PEDOPHILES, POLITICS, AND THE BALANCE OF POWER: THE FALLOUT FROM *UNITED STATES V. SCHAEFER* AND THE EROSION OF STATE AUTHORITY

INTRODUCTION

In a September 2007 opinion that triggered a national response, a three-judge panel of the Tenth Circuit Court of Appeals absolved Kansas citizen William Schaefer of his federal convictions for receipt and possession of child pornography under 18 U.S.C. § 2252.[1] The court held that the government failed to prove the interstate elements of Schaefer's crimes, thereby stripping the federal government of its jurisdiction over the case.[2] The critical issue involved the question of whether Internet use alone, without any other evidence, is sufficient to prove a nexus to interstate commerce.[3] The court answered this question in the negative, refusing to assume that Schaefer's use of the Internet to view child pornography involved knowing transportation of images across state lines.[4] Lacking direct evidence of interstate transport, the court overturned Schaefer's convictions.[5]

The *Schaefer* decision outraged Congress, which promptly responded by passing legislation to extend the reach of federal child pornography statutes to the full scope of Congress's Commerce Clause powers.[6] With President George W. Bush's signature on October 8, 2008, federal prosecutors gained jurisdiction over all production, distribution, receipt, and possession of child pornography that substantially affects interstate commerce.[7] While this knee-jerk reaction may close the loophole that allowed Schaefer to walk out of federal prison, it will also limit the application of state child pornography laws by vastly extending the federal government's intrusion into these traditionally local crimes. Was Congress's sweeping reaction appropriate? Or was it an unwarranted response to a weakly prosecuted case? This Comment argues that Congress overreacted to the Tenth Circuit's *Schaefer* decision and expanded federal jurisdiction into an area of law where state statutes provide more effective solutions.

1. United States v. Schaefer, 501 F.3d 1197, 1197-98 (10th Cir. 2007).
2. *Id.* at 1198.
3. *Id.* at 1200.
4. *Id.* at 1205.
5. *Id.* at 1207.
6. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (codified as amended at 18 U.S.C.A. §§ 2251-52 (West 2009)).
7. *See Rep. Boyda, Attorney General Steve Six Announce New Law to Protect Kansas Kids From Predators*, U.S. FED. NEWS, Oct. 15, 2008, *available at* 2008 WLNR 20424888.

I. CONGRESS HAS CONSISTENTLY EXPANDED FEDERAL JURISDICTION OVER CHILD PORNOGRAPHY CRIMES SINCE 1977

The explosive growth of the Internet during the past two decades has generated myriad benefits, including access to global markets, unimpeded flow of information, and broadening opportunities for entertainment. However, it has also produced tremendous fallout of illicit activity such as the international exchange of child pornography.[8] Congress's response to the mushrooming child pornography problem evolved with the Internet and with the Supreme Court's Commerce Clause jurisprudence, following an often repeated pattern of expanding federal jurisdiction.

A. The Protection of Children Against Sexual Exploitation Act of 1977

During the late 1970s, when the Internet was nothing more than a loosely-linked network of military and research computers,[9] Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977.[10] The act primarily targeted the use of children in commercial development of obscene pornography and commercial distribution of obscene child pornography.[11] This initial federal effort drew motivation from a woeful lack of state legislation; at the time, only six states prohibited the use of children in the production of pornography.[12] While Congress asserted that sexual exploitation of children was a problem that could not be "adequately controlled by state and local authorities," it acknowledged that "[w]hat is needed is a coordinated effort by federal, state and local law enforcement officials aimed at eradicating this form of child abuse."[13] As a result, the act's legislative history expresses congressional intent to limit the scope of the federal power to those proscribed activities involving transportation in the United States mail or "in interstate or foreign commerce."[14] Congress viewed the nexus to interstate commerce as "necessary to preserve the balance between the law enforcement responsibilities of federal officials on one [hand] . . . and their state and local counterparts, on the other."[15] Specifically, Congress intended federal jurisdiction to stop short of "isolated, individual acts . . .

8. *See* Laura Ann Forbes, Comment, *A More Convenient Crime: Why States Must Regulate Internet-Related Criminal Activity Under the Dormant Commerce Clause*, 20 PACE L. REV. 189, 189-90 (1999).

9. Barry M. Leiner et al., *A Brief History of the Internet*, INTERNET SOCIETY, Dec. 10, 2003, http://www.isoc.org/internet/history/brief.shtml.

10. Pub. L. No. 95-225, 92 Stat. 7 (1978) (current version at 18 U.S.C.A. §§ 2251-53, 2423 (West 2009)).

11. *Id.*

12. S. REP. NO. 95-438, at 10 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 48.

13. *Id.*, *reprinted in* 1978 U.S.C.C.A.N. at 48.

14. *Id.* at 16, *reprinted in* 1978 U.S.C.C.A.N. at 53.

15. *Id.*, *reprinted in* 1978 U.S.C.C.A.N. at 53.

. [W]hich often are more appropriately the subject of state or local concern."[16]

Over the next seven years, federal prosecutors secured only twenty-eight indictments under the 1977 law.[17] Congress blamed these meager results on the legislation's pecuniary restrictions, which limited its application to child pornography produced for sale or distribution for sale.[18] Recognizing that many producers and distributors of child pornography often act with prurient motives rather than profit motives, Congress went back to the drawing board.[19]

B. The Child Protection Act of 1984

By the time Congress reevaluated its first-generation child pornography statutes in 1984, at least forty-seven states had enacted laws criminalizing either the distribution of child pornography or the use of children in the production of pornography.[20] However, rather than waiting for the states to experiment with additional legislation, Congress opted to enact the Child Protection Act of 1984.[21] This effort closed many of the loopholes inherent in the 1977 legislation and occupied much of the remaining legal territory related to production, distribution, and receipt of child pornography. The 1984 amendments accomplished this by (1) eliminating the commercial restrictions on federal jurisdiction over criminal distribution of child pornography, (2) eliminating the obscenity requirement for child pornography crimes, and (3) adding a crime for reproducing child pornography.[22]

While the changes effected by the Child Protection Act significantly broadened its reach, the statutes retained the jurisdictional hooks that required transport of proscribed materials in the mail or "in interstate or foreign commerce."[23] These jurisdictional limitations preserved the principles of federalism, leaving the states free to legislate and prosecute within the sphere of purely local, intrastate activities while allowing fed-

16. *Id.*, *reprinted in* 1978 U.S.C.C.A.N. at 53. The initial version of the legislation, Senate bill S. 1011, 95th Cong. (1977) introduced by Senator William Roth (R-DE), included language extending federal jurisdiction to knowing transportation, shipment, or mailing of child pornography "in such a manner as to affect interstate or foreign commerce." *Id.* at 25, *reprinted in* 1978 U.S.C.C.A.N. at 60. The Senate Committee on the Judiciary, while crediting Senator Roth for bringing the problem of child pornography to the attention of the Senate, expressly rejected his proposal because of its jurisdictional deficiencies, which were perceived to extend to "purely local acts" that "should be left to local authorities." *Id.* at 11, 26, *reprinted in* 1978 U.S.C.C.A.N. at 48, 61.

17. H.R. REP. NO. 98-536, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 493.

18. *Id.*, *reprinted in* 1984 U.S.C.C.A.N. at 493.

19. *See id.*, *reprinted in* 1984 U.S.C.C.A.N. at 493.

20. *See* New York v. Ferber, 458 U.S. 747, 749 & n.2 (1982).

21. Pub. L. No. 98-292, 98 Stat. 204 (1984) (current version at 18 U.S.C.A. §§ 2251-53, 2423 (West 2009)).

22. H.R. REP. NO. 98-536, at 7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 498.

23. Pub. L. No. 98-292, 98 Stat. 204 (1984) (current version at 18 U.S.C.A. §§ 2251-53, 2423 (West 2009)).

eral investigators to bring their significant resource advantage to bear against larger, multi-jurisdictional cases of child pornography. The jurisdictional balance struck by the Child Protection Act of 1984 would gradually tip in favor of the federal government as the exigencies of the Internet revolution changed the *modus operandi* of pedophiles around the world.

C. The Child Protection Act of 1988 Incorporated Computer Transmissions

Even before the rise of the Internet as the new central nervous system of commerce and communications, Congress modified federal statutes in 1988 to proscribe knowing transportation, shipment, receipt, or distribution of child pornography in interstate commerce by any means, *including by computer*.[24] With this change, Congress unambiguously expanded its jurisdiction in child pornography crimes to include not only the Internet as a conduit for criminal activity, but electronic data as a form of proscribed material.[25]

D. Schaefer's Prosecution Under the 2003 PROTECT Act Exemplifies Expanded Federal Jurisdiction

Ultimately, the government prosecuted Schaefer under the PROTECT Act of 2003, a version of 18 U.S.C. § 2252 substantially similar to the 1988 Child Protection Act, but with tougher sentences and penalties.[26] The thirty-year evolution of federal child pornography statutes leading up to Schaefer's conviction and appeal reflect a gradual but unmistakable expansion of federal jurisdiction. The slow jurisdictional accretions reflect Congress's efforts to keep pace with the rapidly changing approaches of child pornographers and the dawn of the digital revolution. The initial statute, which proscribed commercial child pornography and preserved a role for state jurisdiction over local crimes, gave way to an expansive and far-reaching law which, coupled with the proliferation of Internet child pornography, reached right into William Schaefer's personal computer in Kansas.[27]

II. *UNITED STATES V. SCHAEFER* DEMONSTRATES THE EFFECT OF JURISDICTIONAL ELEMENTS IN FEDERAL STATUTES

During early 2003, William Schaefer used his credit cards to subscribe to five members-only websites allowing access to electronic im-

24. Pub. L. No. 100-690, § 7511, 102 Stat. 4181 (1988) (current version at 18 U.S.C.A. §§ 2251-53, 2423 (West 2009)).

25. *See* United States v. Wilson, 182 F.3d 737, 741 (10th Cir. 1999).

26. Pub. L. No. 108-21, 117 Stat. 650 (2003) (current version at 18 U.S.C.A. §§ 2251-53, 2423 (West 2009)). PROTECT is an acronym for Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today. *Id.*

27. *See* United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007).

ages of child pornography.[28] An Immigration and Customs Enforcement investigation into the company processing his payments led federal authorities to search Schaefer's home, where they seized a desktop computer and several writable compact discs ("CDs").[29] The computer contained a total of 999 images of child pornography, which were stored in the computer's unallocated clusters and Internet cache.[30] Investigators also found several short video clips and images on the CDs; upon inspection, they determined that eleven of those images contained child pornography.[31] The resulting prosecution and appeal triggered another vast expansion of federal jurisdiction over child pornography and a questionable federal intrusion into criminal territory typically regulated by states.

A. The District Court Convicted Schaefer on Thin Evidence

The government charged Schaefer with one count of receiving child pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).[32] Under these statutes, the government must prove that the images in question or the materials used to create the images were "mailed, or . . . shipped or transported using any means or facility of interstate or foreign commerce . . . by any means including by computer . . . ."[33] The district court opinion focused almost exclusively on establishing Schaefer's knowing receipt and possession of the images on the CDs, failing to address the jurisdictional grounds that allowed the government to prosecute Schaefer under federal law.[34] The conspicuous lack of attention to the interstate elements of the crimes left a gaping hole in the case and ample grounds for Schaefer's appeal.[35]

B. The Tenth Circuit Court of Appeals Faced a Difficult Policy Decision

On appeal, Schaefer focused on the jurisdictional elements of § 2252(a) and argued that the government failed to present sufficient facts showing that the images contained on the CDs actually crossed state lines.[36] Thus, claimed Schaefer, the government failed to prove the ele-

28. *Id.*; Brief of Appellee at 3, *Schaefer*, 501 F.3d 1197 (No. 06-3080), 2007 WL 1379291.

29. *Schaefer*, 501 F.3d at 1198.

30. *See* Brief of Appellee, *supra* note 28, at 4. As described by the 10th Circuit, unallocated clusters are "hidden files on the computer hard drive not usually accessible to a user"; the Internet cache is a file that contains information about recently loaded websites that allow the site to be loaded faster on subsequent visits. *Schaefer*, 501 F.3d at 1198 nn.2-3.

31. *Schaefer*, 501 F.3d at 1198.

32. *Id.* at 1197.

33. 18 U.S.C. § 2252(a)(2), (a)(4)(B) (2000 & Supp. 2005) (amended 2008).

34. *Schaefer*, 501 F.3d at 1199. Schaefer opted for a bench trial over a jury trial. In its opinion, the district court concluded that Schaefer did not *knowingly* download the hundreds of images found on his computer hard drive; rather, his computer automatically stored those images without his knowledge. However, based on the CD evidence, the court found Schaefer guilty of receiving and possessing child pornography and handed down two concurrent 70-month prison terms. *Id.* at 1198-99 & n.5.

35. *See id.* at 1199.

36. *Id.* at 1199-1200.

File: Frommell final for Darby Created on: 4/8/2009 11:48:00 AM Last Printed: 5/19/2009 1:20:00 PM

ment of the crime requiring an interstate nexus. Notably, Schaefer challenged only the sufficiency of the evidence presented at trial, intentionally avoiding a constitutional challenge of the child pornography statutes themselves.[37]

The significance of this distinction bears heavily upon the court's analysis. When a defendant challenges the constitutionality of the statutory jurisdictional element, the reviewing court must apply the Commerce Clause analysis developed under *United States v. Lopez* and its progeny to determine whether Congress had the authority to regulate the defendant's conduct under its Commerce power.[38] If the court determines that Congress acted within its power, the defendant's challenge fails and the conviction is upheld.[39]

However, if the defendant merely challenges the sufficiency of the evidence to satisfy an element of the crime, then the reviewing court applies a vastly different standard of review: it examines the evidence in a light most favorable to the government and upholds the conviction unless no reasonable jury could find the defendant guilty beyond a reasonable doubt.[40] Interpreting the elements of a criminal statute, the court gives the words of the statute their plain meanings.[41]

In a feeble effort to defend the convictions, the government offered the following evidence linking Schaefer's actions to interstate commerce:

> (1) Schaefer, who resided in Kansas, paid for access to Internet websites containing child pornography; the payments were processed by a New Jersey company with the assistance of a Florida company; e-mails containing usernames and passwords to the site were sent to Schaefer's e-mail account which had been issued by a Washington corporation;
>
> (2) One CD found in Schaefer's possession contained movie clips and still images of child pornography; the movie clips consisted of foreign language films and contained embedded Internet addresses; the still images did not contain Internet addresses, but were "quite obviously" captured from the movie clips;

37. *Id.* at 1200 n.7.

38. United States v. Lopez, 514 U.S. 549 (1995). In *Lopez*, the United States Supreme Court suggested that the presence of a jurisdictional element limiting the reach of a federal statute may support the statute's constitutionality. *Id.* at 561-62. Thus, a challenge to the constitutionality of a jurisdictional element invokes the Court's Commerce Clause analysis. *See* United States v. MacEwan, 445 F.3d 237, 244-45 (3d Cir. 2006).

39. *See MacEwan*, 445 F.3d at 244-45; United States v. Kimler, 335 F.3d 1132, 1138-39 (10th Cir. 2003).

40. *Schaefer*, 501 F.3d at 1199-1200.

41. *Id.* at 1201-02, 1204-05 (interpreting plain language of 18 U.S.C. § 2252(a) , criticizing the Third Circuit for an interpretation violating the plain terms, and concluding that the plain language of § 2252(a) contains no "Internet exception" to the requirement to prove images moved in interstate commerce).

> (3) A second CD found in Schaefer's possession contained sexually explicit images of a child known to federal investigators from previous prosecutions; the government suggested that Schaefer downloaded the images from the Internet to the CD.[42]

Based on these facts, the government argued that "[p]roof the images came from the internet suggests an origin outside the state, and is sufficient to establish the interstate nexus."[43]

Schaefer countered, and the Tenth Circuit agreed, that the jurisdictional element of § 2252(a) requires more than a circumstantial connection to interstate commerce; rather, it requires proof that the images or materials containing child pornography in the possession of the defendant actually crossed state lines.[44] "[I]t is not enough to assume that an Internet communication necessarily traveled across state lines in interstate commerce."[45]

To arrive at this conclusion, the court examined the language of § 2252(a), which incorporates the language "in . . . commerce."[46] As the Supreme Court explained in *Circuit City Stores, Inc. v. Adams*, "[t]he plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce,'" implying that Congress intended to limit the reach of the statute.[47] Applying this reasoning to § 2252(a), the Tenth Circuit concluded that "the plain terms of [the statute] convey that Congress intended to punish only those who moved images or 'materials' across state lines."[48] The court's interpretation of the plain statutory language is borne out by the acknowledged role of the states in the legislative history of the federal child pornography statutes discussed above.[49]

Examining the government's case through this jurisdictional lens, the court concluded that the evidence was insufficient. The interstate connections provided by the processing of Schaefer's credit card payments bore no relevance to the physical movement of the CDs, or the images they contained, across state lines.[50] Additionally, none of the evidence provided by the government foreclosed—beyond a reasonable doubt—the possibility that the CDs in Schaefer's possession were produced by and obtained from sources entirely within the state of Kansas.[51] The government offered no convincing evidence that the movie clips or

42. *See* Brief of Appellee, *supra* note 28, at 9-10. Numbered items (1) through (3) have been extracted, refined, and organized from the government's arguments in appellee's brief.
43. *Id.* at 9; *see also Schaefer*, 501 F.3d at 1202.
44. *Schaefer*, 501 F.3d at 1200-01.
45. *Id.*
46. 18 U.S.C. § 2252(a)(2), (a)(4)(B) (2000 & Supp. 2005) (amended 2008).
47. 532 U.S. 105, 118 (2001).
48. *Schaefer*, 501 F.3d at 1202.
49. *See* discussion *supra* Part II.
50. *Schaefer*, 501 F.3d at 1198-99 & n.4.
51. *See id.* at 1201.

still images were produced outside of Kansas, despite the fact that some or all of the actors in the movie clips spoke languages other than English.[52] Similarly, the appearance of a web address in several movie clips failed to meet the standard of proof because the government produced no evidence that the network servers hosting that website resided outside of Kansas.[53] And finally, even if Schaefer downloaded images from the Internet and burned them onto CDs, the record was silent with respect to the origin of the CDs and the locations of the network servers that facilitated the image transfers.[54] The prosecutors did not even attempt to prove that the movie clips or images on the CDs were the same as those residing on Schaefer's computer hard drive.[55] Thus, the government had not even proven that the images on the CDs resulted from Schaefer's use of the Internet. Despite previous decisions acknowledging interstate activity resulting from Internet use,[56] the Tenth Circuit concluded that the government's evidence insufficiently linked Schaefer's actions to interstate commerce.[57]

Given the Tenth Circuit's strict textual interpretation of the governing statute,[58] the missing evidence of clear interstate movement of images in Schaefer's possession gave the court little choice but to reverse the convictions. The court acknowledged that it could have taken judicial notice of the link between the Internet and interstate commerce, giving factual weight to the "vanishingly remote" possibility that the images did *not* cross state lines.[59] However, this alternative would invoke the discretion of the court and expand the jurisdiction of federal child pornography statutes through a judicial act. Alternatively, the court could have affirmed the convictions based on circumstantial evidence, effectively holding that a reasonable jury could infer a connection between Internet communications and interstate commerce without explicit evi-

52. *Id.* at 1206.
53. *Id.* at 1205.
54. *Id.* at 1206.
55. *Id.* at 1206 n.11.
56. Precedential decisions in the Tenth Circuit demonstrate the court's willingness to find interstate connections involving the Internet as well as its insistence that the evidence clearly show movement of proscribed materials across state lines. In *United States v. Kimler*, the defendant was found guilty after the government showed that images he received and distributed were routed through the e-mail service provider's servers in California and the internet service provider's ("ISP") servers in Missouri in addition to arriving or departing from the defendant's Kansas-based computer. 335 F.3d 1132, 1135 (10th Cir. 2003). Similarly, in *United States v. Simpson*, the government secured a conviction after introducing evidence that images downloaded over the Internet by the defendant traveled from out-of-state websites or electronic bulletin boards to the defendant's computer. 152 F.3d 1241, 1245 (10th Cir. 1998). *But see* United States v. Wilson, 182 F.3d 737, 744 (10th Cir. 1999) (overturning the defendant's conviction and finding the evidence insufficient to prove the digital images moved through interstate commerce). The court even showed willingness to recognize an interstate nexus where an e-mail sent between two parties both residing in Utah traveled through the ISP's servers in Virginia before being routed back to Utah. United States v. Kammersell, 196 F.3d 1137, 1138-39 (10th Cir. 1999).
57. *Schaefer*, 501 F.3d at 1206-07.
58. *See* discussion *supra* Part II.B.
59. *Schaefer*, 501 F.3d at 1208 & n.8 (Tymkovich, J., dissenting).

dence of this fact.[60] Despite such holdings in other circuits, however, the Tenth Circuit declined to take this option.[61]

C. The Tenth Circuit Splits from Her Sister Circuits

The jurisdictional considerations of federal child pornography statutes surfaced in cases decided by other Circuit Courts of Appeals prior to *Schaefer*. The Tenth Circuit reviewed these cases and distinguished or disagreed with each one.

1. The First, Fifth and Third Circuits Equate Internet Use with Interstate Commerce

In *United States v. Carroll*, the First Circuit upheld the defendant's conviction for persuading his thirteen-year-old niece to participate in the production of sexually explicit photos in violation of 18 U.S.C. § 2251(a).[62] The jurisdictional element in *Carroll* differed from that in *Schaefer*, requiring the government to prove only that the defendant knew or had reason to know that the photos *would be* transported in interstate commerce.[63] Citing the victim's testimony that Carroll planned to transport the photographs from New Hampshire to Massachusetts and then distribute them on the Internet, the First Circuit held that "[t]ransmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce."[64]

Relying on the First Circuit's reasoning in *Carroll*, the Fifth Circuit came to an identical conclusion in *United States v. Runyan*,[65] "join[ing] the First Circuit in holding that 'transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce' for the purposes of 18 U.S.C. § 2251."[66] But the Fifth Circuit's *Runyan* opinion went beyond the holding in *Carroll* and addressed a second jurisdictional element that was identical to the one at work in *Schaefer*.[67] Unlike

60. *See id.* at 1200; *see also Kimler*, 335 F.3d at 1139-40; United States v. Campos, 221 F.3d 1143, 1151 (10th Cir. 2000).

61. *Schaefer*, 501 F.3d at 1203-05.

62. 105 F.3d 740, 741 (1st Cir. 1997). Note that Schaefer was convicted under 18 U.S.C. § 2252, not § 2251(a).

63. *Id.* at 741-42. The jurisdictional element of § 2251(a) only requires a showing of *intent* to transport child pornography in interstate commerce. *Id.* at 741.

64. *Id.* at 742.

65. 290 F.3d 223, 231 (5th Cir. 2002). Runyan took sexually explicit photographs of a girl when she was between the ages of fifteen and seventeen and told her that he intended to use the Internet to sell the photographs internationally. *Id.* at 232-33, 238-39. Investigators also found CDs in Runyan's possession containing images of child pornography. *Id.* at 232.

66. *Id.* at 239 (quoting *Carroll*, 105 F.3d at 742). Recall that the jurisdictional element of § 2251 only requires a showing of *intent* to transport child pornography in interstate commerce. *Carroll*, 105 F.3d at 741.

67. Recall that the Tenth Circuit interpreted the jurisdictional element as requiring actual interstate movement of the images of child pornography in question. *See* discussion *supra* Part II.B.

Schaefer, the defendant in *Runyan* admitted to authorities that he knew that some of the images found in his possession contained child pornography that had been downloaded from the Internet.[68] Similar to *Schaefer*, however, one of the images featured an embedded Internet address. Based on Runyan's admission and the embedded address, the Fifth Circuit concluded that the Government adduced sufficient facts to "make a specific connection between the images introduced at trial and the Internet . . . ."[69]

However, because a connection to the Internet was not enough to prove interstate transport, the Fifth Circuit added that "circumstantial evidence linking a particular image to the Internet (such as . . . a website address embedded on the image) can be sufficient evidence of interstate transportation to support a conviction . . . ."[70] Thus, not only was the Fifth Circuit willing to infer a connection between Internet use and interstate commerce where only the *intent* to transport proscribed materials was required for conviction, but the court was also willing to make the inference under a statute requiring actual evidence of interstate transportation.

Finally, the Third Circuit made a similar assumption in *United States v. MacEwan*, which addressed an evidentiary challenge similar to the one in *Schaefer*.[71] At trial, the district court convicted MacEwan of receipt of child pornography under 18 U.S.C. § 2252A(a)(2)(B) based on evidence that he had knowingly downloaded child pornography from the Internet, an act that the district court concluded implicitly involved interstate commerce.[72] On appeal, the Third Circuit held that once "images of child pornography [leave] the website server and enter[] the complex global data transmission system that is the Internet, the images [are] being transported in interstate commerce."[73] In so holding, the court essentially rewrote the jurisdictional element of the crime, stating that it "does not matter whether MacEwan downloaded the images from a server located within [his home state] or whether those images were transmitted across state lines. It is sufficient that MacEwan downloaded those images from the Internet, a system that is inexorably intertwined with interstate commerce."[74]

Based on these cases from the First, Fifth, and Third Circuits, it is apparent that courts are willing to embrace the inference that mere Internet use involves interstate commerce for the purpose of satisfying juris-

68. *Runyan*, 290 F.3d at 232.
69. *Id.* at 242.
70. *Id.*
71. 445 F.3d 237, 243 (3d Cir. 2006).
72. *Id.* at 242.
73. *Id.* at 244.
74. *Id.* at 245.

dictional elements in child pornography cases. However, the Tenth Circuit in *Schaefer* refused to take this position.

2. The Tenth Circuit Relied on Textual Arguments to Disagree with Other Circuits

Addressing each of these cases, the Tenth Circuit distinguished or disagreed with each one based on text of the relevant statute in *Schaefer*. First, the court distinguished *Carroll* on the grounds that the jurisdictional element in that case required only the *intent* to move photographs across state lines,[75] whereas *actual* movement across state lines was required under § 2252 in *Schaefer*.[76] This distinction also applies to the *Runyan* case, which relied exclusively on the logic found in *Carroll*. In both the *Runyan* and *Carroll* cases, the defendants plainly manifested the necessary intent to use the Internet to distribute child pornography beyond state boundaries.[77] In both cases, therefore, the jurisdictional requirements of the statute were satisfied independent of the defendant's use of the Internet. Thus, it was unnecessary for the *Runyan* and *Carroll* courts to equate Internet use with interstate commerce. Because the holdings in *Runyan* and *Carroll* were logically unnecessary and because the jurisdictional element in those cases was textually distinguishable, the Tenth Circuit found the decisions unpersuasive.[78]

Oddly, the Tenth Circuit failed to address the second holding in *Runyan*, which presumed a connection between Internet use and interstate commerce for the purpose of showing actual movement of proscribed images across state lines.[79] Rather, the court addressed this issue in its treatment of the *MacEwan* case, with which it respectfully disagreed. The Tenth Circuit argued that the *MacEwan* court's interpretation of the jurisdictional element impermissibly expanded the statute by allowing convictions to be based merely on the use of an interstate facility (the Internet) rather than requiring actual proof that images moved across state boundaries. The Tenth Circuit pointed to other federal statutes in which Congress specifically used more expansive language to "criminaliz[e] the use of 'any facility of interstate . . . commerce.'"[80]

75. United States v. Schaefer, 501 F.3d 1197, 1204 (10th Cir. 2007).

76. *Id.* at 1201-02.

77. Carroll told his victim that he intended to transport the illicit photographs he took in New Hampshire to his colleague's computer in Massachusetts for scanning. United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997). Runyan offered to pay his victim after he sold the images over the Internet to customers in Japan. United States v. Runyan, 290 F.3d 223, 232-33, 238-39 (5th Cir. 2002).

78. *Schaefer*, 501 F.3d at 1203-05.

79. The facts in *Runyan* closely matched those in *Schaefer*. Investigators found Runyan in possession of, among other things, CDs containing child pornography downloaded from the Internet. *Runyan*, 290 F.3d at 232. One of the images contained an embedded Internet address like the videos found in Schaefer's possession. *Compare id.* at 242, *with Schaefer*, 501 F.3d at 1206. As noted above, the cases also shared a common jurisdictional element requiring actual interstate movement of images.

80. *Schaefer*, 501 F.3d at 1205 (quoting 18 U.S.C. § 1958(a) (2006)).

The fact that Congress did not use such expansive language in the child pornography statutes at issue in *Schaefer* and *MacEwan* prompted the Tenth Circuit to reject the *MacEwan* court's conclusion that mere Internet use without a proven interstate transmission satisfied the jurisdictional element of the crime.[81]

In summary, the Tenth Circuit's strict textual interpretation of the jurisdictional element in *Schaefer* provided the foundation for the court's split from her sister circuits and required actual proof that proscribed images moved between states.[82] The Tenth Circuit also held that such proof could not be inferred from Internet use alone.[83] Because the government produced no evidence that Schaefer's images crossed state lines other than his Internet use, the Tenth Circuit had no choice but to reverse. The court made an arguably reluctant decision that remained faithful to the letter of the law[84] and avoided judicial activism. However, it triggered a rapid response from Congress.

III. NOT IN KANSAS ANYMORE? CONGRESS'S LEGISLATIVE REACTION ECLIPSES STATE LAWS

On October 8, 2008, slightly more than thirteen months after the Tenth Circuit's decision in *Schaefer*, Congress presented President George W. Bush the Effective Child Pornography Prosecution Act of 2007, which he signed into law.[85] Not only did Congress respond quickly, it responded comprehensively. The updated legislation unambiguously equates Internet use with interstate commerce and expands federal jurisdiction over child pornography to the full extent of Congress's Commerce powers.[86] Congress expressly stated that "[t]he transmission of child pornography using the Internet constitutes transportation in interstate commerce."[87] In addition, Congress modified the jurisdictional elements of the child pornography statutes to prohibit any transport, shipment, distribution, receipt, or possession of such materials "using any means or facility of interstate . . . commerce" or "in or affecting in-

81. *Id.*
82. *Id.* at 1201-02.
83. *Id.* at 1202.
84. *See id.* at 1207-08 (Tymkovich, J., concurring).
85. *Rep. Boyda, Attorney General Steve Six Announce New Law to Protect Kansas Kids From Predators*, U.S. FED. NEWS, Oct. 15, 2008, *available at* 2008 WLNR 20424888. The bill, authored by Kansas Representative Nancy Boyda, passed the House of Representatives only 70 days after the Tenth Circuit's ruling by a vote of 409 to zero. *Biggert Combats Child Exploitation: House Passes Bill to Close Child Pornography Loophole in Federal Law*, STATES NEWS SERV., Nov. 14, 2007. The Senate required less than a year to add provisions strengthening the federal government's ability to prosecute Internet child pornographers and then returned the bill to the House for final approval, which was secured by a margin of 418 to zero on September 26, 2008. *Boyda Hails Senate Passage of Her Bill to Protect Kansas Kids From Predators*, STATES NEWS SERV., Sep. 24, 2008; *Biggert Bill To Prevent Child Exploitation Heads To White House: New Legislation Will Close Child Pornography Loophole In Federal Law*, STATES NEWS SERV., Sep. 26, 2008.
86. *See* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008).
87. Effective Child Pornography Prosecution Act §102(7).

terstate" or foreign commerce.[88] As the Tenth Circuit itself stated in *Schaefer*, Congress's use of the "term 'affecting interstate or foreign commerce' conveys its intent to exert full Commerce Clause power."[89] With this response, Congress ensured that prosecution of all acts involving child pornography can take place at the federal level—not just in Kansas anymore.

A. The Current State of Commerce Clause Jurisprudence

Congress's response decisively closed the evidentiary loophole in *Schaefer*: no longer must federal prosecutors prove that proscribed images cross state lines "in commerce" to satisfy the jurisdictional element of federal child pornography statutes. The revised statute now proscribes all shipment, transportation, distribution, or receipt of child pornography using any means or facility of interstate commerce or in or affecting interstate commerce.[90] In addition, courts no longer must wrestle with the assumption that Internet use involves interstate commerce.[91] These changes will undoubtedly receive constitutional scrutiny in future prosecutions, requiring careful Commerce Clause analysis. The discussion below summarizes current Commerce Clause jurisprudence.

1. The *Lopez* Framework for Regulation of Interstate Commerce

Recent Commerce Clause decisions include the trilogy of *United States v. Lopez*,[92] *United States v. Morrison*,[93] and *Gonzales v. Raich*.[94] The *Lopez* decision established Congress's authority to regulate three areas under the Commerce Clause: (1) the channels of interstate commerce;[95] (2) the instrumentalities of interstate commerce;[96] and (3) activities that substantially affect interstate commerce.[97] Disputed applications of Commerce Clause power tend to involve the third aspect of Congress's power. In *Lopez*,[98] the Court considered four factors to determine whether Congress can constitutionally regulate a given activity under the Commerce power: (1) whether the regulated activity is economic; (2) the presence of a statutory jurisdictional element limiting the statute's application to interstate activities; (3) legislative findings linking the prohib-

88. Effective Child Pornography Prosecution Act §103.
89. United States v. Schaefer, 501 F.3d 1197, 1202 (10th Cir. 2007).
90. *See* Effective Child Pornography Prosecution Act § 103.
91. *See id.* § 102(7).
92. 514 U.S. 549 (1995).
93. 529 U.S. 598 (2000).
94. 545 U.S. 1 (2005).
95. *Lopez*, 514 U.S. at 558. Channels of interstate commerce include such things as the interstate highway system and the waters of the United States.
96. *Id.* Instrumentalities of interstate commerce include people and things in interstate commerce like vehicles, aircraft, and interstate shipments.
97. *Id.* at 558-59.
98. The defendant in *Lopez* challenged § 922(q) of the Gun Free School Zones Act of 1990 (GFSZA), which prohibited possession of a firearm within 1,000 feet of a school zone. *Id.* at 551 (citing 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. 1993)).

ited activity to interstate commerce; and (4) the degree of attenuation between the regulated activity and interstate commerce.[99] Having established this analytical framework in *Lopez*, the Court later applied it in *Morrison* and *Raich*.

2. Applying *Lopez* to Potentially Non-Economic Activities

Both *Morrison* and *Raich* addressed potentially non-economic activities, but the Court treated each differently. Addressing the issue of violence against women in *Morrison*, the Court confirmed the value of statutory jurisdictional elements[100] and congressional findings[101] when it struck down the Violence Against Women Act of 1994. The court found that neither factor provided dispositive grounds to uphold the federal statute, which regulated non-commercial activities.[102] In so holding, the court implied that such statutes may require a closer nexus to interstate commerce than statutes regulating purely economic activities.[103]

Reaching the Supreme Court five years after *Morrison*, the case of *Gonzales v. Raich* represents a situation where the Court found sufficient grounds to uphold federal regulation of non-commercial activity: the growth, possession, and distribution of medical marijuana prohibited under the Controlled Substances Act ("CSA").[104] The Court found that Congress could rationally regulate home-grown, non-commercial medical marijuana because it was "part of an economic 'class of activities' that [has] a substantial effect on interstate commerce,"[105] and failure to control this source of marijuana could undercut the government's execution of the broader war on drugs.[106] The *Raich* decision suggests that the Court viewed home cultivation of medical marijuana as an activity with such a close connection to interstate commerce that the non-commercial

99. *Id.* at 559-68; Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of* Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2109 (2006). Ultimately, the *Lopez* majority concluded that possession of a firearm near a school was not an inherently economic activity, and was in fact severely attenuated from interstate commerce. *Lopez*, 514 U.S. at 567-68. The additional lack of a jurisdictional element or congressional findings linking gun possession to interstate activity provided the Court with ample evidence that the challenged statute exceeded Congress's Commerce Clause power. *Id.* at 561-63.

100. *See* United States v. Morrison, 529 U.S. 598, 613 (2000). In *Morrison*, the Court considered § 13981 of the Violence Against Women Act of 1994 (VAWA), which provided a federal civil cause of action for victims of gender violence. *Id.* at 601-02 (citing 42 U.S.C. § 13981 (1994 & Supp. 1995)). The Court in *Morrison* held that the lack of a jurisdictional hook contributed to the unconstitutionality of the statute and cited other provisions of VAWA that appropriately included jurisdictional hooks. *Id.* at 613 & n.5, 626-27; Stuckey, *supra* note 99, at 2109-10.

101. *See Morrison*, 529 U.S. at 614-15. Notably, VAWA's preamble included extensive congressional findings linking violence against women to negative impacts on interstate commerce. *Id.*

102. *Id.* at 613-15.

103. *See id.* at 611.

104. 545 U.S. 1 (2005). The plaintiffs in *Raich* challenged the government's ability under the Controlled Substances Act ("CSA") to seize their medical marijuana, arguing that their operations represented strictly intrastate, non-commercial activity. *Id.* at 7-8 (citing 21 U.S.C. § 801 *et seq.* (2000)).

105. *Id.* at 17.

106. *Id.* at 26-27.

product could easily enter the interstate commercial market. Most importantly, the Court provided Congress with a legislative alternative to the jurisdictional element—in situations involving a broad statutory scheme such as the CSA, the Court would generally avoid striking down narrow, individual provisions of the applicable law.[107]

In summary, Congress may comfortably regulate the channels and instrumentalities of interstate commerce.[108] However, where Congress chooses to regulate under the third prong of its Commerce Power—in areas substantially affecting interstate commerce—two options exist. First, if Congress enacts a specific, narrow statute, it must demonstrate an adequate connection to interstate commerce through congressional findings, use of a jurisdictional hook, or, preferably, both.[109] Second, where Congress enacts a sweeping statute addressing multiple, interrelated economic activities, less evidence of an interstate nexus may be required.[110] The future of Commerce Clause jurisprudence remains an open question; the recent amendments to federal child pornography statutes may raise controversies that prompt answers from the federal courts.

B. Looming Commerce Clause Questions Related to Federal Child Pornography Statutes

The 2008 amendments to federal child pornography laws eliminated several statutory loopholes. First, Congress clearly equated the movement of child pornography over the Internet with interstate commerce, regardless of whether images actually cross state lines.[111] Congress also added all facilities of interstate commerce to the proscribed means of transporting child pornography,[112] again implicating all Internet facilities such as servers, telephone and cable lines, and cellular phones. The statutory modifications ensured that the courts will never again lack statutory jurisdiction to uphold the convictions of purveyors and consumers of Internet child pornography. However, the changes also present two important questions. First, does Congress have the authority to regulate purely intrastate occurrences of child pornography solely because it utilizes or occurs over the Internet? And second, do the revised statutes expand into areas beyond what was required to close the evidentiary loophole in *Schaefer*?

107. Stuckey, *supra* note 99, at 2124.
108. United States v. Lopez, 514 U.S. 549, 558 (1995).
109. *See* United States v. Morrison, 529 U.S. 598, 613-18 (2000).
110. *See Raich*, 545 U.S. at 26-33.
111. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(7), 122 Stat. 4001, 4002 (2008).
112. Effective Child Pornography Prosecution Act § 103.

1. The Aggregation Principle Allows Federal Regulation of Purely Intrastate Activity

In the New Deal Era case of *Wickard v. Filburn*, a single farmer's violation of federal wheat growing quotas—where the excess wheat was consumed on the individual's farm—was found to frustrate federal regulation of the national wheat supply.[113] On the assertions that local activities substantially affecting interstate commerce can be regulated by Congress[114] and that, in the aggregate, local consumption of wheat grown in excess of quotas substantially affected the interstate wheat market,[115] the Supreme Court upheld federal fines levied against the defendant. Furthermore, the Supreme Court upheld this aggregation principle and extended it to non-economic or quasi-economic goods in the *Raich* decision, discussed above.[116]

Based on *Wickard* and *Raich*, the ability of Congress to regulate purely local incidences of child pornography[117] simply because they involve the Internet rests on the argument that, in the aggregate, an increase in purely local use of the Internet to distribute, view, and download child pornography may have a significant effect on the overall interstate supply and availability of child pornography on the Internet. Thus, Congress likely enjoys the authority to regulate purely intrastate activity solely because it utilizes or occurs over the Internet. The expansion of federal child pornography statutes following *Schaefer* unquestionably achieves these regulatory goals. But did the revisions go beyond what was required to prevent the next William Schaefer from avoiding prison?

2. Going Beyond *Schaefer*: Congress Expands Federal Jurisdiction to Purely Local Activity

What if Schaefer had been caught in possession of non-digital images depicting the sexual exploitation of children? Similarly, what if Schaefer had entered an adult bookstore intending to view locally-produced child pornography? The revised federal statutes appear to prohibit these activities as well.[118]

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113. 317 U.S. 111 (1942).

114. *Id.* at 125.

115. *Id.* at 127-28.

116. *See* discussion *supra* Part III.A.2.

117. Such a case would occur where a defendant accesses images of child pornography via the Internet but where the source of the images and all of the communications facilities utilized reside in the same state as the defendant.

118. The revised federal child pornography statutes prohibit any transportation, shipment, distribution, or receipt of child pornography using any means or facility of interstate commerce or in or affecting interstate commerce. In addition, the statutes proscribe knowingly possessing or accessing, with the intent to view, any child pornography that has been transported or shipped using any means or facility of interstate commerce or in or affecting interstate commerce. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, §§ 103, 203, 122 Stat. 4001, 4002-04 (2008).

a. Purely Intrastate Possession of Child Pornography

Proponents of federal regulation of purely intrastate possession argue against the constitutionality of the revised statutes based on the non-infinity principle, a concept that prohibits endless aggregation of intrastate activity that would give the federal government "unlimited power to regulate all activity, including activity that has historically been the province of the states . . . ."[119] Indeed, the *Lopez* Court found that intrastate possession of an item was not necessarily economic activity that substantially affects interstate commerce.[120] In addition, producers and consumers of child pornography often exchange images of children by gifting rather than by purchasing,[121] increasing the degree to which their activities are separated from commerce. These factors suggest that the revised jurisdictional element which expands federal powers to any possession of child pornography substantially affecting interstate commerce fails as a meaningful restriction of federal jurisdiction, and therefore fails constitutional scrutiny.

On the other hand, non-digital images of child pornography sadly achieve a quasi-economic character more similar to Raich's marijuana than Lopez's firearm: they are highly sought after by a group of offenders, and even these non-digital images could easily enter the stream of interstate and foreign commerce with a few clicks of a mouse in today's world. Furthermore, the statutory scheme of the Effective Child Pornography Prosecution Act employs a broad approach to eliminate both the supply of and demand for child pornography.[122] This scheme, combined with the quasi-economic character of pornographic images of children, may combine to place future intrastate possession cases within the framework of *Gonzalez v. Raich*. Under such a scenario, a court would likely find that the federal statutes represent a valid exercise of Congress's Commerce authority because failure to regulate the purely local possession of child pornography would undermine the broader federal statutory scheme by failing to address a cumulatively large supply of the proscribed materials.[123]

b. Accessing Child Pornography with the Intent to View

While the prohibitions on production, transportation, and distribution of child pornography attempt to eradicate the supply of such materials, a new provision of the Effective Child Pornography Prosecution Act

119. Susanna Frederick Fisher, *Between Scylla And Charybdis: The Disagreement Among the Federal Circuits over Whether Federal Law Criminalizing the Intrastate Possession of Child Pornography Violates the Commerce Clause*, 10 NEXUS 99, 101 (2005).

120. United States v. Lopez, 514 U.S. 549, 563-68 (1995).

121. *E.g.*, Dan X. McGraw, *Ex-Pastor Guilty of Child Porn: Former Methodist Minister Admitted Trading Images Online*, DALLAS MORNING NEWS, Mar. 20, 2009, at 2B.

122. *Cf.* Gonzales v. Raich, 545 U.S. 1, 24-29 (2005).

123. *See id.* at 31-32.

attempts to curb demand by prohibiting any person from knowingly accessing child pornography with the intent to view.[124] This provision creates the ultimate expression of Congressional intent to prohibit individual, intrastate acts, and seemingly reaches every act of seeking out child pornography, regardless of its source. The critical statutory question related to this provision is whether the required state of mind—knowingly—applies to the nature of the images or materials in question as child pornography. As amended, 18 U.S.C. § 2252(a)(4)(B) reads:

> Any person who . . . *knowingly accesses with intent to view*, 1 or more [materials] which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct; shall be punished as provided . . . .[125]

If the *mens rea* includes knowledge that the visual depiction involves the use of a minor, the revised statute may fall within the scope of *Gonzales v. Raich* as an essential component of a broad regulatory scheme.[126] However, if the mental state does not apply to the use of a minor in the accessed and viewed images, this provision may also ensnare individuals who access and view images that they believe depict adults engaged in sexually explicit conduct. Such a scenario would result in strict liability for engaging in legal, though perverse, conduct. As an example, consider the case of a producer of adult pornography who mass produces videos and images involving a seventeen-year-old actor or actress. Suppose the distributed videos and images either lack statements or contain false statements establishing the majority age of all depicted persons.[127] Anyone knowingly accessing these videos or images in any situation may be liable under § 2252 unless the *mens rea* is extended to include knowledge that the actor or actress is a minor.

Upcoming enforcement actions will determine the constitutional validity of the revised federal child pornography statutes. For now, it is sufficient to note that the amendments represent a vast and perhaps ques-

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124. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 203, 122 Stat. 4001, 4003-04 (2008).

125. 18 U.S.C.A. § 2252(a)(4)(B) (West 2009) (emphasis added).

126. *See Raich*, 545 U.S. at 28-29. This reading of *Raich* is fairly broad. In *Raich*, the Court addressed the issue of production of non-economic or quasi-economic goods rather than possession or accessing such goods with the intent to view. However, the breadth of *Raich* remains unsettled. For purposes of this discussion, a wide reading of *Raich* brings within its scope the statutory prohibition of accessing child pornography with the intent to view.

127. *See 'Girls Gone Wild' Company, Founder to Pay $2.1M in Sexual Exploitation Case*, FOXNEWS.COM, Sept. 13, 2006, http://www.foxnews.com/story/0,2933,213496,00.html.

tionable expansion of federal jurisdiction. A reasonable reading of the revised statutory landscape leaves no conceivable act related to child pornography outside of the purview of the federal government.

IV. THE UNFORTUNATE EFFECT OF *SCHAEFER* ON STATE LAWS

The outcome of *Schaefer* likely resulted from deficient investigation and prosecution rather than deficient federal statutes. Schaefer's prosecutors plainly misunderstood the evidence required to satisfy the jurisdictional element of the federal child pornography statutes and failed to produce any facts linking the images in Schaefer's possession to the Internet or showing the movement of images across state lines.[128] Such evidence appears relatively simple to obtain, as evidenced by the number of Internet child pornography convictions upheld by the Tenth Circuit.[129] The *Schaefer* decision was arguably the correct outcome of the law, even though it secured the freedom of an obviously guilty pedophile.[130]

No sensible person would argue that the federal government should be soft on criminals engaging in or supporting the child pornography market. Yet the question of how to be tougher on crime deserves a more thoughtful response than simply broadening federal statutes to include more criminal activity, especially in cases where relevant state statutes provide effective means to achieve the desired result. The critical issue that has not been addressed is whether federal prosecution of Schaefer was appropriate at all.

A. Prosecuting Schaefer Under Kansas Statutes Would Have Secured a Conviction

Kansas maintains broad prohibitions on sexual exploitation of children, covering any act of enticing a minor to engage in sexually explicit conduct.[131] The statute also prohibits possession of any visual depiction of a minor engaged in such activity.[132] Jurisdictional clauses requiring movement of persons or images across designated boundaries remain logically absent from the state statutes since the Kansas legislature, un-

128. *See* Brief of Appellee, *supra* note 28, at 6-10.

129. United States v. Schaefer, 501 F.3d 1197, 1202-03 (2007); *see also* United States v. Kimler, 335 F.3d 1132, 1135 (10th Cir. 2003); United States v. Wilson, 182 F.3d 737, 744 & n.4 (10th Cir. 1999); United States v. Simpson, 152 F.3d 1241, 1245 (10th Cir. 1998).

130. *See Schaefer*, 501 F.3d at 1207-08 (Tymkovich, J., concurring).

131. KAN. STAT. ANN. § 21-3516(a) (2008).

> Sexual exploitation of a child is: (1) . . . employing, using, persuading, inducing, enticing or coercing a child under 18 years of age to engage in sexually explicit conduct for the purpose of promoting any performance; (2) possessing any visual depiction, including any photograph, film, video picture, digital or computer generated image or picture, whether made or produced by electronic, mechanical or other means, where such visual depiction of a child under 18 years of age is shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender, the child or another . . . .

Id.

132. *Id.*

like Congress, is not a creature of limited legislative authority. Thus, any violation occurring within Kansas—whether or not in connection with the Internet—may be prohibited based on the state's plenary police powers. The evidence presented during Schaefer's trial easily satisfied the elements of the Kansas law, and would have secured an unassailable conviction at the state level.

The main differences between the federal and state statutes in this case involved sentencing, which varied based upon the age of the victim at the time the crime was committed.[133] Since the available facts provide no insight into the ages of the children used to produce the images in Schaefer's possession, little can be said about the potential severity of his sentence under Kansas law. But make no mistake – prosecuting Schaefer under federal law resulted in acquittal, where the same evidence in a Kansas courtroom would have put Schaefer in jail for at least fifty months.

B. Should the Federal Government Prosecute All Crimes Tangentially Involving the Internet?

As described in Part IV of this Comment, Congress reacted to the Tenth Circuit's *Schaefer* reversal by expanding federal jurisdiction to the limits of the Commerce power.[134] But is this the most appropriate response to a mismanaged prosecution? Just because the federal government has the power to regulate crimes potentially affecting interstate commerce does not mean that it should. Currently, federal statutes contain thousands of crimes, including many that address the core interests of states in protecting the health and safety of their citizenry.[135] As more criminals like William Schaefer begin to avail themselves of opportunities presented by the Internet, this number is sure to grow. In addition, the federal government is likely to continue its expansion into local criminal law because of the political benefits to incumbent lawmakers.[136] Many commentators have addressed the expansion of federal power through the Commerce Clause; however, the impact of the Internet on this evolution merits special attention.

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133. The first offense for sexual exploitation of a minor in Kansas carries a minimum sentence of 50 months in prison, while a similar offense under the federal statute involves a 60 month jail sentence. Likewise, repeat offenders in Kansas face shorter prison sentences (9 to 10 years) than they would at the federal level (15 to 40 years). An exception to the Kansas sentencing guidelines exists if the victim is less than 14 years of age; in such a case, a mandatory hard sentence (which allows no early parole) of 25 years imprisonment may be imposed for a first offense. Second and third offenses in Kansas where the victim is less than 14 years old receive hard sentences of 40 years and life without parole, respectively. *Compare* Kansas Sentencing Guidelines, Office of the District Attorney, Sedgwick County (2005), http://www.sedgwickcounty.org/da/sentencing_grid.html, *and* KAN. STAT. ANN. §§ 21-3516(c), 21-4643 (2008), *with* 18 U.S.C.A. § 2252(b) (West 2009).

134. *See* discussion *supra* Part III.

135. *See* Ryan K. Stumphauzer, Note, *Electronic Impulses, Digital Signals, and Federal Jurisdiction: Congress's Commerce Clause Power in the Twenty-First Century*, 56 VAND. L. REV. 277, 284 (2003).

136. *Id.* at 285.

1. Principles of Notice, Consistency and Federalism Present Competing Arguments Regarding Federal Regulation of Activities Involving the Internet

Readily apparent jurisdictional boundaries do not exist on the Internet,[137] with the exception of some state government websites and some non-American websites that indicate a state or country of origin in their web address. As a result, many Internet users have little notice as to whether they have crossed jurisdictional boundaries while surfing the web.[138] Some commentators argue in favor of exclusive federal jurisdiction over the Internet because websites provide insufficient notice of potential jurisdiction in other locations.[139] Congressional findings related to the Internet Tax Freedom Act support this argument: "Addresses on the Internet are designed to be geographically indifferent. Internet transmissions are insensitive to physical distance and can have multiple geographical addresses."[140] The findings also stated that it is "infeasible to separate domestic intrastate Internet transmissions from interstate and foreign Internet transmissions."[141] Thus, concerns about uniformity of law and jurisdictional notice favor exclusive federal regulation of the Internet.[142]

However, as communications in the United States and worldwide increasingly rely on the backbone of the Internet and other new technologies, a growing number of local crimes will incorporate interstate components ranging from routing an e-mail or file transfer across state lines to utilizing cell phone towers located in multiple states.[143] Many crimes now committed using the Internet and other inherently interstate systems have typically been the province of state governments—"the 'ordinary' crimes that target random citizens."[144] This expansion of federal power was a cause for concern for judges and states during the early stages of the Internet's growth as a publicly available tool. In *United States v. Paredes*,[145] the judge warned that the quickening pace of technological advancement would allow the federal government "to prosecute types of crimes from which it was barred in recent years, thus expanding the jurisdiction of the federal government to surpass that origi-

137. Charles R. Topping, Note, *The Surf Is Up, But Who Owns the Beach?—Who Should Regulate Commerce on the Internet?*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 179, 189-90 (1999).

138. *Id.* at 189.

139. *See id.* at 189-90, 220-22.

140. S. 442, 105th Cong. § 2(2), 144 CONG. REC. S11269-01 (1998) (enacted).

141. *Id.* § 2(3).

142. *See id.* § 2(8).

143. *See* Stumphauzer, *supra* note 135, at 282.

144. Forbes, *supra* note 8, at 195.

145. 950 F. Supp. 584 (S.D.N.Y. 1996), *overruled by* United States v. Perez, 404 F.3d 302 (2d Cir. 2005). *Paredes* involved a murder-for-hire case in which the defendant challenged his conviction under federal statute, arguing that no interstate nexus existed despite the use of a paging system with interstate capabilities during the crime. 950 F. Supp. at 584-85; Forbes, *supra* note 8, at 209-10.

nally contemplated by the framers of the Constitution, who feared an excessively centralized government."[146]

2. For Child Pornography Crimes, Cooperative Federalism Provides a Robust Solution

Exercise of the federal power requires constant justification through the use of jurisdictional elements or broad statutory schemes that potentially eclipse state laws.[147] By revising federal statutes in the wake of *Schaefer*, Congress chose the latter option in the case of child pornography and went beyond regulation of crimes involving the Internet into purely local crimes often prosecuted by states. However, as demonstrated in *Schaefer*, such broad federal regulation can prevent simpler and more effective state solutions from securing needed convictions as states decide to conserve their resources and defer to federal prosecutors. In addition, federal laws that reach all local crimes threaten states' ability to adopt different approaches to regulation. In the example of child pornography, states may wish to experiment with rehabilitation of first time offenders or deal differently with crimes involving possession or accessing of proscribed images. The manner in which Congress expanded federal jurisdiction over local child pornography crimes virtually assures constitutional challenges based on Congress's ability to regulate these local activities. Regrettably, more child pornographers may go free as courts resolve this complicated issue.

In the future, Congress should spend more than just a few weeks[148] considering the consequences of dramatic expansions of federal police powers such as the one seen in the wake of *Schaefer*. A better alternative would be to allow states "to preside over cases where there is a substantial vested interest in protection of the state's citizenry."[149] This approach does not necessarily preclude federal involvement. Federal resources could still support state pursuit of the exploding number of local crimes that, because of technology use, tangentially implicate interstate commerce. The binary approach of federal versus state jurisdiction should yield to a cooperative approach of utilizing federal resources in combination with less complicated, and often more successful, state laws. In Schaefer's case, such an approach would surely have secured a conviction.

CONCLUSION

William Schaefer was guilty of possessing child pornography. Without question, he was guilty under Kansas law; he should have found no relief in the federal statutes under which he was tried. However, be-

146. *Paredes*, 950 F. Supp. at 590; Forbes, *supra* note 8, at 210.
147. *See* Commerce Clause discussion *supra* Part III.A.
148. *See supra* note 85.
149. Forbes, *supra* note 8, at 206.

cause of poor prosecution and decision making, Schaefer escaped conviction on an evidentiary technicality. Prosecutors at the federal level must recognize that state laws are often less complicated and more capable than federal laws at catching and convicting local criminals. The rise of the Internet has grafted an interstate component onto many traditionally local crimes,[150] providing a politically ripe opportunity for Congress to expand its jurisdiction and intrude into areas of criminal law typically regulated by states.

In response to Schaefer's acquittal, Congress invoked its Commerce Power to expand federal jurisdiction over crimes involving child pornography.[151] This expansion arguably leaves no act involving child pornography beyond the reach of federal authorities. In the rush to appear tough on crime, however, federal lawmakers left the amended statutes open to constitutional scrutiny—an act that may result in acquittal of more criminals who could easily be jailed under state laws. Before intruding on areas of law traditionally left to the states, Congress should consider innovative ways for the federal government to utilize effective state statutes to achieve their goals. The Internet has allowed criminals to innovate. Why should it not have the same effect on Congress?

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150. *Id.* at 195.

151. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008).

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