress's power to criminalize conduct turns on the economic nature of a class of activities defined in the statute, and not on the economic facts of a particular case).

151. See *Raich*, 125 S. Ct. at 2207 (emphasizing that as homegrown wheat "tend[ed] to

Justice Scalia's concurrence in *Raich*, Congress may regulate the litigants' local and noncommercial cultivation and consumption of marijuana because, when aggregated with others similarly situated, this activity may affect the supply and demand of controlled substances¹⁵² in the interstate market.¹⁵³ Thus, as the homegrown wheat in *Wickard* "tend[ed] to frustrate" the federal interest in protecting and stabilizing the interstate market, an exemption for homegrown marijuana "tends to frustrate" the federal interest in eliminating¹⁵⁴ the interstate illicit drug market.¹⁵⁵

Unlike the *Wickard* Court, the *Raich* Court could not rely on specific findings demonstrating how the regulation of the litigants' activity was essential to the effective regulation of the interstate market.¹⁵⁶ To overcome a lack of Congressional findings¹⁵⁷ purporting to show how noncommercial, intrastate producers and consumers of homegrown

frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety"); *Morales-De Jesús*, 372 F.3d at 15 (asserting that *Wickard* was applicable to child pornography cases because the intrastate possession and production of child pornography "through repetition elsewhere" helps to create and sustain the child pornography market (quoting *United States v. Robinson*, 137 F.3d 652, 656 (1st Cir. 1998) (internal quotation omitted))).

152. See *Raich*, 125 S. Ct. at 2208 n.31 (noting that "[t]he Executive Office of the President has estimated that in 2000 American users spent \$10.5 billion on the purchase of marijuana" (citation omitted)).

153. See *id.* at 2219 (Scalia, J., concurring) (contending that controlled substances produced and distributed intrastate are indistinguishable from those produced and distributed interstate and that marijuana cultivated and possessed for personal use is "never more than an instant from the interstate market"). Justice Scalia also declared that Congress is well within its authority in declining to accept the premise that state law will be effective in maintaining the distinction between the lawful market in marijuana for medicinal purposes and the larger marijuana market. *Id.* at 2220.

154. See *id.* at 2219 (reaffirming that the power to prohibit commerce in a particular product is well within the ambit of Congress's commerce power).

155. In *Raich*, the Court commented:

One need not have degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.

125 S. Ct. at 2212.

156. See *Ashcroft v. Raich*, 352 F.3d 1222, 1230-32 (9th Cir. 2003) (embracing *Morrison's* warning "to take congressional findings with a grain of salt" and declining to infer that the litigants' marijuana could be sold in the marketplace, which may then result in a substantial impact on the interstate drug market), *vacated sub nom.* *Gonzales v. Raich*, 125 S. Ct. 2195 (2005); see also *United States v. Smith*, 402 F.3d 1303, 1320 (11th Cir. 2005) (declining to infer that an individual who produces a depiction of child pornography for one's own consumption will later distribute, sell, or exchange the material), *vacated*, 125 S. Ct. 2938 (2005).

157. See *Raich*, 125 S. Ct. at 2208 n.32 (responding to the dissenters' critique of the Court's use of rational basis scrutiny by declaring that the dissenters would impose an "unprecedented" and "impractical" burden on Congress's ability to effectively regulate interstate commerce). The Court repeated that the "absence of particularized findings" does not cast doubt unto Congress's ability to regulate under the Commerce Clause. *Id.* at 2208.

marijuana for medical purposes affect the interstate drug market,¹⁵⁸ the Court resurrected the rational basis standard.¹⁵⁹ It inferred that ruling for the litigants would lead to an exemption for marijuana that would include not only the sick, but their “friends, neighbors, and family members,” and thus *could* have a substantial impact on interstate commerce.¹⁶⁰

C. Resolving the Circuit Split over the Intrastate Production of Child Pornography

Now that the Supreme Court has provided an expansive set of constitutional parameters for resolving as-applied challenges under the Commerce Clause,¹⁶¹ the macrocosmic approach exemplified by the First Circuit in *Morales-De Jesús* will prevail over the microcosmic approach employed by the Eleventh Circuit in *Smith*. Future litigants will not succeed if they raise as-applied challenges to the federal pornography statute on the basis that their intrastate, noncommercial conduct has only an attenuated connection to interstate commerce.¹⁶²

In both *Morales-De Jesús* and *Smith*, the defendants challenged that § 2251(a) was unconstitutional as applied to them because the defendants produced the child pornography for their own use.¹⁶³ Neither defendant had distributed, traded, or sold the child pornography they created, nor was there any evidence that they intended to do so.¹⁶⁴ Under the expansive

158. *See id.* at 2211 (determining that since the CSA regulates the production, distribution, and consumption of products for which there is a profitable, national market, the prohibition of the intrastate cultivation and possession of such products is a rational way to effectively regulate commerce in that commodity).

159. *See id.* at 2208 (echoing that the Court only needs to employ rational basis scrutiny in reviewing legislation enacted under the Commerce Clause); *cf.* *United States v. Morales-De Jesús*, 372 F.3d 6, 17 (1st Cir. 2004) (explaining that the Government only needs to prove that the defendant produced a depiction of child pornography that *could* find its way into the national child pornography market), *cert. denied*, 125 S. Ct. 2929 (2005).

160. *Raich*, 125 S. Ct. at 2212.

161. *See supra* Part III.B (explaining how the Court applied the macrocosmic approach to the litigants’ as-applied challenge in the debate over the intrastate production and consumption of medical marijuana).

162. *See, e.g.*, *United States v. Maxwell*, 126 S. Ct. 321 (2005) (vacating circuit court’s decision sustaining as-applied challenge to § 2251(a) and remanding for reconsideration in light of *Raich*); *United States v. Smith*, 125 S. Ct. 2938 (2005); *United States v. Stewart*, 125 S. Ct. 2899 (2005) (vacating and remanding in light of *Raich*). *But see Morales-De Jesús*, 372 F.3d at 15 (noting that a defendant may prevail with an as-applied challenge to the federal pornography statute where no sexual exploitation has taken place).

163. *See Morales-De Jesús*, 372 F.3d at 17 (noting defendant’s argument that he had no intention to purchase, distribute, or sell the homegrown pornography); *United States v. Smith*, 402 F.3d 1303, 1312-13 (11th Cir. 2005) (observing defendant’s contentions that he lacked knowledge that the materials used to produce visual depictions of himself having sex with minors were transported in interstate commerce, that he never distributed, sold, or exchanged the homegrown pornography, and that the state lacked evidence showing that he intended to do so), *vacated*, 125 S. Ct. 2938 (2005).

164. *Compare Morales-De Jesús*, 372 F.3d at 19 (dismissing the defendant’s as-applied challenge since the “apparent commercial character” does not depend on any intent by the

definition of commercial activity adopted by the *Raich* Court, the courts may classify the defendants' activity as commercial if they create a product for which there is an interstate market.¹⁶⁵ Even if courts employ a more traditional definition of commerce activity and classify the defendants' activity as noncommercial, they may still find the statute constitutional as applied to the defendants.¹⁶⁶ As held in *Morales-De Jesús* and more recently in *Raich*, if the challenged statute itself regulates commercial activity, Congress may reach the defendants' local, noncommercial conduct.¹⁶⁷ As a result, Congress may reach Smith and Morales' intrastate, noncommercial activity because § 2251(a) is a provision of the CPPA that seeks to regulate the multi-million dollar interstate market in child pornography.¹⁶⁸

Under the more expansive approach, courts may use *Wickard* to aggregate a defendant's noncommercial activity.¹⁶⁹ To support this interpretation of *Wickard*, the courts must place little importance upon the fact that Congress enacted the CPPA, unlike the statute in *Wickard*, to eliminate a market instead of preserving it through regulation.¹⁷⁰ Instead,

defendant to introduce the proscribed visual depictions into commerce), *with Smith*, 402 F.3d at 1315-16 (concluding that the defendant's intrastate, noncommercial production and possession of child pornography is not within Congress's regulatory authority under the Commerce Clause).

165. See *Raich*, 125 S. Ct. at 2211 (defining commercial activity as "the production, distribution, and consumption of commodities" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1964))).

166. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 118-19 (1942) (finding federal jurisdiction could reach the wheat grown and consumed on a single farm because that wheat fed the livestock, which was then "sold, bartered, or exchanged" on the interstate market).

167. See *Raich*, 125 S. Ct. at 2205 (concluding that the litigants' arguably noncommercial activity does not exempt them from federal regulation since their conduct is part of an "economic class of activities that have a substantial effect on interstate commerce"); *Morales-De Jesús*, 372 F.3d at 17 (determining that Congress's ability to proscribe conduct depends upon on the commercial nature of the class of activities defined in the statute and not on the economic facts of an individual case).

168. See *Morales-De Jesús*, 372 F.3d at 12 (reviewing congressional findings related to the CPPA and its predecessors and concluding that Congress intended "to diminish [the] national market" for child pornography); see also *Raich*, 125 S. Ct. at 2206 (arguing that *Wickard* permits Congress to regulate intrastate, noncommercial activity as long as it concludes that the failure to regulate that activity threatens its ability to effectively regulate the interstate market in that commodity); *Morales-De Jesús*, 372 F.3d at 17 (recognizing that it is often necessary to control local behavior in order to effectively regulate interstate commerce).

169. See *Raich*, 125 S. Ct. at 2206 (declaring that under *Wickard*, Congress can regulate intrastate, noncommercial activity if it determines that regulating such conduct is necessary in order to effectively regulate the interstate market for a product); *Morales-De Jesús*, 372 F.3d at 19-20 (interpreting *Lopez* and *Morrison* as requiring only that the general subject of the statute, not the defendant's particular activity, be commercial in order to employ the *Wickard* aggregation principle).

170. See *United States v. Smith*, 402 F.3d 1303, 1318 (11th Cir. 2005) (explaining that Congress enacted § 2251(a) not to control surpluses and shortages in the supply of child pornography in the interstate market, but rather to end the sexual exploitation of children), *vacated*, 125 S. Ct. 2938 (2005).

this approach emphasizes that, as Congress regulated local production of wheat because it affected the supply and demand of the commodity in the national market, Congress may now regulate the intrastate production of child pornography in an effort to curb the supply of that material in the national market.¹⁷¹

While Congress provided the *Wickard* Court with specific findings that demonstrated how local wheat producers substantially affected the national market for that commodity,¹⁷² Congress has not provided evidence as to how the regulation of intrastate noncommercial production of child pornography is essential to eliminating the interstate market in child pornography.¹⁷³ This difference, however, is not determinative.¹⁷⁴ After *Raich*, courts only have a “modest” task.¹⁷⁵ The courts do not have to find that the litigants’ activity, when taken in the aggregate, *actually* has a substantial impact on interstate commerce, but only that there is a “rational basis” for believing so.¹⁷⁶ Consequently, despite the congressional findings that much of child pornography is homegrown and distributed without commercial motivation,¹⁷⁷ the courts may conclude that Congress can reach

171. See *Morales-De Jesús*, 372 F.3d at 16-17 (concluding that since much of the child pornography Congress seeks to regulate is homegrown and finds its way into the national market “surreptitiously,” Congress can proscribe the local production that feeds the national market, as this production substantially affects interstate commerce); cf. *Raich*, 125 S. Ct. at 2213 (declaring that “[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected”).

172. See *Wickard v. Filburn*, 317 U.S. 111, 125-27 (1942) (acknowledging that the consumption of homegrown wheat was the “most variable factor” affecting the national wheat market and that without regulating this activity, domestic wheat prices would have been greatly affected by the world market).

173. See *Smith*, 402 F.3d at 1320-21 (illustrating that congressional findings support the proposition that intrastate commercial producers and other persons who distribute child pornography non-commercially affect interstate commerce, but noting that these findings fail to show how those who produce child pornography for their own consumption affect the national market).

174. See *Morales-De Jesús*, 372 F.3d at 11-12 (responding that given the congressional findings and subsequent amendments to the Protection of Children Against Sexual Exploitation Act, there is no doubt that Congress recognized the need to eliminate the national market in child pornography by prohibiting its production at the local level); see also *Raich*, 125 S. Ct. at 2208 (declaring that the “absence of particularized findings” does not cast doubt into Congress’s ability to regulate under the Commerce Clause).

175. *Raich*, 125 S. Ct. at 2208.

176. *Id.*; see *Morales-De Jesús*, 372 F.3d at 17 (arguing that the government only needs to prove that the defendant produced a visual depiction of child pornography).

177. *Morales-De Jesús*, 372 F.3d at 11 (discussing congressional findings that “many of the individuals who distribute [child pornography] do so by gift or exchange without any commercial motive” and that “[g]enerally the domestic material is of the ‘homemade’ variety” (citing H.R. REP. NO. 98-536, at 10, 17 (1983), reprinted in 1984 U.S.C.C.A.N. 492, 501, 508)); see also Lisa S. Smith, *Private Possession of Child Pornography: Narrowing At-Home Privacy Rights*, 1991 ANN. SURV. AM. L. 1011, 1015 (1993) (describing the child pornography as an “underground . . . pedophilic subculture” and “informal cottage industry [operating] for the pleasure, not the profit, of pedophiles”). See

the defendants' local, noncommercial production because the depiction *could* find its way into the national child pornography market.¹⁷⁸ While this conclusion requires the courts to make an inference that the defendants will either sell, trade, or distribute the homegrown pornography, the courts may make such inferences under the macrocosmic approach.¹⁷⁹

IV. THE PROBLEMS WITH ADOPTING THE MACROCOSMIC APPROACH TO AS-APPLIED CHALLENGES

There is little doubt that the Court needed to provide guidance for resolving as-applied challenges under the Commerce Clause.¹⁸⁰ The Court's macrocosmic approach, however, is flawed. In focusing exclusively on the need for a practical conception of the Commerce Clause, the Court has set the constitutional parameters too broadly.¹⁸¹ As a result of such an expansive approach, Congress may now regulate most of the conduct that *Lopez* and *Morrison* sought to limit: local, noncommercial activity without a sufficient nexus to interstate commerce.¹⁸² By permitting federal regulation over such intrastate criminal behavior, the macrocosmic approach presents serious problems for an already overburdened federal court system.¹⁸³

A. Doctrinal Problems with the Macrocosmic Approach

To sustain such an expansive approach for resolving as-applied challenges while attempting to avoid the explicit rejection of the Commerce Clause precedent set by *Lopez* and *Morrison*, the Court made

generally Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 212 (2001) (arguing that child pornography law is both the solution and the problem because it may "unwittingly heighten[] pedophilic desire").

178. See *supra* note 159 and accompanying text; cf. *Raich*, 125 S. Ct. at 2209 (emphasizing that homegrown marijuana may hinder Congress's ability to eliminate marijuana in the interstate market).

179. See *supra* note 160 and accompanying text (detailing how the Court, in *Raich*, employed rational basis scrutiny and found that providing an exemption for the intrastate, medicinal use of marijuana may have a substantial impact on the interstate marijuana market since the exemption may not be limited to just the sick, but could include their "friends, neighbors, and family members").

180. See *supra* Part II (exploring how two federal circuit courts reached different outcomes regarding as-applied challenges to the statute prohibiting the production of child pornography despite similar facts).

181. See discussion *infra* Part IV.A (asserting that the Court's macrocosmic approach is not in keeping with recent Commerce Clause jurisprudence, particularly *Lopez* and *Morrison*).

182. See discussion *infra* Part IV.A (contending that *Lopez* and *Morrison* stood for a narrower interpretation of the Commerce Clause that distinguished interstate commerce from intrastate, noncommercial activity).

183. See discussion *infra* Part IV.B (explaining that the unchecked federalization of local crimes threatens the quality of federal courts, clogs federal court dockets, and strains federal prosecutors and federal police agencies).

several dubious claims. The *Raich* Court adopted an unprecedented and expansive definition of commercial activity¹⁸⁴ and misinterpreted *Wickard* as allowing federal regulation of noncommercial activity.¹⁸⁵ Additionally, the Court resurrected rational basis review to justify federal regulation over intrastate conduct with an exceedingly attenuated connection to interstate commerce.¹⁸⁶

Lopez and *Morrison* articulated an approach to addressing Commerce Clause challenges that sought to preserve the distinction between “what is national and what is local,”¹⁸⁷ so to avoid creating an increasingly centralized government.¹⁸⁸ Yet, the *Raich* Court adopted an unprecedented definition of economic activity, encompassing a greater amount of local activity than more traditional definitions.¹⁸⁹ By opting for a definition of economic activity that includes “producing” and “consuming” a good for which there is a national market,¹⁹⁰ there is little Congress is unable to regulate considering all the products for which an interstate market exists.¹⁹¹

184. See *supra* notes 146-147 and accompanying text (comparing *Wickard*'s definition of commerce as “[selling], barter[ing], or exchang[ing],” 317 U.S. 111, 119, 138 (1942) with *Raich*'s definition of commerce as “production, distribution, and consumption,” 125 S. Ct. 2195, 2211 (2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966))).

185. See *supra* notes 205-207 and accompanying text (explaining that the conduct at issue in *Wickard*—harvesting wheat in excess of a regulatory quota—constituted commercial activity because part of the wheat crop and livestock which fed on the excess wheat were sold in interstate commerce).

186. See discussion *infra* Part IV.A (demonstrating how the Court's dubious arguments are inconsistent with Commerce Clause precedent).

187. *Raich*, 125 S. Ct. at 2216 (Scalia, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 566-67 (1995) (citation omitted)). In *Gregory v. Ashcroft*, Justice O'Connor enumerated the virtues of federalism:

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry . . . Perhaps the principle benefit of the federalist system is a check on abuses of government power.

501 U.S. 452, 458 (1991).

188. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (warning that the Court should decline to adopt a view of causation that could very well “obliterate the distinction between what is national and what is local in the activities of commerce”).

189. See Jonathan H. Adler, *Federalism, Up in Smoke?*, NAT'L REV. ONLINE, June 7, 2005, <http://www.nationalreview.com/adler/adler200506070921.asp> (observing that few other dictionaries beside Webster's Third New International Dictionary provide such an expansive definition).

190. *Raich*, 125 S. Ct. at 2211.

191. See *United States v. Morrison*, 529 U.S. 598, 611 (2000) (“In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.” (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring))); see also *Raich*, 125 S. Ct. at 2224-25 (O'Connor, J., dissenting) (rejecting the Court's definition of economic activity as it could encompass nearly “all productive human activity . . . [as] . . . most commercial goods . . . have some sort of

The Court's misinterpretation of *Wickard* in *Raich* further illustrates the Court's departure from *Lopez* and *Morrison*'s holdings that Congress could not regulate local, noncommercial activity. In both *Lopez* and *Morrison*, the Court labeled *Wickard* as the "most far-reaching example of Commerce Clause authority over intrastate activity."¹⁹² Recognizing that the Court's pre-*Lopez* decisions upheld the aggregation of local activity under *Wickard* only where the litigants themselves were engaged in economic activity,¹⁹³ *Lopez* and *Morrison* declined to extend Congress's regulatory reach further.¹⁹⁴ By employing the macrocosmic approach, however, *Raich* now supplants the limits of *Wickard*.

Under the far-reaching approach in *Raich*, *Wickard* now stands for the proposition that only the general subject of the statute needs to be commercial for aggregation of the litigants' local conduct to occur.¹⁹⁵ This view of the aggregation principle relies on a fundamental misinterpretation of *Wickard* as involving noncommercial activity.¹⁹⁶ The First Circuit in *Morales-De Jesús*¹⁹⁷ and the Supreme Court in *Raich*¹⁹⁸ relied on one sentence in *Wickard* to support this misinterpretation: "[T]hough it may

privately producible analogue").

192. *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 561); see also *United States v. Stewart*, 348 F.3d 1132, 1141 (9th Cir. 2003) (viewing *Wickard* as "quite radical" in its interpretation of the commerce power, because it first declared "Congress's power to regulate persons and things twice and thrice removed from interstate commerce"), *vacated*, 125 S. Ct. 2899 (2005) (remanding case for reconsideration in light of *Raich*).

193. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (permitting federal regulation of intrastate coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (finding that Congress's commerce power extended to regulation of intrastate loan sharking); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the same statute where defendant owned and operated a hotel which catered to interstate guests); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding a federal statute that proscribed racial discrimination where litigant's restaurant used substantial interstate supplies).

194. See *Morrison*, 529 U.S. at 617 (rejecting the argument that Congress may regulate non-economic criminal conduct, such as violence against women, based only upon that conduct's "aggregate effect" on interstate commerce); *Lopez*, 514 U.S. at 560 (maintaining that the conduct at issue in *Wickard* involved commercial activity in a way that gun possession in a school zone does not).

195. See *Raich*, 125 S. Ct. at 2206 (arguing that *Wickard* stands for Congress's ability to regulate intrastate, noncommercial activity if Congress determines that regulating such conduct is necessary in order to effectively regulate the interstate market for a product); *United States v. Morales-De Jesús*, 372 F.3d 6, 20 (1st Cir. 2004) (contending that only the general subject of the statute, and not the litigant's particular activity, need be commercial in nature in order to use the *Wickard* aggregation principle), *cert. denied*, 125 S. Ct. 2929 (2005).

196. See *Raich*, 125 S. Ct. at 2205-06 (relying upon the language that "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" (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942))); *Morales-De Jesús*, 372 F.3d at 15 (utilizing the same language to support aggregating intrastate, noncommercial activity that substantially affects interstate commerce).

197. 372 F.3d at 15.

198. 125 S. Ct. at 2205-06.

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.”¹⁹⁹ Taken in context, however, this sentence came after the *Wickard* Court’s rejection of previous holdings²⁰⁰ that had unreasonably constrained Congress’s power to regulate interstate commerce—by preventing it from regulating mining, production, and manufacturing merely because the Court did not consider these activities to be “commerce” in its narrowest sense.²⁰¹

Often overlooked by some scholars,²⁰² lower courts like the First Circuit in *Morales-De Jesús*,²⁰³ and now the *Raich* majority,²⁰⁴ are the facts that the farmer in *Wickard* operated a commercial farm and that the wheat he grew in excess of his allotment supported his farm’s commercial operations.²⁰⁵ Specifically, he sold part of the wheat crop, and sold the poultry and livestock that fed on the wheat.²⁰⁶ Thus, the Court found that Congress could reach the litigant because he fed his wheat to “poultry [and] livestock which, or the products of which, are sold, bartered, or exchanged.”²⁰⁷ In truth, then, *Wickard* did not employ the macrocosmic approach’s expansive definition of commerce,²⁰⁸ and involved commercial activity in a way that

199. *Wickard*, 317 U.S. at 125.

200. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down federal regulation of the coal industry, including minimum wages and maximum hours, because manufacturing did not constitute “commerce”); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating a portion of the National Industrial Recovery Act dealing with minimum wages and maximum hours because even though the defendant’s product had moved interstate, the defendant engaged in distribution and not “commerce”).

201. *Wickard* followed the landmark case *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), where the Court departed from precedent holding certain activities to be non-commercial. See *Jones & Laughlin*, 301 U.S. at 57 (rejecting argument that mining, production, and manufacturing did not constitute commerce). *Contra Carter Coal*, 298 U.S. at 304 (“Mining brings the subject matter of commerce into existence. Commerce disposes of it.”); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (“Commerce succeeds to manufacture, and is not part of it.”).

202. See Saylor, *supra* note 67, at 65 (criticizing *Morrison* for creating the determinative distinction between economic and non-economic activity while reaffirming *Wickard*, because the *Wickard* opinion found that the litigant’s activity was not economic in nature).

203. See *supra* notes 89-90 and accompanying text (observing *Morales-De Jesús*’s conclusion that *Wickard* supports the aggregation of noncommercial, intrastate activity).

204. See *supra* Part II.A (analyzing *Raich*’s interpretation of *Wickard* as permitting federal regulation over intrastate noncommercial activity as long as Congress concluded that regulating such conduct was a necessary part of regulating the interstate market for a product).

205. See *Wickard v. Filburn*, 317 U.S. 111, 114 (1942) (finding the litigant’s business operations included “maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs”). See generally Jim Chen, *Filburn’s Legacy*, 52 EMORY L.J. 1719, 1734 (2003) (noting that Filburn harvested nearly twice the amount permissible under federal law).

206. See Chen, *supra* note 205, at 1734 (providing that, in addition, “Filburn . . . ground part [of his surplus harvest] into flour for household consumption, and kept the rest as seed for the following season”).

207. *Wickard*, 317 U.S. at 118-19.

208. Compare *id.* at 119 (finding federal jurisdiction could extend to the intrastate

the litigants in *Raich*, *Morales-De Jesús*, and *Smith* did not.²⁰⁹

To argue that the expansive interpretation of *Wickard* does not alter Commerce Clause precedent, both *Raich* and *Morales-De Jesús* relied on the fact that the statutes in *Lopez* and *Morrison* did not regulate activity for which there is an interstate market, unlike the child pornography market in *Morales* and the marijuana market in *Raich*.²¹⁰ While this is a distinguishing factor, the macrocosmic approach still violates Commerce Clause precedent. Under this framework, *Wickard* stands for the unprecedented proposition that Congress can regulate local, non-economic conduct because it may parallel some economic activity or product in the interstate market without any showing that regulating the litigants' conduct is essential to the statutory scheme.²¹¹

Given such considerable leeway, Congress can simply draft statutes broadly enough to encompass some commercial activity in order to ensnare the activity that *Lopez* and *Morrison* explicitly placed out of Congress's reach—local, noncommercial conduct without a sufficient nexus to interstate commerce.²¹² For example, under this approach, the statute struck down in *Lopez* could have survived constitutional scrutiny if Congress had placed it within a comprehensive scheme regulating firearms.²¹³ *Wickard*, however, does not stand for the legitimacy of federal

cultivation and consumption of wheat because the wheat was used to feed poultry and livestock, which were “sold, bartered or exchanged”), *with* *Gonzales v. Raich*, 125 S. Ct. 2195, 2211 (2005) (defining commercial activity as including “production, distribution, and consumption of commodities” (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966))).

209. *Compare* *Wickard*, 317 U.S. at 119 (observing that the litigant sold the poultry and livestock which fed on the surplus wheat), *with* *Raich*, 125 S. Ct. at 2207 (finding the CSA constitutional as applied to litigants who merely cultivated, possessed, and consumed marijuana for medical purposes).

210. *See* discussion *supra* Part III.B (explaining how the First Circuit in *Morales-De Jesús* and the Court in *Raich* placed considerable emphasis on the fact that the statutes regulated activity for which there is an interstate market).

211. *Raich*, 125 S. Ct. at 2223 (O'Connor, J., dissenting) (criticizing the majority's logic in that it assumes any local activity is essential to a regulatory scheme as long as Congress placed that local activity within a broad regulatory scheme); *see also* *United States v. Lopez*, 514 U.S. 549, 561 (1995) (declining to uphold statute since it was not an “essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated”).

212. *See* *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (barring Congress from regulating non-economic activity on the basis of its aggregate affect on interstate commerce); *Lopez*, 514 U.S. at 600 (Thomas, J., concurring) (noting that “one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce”) (emphasis in original); *see also* discussion *supra* Part I (explaining how the local, criminal and noncommercial nature of the activity regulated by the statutes in *Lopez* and *Morrison* was central to the Court's decision).

213. *See* *Raich*, 125 S. Ct. at 2222 (O'Connor, J., dissenting) (criticizing the majority's contradictory approach in being willing to evaluate the statute in *Lopez* in isolation, but not viewing the local activity encompassed by the CSA in isolation because it is merely a part of a broad regulatory scheme); *see also* *id.* at 2223 (denouncing the majority's approach as reducing *Lopez* to a “drafting guide”).

regulation over any commodity for which there is a national market.²¹⁴ On the contrary, the statute in *Wickard* exempted small farms from the regulation.²¹⁵ In addition, in *Wickard*, Congress made specific findings on how farmers just like the litigant, when taken in the aggregate, could vary the amount of wheat sent to market by as much as twenty percent.²¹⁶ With such findings, the Court had no doubt that the home consumption of wheat, if left unregulated, “would have a substantial effect in defeating and obstructing [Congress’s] desire to stimulate trade at increased prices.”²¹⁷

Unlike the case in *Wickard*, there are no congressional findings that show how individuals who produce child pornography or cultivate marijuana for their own consumption substantially affect those national markets.²¹⁸ Instead, the courts in *Morales-De Jesús* and *Raich* had to make inferences to overcome the lack of congressional findings.²¹⁹ This, however, is at odds with *Lopez* and *Morrison*, where the Court explicitly rejected an approach that would require it to “pil[e] inference upon inference” in order to permit Congress’s regulatory authority to extend to activity that has only a tenuous connection to interstate commerce.²²⁰

The *Raich* Court simply applied *Wickard*’s rational basis review and found that, unlike the statutes in *Lopez* and *Morrison*, the CSA regulated

214. See *id.* at 2222 (O’Connor, J., dissenting) (denouncing the majority’s interpretation of *Wickard* since the decision did not “extend Commerce Clause authority to something as modest as the home cook’s herb garden”).

215. See *Wickard v. Filburn*, 317 U.S. 111, 131 n.30 (1942) (observing that the quota was not applicable to any farm on which the acreage allotted for wheat did not exceed fifteen acres (internal citation omitted)).

216. See *id.* at 127 (highlighting that the consumption of homegrown wheat constituted the “most variable factor” in the larger wheat market).

217. *Id.* at 128-29.

218. See *Raich*, 125 S. Ct. at 2208 (admitting an “absence of particularized findings” in the CSA as to the effects of intrastate cultivation and personal use of marijuana on interstate commerce); *United States v. Morales-De Jesús*, 372 F.3d 6, 12 (1st Cir. 2004) (describing Congress’s findings as relating to “the extensive *national* market in child pornography and the *need to diminish* that national market by prohibiting [its] production . . . at the local level” (emphasis added)), *cert. denied*, 125 S. Ct. 2929 (2005). But see *Morales-De Jesús*, 372 F.3d at 11 (noting congressional finding that child pornography “inflames the desires of child molesters . . . thereby increasing the creation and distribution” of such materials (quoting Child Pornography Protection Act of 1996, Pub. L. No. 104-208, § 1(4), 110 Stat. 3009-26 (1996))).

219. See *Raich*, 125 S. Ct. at 2211-12 (reasoning that the CSA regulates the national market for marijuana, that personal use of self-produced marijuana impacts that market, and therefore, meaningful enforcement of the CSA requires regulation of such intrastate activity); *Morales-De Jesús*, 372 F.3d at 16 (finding that child pornography, whether created for sale or personal use, constitutes a commodity for Commerce Clause purposes, and that prohibiting intrastate production reduces the overall supply of child pornography on the national market).

220. See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (condemning such an approach as converting Congress’s Commerce Clause authority into a “general police power”); see also *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968) (emphasizing that *Wickard* does not permit Congress to use a “trivial impact on commerce as an excuse for broad general regulation of state or private activities”).

activities that were inherently economic.²²¹ By stating that the Court has never required Congress to “legislate with scientific exactitude,”²²² the *Raich* Court determined that it did not have to decide whether the litigants’ activities, when taken in the aggregate, substantially affected interstate commerce in fact, but only whether a “rational basis exists for believing” so.²²³

This type of judicial deference is difficult, if not impossible, to square with *Lopez* and *Morrison*.²²⁴ Those decisions emphasized that congressional findings can be significant in providing the Court with the ability to evaluate Congress’s assertion that the activity substantially affects interstate commerce, especially where “no such substantial effect [is] visible to the naked eye.”²²⁵ Further, *Lopez* and *Morrison* recognized that it is the judiciary, not the legislature, who ultimately decides whether a particular activity substantially affects interstate commerce.²²⁶ Consequently, it is up to the judiciary to accept Congress’s findings that purport to show the necessary connection to interstate commerce.²²⁷ As Rehnquist emphasized in *Lopez* and later reaffirmed in *Morrison*, “simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”²²⁸

Recognizing that *Lopez* and *Morrison* preclude Congress’s regulatory power from extending to activities with only a tenuous connection to interstate commerce, the *Raich* and *Morales-De Jesús* majorities defended their approach by misinterpreting Commerce Clause precedent yet again. Both *Morales-De Jesús* and *Raich* relied upon the same language: Where “a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”²²⁹ This quotation is from a footnote in *Maryland v.*

221. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2206-11 (2005) (distinguishing *Lopez* and *Morrison* and instead citing *Wickard* for the proposition that the Court need only conclude that Congress had a rational basis for believing that “home-consumed” commodities, taken in aggregate, substantially affect the interstate market for that commodity).

222. *Id.* at 2206.

223. *Id.*

224. Compare *id.* at 2208-09 (arguing that only rational basis scrutiny is necessary when evaluating congressional findings that purport to show a connection between activity that Congress seeks to regulate and interstate commerce), with *Lopez*, 514 U.S. at 557 n.2 (establishing that whether particular activities affect interstate commerce to the extent necessary in order to permit federal regulation is not a legislative question, but a judicial one (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964))).

225. *Lopez*, 514 U.S. at 563.

226. *Id.* at 557 n.2 (citation omitted).

227. *United States v. Morrison*, 529 U.S. 598, 614 (2000) (stating that congressional findings, without more, are insufficient to establish the constitutionality of a statute).

228. *Id.* (quoting *Lopez*, 514 U.S. at 557 n.2 (citation omitted)).

229. *Raich*, 125 S. Ct. at 2206 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)); *United States v. Morales-De Jesús*, 372 F.3d 6, 17 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 2929 (2005).

Wirtz,²³⁰ which did not discuss as-applied challenges but the “enterprise concept.”²³¹ The enterprise concept grants Congress the ability to exercise authority over an industry or large enterprise by regulating its smaller parts.²³² Thus, this concept extends Congress’s commerce power only to *enterprises* that engage in commerce and does not encompass the individualized, noncommercial activity at issue in *Raich* or *Morales-De Jesús*.²³³ These courts, however, have interpreted this concept to mean that Congress may regulate any “privately producible analogue” to “commercial goods or services.”²³⁴ In sum, the macrocosmic approach employed by *Raich* and *Morales-De Jesús* pays only lip service to Commerce Clause precedent, while permitting federal regulation over more local criminal activity than ever before. By permitting federal regulation of conduct previously reserved for the States to control, this approach not only violates Commerce Clause precedent, but poses practical problems as well.

B. Practical Problems with the Increasing Federalization of Crime

In recognizing that the federalization of crime threatens the very foundation of our dual system of government, *Lopez* and *Morrison* both emphasized the importance of preserving States’ autonomy over the area of criminal law.²³⁵ While the States may agree with Congress that certain

230. In *Wirtz*, the state of Maryland challenged the Fair Labor Standard Act, which had been extended to cover additional categories of employees and removed an exemption for state-run enterprises like schools and hospitals. 392 U.S. at 186-87. The original statute required employers to pay their employees the specified minimum wages if they were engaged in commerce or the production of goods for commerce. *Id.* at 185-86. The amendment, challenged in *Wirtz*, expanded the law to encompass all employees working for an enterprise engaged in commerce or the production of goods for commerce, regardless of whether the individual employee was actually involved in that activity. *Id.* at 186.

231. *See id.* at 197 n.27 (“‘Enterprise’ means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . but shall not include the related activities performed for such enterprise by an independent contractor.” (quoting Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 203(r))).

232. *See id.* (upholding the enterprise concept on the “explicit premise that an ‘enterprise’ is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group of employees, which is what Congress obviously intended”).

233. *See id.* (emphasizing that the enterprise concept, as explicitly defined above, recognizes the limitations of Congress’s regulatory authority under the Commerce Clause); *see also* Kreit, *supra* note 85, at 197 (arguing that the enterprise concept does not provide Congress with “limitless substantive authority,” but permits Congress’s regulatory reach to extend only to enterprises engaged in commerce).

234. *Raich*, 125 S. Ct. at 2225 (O’Connor, J., dissenting).

235. *See* United States v. Morrison, 529 U.S. 598, 615 (2000) (declining to accept petitioner’s but-for causal reasoning because of the concern that, if accepted, it would “completely obliterate the Constitution’s distinction between national and local authority”); United States v. Lopez, 514 U.S. 549, 564 (1995) (rejecting the Government’s “costs of crime” and “national productivity” theories because, if accepted, it would be difficult to posit any meaningful limit on federal power, even in the area of criminal law which has historically been left to the States); *see also* Gonzales v. Raich, 125 S. Ct. 2195, 2221

behavior, such as child pornography, should be proscribed, this does not legitimize the macrocosmic approach.²³⁶ On the contrary, Rehnquist maintained in *Lopez* that when Congress criminalizes conduct that is already proscribed by the States, it impacts the “sensitive relation” between state and federal jurisdictions.²³⁷ Our system of dual sovereignty allows States to act as “laboratories”²³⁸ to devise innovative solutions to problems of traditional state concern like criminal law.²³⁹ Therefore, even when both federal and state law proscribe a particular activity, disagreement about how to achieve that end can exist.²⁴⁰

Also, by encompassing intrastate criminal activity, the macrocosmic approach presents serious problems to an already overworked federal court system.²⁴¹ A 1998 American Bar Association task force “concluded that ‘inappropriate federalization’ causes ‘long-range damage to real crime control and to the nation’s structure.’”²⁴² In a 1998 report on the federal

(2005) (O’Connor, J., dissenting) (emphasizing that the States’ police powers have “always included authority to define criminal law and to protect the health, safety, and welfare of their citizens”).

236. Cf. *Lopez*, 514 U.S. at 561 n.3 (“Most egregiously, section [922(q)] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress.” (quoting President George H.W. Bush, *Statement on Signing the Crime Control Act of 1990*, 26 WEEKLY COMP. PRES. DOC. 1944, 1945 (1990))). See *Lopez*, 514 U.S. at 596-97 (Thomas, J., concurring) (explaining that the Court has always rejected readings of the Commerce Clause that would grant Congress the power to punish felonies “generally”).

237. *Id.* at 561 n.3.

238. *Id.* at 581 (Kennedy, J., concurring).

239. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”); see also *Gonzales v. Raich*, 125 S. Ct. 2195, 2220 (2005) (O’Connor, J., dissenting) (arguing that one of the primary virtues of federalism is that it encourages innovation).

240. See *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (“While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal.”).

241. See Otto G. Obermaier & Barry A. Bohrer, *The ‘Federalization’ of Criminal Law: The Last 100 Years Gave Rise to Huge Growth in the Numbers of U.S. Statutes*, N.Y.L.J., Nov. 29, 1999, at S4 (observing that the trend to federalize criminal conduct historically governed by the States began around the turn of the century); see also *id.* (finding that more than forty percent of the federal criminal laws enacted since the Civil War have been enacted since 1970).

242. Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 895-96 (2000); see James Strazzella et al., *Task Force on the Federalization of Criminal Law*, AM. BAR ASS’N CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 15, 26-31 (1998), available at <http://www.abanet.org/crimjust/fedcrimlaw2.pdf> (delineating several adverse repercussions to the continuing federalization of criminal law, including, “undermining the constitutionally-established role of the states as the primary enforcers of criminal law, expanding ‘federal investigative power,’ and establishing a dual criminal justice system where the same conduct is subject to differing criminal penalties at the state and federal levels”).

judiciary, Rehnquist warned that a crisis would result if nothing limited the growth of federal crimes.²⁴³

The overburdening of the federal system threatens the very quality of the federal courts.²⁴⁴ For example, the increase in criminal cases²⁴⁵ has clogged federal court dockets.²⁴⁶ The federal prison population more than doubled between 1980 and 1990; and between 1990 and 1995, it nearly doubled again.²⁴⁷ Federal prosecutors and federal police agencies also feel the strain of this trend.²⁴⁸ And unfortunately, this trend has created an interesting paradox: federalization “creat[es] the illusion of greater crime control, while undermining an already over-burdened criminal justice system.”²⁴⁹

V. AN ALTERNATIVE TO THE MACROCOSMIC APPROACH

Since the macrocosmic approach is flawed for its inconsistency with the rest of Commerce Clause precedent and its possible deleterious impact on the federal court system, the following section proposes an alternate

243. See Hon. William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, THIRD BRANCH, Jan. 1999, at 1, 2 [hereinafter Rehnquist, *1998 Report*] (warning that the trend of federalizing crime is “taxing the Judiciary’s resources and affecting budget needs, but . . . also threatens to change entirely the nature of our federal system”); see also Hon. William H. Rehnquist, *Chief Justice’s 1993 Year-end Report Highlights Cost-saving Measures*, THIRD BRANCH, Jan. 1994, at 1, 2 (urging that “we can no longer afford the luxury of state and federal courts that work at cross purposes or irrationally duplicate one another”).

244. See Rehnquist, *1998 Report*, *supra* note 243, at 2 (believing that increasing federalization of crime “threatens to change entirely the nature of our federal system”); see also Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1165 (1995) (attributing the “impending crisis in the federal justice system” to federalization).

245. See Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 45-46 (1996) (noting that the number of federal criminal cases grew by seventy percent from 1980 to 1992).

246. See Beale, *supra* note 245, at 46 (“Although criminal cases currently account for only seventeen percent of the federal judicial docket, thirty-eight of the ninety-two federal districts devoted more than fifty percent of their trial dockets to criminal cases in 1992.”). But see Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 963 (1997) (arguing that the recent federalization of crime does not “supplant state criminal legislation and bring vast numbers of local crimes into federal court,” but that it makes federal prosecution possible where the need for federal response is “difficult to deny”); *id.* (arguing that federal prosecutions occur in only a small fraction of the cases covered by federal criminal legislation).

247. Anna Johnson Cramer, Note, *The Right Result for all the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 287 (2001) (citing Brickey, *supra* note 244, at 1157-58 & nn.135-36 (internal citation omitted)).

248. See Beale, *supra* note 245, at 44-48 (finding that the federalization of crime has shifted resources from civil to criminal cases despite an overall growth in the number of federal prosecutors and financial resources since the 1970s).

249. See James A. Strazzella & William W. Taylor, *Federalizing Crime: Examining The Congressional Trend To Duplicate State Laws*, 14 CRIM. JUST. 4, 6 (1999) (explaining that the impetus for the federalization trend is that it is politically popular).

approach to resolving as-applied challenges to the Commerce Clause. This proposal seeks to balance the need for a practical conception of the commerce power with the need to limit Congress's regulatory authority to preserve the sovereignty of the States.²⁵⁰ This section first sets forth the proposed alternative, and then explains how the courts should apply it to the intrastate production of child pornography.

A. *The Alternate Approach to Resolving As-Applied Challenges under the Commerce Clause Generally*

Under the alternate approach, the courts would employ rational basis scrutiny when the litigant's intrastate activity is economic in nature,²⁵¹ but would implement a heightened level of scrutiny when the litigant's intrastate activity is noncommercial.²⁵² Courts would consider the nature of the litigant's conduct, and not merely look at the general subject of the statute, because Congress could almost always define the regulated activity with such generality that it would include some commercial applications.²⁵³ Thus, this approach is designed to prevent federal regulation over intrastate, noncommercial activity that lacks any real connection to interstate commerce. Moreover, this approach is in keeping with the precedent set by *Lopez* and *Morrison*, where the Court employed a heightened level of scrutiny in evaluating whether noncommercial activities like gun possession in schools and gender-motivated violence substantially affected interstate commerce.²⁵⁴

250. See *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) ("The federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scale too far.").

251. See, e.g., *Perez v. United States*, 402 U.S. 146, 155-56 (1970) (using rational basis scrutiny to determine that federal law prohibiting extortionate credit transactions could be applied to an individual engaged in loan sharking within one state); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964) (applying rational basis scrutiny to determine that federal law prohibiting racial discrimination could reach litigant who owned and operated a motel with seventy-five percent of its customers out-of-state residents); *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964) (applying rational basis scrutiny to determine that federal law proscribing racial discrimination could reach litigant who owned and operated a local restaurant that received over \$70,000 worth of food from out-of-state).

252. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (emphasizing that the Court has only upheld the regulation of intrastate activity where the activity has been economic in nature).

253. See *Lopez*, 514 U.S. at 565 (rejecting Justice Breyer's rationale as "lack[ing] any real limits because, depending on the level of generality, any activity can be looked upon as commercial").

254. See *United States v. Wall*, 92 F.3d 1444, 1459 (6th Cir. 1995) (observing that the *Lopez* Court applied a higher standard of review than the rational basis level of scrutiny for evaluating the constitutionality of regulating noncommercial activity under the Commerce Clause); see also *Dral & Phillips*, *supra* note 18, at 616-17 (explaining that in both *Lopez* and *Morrison*, the Court struck down legislation by employing a level of scrutiny that was stricter than rational basis).

In determining whether the litigant's activity is commercial, courts would not use *Raich's* expansive definition of "economic."²⁵⁵ Given the vast array of commodities available in the interstate market, there is little activity that the courts would not classify as "economic" under *Raich's* definition.²⁵⁶ Instead, courts would employ the prevailing definition of commerce in Commerce Clause jurisprudence—one that encompasses the activities of selling, bartering, or exchanging.²⁵⁷

In seeking to balance a practical understanding of the commerce power with the need for a meaningful limit on Congress's regulatory authority, this alternative ensures that the noncommercial nature of a litigant's conduct will not necessarily exempt him from federal regulation.²⁵⁸ Where the litigant's conduct is noncommercial, the courts would use a heightened level of scrutiny as the Supreme Court did in *Lopez* and *Morrison*.²⁵⁹ Under this heightened scrutiny, the courts could conclude from the congressional findings whether the litigant's activity, when aggregated with others similarly situated, would substantially affect interstate commerce.²⁶⁰ The courts should not, however, follow *Raich* and *Morales-De Jesús's* approach of substituting their inferences to overcome a lack of these congressional findings.²⁶¹

255. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2236 n.7 (2005) (Thomas, J., dissenting) (criticizing majority's use of a "remarkably expansive forty-year-old definition" of "economic" where "[o]ther dictionaries do not define [the term] as broadly"). As an example, Justice Thomas cited the American Heritage Dictionary, which defines "economic" as "[o]f or relating to the production, development, and management of material wealth, as of a country, household, or business enterprise." *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 583 (3d ed. 1992)).

256. See *Morrison*, 529 U.S. at 611 ("In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.").

257. Black's Law Dictionary defines commerce as "[t]he exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations." BLACK'S LAW DICTIONARY 285 (8th ed. 2004).

258. This proposal seeks to avoid the problems associated with allowing Congress's to legislate under the clause without check. See discussion *supra* Part IV.B (illustrating the practical problems with the increasing federalization of local crime). This proposal also seeks to avoid digressing to the pre-1937 era of the Commerce Clause precedent. See *supra* note 27 (demonstrating how the Court employed arbitrary distinctions that unduly interfered with Congress's ability to regulate interstate commerce effectively).

259. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (employing a heightened level of scrutiny in determining whether the federal jurisdiction could extend to gun possession in a school zone); *Morrison*, 529 U.S. at 615 (employing heightened level of scrutiny in determining whether federal jurisdiction could extend to those who commit gender-motivated acts of violence).

260. See *Morrison*, 529 U.S. at 615 ("The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce."). "If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.*

261. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2219 (2005) (Scalia, J., concurring)

This approach is consistent with the *Wickard* decision, that once was and should still be the most expansive use of the Commerce Clause.²⁶² Even if one disagreed with the argument that the litigant in *Wickard* had engaged in commercial activity, Congress would still be able to reach his conduct under the approach proposed here because of the explicit congressional findings demonstrating how farms producing wheat for their own consumption substantially affected the interstate wheat market.²⁶³ Thus, the courts would not be able to make inferences as to how the specific type of activity engaged in by the litigant, when taken in the aggregate, substantially affects interstate commerce.²⁶⁴

*B. The Alternate Approach Applied to the Intrastate
Production of Child Pornography*

Under this framework, a litigant who produced a depiction of child pornography for his own use, but never traded, distributed, or sold the material, would prevail with his as-applied challenge to the statute. This is because the litigant engaged in local and noncommercial criminal activity with an attenuated connection to interstate commerce.²⁶⁵ In other words, the litigant engaged in the very activity that *Lopez* and *Morrison* declined to permit federal regulation to reach.

Under the traditional definition of commercial activity, a litigant's intrastate conduct is properly classified as noncommercial if he does not sell, trade, or exchange the child pornography.²⁶⁶ Consequently, courts should employ a heightened level of scrutiny in evaluating the congressional findings purporting to show a sufficient nexus between the

(finding that Congress could reach the local cultivation and consumption of medicinal marijuana because the product is "never more than an instant" from the interstate market, and that an exemption would likely lead to the use of not only the sick, but their "friends, neighbors, and family members," and thus may have a substantial impact on the interstate market); *United States v. Morales-De Jesús*, 372 F.3d 6, 17 (11th Cir. 2004) (holding that the Government was only required to prove that the defendant produced a depiction of child pornography that could find its way into the interstate market, and not that he sold, distributed, or exchanged the material), *cert. denied*, 125 S. Ct. 2929 (2005).

262. *Wickard v. Filburn*, 317 U.S. 111 (1942); *see also Lopez*, 514 U.S. at 560 (describing *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity").

263. *See Wickard*, 317 U.S. at 127 (finding that the home consumption of wheat affected the national wheat market by as much as twenty percent and was the "most variable factor in the disappearance of the wheat crop").

264. *See id.* at 127-28 (finding federal jurisdiction could extend to a local farmer since the findings provided the Court with the ability to conclude that his contribution to the national wheat market, when taken together with others similarly situated, was "far from trivial").

265. *See Morales-De Jesús*, 372 F.3d at 11-12 (finding that many who distribute child pornography in the United States do so without any commercial purpose).

266. *See supra* note 257 and accompanying text (adopting a definition of commerce that encompasses the exchanging, buying, and selling of commodities).

litigant's activity and the interstate child pornography market.²⁶⁷

The relevant congressional findings show that much of the child pornography is homegrown and distributed without commercial motivation.²⁶⁸ Given these findings, the courts would have to make an inference to find that the litigant's conduct, when taken in the aggregate, substantially affected the interstate child pornography market.²⁶⁹ Specifically, the courts must infer that the litigant will either sell, trade, or distribute the depiction. Because the courts cannot make such inferences under this level of scrutiny, the litigant will prevail with his as-applied challenge.

CONCLUSION

Lopez and *Morrison* resurrected the Commerce Clause principle that there must be a reasonable limit to Congress's regulatory power. By upholding the litigants' facial challenges to those statutes, however, those decisions provided insufficient guidance for resolving as-applied challenges under the Commerce Clause. Courts adopted two different approaches for resolving these challenges: the macrocosmic approach and the microcosmic approach. In supporting a particular approach, courts focused on one of two competing interests within the larger framework of the Court's Commerce Clause jurisprudence. The macrocosmic approach, employed by *Morales-De Jesús* and the Supreme Court in *Raich*, focused on the principle that the court must employ a practical conception of the commerce power. The microcosmic approach, on the other hand, employed by *Smith* and the Ninth Circuit in *Raich*, focused on the competing Commerce Clause value that there must be a meaningful limit on Congress's regulatory authority.

While the Supreme Court's *Raich* decision provided much needed clarification to the lower courts for resolving as-applied challenges, its adoption of the macrocosmic approach is flawed. The Court's preoccupation with a practical conception of the Commerce Clause caused the Court to set the constitutional parameters so broadly that there is little activity that cannot be subject to federal regulation.

267. See *supra* notes 252-254 and accompanying text (explaining that employing a heightened level of scrutiny in evaluating whether federal jurisdiction can extend to intrastate, noncommercial activity is in keeping with Commerce Clause precedent).

268. H.R. REP. NO. 98-536, at 10, 17 (1983), reprinted in 1984 U.S.S.C.A.N. 492, 501.

269. See *United States v. Smith*, 402 F.3d 1303, 1320 (11th Cir. 2005) (determining, without explanation, that the congressional findings demonstrate how intrastate commercial producers and persons who distribute child pornography non-commercially affect interstate commerce), vacated, 125 S. Ct. 2938 (2005); *Morales-De Jesús*, 372 F.3d at 17 (permitting federal jurisdiction to reach the defendant on the assumption that the child pornography he produced could find its way into the interstate market).

